UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2501 MEMPHIS, TENNESSEE Respondent	
and CLARENCE C. BROWN, AN INDIVIDUAL Charging Party	Case No. AT-CO-30678

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **APRIL 30, 1997**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

Dated: March 31, 1997

Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 31, 1997

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2501
MEMPHIS, TENNESSEE

Respondent

and Case No. AT-CO-30678

CLARENCE C. BROWN, AN INDIVIDUAL

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the Respondent's application for attorney fees, and the record in this case which was transferred to this Office on March 10, 1997.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2501 MEMPHIS, TENNESSEE Respondent	
and CLARENCE C. BROWN, AN INDIVIDUAL Charging Party	Case No. AT-CO-30678

Stuart A. Kirsch, Esq.
For the Respondent

Sherrod G. Patterson, Esq.
For the General Counsel

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION ON APPLICATION FOR ATTORNEY FEES

Statement of the Case

This proceeding is based upon an application for attorney fees filed under the Equal Access to Justice Act, 5 U.S.C. § 504, hereinafter referred to as the EAJA, and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), codified at 5 C.F.R. Part 2430.

The Authority issued its decision in the above-captioned case on July 29, 1996, in which it found that the Respondent, American Federation of Government Employees, Local 2501 (the Union), did not violate the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), as alleged in the complaint and therefore dismissed the complaint in its entirety. *American Federation of Government Employees, Local 2501, Memphis,*

Tennessee and Clarence C. Brown, An Individual, 51 FLRA 1657 (1996).

Thereafter, on August 28, 1996, the Union filed an Application For Attorney Fees and a separate Petition For Rulemaking To Increase The Maximum Rate For Attorney Fees. The General Counsel's Answer To Respondent's Application For Attorney Fees, requesting dismissal of the application, was received on October 3, 1996. By Order dated March 10, 1997, the Authority referred the Union's application for attorney fees to the Office of Administrative Law Judges for further processing in accordance with section 2430.7(a) of its Rules and Regulations, 5 C.F.R. § 2430.7(a), and placed the Union's petition for rulemaking in abeyance pending disposition of the application for attorney fees. The Union's application has been referred to the undersigned for disposition.1

The Applicable Law and Regulations

The Union's application for attorney fees was filed under the Equal Access to Justice Act which provides, in part, as follows:

> Sec. 504. Costs and Fees of Parties.
>
> > (a)(1). An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances made an award unjust.

5 U.S.C. § 504(a)(1).

The Authority's implementation of the EAJA is found in Part 2430 of the Rules and Regulations. Section 2430.1 provides, in pertinent part:

> § 2430.1 Purpose.

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1 The presiding Judge, Salvatore Arrigo, retired before the instant application for attorney fees was received, and therefore was not available to rule upon the request under section 2430.7(a) of the Authority's Rules and Regulations. Accordingly I appoint myself to consider the matter.

> An eligible party may receive an award when it prevails over the General Counsel, unless the General Counsel's position in the proceeding was substantially justified, or special circumstances make an award unjust.

Section 2430.2 sets forth who is eligible to apply for an award, and the eligibility requirements are in accord with those specified in the EAJA. The standards for receiving an award are found in section 2430.3, which provides as follows:

> § 2430.3 Standards for awards.
>
> (a) An eligible applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete portion of the proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that its position in initiating the proceeding was reasonable in law and fact.
>
> (b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

The application and supporting documents establish, and the General Counsel does not dispute, that the Union meets the eligibility requirements under the EAJA and the Authority's implementing Rules and Regulations. Additionally, it is clear and undisputed that the Union was the prevailing party in the adversary unfair labor practice proceeding for which attorney fees are being sought. There is no contention that the Union unduly or unreasonably protracted the proceeding, or that special circumstances would make an attorney fee award unjust. Nor has the General Counsel challenged the amount of attorney fees and expenses sought by the Union herein.[2] Accordingly, the only issue to be decided is whether the General Counsel has met the burden of showing

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[2] Since the General Counsel does not challenge the reasonableness of the fees sought by the Union, I need not consider the case cited by the Union herein, *American Federation of Government Employees, Local 2391, AFL-CIO*, 44 FLRA 1084, 1091 (1992), which presented only that issue.

that there was a reasonable basis in law and fact for initiating the proceeding.

There was a Reasonable Basis in Law

The complaint issued by the General Counsel in this proceeding alleged that the Union violated section 7116(b)(1) and (8) of the Statute by telling the Charging Party, Clarence C. Brown (Brown), that the Union would not arbitrate his suspension from work if he did not pay the Union's cost of arbitrating the matter, because the Union's position was based on the fact that Brown was not a member of the Union at the time when he allegedly engaged in the conduct for which he was suspended. The complaint further alleged that the Union violated the Statute by canceling the arbitration of Brown's suspension because the latter refused to pay the Union's cost of doing so. In my judgment, if the General Counsel were able to prove the allegations of the complaint at the hearing, a violation of the Statute would have been established. In any event, at the very least, the General Counsel's theory of a violation was reasonable.

Under section 7114(a)(1) of the Statute, "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." As the Authority and the courts have interpreted that provision, a union may not discriminate between members and non-members when acting within the scope of its authority as exclusive representative of the bargaining unit--i.e., when "act[ing] for, and negotiat[ing] collective bargaining agree-ments covering, all employees in the unit." *Fort Bragg Association of Educators, National Education Association, Fort Bragg, North Carolina*, 28 FLRA 908, 918 (1987); *Antilles Consolidated Education Association, (OEA/NEA), San Juan, Puerto Rico*, 36 FLRA 776, 788 (1990). As the Authority stated in *National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service*, 38 FLRA 615, 624 (1990):

> A union's obligations under section 7114(a)(1) require that, with respect to matters falling within the scope of that section, a union's activities be undertaken without regard to membership status. *Antilles Consolidated*, 36 FLRA at 797. By requiring bargaining unit employees who are non-members to pay certain costs for arbitration, [a union] discriminates against non-members on the basis of their membership status, and, therefore, [acts] inconsistent with 7114(a)(1) of the Statute.

To the same effect, *see National Treasury Employees Union v. FLRA*, 721 F.2d 1402, 1406 (D.C. Cir. 1983) enforcing *National Treasury Employees Union*, 10 FLRA 519 (1982):

> This duty applies whenever a union is representing bargaining unit employees either in contract negotiations or in enforcement of the resulting collective bargaining agreement. . . . [U]nder the duty of fair representation, a union may adopt virtually *any* non-arbitrary standard for providing representation of individual employees, so long as the standard adopted is applied in a nondiscriminatory manner with respect to all unit employees, *i.e.*, members and nonmembers alike.

Accordingly, the Court affirmed the Authority's conclusion that the union in that case violated section 7116(b)(1) and (8) of the Statute by following a policy of providing only union members with assistance of legal counsel concerning grievances and other matters affecting unit employees' conditions of employment. *Id.*

In view of the foregoing precedent, it is clear that the allegations of the complaint, if proven, would constitute a violation of section 7116(b)(1) and (8) of the Statute in that the Union's decision to require Brown to pay its cost of arbitrating his suspension and its decision to cancel the arbitration were based on his non-member status at the time when the events leading to his suspension occurred. Even though Brown had become a dues-paying member of the Union by the time the Union initiated a grievance on his behalf with respect to the suspension, in my view the General Counsel was reasonable in pursuing a legal theory that the Union had discriminated against Brown either because he was not a dues-paying member when the events arose which led to his suspension or for a sufficient length of time thereafter to warrant the Union's incurring the costs of arbitration for him. As the Authority has recognized in prior cases involving requests for attorney fees under the EAJA, that law was not intended to deter the General Counsel from advancing "novel or untested legal theories and cases . . . ." *American Federation of Government Employees, Local 1857, AFL-CIO (Sacramento Air Logistics Center), North Highland, California*, 48 FLRA 900, 901 (1993); *American Federation of Government Employees, Local 495, AFL-CIO (Veterans Administration Medical Center, Tucson, Arizona)*, 22 FLRA 966, 970-71 (1986)(*AFGE Local 495*). The fact that the complaint was ultimately dismissed

does not militate against a finding that there was a reasonable basis in law to institute the action. *American Federation of Government Employees, Local 2369, AFL-CIO*, 25 FLRA 354, 361 (1987).

Accordingly, I conclude that the General Counsel had a reasonable basis in law to issue the complaint in this case.

There Was a Reasonable Basis in Fact

With respect to whether the General Counsel had a reasonable basis in fact for issuing the complaint, the Authority has adopted the private sector approach used by the National Labor Relations Board (NLRB). The NLRB will conclude that its General Counsel was not substantially justified if there is a failure to present evidence which, if credited by a factfinder, would constitute a *prima facie* case. *Derickson Company, Inc.*, 270 NLRB 516, 518 (1984); *SME Cement, Inc.*, 267 NLRB 763, n.1 (1983). *See also MacDonald Miller Company*, 283 NLRB 676, 678 (1987).

In finding the foregoing rule appropriate as a threshold test in unfair labor practice proceedings under the Statute, the Authority stated:

> A "*prima facie*" case is one in which the evidence presented would suffice to show that there is a basis for the theory of the case if such evidence is presumed to be true and the evidence presented by the opposing party is disregarded. *Black's Law Dictionary* 1353 (rev. 4th ed. 1986); *Webster's Third New International Dictionary, Unabridged* 1800 (1976).

AFGE Local 495, 22 FLRA at 971.

Applying that rule to the circumstances of this case, I find that the General Counsel had a reasonable basis in fact for issuing the complaint.

From the evidence presented at the hearing, the General Counsel issued the complaint herein primarily on the following set of circumstances: Brown, the Charging Party, testified that Union President Nathaniel Boyd told him on several occasions starting in August 1992 that the Union would not pay the cost of arbitrating Brown's 5-day suspension but would represent him if Brown agreed to pay

the estimated $1250 cost of doing so.[3] According to Brown, Boyd told him that:

> [S]ince I wasn't a Union member at the time the incident occurred and when I did join that I hadn't been in the Union long enough to have that kind of money deducted from my check to cover this. That's why he expected me to pay this twelve hundred and fifty bucks. (51 FLRA at 1668).[4]

The General Counsel also introduced evidence that William Hendrix, whom President Boyd had appointed to a 3-member arbitration committee to consider whether the Union should arbitrate Brown's grievance over the 5-day suspension, sent a letter to Boyd and the other 2 members of the committee on October 17, 1992, recommending that the Union should take Brown's case to arbitration but stating:

> It is my recommendation that Mr. Brown be responsible to pay half the cost for this local to take his grievance to arbitration. Due to the fact that this grievance occurred before Mr. Brown joined our local and became a member, I do not feel that it would be right to ask our members to carry the full financial responsi-bility, when the action occurred before he became a member of A.F.G.E. Local 2501.
> (51 FLRA at 1670.)

Additionally, there was testimony from Eugene Newbern, a Union steward at the time, who disagreed with the recommendation of
Hendrix quoted above because in his experience "most members [do] not pay for arbitration even based on the Local's finances." 51 FLRA at 1671. Finally, there was evidence that Union President Boyd, at a regular Union meeting on December 12, 1992, attended by 13 individuals, told the committee members considering whether to arbitrate Brown's case that they should weigh the fact that Brown had not paid dues into the Union long enough to cover the cost of the arbitration. 51 FLRA at 1673-74. Of course, it is also

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Boyd denied ever making such statements to Brown. 51 FLRA at 1669.

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The record indicates that Brown was notified of his proposed suspension on May 12, 1992 and immediately brought the matter to Boyd's attention; that Boyd advised Brown to file a grievance which the Union would take through the grievance procedure; that Brown voluntarily joined the Union on May 27, effective June 2, 1992; and that Brown's suspension became final July 27, 1992. 51 FLRA at 1666-67.

undisputed that the scheduled arbitration of Brown's grievance was canceled by the Union thereafter when Brown refused to pay the cost of the arbitration.5

As previously stated, I conclude that the foregoing evidence provided the General Counsel with a reasonable basis in fact for issuing the complaint herein. The Judge who decided the case on the merits did not credit the testimony of Brown, the Charging Party, that Union President Boyd told him on several occasions that the Union would not pay to arbitrate Brown's grievance because Brown was not a member of the Union when the events giving rise to the grievance arose and had not been a dues-paying member long enough to defray the cost of such a proceeding. Instead, the Judge credited Boyd's denial that he ever made such statements to Brown. 51 FLRA at 1677. Nevertheless, the General Counsel was entitled to assume that Brown's testimony would be credited when deciding whether to issue a complaint. *AFGE Local 495, supra.*

Similarly, the Judge found that Boyd's comments to the Union arbitration committee on December 12, 1992, concerning the import of Brown's status as a recent dues-paying Union member on the obligation to arbitrate his grievance were "improvident" but not necessarily indicative of the Union's discriminatory intent in light of other evidence submitted by the Union demonstrating that its bankrupt financial condition was the real reason for requiring both Union members and non-members to pay the cost of arbitrating their grievances. 51 FLRA at 1677-78. However, the reasonableness of the General Counsel's decision to issue a complaint in this case must be judged without regard to the exculpatory evidence of financial hardship submitted by the Union in its defense. When Boyd's comments--and Hendrix's earlier letter--to the arbitration committee are considered alone, they provide a reasonable basis in fact for the General Counsel to have issued the complaint herein.

Conclusion

Accordingly, I conclude that based upon the Authority's standards, the position of the General Counsel in prosecuting this case was substantially justified. Therefore, I recommend that the Authority reject counsel for the Union's application for attorney fees under the Equal Access to Justice Act,

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Although the record indicates that the scheduled arbitration was canceled on January 8, 1993, it is unclear whether the Union's arbitration committee reached this conclusion or whether President Boyd exercised his authority to decide which cases the Union would take to arbitration. Compare 51 FLRA at 1669 n.4 and 1677-78 with 51 FLRA at 1672.

5 U.S.C. § 504.

Issued, Washington, D.C., March 31, 1997

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SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case No. AT-CO-30678, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Stuart A. Kirsch, Esq.
Assistant General Counsel-Litigation
American Federation of Government
Employees, Local 2501
510 Plaza Drive, Suite 2510
College Park, GA 30349

Mr. Clarence C. Brown
1078 Ayers Street
Memphis, TN 38107

Sherrod Patterson, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
Marquis Two Tower, Suite 701
285 Peachtree Center Avenue
Atlanta, GA 30303-1270

REGULAR MAIL:

National President
American Federation of Government
Employees
80 F Street, NW
Washington, DC 20001

Dated: March 31, 1997
Washington, DC