U.S. ARMY ARMAMENT RESEARCH DEVELOPMENT & ENGINEERING CENTER, PICATINNY ARSENAL, NEW JERSEY Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1437 Charging Party	Case No. BY-CA-40319

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 **JUNE 19, 1995**, and addressed to:

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

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: May 17, 1995
Washington, DC

MEMORANDUM DATE: May 17, 1995

TO: The Federal Labor Relations Authority

FROM: SALVATORE J. ARRIGO
Administrative Law Judge

SUBJECT: U.S. ARMY ARMAMENT RESEARCH
DEVELOPMENT & ENGINEERING CENTER,
PICATINNY ARSENAL, NEW JERSEY

Respondent

and Case No. BY-CA-40319

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1437

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 transcript, exhibits and any briefs filed by the parties.

Enclosures

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

U.S. ARMY ARMAMENT RESEARCH DEVELOPMENT & ENGINEERING CENTER, PICATINNY ARSENAL, NEW JERSEY Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1437 Charging Party	Case No. BY-CA-40319

Joel L. Friedman, Esq.
For the Respondent

Jacob Klappholz
For the Charging Party

Allen W. Stadtmauer, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Boston Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing to comply with the terms of a final arbitration award and failing to advise the Charging Party, the arbitrator and/or the Authority, which overruled Respondent's exceptions to the arbitrator's award, of a significant change in factual circumstances at issue during the arbitration.

A hearing on the Complaint was conducted in New York, New York, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees. In December 1990 Respondent issued Merit Promotion/Internal Placement Announcement No. ARDEC 434-90 for the position of Chemical Engineer, GS-0893-13, in Respondent's Surety and Ammunition Office. A major duty of position was to serve as engineering project leader for a new explosive waste incinerator facility. On March 10, 1991, the Respondent filled this Chemical Engineer position by promoting bargaining unit employee John Pastuck to the position. Shortly thereafter Union Vice President for Grievances, Jacob Klappholz, began to receive complaints from employees about how the position was filled. After investigating the employees' complaints, Klappholz filed a grievance in August 1991 under the parties' negotiated collective bargaining agreement alleging preselection and improper procedures in the filling of the Chemical Engineer position. Efforts to resolve the matter during the processing of the grievance failed and the Union invoked arbitration in December 1991 or January 1992. An arbitration hearing on the grievance was held before arbitrator Alexander M. Freund on May 29, 1992 and September 2 and 3, 1992.

Arbitrator Freund issued his Opinion and Award in the matter on April 16, 1993. The decision set out the issues in the case as framed by the parties as follows:

1. Was the merit promotion system agreed to by the parties violated by the selection of [J.P.] for ARDEC Vacancy Announcement 434-90 through preselection?

2. Did the Agency violate (prohibited personnel practices) in selecting [J.P.] for the promotion?

3. Did the Agency violate AR 690-300 by discarding the original (eligibility) list developed by [D.F.]?

The arbitrator sustained the grievance and found Respondent violated various Government and Agency regulations and the parties' collective bargaining agreement when selecting Pastuck for the position. The arbitrator ordered the removal of Pastuck from the position and rerunning the selection action.

Respondent filed exceptions with the Federal Labor Relations Authority to arbitrator Freund's award and on November 15, 1993 the Authority issued its decision in U.S. Department of the Army, Armament Research, Development and Engineering Center, Picatinny Arsenal, New Jersey and National Federation of Federal Employees, Local 1437 (Picatinny Arsenal), 48 FLRA 873 (1993). The Authority denied Respondent's exceptions, specifically rejecting Respondent's arguments that Pastuck should be allowed to remain in the position pending the rerunning of the promotion action, and that Pastuck should be allowed to reapply for the position. The Authority also noted, at 879, Respondent had argued in its exceptions that "following the first vacancy announcement 2 years ago, there was a reorganization in which that position was converted to a General Management (GM) position designated as Supervisory General Engineer, GM-893-13". It is undisputed that prior to making this assertion in its exceptions Respondent had never informed the Union or the arbitrator of this change to the position occupied by Pastuck. The Authority also noted in its decision that the Agency argued the award requiring it to reannounce the original position interfered with management's rights and prevented it from changing the requirements of the position should it be determined that the major components of the position had changed. The Authority refused to overturn the arbitrator's award on this basis, finding the award required the Agency to rerun the promotion action only if it decided to fill the same position that was originally announced. Thus the Authority held, at 882-883:

> With respect to the Agency's contention that the Arbitrator's award is deficient because it requires the Agency to establish and fill a position that it no longer desires to fill, we note that the Agency did make a selection for a Chemical Engineer, GS-13 position. The Agency has provided no basis for finding the award deficient with regard to the reannouncement of that position. Consequently, if the Agency intends to retain and fill the position
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> and reannounce a vacancy for that position, then t he Agency must comply with the award.

> However, if the Agency has abolished the original Chemical Engineer, GS-13 position and does not intend to fill the position, we find nothing in the award that specifically requires the Agency to rerun the promotion action. Stated differently, we construe the award as requiring the Agency to rerun the promotion action only if the Agency determines to fill the same position that was originally announced. We find that, under the award, the Agency is free to elect not to fill the original GS-13 position. . . . In view of our conclusion that the award does not require the Agency to fill the position, we also find that there is no need to consider the Agency's contention that the award interferes with its right to determine the numbers, types and grades of positions within its organization.

By letter dated November 30, 1993 the Union requested Respondent provide the following information relative to questions raised in the Authority's November 15 decision:

> Will the position announced in Merit Promotion Announcement No. ARDEC 434-90 be rerun as stated in the arbitrator's award with the incumbent, Mr. Pastuck, removed? If the answer to this question is no, what happened to and who is performing the duties in the job description related to the subject position? What happened to Mr. Pastuck's, the preselected incumbent, career from the time the subject position was illegally filled to the present? Please provide job descriptions for all the above events. Who, from the time the position was illegally filled to the present, was and is handling the duties relating to the incinerator project? If the position is no longer in Local 1437's bargaining unit, what is the rationale for this change.

Respondent's reply of December 10, 1993 stated:

> The position announced in Merit Promotion Announcement No. ARDEC 434-90 will not be refilled because the majority of the duties associated with that position are now completed. Mr. Pastuck will be removed from the position and reassigned to another position. The remaining duties will be
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> divided among other personnel or will be made part of another position.

From the time the position was filled to the present, Mr. Pastuck was handling the duties relating to the incinerator project and is still monitoring the incinerator. Because of the addition of supervisory duties, the position was converted to a GM position on April 19, 1992 and was therefore excluded from your bargaining unit.

Attached as you requested are the job descriptions for the GS-893-13 Chemical Engineer and the GM-893-13 Supervisory Chemical Engineer.

The Union responded on December 10, 1993 as follows:

[Y]our reply states that the referenced position will not be refilled because "the majority of the duties associated with the position are now completed" but that the remaining duties will be performed by one or more persons. Please identify which duties you claim are now completed and which must still be performed. Please state when Mr. Pastuck will be removed from this position whose duties are now completed, and when and by whom the remaining duties will be performed.

The material you furnished seems to indicate that on or about March 17, 1992, a new position of Supervisory Chemical Engineer, GM/893/13 bearing the Job Number 36219 was created, incorporating the duties of the previously referenced position plus others. Please inform us when and how that job was announced and what procedures were used to fill it. Were appropriate competitive procedures followed in accordance with the appropriate regulations? If so, what were those procedures.

On December 22, 1993 Respondent replied:

The duties associated with this position that are now completed are the design, development, environmental permitting (95%), and all of the procurement. The duties left to be performed are the fabrication, construction and testing of the incinerator.

I cannot yet give you a specific date as to when Mr. Pastuck will be removed from the position,

but I expect that it will be in the very near future.

At the time Mr. Pastuck was selected for the Chemical Engineer position, the SSEO had submitted a proposal to PEG III to include demilitarization operations in the SSEO. The SSEO fully expected that their proposal would be approved at the time they submitted it, but it was not until October of 1991 that final approval was given. As a result, the SSEO brought on 7 or 8 people and formed a Demilitarization Branch. On April 19, 1992 Mr. Pastuck was reassigned from a "Chemical Engineer" to a "Supervisory Chemical Engineer" because he was assigned supervisory duties in connection with this newly formed Branch.

On December 27, 1993 the Union filed the unfair labor practice charge in this case contending Respondent had not implemented the arbitrator's award after the Authority's denial of it's exceptions, specifically alleging:

> . . . the Arbitrator found that the selectee was not qualified for the position under the KSAs established by the Agency. Therefore, the selectee had to be removed from the position and the position rerun precluding the selectee from being considered in the rerunning of the of the selection action. As of this date the selectee is still in the original position, for which the selectee was found unqualified to occupy, with the addition of supervisory duties as a subterfuge to implementing the Arbitrator's award.

The charge made no mention of Respondent's failure to disclose to the arbitrator, or to the Union, that the job in question had changed or ceased to exist.[1]

The record reveals that the Chemical Engineer position Pastuck originally received on March 10, 1991 dealt with an explosive waste incinerator project. The main duties of the position comprised reviewing design efforts already in

progress, establishing and applying for the necessary air and hazardous waste permits, overseeing the solicitation and award

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[1] Union Vice President Klappholz acknowledged that at some undisclosed time there were "rumors" the job Pastuck held was made into a management position. He testified the first he knew Respondent was claiming that a change in the job had occurred was when he saw Respondent's exceptions to the arbitrator's award.

of the construction contract and eventually supervising the construction effort. Due to reorganization at the facility, beginning in November 1991 Pastuck's job was restructured whereby Pastuck was given supervisory responsibility over two other already established explosives and munitions distruction functions, which included the supervision of seven employees. The restructuring resulted in Pastuck spending an estimated 30 percent of his time on the incinerator project and the remainder of his time on his newly acquired supervisory responsibilities.[2] On April 19, 1992 Pastuck was formally laterally converted from Chemical Engineer to Supervisory Chemical Engineer, a non-supervisory (GS) position to a supervisory (GM) position. By this time Pastuck was spending only 20 percent of his time on nonsupervisory duties related to the incinerator. The record also reveals that Pastuck's nonsupervisory work on the incinerator further declined to 10 percent by April 1993 and to 5 percent by September 1993. In May 1994 Pastuck was reassigned from a Supervisory Chemical Engineer to a Supervisory General Engineer in another office and thereafter had no duties related to the incinerator project, and the job of Contracting Officer's Representative for the purchase of the incinerator, the last remaining portion of that position, was given to a Division Chief.

Additional Findings, Discussion and Conclusions

The General Counsel alleges Respondent violated section 7116(a)(1) and (8) of the Statute by failing to implement a final and binding arbitrator's award and violated section 7116(a)(1) of the Statute by failing to advise the arbitrator and the Union of a change in the status of the position which was the subject of the arbitration.[3] Respondent essentially takes the position that the Agency has complied with the arbitrator's order by completely abolishing what remained of the position in question and contends the Union was "untimely" in its allegation that Respondent

violated the Statute by failing to inform the Union (and the arbitrator) that the job in dispute was converted to a supervisory position. Respondent also contends that the

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[2] See General Counsel exhibits 2 through 5.

[3] Apparently, the contention in the Complaint that there was a failure to notify the Authority of the change in status of the position and the failure constituted an unfair labor practice, is not being pursued herein. In any event, no facts were presented nor legal theory or argument has been made to support the contention that there was a failure to make known such information to the Authority or, if such occurred, it would constitute an unfair labor practice under the Statute.

matter at issue is de minimis and therefore the Complaint should be dismissed.[4]

The failure to comply with a final and binding arbitration award violates section 7116(a)(1) and (8) of the Statute and the arbitration award herein became final and binding when Respondent's exceptions were denied by the Authority. See U.S. Department of Justice and Department of Justice, Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut), 20 FLRA 39, 42 (1985), enforced sub nom. United States Department of Justice v. FLRA, 729 F.2d 25 (2nd Cir. 1986). However, as counsel for the General Counsel notes and supports with relevant case citations, where a dispute arises over whether an agency has complied adequately with a final and binding arbitration award, the standard applied by the Authority is whether the agency's construction of the award is reasonable.

In the case herein we have not merely an arbitration award to construe but, rather, an arbitration award which has already been interpreted by the Authority to some extent. The arbitrator's award was limited to ordering Pastuck's removal from the position at issue and rerunning the selection action. The Authority denied Respondent's exceptions but, in response to Respondent's assertion that the original job was converted from a GS to a GM position and the Agency no longer desires to fill the prior position, the Authority held "if the Agency has abolished the original Chemical Engineer, GS-13 position and does not intend to fill the position, we find nothing in the award that specifically requires the Agency to rerun the promotion action." Picatinny Arsenal, at 882-883.

The record reveals that when the arbitrator's award became final and binding on November 15, 1993, the date of the Authority's decision denying the Agency's exceptions, Respondent clearly had no intent on filling the Chemical

Engineer GS-13 incinerator position at issue. By that date about 5 percent of Pastuck's worktime was spent performing duties originally assigned to that position. Indeed, at the time of the arbitrator's opinion of April 16, 1993 that figure was at 10 percent, down from only 20 percent in April 1992

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[4] Respondent argues that since the issue involved herein concerns only one employee, the case should be dismissed as de minimis. Respondent's contention is clearly without merit and is rejected. See United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 47 FLRA 225, 231-232 (1993); see Veterans Adminis-tration Medical Center, Phoenix, Arizona, 47 FLRA 419 (1993); and see Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986).

when Pastuck was officially converted from a GS to a GM position having been given supervisory responsibilities over two other functions. Essentially the duties associated with the incinerator Chemical Engineer position had been almost entirely completed by the date of the Authority's decision and, for that matter, had been substantially completed within a year after Pastuck filled the position. In these circumstances I conclude the original Chemical Engineer incinerator position was essentially "abolished" when the arbitrator's decision became final and binding and Respondent had no intention to retain and fill the position. Accordingly I conclude a reasonable construction of the award as interpreted by the Authority did not require Respondent to reannounce a vacancy for the position or remove Pastuck from the minimal responsibilities that remained relative to the incinerator position in order to be in compliance with the arbitrator's award. See Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma, 46 FLRA 862, 868 (1992) and Department of the Treasury, Internal Revenue Service and Department of the Treasury, Internal Revenue Service, Austin, Texas, 25 FLRA 71 (1987).

The General Counsel suggests that to remedy the alleged unfair labor practice Respondent should be required to rerun the original promotion action, identify the employee who properly should have been selected and make whole the employee for Respondent's failure to promote. The General Counsel further urges that any experience Pastuck gained as a result of his original improper promotion should not be considered for any subsequent positions for which Pastuck is an applicant. In my view the remedy sought is not available in a case such as this, devised as a mechanism to enforce an arbitration award, since the question of back pay for the period Pastuck improperly filled the position and experience gained during that period were not matters in issue before the arbitrator. Backpay would be appropriate, however, to remedy a refusal by Respondent to comply with the terms of the arbitrator's award after it became final and binding, if so found. See United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas, 44 FLRA 1306, 1313 (1992).

The General Counsel contends Respondent violated section 7116(a)(1) of the Statute by failing to advise the arbitrator and the Union of the change in status regarding Pastuck's filling the position in question while the matter was before the arbitrator. To remedy this alleged violation,

the General Counsel suggests that Respondent should be ordered to reimburse the Union for all expenses related to the arbitration proceeding since such failure by the Agency allegedly precluded the Union from properly presenting its case to the arbitrator and the Authority. Respondent takes the position that this allegation is untimely since there is no mention in the unfair labor practice charge filed by the Union concerning this allegation, although known to the Union when the charge was filed, and in any event, the conduct occurred in excess of six months prior to the filing of the charge.

As to whether the unfair labor practice charge herein was timely filed with regard to the failure to notify allegation, section 7118(a)(4) of the Statute provides:

> "(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.
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> "(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of--
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> "(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or
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> "(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,
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> the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

Jacob Klappholz, the Union's Vice President for grievances, testified that the Union was never informed of the changes which occurred in Pastuck's job before or while the grievance was being presented to the arbitrator. Klappholz testified that while there were "rumors" that the job had been changed, his first factual notification concerning this matter came from the Agency's exceptions to the arbitrator's Opinion and Award. Authority records reveal that a copy of

Respondent's exceptions to the arbitrator's Opinion and Award was sent to Klappholz by certified mail on June 11, 1993. The exceptions contain, inter alia, the following statements:

> Additionally, the arbitrator's award does not provide for management to determine that it no longer needs to fill the position in question. That is a Chemical Engineer, GS-0893-13. In fact, on or about March 1992, there was a reorganization which involved, among other positions, the GS-13 Chemical Engineer position in question. On April 19, 1992, that position became a "GM" supervisory position. Management no longer has the GS-893-13 position. It now has a GM-893-13, Supervisory Chemical Engineer position. Requiring management to re-establish the non-supervisory Chemical Engineer position violates its right to determine the number, types and grades of employees.
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> . . . .
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> The arbitrator's award mandates the referral of previously determined highly qualified candidates to a position that was filled over two years ago. Additionally, the award requires reannouncing the old vacancy. The position, now supervisory, has different qualifications. Limiting management to consider employees who only need to meet the previous qualification requirements to be considered highly qualified, violates management's right to make selections as it would not allow for the constitution of an appropriate list of candidates.

I conclude that the statements contained in the above exceptions to the arbitrator's award filed by Respondent were sufficient to put the Union on notice that a change in the Chemical Engineer position had occurred prior to the commencement of the arbitration hearing on May 29, 1993. Thus, upon receiving sometime after June 11, 1993 a copy of Respondent's exceptions to the arbitrator's award the Union unquestionably had notice of the very conduct which became an allegation in the Complaint herein. The Complaint, dated May 16, 1994, of course, is based upon the unfair labor practice charge filed with the Authority on December 29, 1993. As stated in section 7118(a)(4) of the Statute, above, a complaint may not be based upon an alleged unfair labor practice which occurred more than 6 months before the filing of the charge. Thus, to validly support the allegations of the Complaint in this case the conduct alleged to have violated the Statute must have occurred on June 29, 1993 or

thereafter, unless unknown to the Union for reasons set forth in section 7118(a)(4)(B)(i)or (ii) of the Statute, i.e., failure "to perform a duty owed" or "concealment."

The allegation that Respondent did not comply with the arbitrator's award obviously could not be made until such award became final and binding, which occurred on November 15, 1993 when the Authority issued its decision in the case. But, Respondent's conduct related to the allegation concerning revising the GS-Chemical Engineer job which Pastuck originally received pursuant to the vacancy announcement occurred in April 1992, substantially in excess of 6 months prior to the filing of the unfair labor practice charge. However, Respondent did not inform the Union of this fact. I conclude such failure to notify the Union in the circumstances herein was conduct which tolled the running of the 6-month period under section 7118(b)(4(B) of the Statute until the Union obtained actual notice of the change. See U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C. et al., 43 FLRA 241 (1991). Indeed, the Union was unaware of the change in job composition until receiving such information in Respondent's exception which were mailed to Klappholz, the Union's representative of record in the arbitration proceeding, on June 11, 1993 pursuant to a June 3, 1993 Order of the Authority. I find the circumstances herein warrant the assumption that the Union had notice of the above matters raised in Respondent's exceptions prior to June 29, 1993.[5] While the Union could have filed an unfair labor practice charge over changing the composition of Pastuck's job at any time during the 6-month period after receiving a copy of Respondent's exceptions, at least between mid-June 1993 and mid-December 1993, clearly the unfair labor practice charge filed on December 29, 1993, as reflected in the Complaint in this case, concerned known conduct "which occurred more than 6 months before the filing of the charge" and therefore the charge is untimely and can not form the basis of an unfair labor practice finding. See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 28 FLRA 409, 424-428 (1987) and see U.S. Department of Energy, Western Area Power Administration, Golden, Colorado, 27 FLRA 268, 271 (1987).

Accordingly, in view of the entire foregoing and the record herein I conclude it has not been established that

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5 The Authority's records reveal that Respondent's exceptions to the arbitrator's award were dated May 20, 1993 and a statement of service, appended to the exceptions, states that the President of the Union was sent a copy of the exceptions by certified mail on May 20, 1993.

Respondent violated section 7116(a)(1) and (8) of the Statute as alleged and I recommend the Authority issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. BY-CA-40319 be, and hereby is, dismissed.

Issued, Washington, DC, May 17, 1995

SALVATORE J. ARRIGO
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SALVATORE J. ARRIGO, Administrative Law Judge, in Case No. BY-CA-40319, were sent to the following parties in the manner indicated:

_____

_

CERTIFIED MAIL:

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Dated: May 17, 1995
Washington, DC