68 FLRA No. 66

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 2189
(Respondent)

and

JONATHAN JARMAN
(Charging Party)

DA-CO-12-0111

_____

DECISION AND ORDER

March 24, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (Judge) found that the Respondent committed an unfair labor practice (ULP) under § 7116(c) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by denying initial union membership to the Charging Party, an individual employee (the employee). The Judge found that the Respondent violated the Statute as alleged, and, as relevant here, she recommended ordering that the Respondent retroactively admit the employee as a member in good standing. There are two substantive questions before the Authority.

The first question is whether the Judge erred in finding that the Respondent violated § 7116(c). Because this case involves a denial of *initial* membership in the Respondent, and there is no dispute that the Respondent did not deny the employee initial membership for one of the specific reasons that the Statute allows, the answer is no.

The second question is whether the recommended order to retroactively admit the employee violates the Respondent's right to freedom of association under the First Amendment to the U.S. Constitution.[2] Because the Respondent has not demonstrated that this remedy would significantly affect the Respondent's ability to advocate its viewpoints, the answer is no.

II. Background and Judge's Decision

A. Background

Before becoming a part of the bargaining unit that the Respondent represents, the employee was a member, and the president, of a different union (the guards union). While he was the president of the guards union, his employing agency (the Agency) proposed to change its work schedules. As relevant here, the employee and the guards union had a disagreement with the Respondent over how to respond to the proposed scheduling change. While the employee favored a vote among affected employees regarding their scheduling preferences, the Respondent wanted to bargain with the Agency.

The employee made two posts on his private Facebook page regarding the proposed scheduling change. Although the employee restricted the posts so that they were visible only to his Facebook friends, those friends could share the posts, which allowed others to view them as well. One of the posts (the Facebook note) stated, in relevant part, that employees in the bargaining unit represented by the Respondent should

> rise up and create a grassroots movement so strong that your National knows you will either have your vote or you will decertify them and get a new union. And[] don't let anyone tell you that you can't decertify your union if they become corrupt . . . . Look at UnionFacts.org. There are step[-]by[-]step instructions on how to get rid of a corrupt union.[3]

Several of the Respondent's officers saw the Facebook note.

Several months after posting the Facebook note, the employee accepted a position in the bargaining unit that the Respondent represents, and he attempted to become a member. The employee completed and delivered to the Agency a standard-form 1187, "Request for Payroll Deductions for Labor Organization Dues," authorizing the Agency to begin deducting union dues from his pay and remitting them to the Respondent, which the Agency did.[4]

[1] 5 U.S.C. § 7116(c).
[2] U.S. Const. amend. I.
[3] Judge's Decision at 3 (quoting GC's Ex. 4).
[4] *Id.* at 4-5.

Later, the Respondent held a meeting at which members voted to deny the employee's membership application. The Respondent cited the Facebook note as the reason for the denial, claiming that it was evidence that the employee wanted to rally employees to decertify the Respondent. One member of the Respondent's executive board explained that even though the employee was not a member of the Respondent or in the bargaining unit represented by the Respondent when he posted the Facebook note, the Respondent applied its constitution to the employee as if he were a member. But the Respondent did not allow the employee to attend the meeting because he "was not a member" of the Respondent.[5] Following the denial of the employee's membership application, the Respondent returned the dues that the employee had paid through payroll deduction up to that point.

The employee then filed a ULP charge alleging, as relevant here, that the Respondent violated § 7116(c) of the Statute. The FLRA's General Counsel (the GC) issued a complaint containing that same allegation. The Respondent filed an answer denying the allegations in the complaint, and the case went to a hearing before the Judge.

B. Judge's Decision

The Judge found that, during the time when the schedule vote was at issue, the Respondent "had been placed in a trusteeship because of an internal struggle with its [c]hief [s]teward who had sponsored a petition seeking to decertify the [Respondent]."[6] And the Judge acknowledged that the Respondent was, therefore, "greatly concerned about . . . threat[s] to its existence."[7] Nevertheless, the Judge found that the employee's Facebook note was insufficient to justify denying him membership.[8] In that connection, the Judge noted that the employee: (1) was not a member of the Respondent or in the bargaining unit represented by the Respondent when he posted the Facebook note; (2) never actively pursued a decertification petition against the Respondent; and (3) discussed the Respondent on his Facebook page only once – when he wrote the Facebook note. Accordingly, the Judge found that the Respondent violated § 7116(c) of the Statute when it denied the employee's membership application.[9]

Before the Judge, the GC requested as remedies a notice posting and an order requiring the Respondent to "unconditionally offer to retroactively admit [the employee] to membership" as of the date on which he originally submitted his application materials.[10] The Respondent argued that ordering the employee's admission as a member would violate the Respondent's right to freedom of expressive association under the First Amendment to the U.S. Constitution. The Judge acknowledged the Respondent's argument, but did not address it, because she found that she did not have the authority "to review the constitutionality of the Statute."[11] The Judge awarded the GC's requested remedies.

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to the Respondent's exceptions.

III. Preliminary Matter: Section 2429.5 of the Authority's Regulations bars one of the Respondent's arguments.

The GC claims that the Respondent's exceptions raise "completely new arguments" that the Respondent did not raise before the Judge.[12] Under § 2429.5 of the Authority's Regulations, "[t]he Authority will not consider any . . . arguments . . . or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the . . . Judge."[13]

First, in its exceptions, the Respondent argues that the Judge "failed to acknowledge" that § 7116 of the Statute allows a union to "enforc[e] discipline in accordance with the procedures under its constitution,"[14] and that the Respondent's actions in denying membership to the employee "were in full accordance with [the Respondent's c]onstitution."[15] The GC asserts that the Respondent did not raise this argument below.[16] But, in its pre-hearing disclosure, the Respondent cited § 7116(c) for that same proposition, arguing that its "actions constitute discipline for purposes of the [S]tatute" and that it "followed the procedures contained in relevant governing documents concerning membership" when it implemented that discipline.[17] And in its "Answers and Defenses" submitted to the GC, the Respondent stated as its first defense that its actions concerning the employee's "attempt to become a member of the [Respondent] were consistent with the [Respondent]'s governing documents and were consistent with . . . § 7116(c) with respect to enforcing discipline."[18] Further, in its post-hearing brief to the Judge, the Respondent raised the same argument – that it can enforce discipline as long as it

[5] *Id.* at 6.
[6] *Id.* at 11.
[7] *Id.*
[8] *Id.* at 11-12.
[9] *Id.* at 12.
[10] *Id.* at 13.
[11] *Id.*
[12] Opp'n at 5 n.6.
[13] 5 C.F.R. § 2429.5.
[14] Exceptions at 5 (internal quotation marks omitted).
[15] *Id.*
[16] Opp'n at 5 n.6 (citing 5 U.S.C. § 7116(c)).
[17] Respondent's Pre-Hr'g Disclosure at 2.
[18] Respondent's Answers & Defenses at 2-3.

follows the procedures in its constitution.[19] Thus, we find that the Respondent raised this argument before the Judge and that, consequently, § 2429.5 does not bar the argument.

Next, the Respondent argues that the test under § 7116(c) for whether a union has sufficient reason to deny an employee membership should be subjective, rather than objective.[20] In particular, the Respondent argues that, if a union has a "sincere fear" that an employee presents a threat to its existence, then the union has the right to deny membership to that employee.[21] Again, the GC argues that the Respondent did not raise this argument before the Judge.[22] For the reasons set forth in our analysis in the next section, the Respondent's subjective belief is not relevant to whether its denial of the employee's application for initial membership violated § 7116(c) of the Statute.[23] Therefore, we need not decide whether § 2429.5 bars considering the Respondent's argument regarding its subjective belief.[24] Instead, we assume, without deciding, that the argument is properly before us.[25]

The Respondent further argues that the Judge's recommended order to admit the employee to membership retroactively is both "[u]nprecedented"[26] and void for "impossibility of performance"[27] because, according to the Respondent, the local chapter has no authority to admit the employee retroactively.[28] As mentioned previously, the GC specifically asked the Judge to order retroactive admission as a remedy.[29] Therefore, the Respondent could have presented its remedial arguments to the Judge. But there is no evidence that it did so. Accordingly, we find that § 2429.5 bars the Respondent from making these remedial arguments in its exceptions.[30]

IV. Analysis and Conclusions

The Respondent excepts to the Judge's finding of a § 7116(c) violation.[31] Specifically, the Respondent argues that the Judge: (1) "[i]gnored the [p]lain [l]anguage of § 7116(c)," which allows the Respondent to enforce discipline in accordance with the Respondent's constitution;[32] and (2) misapplied Authority precedent[33] and reached an "improper factual[] and legal[] conclusion" when she found that the employee's actions were mere criticism, rather than a threat to the Respondent's existence.[34]

Section 7116(c) provides:

> For the purpose of [the Statute] it shall be [a ULP] for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure –
>
> (1) to meet reasonable occupational standards uniformly required for admission, or
>
> (2) to tender dues uniformly required as a condition of acquiring and retaining membership.
>
> This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of [the Statute].[35]

Authority precedent interpreting § 7116(c) differentiates between: (1) a union's denial of a bargaining-unit employee's *initial* application for membership;[36] and (2) denial of membership by expelling

[19] Respondent's Post-Hr'g Br. at 9-10.
[20] Opp'n at 5 n.6.
[21] Exceptions at 7.
[22] Opp'n at 5 n.6.
[23] 5 U.S.C. § 7116(c).
[24] *See, e.g., U.S. DOD, Ala. Air Nat'l Guard, Montgomery, Ala.*, 58 FLRA 411, 413 n.4 (2003) (finding it unnecessary to address whether an argument was raised below because the argument was not relevant to resolving exceptions); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Ctr., New Cumberland, Pa.*, 55 FLRA 1303, 1305 n.4 (2000) (finding it unnecessary to address one party's request to apply § 2429.5 because Authority resolved exceptions without relying on contested submission).
[25] *See, e.g., USDA, U.S. Forest Serv., Law Enforcement & Investigations, Region 8*, 68 FLRA 90, 92-93 (2014) (assuming, without deciding, that an argument was properly before the Authority).
[26] Exceptions at 9.
[27] *Id.* at 10.
[28] *Id.*
[29] GC's Post-Hr'g Br. at 28-30; Judge's Decision at 13.
[30] *See, e.g., U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 502 (2000) (under § 2429.5, Authority did not consider remedial challenges that could have been, but were not, raised below).
[31] Exceptions at 5-13.
[32] *Id.* at 5.
[33] *Id.* at 6.
[34] *Id.* at 8.
[35] 5 U.S.C. § 7116(c).
[36] *See AFGE, Local 2344, AFL-CIO*, 45 FLRA 1004, 1009-11 (1992) (*Local 2344*).

a *current* member[37] or denying readmission to a *former* member of the union.[38]

With regard to the denial of a bargaining-unit employee's *initial* application for membership, the Authority has held that a union may deny such an application *only* for the reasons stated in § 7116(c)(1) and (2) – specifically, for failure to meet occupational standards uniformly required for admission or failure to tender dues.[39] In that connection, the Authority has stated that "[t]he statutory language clearly sets out two exceptions to the right of union membership," and "[j]ust as clearly, it limits the exceptions to those two circumstances and mandates that it shall be [a ULP] to deny a unit employee membership for any other reason."[40] Consequently, the Authority has held that, even if an employee "admittedly was determined to destroy the union 'from the inside,'" that does not provide an acceptable basis for denying the employee initial membership in the union.[41] But the Authority has cautioned, in that regard, that "once [an employee] has been admitted to membership[,] he [or she] will be subject to discipline by the [u]nion for subsequent misconduct consistent with the requirements of" § 7116(c).[42]

With regard to denial of membership by expelling a current member[43] or denying readmission to a former member,[44] the Authority has held that unions may impose these forms of discipline if: (1) the discipline concerns the employee's actions while the employee was a member of the union imposing the discipline; and (2) the employee's actions "threaten[ed] or attack[ed] the union's existence as an institution."[45]

This case involves denying an employee initial membership in the Respondent – not expelling a current member or denying readmission of a former member. And there is no claim that the employee either failed to meet occupational standards uniformly required for admission or failed to tender dues. Thus, Authority precedent interpreting § 7116(c) supports finding that the Respondent violated that statutory section by denying the employee initial membership.[46]

The Respondent cites *AFGE, Local 2419* (*Local 2419*)[47] and claims that denying the employee membership was permissible discipline.[48] But *Local 2419* involved *expulsion of an existing union member* (and officer) from the union.[49] Although the decision discussed the standards for "deny[ing] membership" in a union, it did so in the context of a union's denial of membership by *expulsion*; it did not change the Authority's different standards for when a union can deny *initial* membership to an employee.[50] Thus, *Local 2419* does not support the Respondent's actions in this case.

For the foregoing reasons, we find that the Respondent has not established that the Judge erred in finding a violation of § 7116(c).

Additionally, the Respondent argued before the Judge, and argues in its exceptions, that requiring it to admit the employee as a remedy for any violation of § 7116(c) would violate its freedom of association under the First Amendment.[51] In this connection, the Respondent cites *Boy Scouts of America & Monmouth Council v. Dale* (*Boy Scouts*)[52] for the proposition that the "forced inclusion" of the employee "infringes [its] freedom of expressive association,"[53] because the employee's presence would prevent it from advocating its viewpoints against decertification and "dual unionism."[54] The Respondent argues that the freedom to associate includes the "freedom not to associate," which the Respondent claims would be violated by the employee's forced inclusion.[55]

The Judge did not consider the Respondent's First Amendment argument, because she found that she did "not have the authority to review the constitutionality of the Statute."[56] In that regard, she correctly determined that she did not have the authority to declare part of the Statute unconstitutional.[57] However, the U.S. Court of

[37] *See NAGE, Local R5-66*, 17 FLRA 796, 813 (1985) (*NAGE*).
[38] *AFGE, Local 987*, 53 FLRA 364, 369 (1997) (*Local 987*).
[39] *Local 2344*, 45 FLRA at 1009-11 (finding a violation of § 7116(c) for denying initial membership to a bargaining-unit employee who made disparaging statements about union officials and stated that he wanted to destroy the union from the inside).
[40] *Id.* at 1010.
[41] *Id.* at 1011.
[42] *Id.*
[43] *NAGE*, 17 FLRA at 813 (stating that expulsion from membership is lawful discipline when internal affairs of the union are involved).
[44] *Local 987*, 53 FLRA at 369.
[45] *AFGE, Local 2419*, 53 FLRA 835, 846 (1997) (*Local 2419*).
[46] *Local 2344*, 45 FLRA at 1009-11.
[47] 53 FLRA at 835.
[48] Exceptions at 7-9.
[49] *Local 2419*, 53 FLRA at 836-37.
[50] *Id.* at 842.
[51] Exceptions at 10.
[52] 530 U.S. 640 (2000).
[53] Exceptions at 11 (internal quotation marks omitted).
[54] *Id.* at 12.
[55] *Id.* at 13 (quoting *Boy Scouts*, 530 U.S. at 648) (citation omitted) (internal quotation marks omitted).
[56] Judge's Decision at 13.
[57] *Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987) (citing *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Public Utils. Comm'n of Cal. v. United States*, 355 U.S. 534, 539 (1958)).

Appeals for the District of Columbia Circuit has held that, when deciding among competing interpretations of the Statute, the Authority should "tak[e] into account the uncertain constitutionality of the Statute as interpreted one way but not another."[58] The court stated that by considering such constitutional implications up front, the Authority may avoid the unnecessary resolution of a constitutional question later.[59] Thus, we consider the Respondent's arguments concerning the constitutional implications of the Judge's application of § 7116(c).[60]

In *Boy Scouts*, the Supreme Court held that a state law violated the Boy Scouts' freedom of association.[61] In that case, the organization sought to exclude from membership an openly gay civil-rights activist who was also an assistant scoutmaster.[62] The Court stated that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[63] The Court found that including an openly gay assistant scoutmaster would inhibit the Boy Scouts' ability to advocate its viewpoint that homosexuality is not "morally straight."[64] The Court noted that, in other cases, where the inclusion of an unwanted person would not "materially interfere" with a group's ability to advocate its desired viewpoints, enforcement of a statute to require the person's inclusion did not violate the group's freedom of association.[65]

The *Boy Scouts* Court explained that a two-step analysis applies when evaluating whether a law, as applied to a particular group, violates the First Amendment.[66] Specifically, it must be determined whether: (1) the group engages in expressive activity; and (2) if so, whether inclusion of the unwanted person would "significantly burden" the group's ability to express its viewpoints.[67]

As to the first step, it is undisputed that the Respondent engages in expressive activity, with its mission being "to advance its brand . . . , to engage in collective bargaining on behalf of the members it represents, and to promote and protect the fundamental tenets of unionism."[68]

Regarding the second step, the Respondent argues that its constitution prohibits it from including members who advocate particular viewpoints.[69] In support, the Respondent cites Article I, Section 5 of its constitution for the proposition that it is prohibited from including any person "who advocates dual unionism or supports movements or organizations inimical to the interests of the [Respondent]."[70] However, the cited section actually states that "[a]ny *member*" who advocates such ideas "shall not be eligible to *hold office* in the [Respondent]," not that a bargaining-unit employee who holds such beliefs is precluded from initial membership outright.[71] The Respondent also cites Article L, Section 3 of its constitution, which permits expulsion of a *member* for improper conduct,[72] but the Respondent does not explain how Article L is applicable to nonmembers.

As further support for its First Amendment argument, the Respondent contends that the "defamatory and insidious"[73] Facebook note was evidence of the employee's "support for an organization inimical to [the Respondent] and was encouragement of [decertification] and dual unionism."[74] The Respondent argues that, therefore, the Authority should defer to its belief that the employee's inclusion would impair its expression.[75]

While the *Boy Scouts* Court noted that it would give some deference to a group's view about what would impair its expressive ability,[76] because it defers to a group's assertion as to *what its viewpoints are*, the Court stated that it is not sufficient for an organization to assert simply that "mere acceptance of a member from a particular group would impair its message."[77] The Court explained that if the evidence fails to demonstrate that including the unwanted person would affect "in any significant way the existing members' ability to carry out their various purposes," then the inclusion of that person does not infringe the group's First Amendment rights.[78]

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[58] *NTEU v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993) (citing *Meredith v. FCC*, 809 F.2d 863, 872-73 (D.C. Cir. 1987)).
[59] *Id.*
[60] *See, e.g.*, *SSA*, 52 FLRA 1159, 1160 (1997).
[61] *Boy Scouts*, 530 U.S. at 644.
[62] *Id.*
[63] *Id.* at 648.
[64] *Id.* at 651.
[65] *Id.* at 657 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (*Duarte*)).
[66] *Id.* at 648-53.
[67] *Id.* at 653.
[68] Exceptions at 11.
[69] *Id.* at 12.
[70] *Id.* (citing GC's Ex. 18 at 3) (internal quotation marks omitted).
[71] GC's Ex. 18 at 3 (emphases added).
[72] Exceptions at 12 (citing GC's Ex. 18 at 147) (emphasis added).
[73] *Id.* at 13.
[74] *Id.* at 12.
[75] *Id.* at 12-13.
[76] *Boy Scouts*, 530 U.S. at 652-53.
[77] *Id.* at 653.
[78] *Id.* at 658 (citing *Duarte*, 481 U.S. at 548) (internal quotation marks omitted).

Here, the Respondent argues that the Authority must defer to its belief that the Facebook note presented a threat to its existence.[79] But *Boy Scouts* does not support that proposition, and the Respondent does not cite any other authority that does. Additionally, as discussed previously, although the Facebook note mentioned generally that it is possible to decertify a union,[80] the Judge found that the employee: (1) was not a member of the Respondent or in the bargaining unit represented by the Respondent when he posted the Facebook note; (2) never actively pursued a decertification petition against the Respondent; and (3) discussed the Respondent on his Facebook page only once – when he wrote the Facebook note.[81] The Respondent provides no basis for finding that the Judge erred in this regard. And the Respondent offers no evidence that granting the employee membership would "significantly burden" its ability to advocate its viewpoints.[82] Further, as stated previously, once the employee is a member, if he engages in actions that "threaten or attack the [Respondent]'s existence as an institution," Authority precedent supports a conclusion that he may be subject to discipline by the Respondent.[83] Accordingly, we find that the Respondent has not demonstrated that requiring it to admit the employee to membership would violate its freedom of association.

Finally, the Judge stated that she would incorporate the GC's request for an electronic posting into her order,[84] but did not.[85] As noted by the GC,[86] the Authority routinely modifies administrative law judges' orders to provide for electronic-notice posting.[87] Therefore, we modify the Judge's order by adding a direction to post an electronic notice.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[88] and § 7118 of the Statute,[89] the Respondent shall:

1. Cease and desist from:

   (a) Denying membership to the employee or any other eligible employee in the exclusive collective-bargaining unit represented by the Respondent at the Agency, for any unlawful reason.

   (b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

   (a) Unconditionally offer to retroactively admit the employee to membership as a member in good standing in the Respondent, with full rights of membership, and no cost to the employee for back dues, effective December 1, 2011, when the employee originally submitted the standard-form 1187 to the Respondent.

   (b) If tendered, accept from the employee payment of future dues uniformly required as a condition of retaining membership, covering the period beginning from the employee's receipt of the unconditional offer of admission into the Respondent.

[79] Exceptions at 13.
[80] Judge's Decision at 10; GC's Ex. 3.
[81] Judge's Decision at 12.
[82] *Boy Scouts*, 530 U.S. at 653.
[83] *Local 2419*, 53 FLRA at 846.
[84] Judge's Decision at 12.
[85] *Id.* at 13-14.
[86] Opp'n at 4 n.5.
[87] *U.S. Dep't of the Air Force, Space & Missile Sys. Ctr., L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 569 (2014).
[88] 5 C.F.R. § 2423.41(c).
[89] 5 U.S.C. § 7118.

(c) If tendered, request that the Agency reinstate the deduction, from the employee's pay, of regular and periodic dues to the Respondent.

(d) Post at the Respondent's business office, and in all normal meeting places, including all places where notices to members of, and bargaining-unit employees represented by the Respondent are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the President of the Respondent, and shall be posted and maintained for sixty consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(e) Pursuant to § 2423.41(e) of the Authority's Regulations,[90] notify the Regional Director, Dallas Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

[90] 5 C.F.R. § 2423.41(e).

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (FLRA) has found that National Federation of Federal Employees, Local 2189 (the Respondent), violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT deny membership to Jonathan Jarman (Jarman) or any other eligible employee in the exclusive collective-bargaining unit represented by the Respondent at the U.S. Department of the Army, Red River Army Depot, Texarkana, Texas, for any unlawful reason.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of their rights assured by the Statute.

WE WILL unconditionally offer to retroactively admit Jarman to membership as a member in good standing in the Respondent, with full rights of membership, and at no cost to Jarman for back dues, effective December 1, 2011, when Jarman originally submitted a standard-form 1187 to the Respondent.

WE WILL, if tendered, accept from Jarman payment of future dues uniformly required as a condition of retaining membership, covering the period beginning from Jarman's receipt of the unconditional offer of admission into the Respondent.

WE WILL, if tendered, request that the Agency reinstate the deduction, from Jarman's pay, of regular and periodic dues to the Respondent.

_____
National Federation of Federal Employees, Local 2189

Dated: _____ By: _____
(Signature) (President)

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, FLRA, whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, TX, 75202-1906, and whose telephone number is: (214) 767-6266.

Member Pizzella, concurring:

In 1880, Roseanna McCoy caused quite a stir when she went to live in the neighboring Hatfield family cabin in order to join her boyfriend, Johnse Hatfield.[1] Roseanna's move reignited a long-standing feud between the Hatfield and McCoy families that went on for another eleven years.[2] Jonathan Jarman, a security guard at Red River Army Depot (RRAD) in Texarkana, Texas, who also served as the president of the International Guards Union of America, Local 124 (IGUA),[3] caused a similar stir when he tried to join the neighboring National Federation of Federal Employees (NFFE), Local 2189 (Local 2189).[4]

In November 2011, Jarman was selected for a promotion to a position in the emergency services directorate at RRAD, a position which placed him under a different Union, Local 2189.[5] Upon his transfer, Jarman applied to become a member of Local 2189 and immediately began to pay dues, but his move was received about as warmly as was the move of Roseanna McCoy into the Hatfield cabin.

Local 2189 had not been on good terms with Jarman and IGUA since 2008, when Jarman, after just six months as a federal employee, was elected president of IGUA as well as co-chair of the RRAD Labor-Management Forum (which included one representative from each of the five unions recognized at RRAD).[6] The selection of Jarman apparently did not go over well with the officers of Local 2189 which constituted the largest bargaining unit at RRAD.[7] The feud between Local 2189 and IGUA, became even more heated in 2011 when all of the unions, except for Local 2189, thought it was a good idea to have their members participate in a binding vote on whether to support a schedule change that had been proposed by the RRAD commanding officer.[8] Local 2189 alone determined that it "was not going to allow [its bargaining-unit] employees to vote."[9]

Jarman was concerned that the effort to keep the existing schedule would fail if the members of Local 2189 did not participate.[10] To generate support for the vote, Jarman posted an entry on his *personal* Facebook page, which expressed *his opinion* that employees at RRAD "were lucky to be given a vote" but that the "egos of the two guys running [Local 2189] [would] effectively crush[] any chance of staying on [the preferred schedule]."[11] On the same post, he suggested that if the leaders of Local 2189 did not permit a vote, its members should consider an effort to "decertify them and get a new union."[12] Jarman's efforts were successful and the proposed shift change was never implemented.[13]

But, according to the executive board of Local 2189, Jarman's single Facebook post created such "fear" in the Local 2189 family that they had no choice but to reject his application for membership after he was transferred into their work unit.[14] Apparently, they believed that he would single-handedly "attack" their institutional "existence."[15] (Oddly, there is no mention in the record of Jarman's ability to leap tall buildings in a single bound.)

The leaders of Local 2189, nonetheless, may have had a very *real* cause for concern, but it had nothing whatsoever to do with Jarman's Facebook post. The previous year was not a happy one in the Local 2189 household. In 2010, NFFE's national office placed Local 2189 under "trusteeship" after its Chief Steward, Danny Williamson, was accused of engaging in "improper conduct" in violation of the Union's constitution because he dared to file a petition to "decertify" Local 2189.[16] That family squabble only aggravated its ongoing feud with Jarman and IGUA.

After Jarman's application for membership was rejected by Local 2189, he filed an unfair-labor-practice (ULP) charge complaining that the rejection of his membership was a violation of § 7106(c) of the Federal Service Labor-Management Relations Statute (the Statute). In response, Local 2189 argued that it did not violate the Statute because it has the "right" to anticipatorily "discipline" an applicant for membership, and deny his application, simply because the applicant made a statement that was "critical of union leadership."[17] It now seems as though any employee seeking to join Local 2189 might first want to consider

[1] http://www.mixbook.com/photo-books/family/hatfield-and-mccoy-feud-6141346.
[2] *Id*.
[3] Judge's Decision at 2.
[4] *Id.* at 4.
[5] *Id.* at 4.
[6] *Id*. at 2.
[7] *Id*.
[8] *Id.* (RRAD operated on a 4-10 work schedule, the commander notified the unions that he intended to change to a 5-8 schedule, but all five unions supported remaining on a 4-10 schedule.)
[9] *Id*.
[10] *Id*. at 3.
[11] *Id*. (internal quotation marks omitted).
[12] *Id*. (internal quotation marks omitted).
[13] *Id*. at 4.
[14] Majority at 4; Judge's Decision at 9.
[15] Judge's Decision at 9.
[16] *Id.* at 7.
[17] *Id*. at 9 (internal quotation marks omitted).

the lament made famous by Groucho Marx: "I refuse to join any club that would have me as a member."[18]

Administrative Law Judge Susan Jelen determined that Local 2189 had, indeed, crossed the line in this case, and violated § 7106(c), when it denied Jarman membership in Local 2189. As a remedy, the Judge ordered that Jarman must be retroactively accepted into membership.[19]

Stefan Sutich, the General Counsel of NFFE (apparently missing the irony) argues, in Local 2189's exceptions, that the Judge's remedy somehow violates its "freedom of association under the First Amendment" of the United States Constitution. If I am reading the exceptions correctly, Counsel Sutich's argument boils down to this − even though Local 2189 *denied Jarman his right* to become a member because he expressed his opinion in a single Facebook post, the Judge's remedial order, issued to reverse the Union's unlawful action, violates *the Union's* "*[f]reedom of association.*"[20] Wait a minute!! Whose rights are we talking about here?

I wholeheartedly agree with my colleagues that Local 2189's actions were unlawful and that Judge Jelen did not err in directing a retroactive remedy.

Unlike my colleagues, however, I agree with FLRA Regional Attorney Charlotte Dye, who argues on behalf of the General Counsel in opposition to the exceptions, that Local 2189 did not raise its arguments – concerning provisions in the Union's constitution that pertain to employee membership and whether Local 2189's "fear" defense should be assessed under an "objective" or "subjective" test – below and should be dismissed under 5 C.F.R. § 2429.5.[21]

I also do not agree with the majority insofar as they presume that they have the authority to address Local 2189's specious constitutional arguments. I agree with Judge Jelen and the General Counsel that the Authority's jurisdiction in ULP cases does not extend that far.[22] In long-standing precedent, the U.S. Court of Appeals for the D.C. Circuit (the court) and the Authority have held that "the Authority's jurisdiction in ULP cases extends only to claims arising from the Statute, not constitutional claims."[23]

The majority does not simply "tak[e] into account the uncertain constitutionality of the Statute" (which, in dicta, the court implied would not be "prohibited").[24] Instead, my colleagues make an unmistakable constitutional interpretation that requiring Local 2189 to accept Jarman's membership does not "violate its freedom of association,"[25] a point that they need not address. As I have previously noted, the court has cautioned the Authority against reading the reach of our Statute and the scope of our jurisdiction too broadly.[26]

Local 2189 could learn a valuable lesson from the Hatfield-McCoy history alluded to earlier. Had the Hatfields not made life so difficult for Roseanna when she moved into their home, the feud between the families in all likelihood would not have gone on for another eleven years and the eight family members who lost their lives during that period might well have survived.[27]

Thank you.

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[18] http://www.brainyquote.com/quotes/quotes/g/grouchomar122546.html.

[19] Judge's Decision at 13-14.

[20] Exceptions at 13 (emphasis added) (internal quotation marks omitted).

[21] Opp'n at 5 n.6.

[22] Judge's Decision at 13.

[23] *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC) Carolina, P.R.*, 56 FLRA 174, 182 (2000) (citing *NTEU v. King*, 240, 243 (D.C. Cir. 1992); *see also Miss. Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337, 339 (2001) (citing *NTEU v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993)) (then-Member Pope joining with Chairman Cabaniss and Member Wasserman in a unanimous decision).

[24] *NTEU*, 986 F.2d at 540.

[25] Majority at 10.

[26] *See AFGE, Local 1547*, 67 FLRA 523, 532 (2014) (Dissenting Opinion of Member Pizzella) (citing *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I. v. FLRA*, 665 F.3d. 1339, 1348 (2012)); *U.S. DHS, U.S. ICE*, 67 FLRA 501, 508 (2014) (Dissenting Opinion of Member Pizzella).

[27] *See* http://www.mixbook.com/photo-books/family/hatfield-and-mccoy-feud-6141346.

Office of Administrative Law Judges

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2189
Respondent

AND

JONATHAN JARMAN
Charging Party

Case No. DA-CO-12-0111

Charlotte A. Dye
Carmen Byrd
For the General Counsel

Stefan Sutich
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

Based upon an unfair labor practice filed by Jonathan Jarman, an individual, a Complaint and Notice of Hearing was issued by the Regional Director of the Dallas Regional Office. The complaint alleges that the National Federation of Federal Employees, Local 2189 (Respondent/NFFE Local 2189/Union) violated § 7116(c) of the Statute when it denied membership to Jarman. (G.C. Ex. 1(c) & 1(d)). The Respondent timely filed an Answer denying the allegations of the complaint. (G.C. Ex. 1(g).

A hearing was held in Texarkana, Texas on August 21, 2012, at which time the parties were afforded an opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence, and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

Based upon the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

The Department of the Army, Red River Army Depot (RRAD/Agency) is located near Texarkana, Texas. There are five separate bargaining units located at RRAD; the largest is NFFE Local 2189, which primarily represents production employees, including those in Building 345. (Tr. 55, 103). The Red River Army Depot Labor-Management Forum (Forum) is comprised of six management members and five unions, including the Respondent and the International Guards Union of America, Local 124 (IGUA). Jarman began work as a contract security guard in July 2005 and was converted to a federal employee as a federal security guard in November 2007 and then a Police Officer for the Directorate of Emergency Services in April 2008. (G.C. Ex. 5; Tr. 21-24). In 2008, Jarman was elected as President of IGUA and served as President for nearly four years. Jarman also served as a Regional representative for IGUA. (Tr. 23). As President of IGUA, Jarman was a member of the Forum and was elected by the five unions to serve as their co-chair. The Commander of the RRAD served as the co-chair for management. (Tr. 24).

On April 6, 2011, Chief of Staff Teresa Weaver served Jarman (as co-chair of the Forum) with notice that the RRAD intended to hold a meeting the next day regarding a proposed shift change from a 4-10 schedule to a 5-8 schedule. (Tr. 24-25). Jarman then informed and met with the other four union presidents: Bill Roush for Respondent; Sid Jones for the Firefighters Union, Ron Starkey for the Electrical Workers Union, and Rodney White for the Pipefitters Union. (Tr. 25). During this meeting, all five unions expressed their preference to remain on a 4-10 schedule. The union presidents unanimously agreed that Jarman would make a PowerPoint presentation setting forth their position at the scheduled meeting. (Tr. 25-26).

On April 7, Jarman presented the PowerPoint slides to management. (Tr. 26). On April 13, the Commander held a meeting with the five union presidents regarding the proposed shift change. (Tr. 27). During this meeting, Rodney White, President for the Pipefitters Union , suggested that the employees be permitted to vote regarding their preference on the shift change because he believed that the general population, rather than a couple of people, should decide the issue. (Tr. 27, 80). The Commander stated that if all the unions agreed, then a poll could be conducted and he could live with the results. (Tr. 27). At that time, the five union presidents, including Bill Roush, the Respondent's president, agreed to take a vote of all the employees regarding the proposed shift change schedule. (Tr. 27-28).

Shortly after the meeting, however, Roush informed Jarman and White that NFFE Local 2189 was

not going to allow the employees to vote on the shift change. (Tr. 28, 106). Roush had been instructed by the National Business Representative for NFFE Local 2189, John Griffin. Roush gave Jarman permission to call Griffin directly, which he proceeded to do. Jarman told Griffin that he thought the vote was a great idea and that the people would overwhelmingly support retaining the 4-10 schedule. (Tr. 29). Griffin stated that he wanted to file a notice to bargain with the agency regarding the proposed shift change and that it would be unprecedented to allow the general population, rather than the union, to make the decision. (Tr. 29).

Following the April 13 events, Jarman posted a question on his Facebook page in which he asked: "If you worked in a production environment like at bldg. 345 at Red River Army Depot, would you think it would be better to work (4) 10 hour shifts Mon-Thur or (5) 9 hour?" (G.C. Ex. 3; Tr. 30, 56). Below the questions, Jarman posted three answer options: "(4) 10 Hours Shifts"; "(5) 8 Hour Shifts"; and "They're about the same." (G.C. Ex.3). Jarman posted the question so that it was only visible to his Facebook friends; that is, Facebook accountholders who Jarman had specifically accepted as his friend under his Facebook account. At the time, Jarman had approximately 200 Facebook friends, but only 20 or less worked at RRAD. (Tr. 30).

According to Jarman, he posted the question to get an understanding of the difference between a 5-8 and 4-10 scheduled because he had never worked a 4-10 schedule before. (Tr. 32). Jarman did not target the question to only his Facebook friends who actually worked at RRAD because he wanted to get a general idea of what a popular decision would be regarding the two shifts, regardless of where the individual worked. (Tr. 32, 55). Because of a share function on Facebook, Jarman's Facebook friends could click the "share" button below Jarman's question and allow other people – who were not specifically Jarman's Facebook friends – to view and answer the question, which they did. (Tr. 31). As a result, 182 individuals answered Jarman's question on Facebook, including people who were not Jarman's Facebook friends. (Tr. 31). All of Jarman's Facebook friends who worked at RRAD responded that they would prefer to remain on the 4-10 schedule. (Tr. 31).

On June 14, 2011, Jarman posted a note on his Facebook page regarding Respondent's decision to bargain over the shift change. (G.C. Ex. 4; Tr. 32-33). The note stated:

> The unions were served with demands for negotiation starting Monday the 19th over whether to move to (5) 8 hr shifts or stay on (4) 10 hr shifts. The commander was pretty gracious on April 13th when he offered to allow the workers to vote but only 4 of 5 unions agreed. NFFE's rep present even agreed at the time but for whatever reason, they think negotiating is a better idea. It's not.
>
> On Monday, we are going to face a cold, hard reality – that they never had to negotiate to begin with. Under their permissive rights, they can determine the shift without bargaining. I knew this all along, which is why I knew we were lucky to be given a vote. But, the giant egos of the two guys running that union have effectively crushed any chance of staying on (4) 10s.
>
> So, what can you do? Well, the chances are pretty grim, I can tell you that. The ONLY hope you have is if you people rise up and create a grassroots movement so strong that your National knows you will either have your vote or you will decertify them and get a new union. And, don't let anyone tell you that you can't decertify your union if they become corrupt. It happens all the time. Look at UnionFacts.org. There are step by step instructions on how to get rid of a corrupt union.
>
> And don't let anyone tell you a vote is illegal. It's not. You could even call it a "climate survey"… who cares?
>
> Maybe the guy drunk on power will put the bottle down for a minute and decide to ask the commander for a vote. I know the other 4 of us will. But you need 5 I would raise hell between now and Monday to get that [illegible].

(G.C. Ex. 4).

The note was initially visible to only Jarman's Facebook friends, but could be shared with others. (G.C. Ex. 4; Tr. 32-33). The Facebook note was circulated within the Union membership, but not specifically by Jarman. (Tr. 130). Respondent's President Bill Roush informed the National Business Representative Gary Johanson about Jarman's note when it was first posted. (Tr. 114-15).

The shift change issue was not immediately resolved and continued as an issue at RRAD for several months. In October 2011, the Commander determined not to go forward with the 5-8 shift change. (Tr. 57-58).

On November 20, 2011, Jarman began working as an Administrative Support Assistant to the Directorate of Emergency Services at RRAD, which was a promotion. (G.C. Ex. 5; Tr. 36). With his new position, Jarman was no longer in the bargaining unit represented

by IGUA, but was in the bargaining unit exclusively represented by NFFE Local 2189. (Tr. 57-58).

In early November 2011, Jarman contacted representatives of Respondent to request assistance on the completing and submitting of a Standard Form 1187 to become a member of the Union. (Tr. 38-39). On November 8, Jarman contacted Chief Steward Billy Pettit by text message, inquiring how to the join the Union. (G.C. Ex. 8; Tr. 39, 60).

The 2001 master collective bargaining agreement between the Red River Army Depot and Respondent contains Article VIII, Voluntary Allotment of Union Dues, which includes, among other things, provisions regarding the process for commencing dues deduction by the Agency by submitting a Standard Form 1187, Request for Payroll Deductions for Labor Organization Dues; when deductions will begin after the receipt of a completed Standard Form 1187; and how employees may terminate a dues deduction allotment. (G.C. Ex. 7; Tr. 37-38). The Standard Form 1187 is a form an employee completes to authorize the agency to deduct from their pay regular dues of the labor organization. (G.C. Ex. 10; Tr. 37-38). Section A of the form is completed by an authorized official of the labor organization, while Section B is completed by the employee. (G.C. Ex. 10). Article VII, Section 1 of the parties' collective bargaining agreement permits the Agency to deduct union dues from an employee's biweekly pay, when an employee voluntarily executes a Standard Form 1187 and the Union submits the form to the Agency. (G.C. Ex. 7; Tr. 37-38).

In multiple text messages to Pettit, Jarman requested information on how much Union dues were and the fax number for Respondent so that he could complete and submit the Standard Form 1187 to the Union. Pettit provided Jarman with the Union's fax number, but no information regarding the dues. (Tr. 40, 61).

On December 1, Jarman completed Section B of the Standard Form 1187 and emailed the form to the Agency, through Mary Shelton, with a copy to Billy Pettit. (G.C. Ex. 9; Tr. 40-41; 62-63). In the email, Jarman requested to be enrolled in the local NFFE union and stated that he had left the dues area blank because he did not know how much they were. (G.C. Ex. 9; Tr. 40-41). The Respondent did not sign off on the form.

On December 7, Jarman emailed Pettit stating: "it's starting to seem like I'm not going to be able to join NFFE. Can I join please?" (G.C. Ex. 11; Tr. 42-43). On December 13, Jarman hand delivered a copy of the Standard Form 1187 to the Agency, through Mary Shelton. (Tr. 43). At that time the Agency processed the form and provided Jarman with a receipt in the amount of $25.31 for dues allotment to NFFE Local 2189. (G.C. Ex. 12; Tr. 43-44). Jarman believed that he was now a member of the Union.

On December 13, Respondent's Executive Board formed a committee to vote on Jarman's membership application. (Tr. 68). In attendance at the meeting were: Gary Johanson by telephone; President Bill Roush; Trustee Zephyr Bagby; Trustee Susan Curl; Trustee John Eastman; Acting Vice President Cebron O'Bier; Steward David Sharp; Secretary Sonny Young, and Steward David Hill. (G.C. Ex. 19; Tr. 69, 115). O'Bier served as Acting Vice President because David Hill had taken a temporary promotion. (Tr. 67, 102). Although Hill attended the meeting as a steward, he did not have a vote in the proceedings. (G.C. Ex. 19; Tr. 67-69). During the meeting, the Respondent made it clear that the issue with Jarman's application for membership was his June 14th Facebook note, which was distributed and reviewed by the E-Board members during the meeting. (Tr. 70, 73, 115-16). Jarman's Facebook note was the only statement by Jarman that was referenced regarding his membership application. (Tr. 74-75).

Over the telephone Gary Johanson explained to the E-Board about his involvement in the Williamson trial, including the expenses involved. (Tr. 116). Johanson advised that if the Union did not feel a person was an acceptable candidate for union membership, the candidate should not be accepted as a member because it was easier to deny a person membership at the outset than to hold a trial. (Tr. 116-17, 122). Johanson testified that he was fearful that Jarman would attempt to hollow the Union out from the inside like an Afghani soldier putting on a suicide vest and going to a Marine post. (Tr. 122). Johanson testified that although Jarman was not a member of the Union, or even an employee whose position was represented by the Union when he drafted the June 14th Facebook note, the Union still applied the IAM Constitution to him as though he were a member of the Union. (Tr. 121, 127).

The E-Board voted to deny Jarman membership to the Union for an indefinite period of time, but no less than five years. (G.C. Ex. 19; Tr. 75-76, 122-23, 131). Hill testified that he advised the E-Board that by voting to deny Jarman membership at the E-Board meeting and imposing an indefinite time frame, the Union was not following the IAM Constitution. (Tr. 76-77). Hill testified that the Constitution only allowed the E-Board to make a recommendation to the Union members, who could then vote to admit or deny Jarman's membership application. (Tr. 87).

Jarman did not receive any official notification from the Union regarding his membership status, but did begin to hear rumors that he had been denied membership in the Union. (Tr. 45). On December 21, Jarman

emailed Johanson, stating that he had attempted to join the Union since he took his new position in November 2011, and that he had heard that he may have been banned from the Union for five years because of a disagreement with John Griffin over the shift change issue. (G.C. Ex. 13; Tr. 44-45). Jarman requested to know if he had been denied membership to the Union. (G.C. Ex. 13; Tr. 45). Jarman also stated that he still wanted to join NFFE and run for official office and stated that because he was a shrewd negotiator with popular appeal and had been president of IGUA Local 124, he believed he had a lot to offer NFFE. (G.C. Ex. 13; Tr. 45-47). Johanson did not respond the Jarman's email. (Tr. 45).

On January 3, 2012, Union President Bill Roush emailed the Agency requesting that it stop Jarman's dues deduction, which the Agency did on the same day. (G.C. Ex. 21).

At some point, Rodney White, President of the Pipefitter's Union, asked Union steward David Hill if he would look into why Jarman was not being admitted to membership in the Union. (Tr. 78). Hill agreed and spoke to Jarman. (Tr. 78). Hill then began to represent Jarman in his effort to obtain membership in the union. (Tr. 48, 67, 83). Hill testified that he believed Jarman deserved the opportunity to make his case because he did not believe that the Union had all the facts regarding Jarman's membership application and believed that the Union had not dealt with the issue properly. (Tr. 78-79, 82).

As a result, on January 11, 2012, Hill emailed Gary Johanson, with copies to Jarman, Pettit and White, stating that he want to set up a meeting to discuss the membership application. (G.C. Ex. 14; Tr. 47-48, 77-79). This proposed meeting never took place. (Tr. 49, 84).

On January 17, Hill informed Jarman that the Union was going to hold another meeting that day regarding his membership application because the previous meeting did not comply with the Union's governing documents. (Tr. 49, 84). Jarman asked Hill if he could attend the meeting. (Tr. 49, 85). Hill later informed Jarman that he had spoken with President Roush, who had told him that Jarman could not attend the meeting because he was not a member of the Union. (Tr. 49-50, 85). That same day, Jarman e-mailed Roush, disagreeing with the decision to not allow him to attend the Union meeting and stating that he thought he should have been allowed to attend. (G.C. Ex. 15; Tr. 50).

Approximately ten people attended the January 17 meeting, which consisted primarily of the E-Board members who had previously voted to deny Jarman membership, plus two or three other members. (Tr. 85-88). Roush passed out Jarman's June 14, Facebook note during the meeting. Apparently, there was no discussion that Jarman had not been a member of the NFFE bargaining unit when he drafted and posted the Facebook note. (Tr. 88, 133).

The Union membership unanimously voted to deny Jarman membership to the Union, with the option to reapply in six months. (G.C. Ex. 20; Tr. 89-90, 131). Hill later informed Jarman that he had attended the January 17, meeting and had voted, along with the other Union members, to deny Jarman membership to the Union. (G.C. Ex. 20; Tr. 50-51, 85, 91-92).

On January 17, Jarman emailed Johanson and Hill asking if they had a chance to speak about his membership to the Union and, if not, requested that the other union presidents join the meeting. (G.C. Ex. 19). Johanson responded on January 19, and requested to meet with Jarman the following week. (G.C. Ex. 19. Jarman emailed Johanson informing him that he had reserved a private office so they could meet. (G.C. Ex. 16; Tr. 51).

On January 26, Johanson informed Jarman that he was denied membership to the Union. Johanson showed Jarman a copy of his June 14, Facebook note and told him that he interpreted the note to mean that Jarman was rallying a petition against the Union to have it decertified. (Tr. 52, 133-34). Johanson did not inform Jarman how he had obtained a copy of the Facebook note. (Tr. 58). Jarman informed Johanson that he had not advocated to decertify the Union, but Johanson still told Jarman that he was denied membership to the Union and that his application could be reviewed every six months. (Tr. 52-54, 123). Johanson did not provide Jarman with any information on how to appeal the Union's decision. (Tr. 134). Johanson gave Jarman a check for the amount of dues he had previously paid to NFFE. (Tr. 53-54, 123).

In December 2010, IAM placed NFFE Local 2189 into trusteeship because it had accused Denny Williamson, a member and Chief Steward, of running a petition to decertify the Union in violation of Article L of the IAM Constitution. (Tr. 11, 112). The IAM constitution governs NFFE Local 2189. Article L includes, among other things, provisions regarding the improper conduct of officers, representatives, and members; the trial of officers or representatives; the trial of members; appointment of a trial committee; trial procedures; report of the trial committee; and appeal procedures. (G.C. Ex. 18). National Business Representative Gary Johanson was appointed, along with two other national business representatives, to investigate, prepare a report, and hold a trial regarding Williamson's alleged misconduct. (Tr. 111-12). Within several months, the investigation and trial of Williamson closed and IAM, through the International President,

delivered a verdict. (Tr. 113). No petition was ever filed with the Dallas Region to decertify the Respondent.

The Union had three different trustees during this period: David Stamey, John Griffin, and Gary Johanson. (Tr. 106-08). In May or June 2011, Johanson was replaced with Griffin and began to provide advice to the Respondent as a part of his regular duties. (Tr. 110). Bill Roush served as the President of the Union during and after the trusteeship. (Tr. 108).

At the same time as the committee was reviewing Jarman's membership application, it was also reviewing the application of a female employee, who had been heavily involved in Williamson's decertification campaign. She had previously revoked her membership but was seeking to rejoin the Union. After much discussion, the committee voted unanimously to deny membership to both Jarman and the female employee. (Tr. 73-75, 115-18).

Section 7116(c) of the Statute states:

> For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure –
>
> (1) to meet reasonable occupational standards uniformly required for admission, or
>
> (2) to tender dues uniformly required as a condition of acquiring and retaining membership.
>
> This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated § 7116(c) of the Statute when it denied Jarman membership to the Union based on a critical statement Jarman posted on his Facebook account. The GC notes that Jarman's note criticized the Respondent's decision to bargain over the proposed shift change and was posted in June, five months before he was even in the bargaining unit represented by the Respondent.

The GC asserts that the Authority has interpreted the final proviso of § 7116(c) to allow a union to discipline a member, including the denial of membership or expulsion, for reasons unrelated to occupational standards and dues. Such ability to enforce discipline is subject to the requirement that the discipline be consistent with the provisions of the Statute. *Am. Fed'n of Gov't Employees, Local 2419*, 53 FLRA 835, 841-42 (1997) (*AFGE Local 2419*). The Authority has held that a union may deny an employee membership to the union where the employee's actions "threaten or attack the union's existence as an institution." *Id.* at 846. But "absent a threat to its continued existence, a union may not discipline an employee for mere criticism of its management or policies." *Id.* This rule is consistent with § 7102, which both clearly protects an employee's right to speak out, for or against the union, and recognizes the employees' "right to form, join, or assist any labor organization," freely and without fear of penalty or reprisal. *Am. Fed'n of Gov't Employees, Local 3475, AFL-CIO*, 45 FLRA 537, 549 (1992) (*AFGE Local 3475*); *Am. Fed'n of Gov't Employees, AFL-CIO*, 29 FLRA 1359, 1364 (1987) (*AFGE, AFL-CIO*).

The GC asserts that Respondent denied Jarman membership to the Union because he criticized the Union in a Facebook note. It argues that Jarman's note can only reasonably be interpreted as mere criticism of Respondent's decision to bargain over the shift change and did not constitute an attack on the Respondent's existence as an institution. As a general matter, employees who are dissatisfied with their exclusive representative may seek to decertify their existing exclusive representative. Consistent with this fact, Jarman simply mentions that a union can be decertified if it becomes corrupt. He does not state that Respondent is a corrupt union or advocate that employees should decertify the union. (Tr. 19). Therefore, the GC concludes that Jarman's Facebook note constituted mere criticism of the Respondent and could not be used to deny him membership in the union.

Although Jarman referenced UnionFacts.org in his Facebook note, the GC asserts that this reference does not transform the note into an attack on Respondent's existence as an institution. UnionFacts.org does provide information on how to decertify a private sector union under the National Labor Relations Act, but does not mention the Statute or the Authority. Even if it did, that would not compel the conclusion that Jarman advocated the decertification of Respondent. He simply mentioned there was a website providing information regarding the decertification process in his Facebook note. Further, at the time of the posting, Jarman was not a member of the NFFE bargaining unit or a member of NFFE, and therefore, was not subject to the Respondent's constitution.

The GC further asserts that the Respondent's subjective fear of an attack on its existence as an

institution, having recently undergone a decertification attempt, should not be considered a valid defense to its actions. There is no evidence that Jarman had been involved in the earlier decertification effort, no evidence that Jarman was orchestrating a plot to undermine the Respondent, and no evidence that Jarman was anything but sincere and genuine in his attempt to join and contribute to the Union that now represented him. Further, the Respondent's argument that § 7116(c) is broad enough to excuse its conduct of denying Jarman membership in the union for a statement he made five months before he was even a member of the bargaining unit it represented should be rejected.

Respondent

Respondent denies that it violated § 7116(c) of the Statute when it denied Jarman membership in the union. In *AFGE Local 2419*, 53 FLRA at 835, the Authority held that "a union can enforce discipline that denies membership for reasons unrelated to occupational standards and dues." *Id.* at 842. A union's right to enforce discipline is limited by the procedures under its constitution and bylaws. The Authority has also made it clear that discipline under this subsection may not be imposed "for statements critical of union leadership if an employee is not attempting to destroy or threaten the existence of the union." *Id.* at 845. The Authority further noted that "in light of the inherent tension between these important individual and institutional statutory rights, future cases will be evaluated on their specific facts and the arguments presented by the parties." *Id.* at 846.

The Respondent asserts that its decision to deny Jarman's membership was wholly consistent with NFFE's right to enforce discipline under § 7116(c). It should be clear that Jarman's Facebook post which encouraged NFFE members to "rise up" and decertify the union was not a mere criticism of Roush or Griffin which would be protected by the Statute. Rather, Jarman openly promoted UnionFacts.com, a rabidly anti-union website with a wealth of information on how to decertify a union but absolutely no instruction on how to form one. Jarman's open Facebook post which could be shared by anyone with anyone amounted to an action which attacks or threatens NFFE's existence as an institution. This was a threat to NFFE's continued existence, and NFFE took the threat seriously.

The Respondent further argues that, even if it is found to have violated § 7116(c) of the Statute, requiring NFFE to admit Jarman would violate the Union's First Amendment right to expressive association. The Respondent argues that the Authority's standard under § 7116(c) dictates that a union has the right to discipline, including the denial of membership, where an employee's actions threaten or attack the union's existence as an institution so long as the actions are not mere criticisms or the filing of an unfair labor practice charge, and so long as the union's discipline does not affect the employee's status as an employee. *AFGE Local 2419*, 53 FLRA at 846. The Respondent asserts that Jarman's Facebook post amounts to action, above and beyond mere criticism, which threatened NFFE's existence, especially in light of the particular facts surrounding this case and the contemporaneous decertification attempt just months before the posts. A finding that § 7116(c) requires NFFE to admit Jarman as a member will impose a greater burden on NFFE than allowed under Supreme Court precedent and will violate NFFE's First Amendment right of expressive association. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (*Boy Scouts*), in which the Supreme Court held that "[t]he forced inclusion of an unwanted person in a group infringes the groups' [First Amendment] freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. The Court looked at four factors, which in this matter, would be: (1) whether NFFE engages in "expressive association"; (2) whether the forced inclusion of Jarman would significantly affect NFFE"s ability to advocate public or private viewpoints; (3) whether Jarman's presence would significantly burden NFFE's desire not to express Jarman's viewpoints; and (4) whether forcing NFFE to accept Jarman as a member under 7116(c) would run afoul of NFFE's freedom of expressive association. The Respondent asserts that it meets these four factors and that even if its conduct was found to violate the Statute, it should not be required to admit Jarman as a member since this would violate NFFE's First Amendment right of expressive association.

ANALYSIS AND CONCLUSION

The facts in this matter are essentially not in dispute. In the spring of 2011, RRAD gave notice that it intended to change its work schedule from a 4-10 schedule to a 5-4-9 schedule. There are five bargaining unit employees at RRAD, with NFFE Local 2189 representing the majority of bargaining unit employees. The five unions opposed the change in schedule, but were unable to agree that a binding poll of unit employees could be used to resolve the issue. Jarman, at the time was president of IGUA and not a member of the NFFE Local 2189 bargaining unit, felt that an employee poll was the correct course of action and, in June, posted a statement on his Facebook account, asserting his position on the poll. As the evidence reflects, he also took issue with NFFE not agreeing to the poll, stating "NFFE's rep present even agreed at the time but for whatever reason, they think negotiating is a better idea. It's not." (G.C. Ex. 4). The Facebook post also states: "So, what can you do? Well, the chances are pretty grim, I can tell you that. The ONLY hope you have is if you people rise up and create a grassroots movement so strong that your National knows you will either have your vote or you will

decertify them and get a new union. And, don't let anyone tell you that you can't decertify your union if they become corrupt. It happens all the time. Look at UnionFacts.org. There are step by step instructions on how to get rid of a corrupt union. Maybe the guy drunk on power will put the bottle down for a minute and decide to ask the commander for a vote. I know the other 4 of us will. But you need 5 I would raise hell between now and Monday to get that 5th." (G.C. Ex. 4). There is no evidence that the Facebook post was ever deleted; no evidence that additional posts regarding this issue were made.

In November, Jarman changed jobs and became an employee in the NFFE Local 2189 bargaining unit. He immediately sought membership in NFFE Local 2189. He was denied membership in January 2012, based on his June Facebook posting.

As set forth by the Authority in *AFGE Local 2419*, 53 FLRA at 835, future cases are to be evaluated on their specific facts and the arguments presented by the parties, in light of the inherent tension between important individual and institutional statutory rights in these cases. So it is essential to understand that during 2011, NFFE Local 2189 had been placed in trusteeship due to an internal struggle with its Chief Steward who had sponsored a petition seeking to decertify the Union. Charges of misconduct were brought against the employee under Article L of the IAM Constitution, with a resulting investigation and trial. That employee was apparently removed from membership in Local 2189. Although no decertification petition was filed with the Dallas Region, it is apparent that Local 2189 was greatly concerned about the threat to its existence.

In *AFGE Local 2419*, the Authority deals with the question of when a union may discipline an employee, pursuant to section 7116(c), for words or actions that are asserted to be both protected and potentially detrimental to an exclusive representative's status. The Authority took the opportunity to review how the Statute deals with an employee's right to engage in protected activity vis-à-vis a union's right to enforce discipline against its members. The Authority has acknowledged that a "[u]nion's ability to enforce discipline is not unlimited" and "a union may not threaten or discipline a member because the member has filed unfair labor practice charges." *AFGE, AFL-CIO*, 29 FLRA at 1363, citing *Nat'l Ass'n of Gov't Employees, Local R5-66*, 17 FLRA 796 (1985) (*NAGE Local R5-66*) and *Overseas Educ. Ass'n*, 15 FLRA 488 (1984); see also *AFGE, Local 1857, AFL-CIO*, 44 FLRA 959, 968 (1992) (union violated Statute by disciplining a steward who assisted another employee in filing a ULP charge against the union.) Also in accord with the National Labor Relations Board, the Authority has found a violation of the Statute where employee words or actions amounted to mere criticism of union officials and the discipline for engaging in protected activity affected the employee's status as an employee. *AFGE Local 3475*, 45 FLRA at 549-51 (union violated Statute by attempting to have agency discipline an employee for allegedly using non-work time to prepare and distribute materials critical of local officials); *Overseas Educ. Ass'n*, 11 FLRA 378, 387 (1983) (union violated Statute by requesting agency to discipline an employee for distributing an open letter critical of the local president.)

The Authority determined that a union may discipline an employee when an employee's actions threaten or attack the union's existence as an institution. However, in accordance with previous Authority precedent: (1) a union may neither discipline an employee for merely filing unfair labor practice charges, nor (2) take actions against an employee that affect his or her status as an employee; additionally (3) absent a threat to its continued existence, a union may not discipline an employee for mere criticism of its management or policies. In *AFGE Local 2419*, the Authority did not find a violation, noting that the employee attended a meeting of bargaining unit employees held for the purpose of discussing the dissolution of the local; he publicly announced at the meeting that he favored getting rid of the local, asserted that he would favor another union, and signed a paper reflecting his dissatisfaction with the local. These actions went beyond mere criticism of Local 2419 or its officials and threatened Local 2419's existence as an institution. As a result, Local 2419 properly exercised its statutory right to discipline the employee in a manner that did not affect his status as an employee. *AFGE Local 2419*, 53 FLRA at 846-47.

In reviewing Jarman's Facebook post, even in terms of Local 2189's recent threats, I cannot find that Jarman's actions reached a level beyond mere criticism. While he was clearly critical of Local 2189's decision regarding the employee poll, and did encourage employees to act, he did not actively pursue decertification of Local 2189 and, in fact, made no other Facebook comments. His actions, at a time when he was not even a member of that particular bargaining unit, were not sufficient to threaten Local 2189's existence as an institution. I further note that more than five months had passed by the time a vote was taken in January 2012 and the only evidence used against Jarman was the June Facebook post.

See also Am. Fed. of Gov't Employees, Local 987, Warner Robins, Ga., 46 FLRA 1048 (1992) (*AFGE Local 987)*, in which the Authority found that the union violated section 7116(c) when it denied an employee readmission to the union, even when the employee had allegedly misappropriated funds from the union and engaged in other misconduct before she

applied for readmission. The union refused to process her membership application on the grounds that: (1) it had full power under its constitution to accept or reject applications for membership; (2) it may enforce discipline under its constitution; and (3) to require the employee's acceptance as a member and then compel it to litigate the charges against her would be costly and time-consuming. The Authority adopted the administrative law judge's conclusion that the union violated section 7116(c) by refusing to accept the employee as a union member because "[c]oncerns by the Union as to the burden imposed upon it to accept [the employee] as a member and then take steps to expel her, or the likely affect of her acceptance upon other members as well as its obligation to members, do not justify denying union membership to this employee." *Id.* at 1057. Under the circumstances of this case, the Union's similar concerns relating to Jarman's application for union membership do not justify denying him membership in the Union.

Therefore, I find that the Respondent violated § 7116(c) of the Statute by denying Jonathan Jarman membership in NFFE Local 2189.

Remedy

The GC seeks a posting and electronic dissemination of the Notice in this matter. The Respondent did not express an opinion. In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted both on bulletin boards and electronically, I will incorporate this in the Order. See *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla*., 67 FLRA 221 (2014).

As set forth above, the Respondent did argue that being forced to allow Jarman membership in the union would violate its First Amendment right of expressive association, as set forth in *Boy Scouts*, 530 U.S. 640. The Respondent therefore argues that such a remedy ordered pursuant to section 7116(c) of the Statute would be unconstitutional. In agreement with the GC, this is not the appropriate forum for such an argument as I do not have the authority to review the constitutionality of the Statute. *Miss. Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337, 339 (2001) (citing *NTEU v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993); *Puerto Rico Air Nat'l Guard, 156th Airlift Wing (AMC) Carolina, P.R.*, 56 FLRA 174, 182 (2000) ("the Authority's jurisdiction in ULP cases extends only to claims arising from the Statute, not constitutional claims.") (citing *NTEU v. King*, 961 F.2d 240, 243 (D.C. Cir 1992) (holding that a union's constitutional claim was not adjudicable in the administrative proceeding before the Authority).

The GC further seeks an order requiring that Respondent unconditionally offer to retroactively admit Jarman to membership as a member in good standing with NFFE Local 2189, with full rights of membership, effective the date Jarman originally submitted the Standard Form 1187 to the Union, on December 1, 2011, with no cost to Jarman for back dues, and, if tendered, accept payment of future dues uniformly required as a condition of retaining membership, covering the period beginning from Jarman's receipt of the unconditional offer of admission into the Union. I find this request consistent with Authority precedent, see *AFGE Local 987*, 46 FLRA at 1051; *NAGE Local R5-66*, 17 FLRA at 797.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the National Federation of Federal Employees, Local 2189, shall:

1. Cease and desist from:

   (a) Denying membership to Jonathan Jarman or any other eligible employee in the exclusive collective bargaining unit represented by the National Federation of Federal Employees, Local 2189 (NFFE, Local 2189) at the United States Department of Army, Red River Army Depot, Texarkana, Texas, for any unlawful reason.

   (b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

   (a) Unconditionally offer to retroactively admit Jonathan Jarman to membership as a member in good standing in the Union, with full rights of membership, effective the date Jarman originally submitted the Standard Form 1187 to

the Union on December 1, 2011, with no cost to Jarman for back dues, and if tendered, accept payment of future dues uniformly required as a condition of retaining membership from Jarman, covering the period beginning from Jarman's receipt of the unconditional offer of admission into the Union.

(b) If tendered, request that the United States Department of Army, Red River Army Depot, Texarkana, Texas, reinstate the deduction of regular and periodic dues from the pay of Jonathan Jarman to the NFFE, Local 2189.

(c) Post at the business office of NFFE, Local 2189, and in all normal meeting places, including all places where notices to members of, and bargaining unit employees represented by the NFFE, Local 2189 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the National Federation of Federal Employees, Local 2189, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., June 30, 2014

_____

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL MEMBERS AND EMPLOYEES POSTED BY ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Federation of Federal Employees, Local 2189, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT deny membership to Jonathan Jarman or any other eligible employee in the exclusive collective bargaining unit represented by the National Federation of Federal Employees, Local 2189 at the United States Department of Army, Red River Army Depot, Texarkana, Texas, for any unlawful reason.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL unconditionally offer to retroactively admit Jonathan Jarman to membership as a member in good standing in the Union, with full rights of membership, effective the date Jarman originally submitted the Standard Form 1187 to the Union on December 1, 2011, with no cost to Jarman for back dues, and if tendered, accept payment of future dues uniformly required as a condition of retaining membership from Jarman, covering the period beginning from Jarman's receipt of the unconditional offer of admission into the Union.

_____

National Federation of Federal Employees, Local 2189

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: 214-767-6266.