

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

MEMORANDUM

DATE: November 20, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1923

Respondent

and

Case No. WA-C0-01-0818

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, CENTERS FOR MEDICARE
& MEDICAID SERVICES

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(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

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| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1923 Respondent | |
| and DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES Charging Party | Case No. WA-CO-01-0818 |

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 22, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: November 20, 2003
Washington, DC

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

| | |
|--|------------------------|
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1923 Respondent | |
| and DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES Charging Party | Case No. WA-CO-01-0818 |

David J. Mithen, Esquire
Philip T. Roberts, Esquire
For the General Counsel

Steve Fesler
For the Respondent

Cheryl M. Taylor
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

**DECISION ON UNILATERAL FORMAL
SETTLEMENT AGREEMENT**

Statement of the Case

This case arises out of an unfair labor practice charge which was filed on September 14, 2001, by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (Agency or Charging Party) against the American Federation of Government Employees, AFL-CIO, Local 1923 (Union or Respondent). The charge was amended on April 18,

2002.1 On October 2, 2002, the Regional Director of the Boston Region of the Authority (Regional Director) filed a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of § 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by soliciting employees of the Charging Party, while they were on duty time, to join the Union and by offering the employees a \$25.00 instant rebate on dues as an inducement. Such action by the Respondent was also alleged to have been in violation of § 7131(b) of the Statute.

On November 20, 2002, the Regional Director approved a unilateral settlement agreement over the objections of the Charging Party. On June 5, 2003, in view of the Respondent's noncompliance with the settlement agreement, the Regional Director set the agreement aside and issued a second Complaint and Notice of Hearing on June 13, 2003. In the second Complaint and Notice of Hearing the Regional Director repeated the allegations of the original Complaint and further alleged that the Respondent had violated the terms of the unilateral settlement agreement.

A hearing on the case was scheduled for October 2, 2003, in Baltimore, Maryland. The start of the hearing was delayed to afford the parties the opportunity to engage in settlement discussions. The hearing commenced at 1:40 p.m. on that date. All of the parties were present and were represented by counsel. Counsel for the General Counsel submitted a Stipulation and Unilateral Formal Settlement Agreement (Agreement), which had been signed on behalf of the Regional Director and the Respondent, and requested that it be approved. Counsel for the Charging Party stated that she had been instructed not to sign the Agreement. The parties were thereupon given until October 16, 2003, to submit memoranda in support of their respective positions.

This Decision is based upon careful consideration of the Agreement and of the memoranda submitted by the General Counsel and the Charging Party. The Respondent did not submit a memorandum.

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The amended charge was filed with the Acting Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) inasmuch as the case had been transferred from the Washington Region to the Boston Region on February 20, 2002.

Discussion and Analysis

The Legal Framework

§ 2423.31(e)(2) of the Rules and Regulations of the Authority provides that when the Regional Director has entered into a formal settlement agreement with the Respondent and if the Charging Party has had an opportunity to state on the record or in writing the reasons for its opposition, if any, to the formal settlement agreement, the Regional Director may submit the agreement to the presiding Administrative Law Judge at the hearing and request that the Judge approve the agreement and transmit it to the Authority for approval. See, *American Federation of Government Employees, Local 3475, AFL-CIO*, 44 FLRA 398 (1992).

§ 2423.25(c) of the Rules and Regulations of the Authority provides that the Authority may approve a formal settlement agreement, "upon a sufficient showing that it will effectuate the policies of the . . . Statute".² See, for example, *Social Security Administration, Baltimore, Maryland*, 57 FLRA 577 (2001). The Authority has a longstanding policy of encouraging the amicable resolution of disputes, *American Federation of Government Employees, Local 2145 and U.S. Department of Veterans Affairs Medical Center, Richmond, Virginia*, 44 FLRA 1055, 1061 (1992) (AFGE).

The Stipulation and Unilateral Formal Settlement Agreement

The following is a summary of the provisions of the Agreement:

1. The parties waive a hearing and all other proceedings to which they may be entitled under the Statute.

2. The Respondent admits all allegations in the Complaint and Notice of Hearing issued by the Regional Director on June 13, 2003.

3. The Authority may issue an Order whereby the Respondent would be prohibited from soliciting bargaining unit employees to join the Union while such employees are in a duty status. Specific examples of prohibited action are

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Although § 2423.25 is entitled "Post complaint, prehearing settlements", there is no basis for assuming that the Authority would apply different standards for the approval of a formal settlement agreement that has been submitted during the course of a hearing and has been reviewed by an Administrative Law Judge according to the same criteria.

the solicitation of employees during employee orientation sessions (sometimes referred to as entrance on duty or EOD sessions) and the offering or discussion of cash rebates for joining the Union.

4. Pursuant to the Order the Agency would post a notice signed by the President of the Union which would inform employees of the Union's intent to comply with the Order. The Respondent would also issue written instructions to persons representing the Union before they first make presentations on the Union's behalf during employee orientation sessions. The Union representatives would make written acknowledgments of the receipt of the instructions. The form of the notice and of the instructions are attachments to the Agreement and would be attachments to the Order.

5. The Order of the Authority may be enforced by a decree of the United States Court of Appeals for any appropriate circuit. The Respondent waives notice of the application for the decree as well as all defenses to its entry.

The Charging Party's Objections

The Charging Party has presented four grounds in support of its position that the agreement should not be approved. Each of these will be addressed in the order in which they were stated.

1. The agreement is not "self-enforcing".³

2. The terms of the agreement are substantially similar to the informal agreement and are inadequate to deter the Respondent from persisting in its unlawful conduct.

The first two objections are closely interrelated and will be addressed simultaneously. The Charging Party argues that, in view of the Respondent's "particularly egregious recidivistic nature", the settlement agreement should contain provisions that will deter the Respondent from its allegedly avowed intention of continuing to use the employee orientation sessions as a means of recruiting new members.

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Presumably the Charging Party does not use the term "self-enforcing" literally. According to § 7123(b) of the Statute the orders of the Authority are only enforceable by decree of an appropriate United States court of appeals. No modification of the settlement agreement could enlarge the Authority's powers in this regard.

The Charging Party also notes that the Agreement differs from the informal agreement only in that the Respondent would now be required to inform its representatives of the prohibition against soliciting for new members at the employee orientation sessions. According to the Charging Party, the Respondent should have done that following the effective date of the informal settlement. The Charging Party reasons that, since the Respondent was not deterred from unlawful action by the informal settlement, the current agreement is unlikely to produce more favorable results.

The Charging Party's objections are unpersuasive for the following reasons. In the first place, the issue of the adequacy of the informal settlement agreement is moot since it was set aside by the Regional Director. Whatever the deficiencies of the informal agreement, it has been replaced by the current agreement which specifically requires the Respondent to provide written instructions to its representatives and requires their written acknowledgment of the receipt of those instructions. More importantly, the Agreement, upon approval, will be merged into a formal order of the Authority which, according to the terms of the agreement and § 7123 of the Statute, will be enforceable by a judicial decree. The informal settlement agreement was not an order of the Authority and could not have been judicially enforced. Contrary to the assertions of the Charging Party, those differences are highly significant.

3. The terms of the settlement agreement differ drastically from the remedies sought by the General Counsel in his pre-hearing disclosure.

As stated above, the Authority encourages the amicable resolution of disputes, *AFGE*. Compromise is at the heart of the settlement process. Therefore, the settlement agreement is to be evaluated according to its own terms rather than as compared to the General Counsel's original position.

In his pre-hearing disclosure the General Counsel indicated that he would be advocating what the Charging Party has characterized as "creative" remedies. Those remedies were the posting of a notice to members and employees, the reading of the notice by the Respondent's Benefits Coordinator at a meeting of all of Respondent's employees who had attended employee orientation sessions since July of 2001 and the distribution of the notice to all members and employees under the supervision of an agent of the Authority.

Other than the posting of a notice (which would also be required upon the approval of the Agreement) the remedies in

the General Counsel's pre-hearing disclosure are "extraordinary" and would only be allowed under unusual circumstances such as when there has been evidence of the recurrence of unlawful conduct, *Social Security Administration, Baltimore, Maryland*, 14 FLRA 499, 500 n.2. While it is true that the Regional Director set aside the informal settlement agreement because of the Respondent's failure to conform to its terms, the Charging Party has presented nothing to support the supposition that the Respondent would defy an order of the Authority such as is provided for in the Agreement.⁴ Therefore, the omission of extraordinary remedies does not justify the withholding of approval by the Authority.

4. The Agreement fails to satisfy the legitimate needs of the Agency.

The Charging Party maintains that its employees have the right to adjust to their new work environment without the pressure of a "hard sell" from the Respondent. It also states that, during settlement discussions, the Respondent indicated that it planned to offer additional incentives to new members in the form of free lunch vouchers. According to the Charging Party, the Agreement would not deter the Respondent from such action because it does not specifically prohibit the offering of free lunch vouchers to employees on a duty status.

As to the Charging Party's first argument, the Statute does not prohibit labor organizations from soliciting new members so long as the objects of those solicitations are not in a duty status.

As to the second argument, the form of the order contained in the Agreement would direct the Respondent to cease and desist from:

engaging in internal union activity, such as solicitation of members, with bargaining unit employees while those employees are in a duty status. *For example*, the Respondent will not, during employee orientation sessions, do any of the following: solicit employees to join the union, offer or discuss cash rebates to employees for joining the union. (Emphasis supplied.)

There can be no legitimate doubt that the examples of prohibited activity are not exclusive and that the absence

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The Charging Party has not alleged that the Respondent has previously defied an order of the Authority.

of the mention of free lunch vouchers in the language of the order would not authorize the Respondent to offer the vouchers to employees during orientation sessions or at any other time when the employees are on duty. As a practical matter, it would be impossible to foresee every possible inducement to membership that would be prohibited by the order.⁵ However, the language of the order is both broad enough and specific enough to cover any reasonably foreseeable means of unlawful solicitation.

Finally, the Charging Party argues that the approval of the Agreement which only "mildly addresses" the Respondent's statutory violations would embolden the Respondent to commit future violations of the Statute and would "effectively confer a license to solicit." Furthermore, according to the Charging Party, the approval of the Agreement would encourage the Respondent's unlawful conduct at a time when the parties have invoked the procedures of the Federal Service Impasses Panel to resolve their disputes on major portions of a new collective bargaining agreement.

It is, of course, impossible to ensure that the Respondent will be deterred from its unlawful conduct by the approval of the Agreement. However, if the Respondent does defy the order of the Authority it will be faced with the prospect of enforcement proceedings in an appropriate United States Court of Appeals. In other words, the enforcement procedures are identical to those which are available to enforce an order that is preceded by an evidentiary hearing. Therefore, I have concluded that the Agreement would effectuate the policies of the Statute.

I hereby approve the Stipulation and Unilateral Formal Agreement and transmit it to the Authority for approval. I further recommend that the Authority adopt the following Order in accordance with the terms of the Agreement:⁶

ORDER

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It should be emphasized that both the Complaint and the Agreement are addressed, not to the form of the Union's solicitations, but to the fact that they were offered to employees who were in a duty status.

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The recommended Order is not a verbatim repetition of the language of the Agreement, but has been altered to more closely conform to the customary language used by the Authority. There have been no substantive alterations to the terms of the Agreement.

Pursuant to § 2423.31(e)(2) of the Rules and Regulations of the Authority it is hereby ordered that the Stipulation and Unilateral Formal Settlement Agreement be, and hereby is, approved.

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute it is further ordered that the American Federation of Government Employees, AFL-CIO, Local 1923 (Respondent) shall:

1. Cease and desist from:

(a) Engaging in internal union activity, such as solicitation of members, with bargaining unit employees while those employees are in a duty status. For example, the Respondent will not, during employee orientation sessions, do any of the following: solicit employees to join the union, offer or discuss cash rebates to employees for joining the union.

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

2. Take the following affirmative action in order to effectuate the policies of the Statute:

(a) Post copies of the Notice To All Members and Employees, attached hereto and made a part hereof, in conspicuous places in and about its office(s), including all places where notices to its members are customarily posted for a period of at least 60 days from the date of posting. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material. Additionally, the Respondent will submit a signed copy of said Notice to the Regional Director of the Boston Region of the Federal Labor Relations Authority who will forward it to the Department of Health and Human Services, Centers for Medicare and Medicaid Services (Charging Party) whose employees are involved herein, for posting in those places in and about the Central Office, where notices to employees are customarily posted, for a period of 60 days from the date of posting. The Notice will be signed by the President of the Respondent.

(b) Issue the instructions concerning union presentations at EOD sessions (the Instructions) attached hereto to any representative of the Respondent who makes a presentation at an EOD session. The Respondent will issue

the Instructions to each presenter before the first time he or she makes a presentation at an EOD session after this Order is issued. Upon issuance of the Instructions to each presenter, the Respondent will have the presenter sign and date a copy of the Instructions indicating receipt.

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

Issued, Washington, DC, November 20, 2003

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL MEMBERS

OF THE BARGAINING UNIT

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the American Federation of Government Employees, AFL-CIO, Local 1923 violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify all members of the bargaining unit that:

WE WILL NOT engage in internal union activity, such as solicitation of members, with bargaining unit employees while those employees are in a duty status. For example, we will not, during employee orientation sessions, do any of the following: solicit employees to join the union, offer or discuss cash rebates to employees for joining the union.

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

WE WILL issue the instructions concerning union presentations at EOD sessions (the Instructions) attached hereto to any of our representatives who make presentations at EOD sessions. We will issue the Instructions to each presenter before the first time he or she makes a presentation at an EOD session. Upon issuance of the Instructions to each presenter, we will have the presenter sign and date a copy of the Instructions indicating receipt.

(Agency)

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 its provisions, they may communicate directly with the Regional Director, Boston Regional Office, whose address is: Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and whose telephone number is: 617-424-5731.

INSTRUCTIONS FOR REPRESENTATIVES OF THE AMERICAN FEDERATION

**OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1923 MAKING
PRESENTATIONS AT ENTRANCE ON DUTY (EOD) SESSIONS**

Under Section 7131(b) of the Federal Service Labor-Management Relations Statute it is unlawful for bargaining unit employees to participate in any internal business of a labor organization unless they are in a non-duty status. This means that, among other things, representatives of a labor organization such as AFGE Local 1923 may not solicit employees to join the union at an EOD session. Accordingly, when making your presentation on behalf of AFGE Local 1923 you must refrain from doing any of the following:

- soliciting employees to join the union
- offering or discussing cash rebates to employees for joining the union

When distributing packets of union information you must state the following:

"I'm distributing a packet of information today concerning the union. Although you have been asked to complete several forms today, you are not required to complete the forms in this packet. They are completely voluntary."

Received by _____ Date _____
(Signature of Presenter)

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CO-01-0818 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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Philip T. Roberts, Esquire
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REGULAR MAIL:

President
AFGE, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: November 20, 2003
Washington, DC