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, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164 Respondent	
and KAREN HARRINGTON EMERY Charging Party	Case No. BN-CO-50066

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **APRIL 8, 1996**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 7, 1996
Washington, DC

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

MEMORANDUM DATE: March 7, 1996

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164

Respondent

and Case No. BN-CO-50066

KAREN HARRINGTON EMERY

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164 Respondent	
and KAREN HARRINGTON EMERY Charging Party	Case No. BN-CO-50066

Martin R. Cohen, Esquire
On Brief
Mark D. Roth, Esquire
For the Respondent

Richard D. Zaiger, Esquire
Linda I. Bauer, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns two issues: First, whether the Union, in denying a request for a hardship transfer, treated the request in a disparate manner because the employee was not a member of the Union; and, second, whether the Union's

[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(b)(1) will be referred to, simply, as, "§ 16(b)(1)".

questions about Union membership and statements concerning membership at the time the employee sought assistance constituted an independent violation of the Statute?

This case was initiated by a charge filed on October 24, 1994 (G.C. Exh. 1(A)), which alleged violation of § 16(b)(1); a First Amended charge filed on October 24, 1994 (G.C. Exh. 1(C)) which alleged violations of §§ 16(b)(1) and (2); and by a Second Amended charge filed on June 19, 1995 (G.C. Exh. 1(E)) which alleged violations of §§ 16(b)(1) and (8). The Complaint issued June 28, 1995 (G.C. Exh. 1(G)), alleged violations of §§ 16(b)(1), (2) and (8), and set the hearing for September 7, 1995, pursuant to which a hearing was duly held on September 7, 1995, in Boston, Massachusetts, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent exercised. At the conclusion of the hearing, October 10, 1995, was fixed as the date for mailing post-hearing briefs, which time, on timely motion of Respondent, to which there was no objection, for good cause shown, was extended to October 24, 1995. General Counsel and Respondent each timely mailed an excellent brief, received on, or before, October 27, 1995[2], which have been carefully considered. On the basis of the entire record, I make the following findings and conclusions:

Findings of Fact

1. The American Federation of Government Employees, AFL-CIO (hereinafter, "AFGE"), is the certified exclusive representative of a nationwide unit of Social Security Administration (hereinafter, "SSA" or "agency"), employees, including employees in SSA's Boston Region (G.C. Exhs. G and I).

2. American Federation of Government Employees, Local 1164 (hereinafter, "Union"), an affiliated local of AFGE, is an agent of AFGE for the representation of SSA's Boston Region employees, (G.C. Exhs. G, H, I).

3. On July 17, 1992, AFGE and SSA signed a Memorandum of Understanding (hereinafter, "MOU") with regard to non-competitive reassignments which, as relevant, provides as follows:

---

2 Respondent also timely mailed with its Brief a "Request For Permission to File a Reply Brief", which General Counsel opposed. The request was received on October 26, 1995, and was denied by Order dated October 30, 1995.

"B. Definitions

. . .

"5. Hardship is defined as a set of circumstances that are so severe that they jeopardize the employee's or his/her family's health or financial security.

. . .

"C. Solicitation Procedures

"1. When the agency decides to fill a vacancy through the reassignment method it will announce the vacancy, in writing, throughout the area of solicitation. . . .

. . .

> "b. If an employee alleges hardship and both management and the Council President (or designee) agree, a reassignment may be made directly without solicitation.

. . .

"D. Selection Procedures

"Should the number of qualified volunteers exceed the number of reassignment positions available, the Employer shall normally select the qualified volunteer with the most seniority. . . . Seniority will be determined by service computation date.

"If the Employer does not select an employee who would have been designated if the selection followed the above procedure, the Employer will provide its reasons in writing . . . . When selection or non-selection would create/aggravate a hardship for an employee, the employee highest in the selection priority may be bypassed if mutually agreed to by the Employer and the Union. . . . In the event the Employer and the Union cannot agree, the Employer may go forward with its selection. The Employer's assignment is subject to the parties' negotiated grievance/ arbitration procedure." (Union Exh. 4).

4. On September 13, 1992, AFGE issued instructions for the MOU and with regard to the definition of "Hardship" commented as follows:

> "The hardship provision is a critical element in the new reassignment procedures because the MOU allows applicants with a hardship to bypass senior employees in the selection process. An applicant's circumstances must meet two tests to qualify under the hardship provision. First, the circumstances must be severe. Employee inconvenience or a simple desire to relocate do not meet the severity test. Secondly, the employee's situation must jeopardize the employee's or his/her family's health or financial security. Jeopardize means endanger or imperil.
>
> "In other words, hardship should be the exception rather than the rule. Seniority is the rule. This provision is intended to accommodate those employees who really need help.
>
> "Example: An SSA employee's spouse works for General Motors in Flint, Michigan. The auto plant closes down and he is involuntarily reassigned to an auto plant in Los Angeles. Such circumstances would qualify as a hardship under section B.5.
>
> "Example: An SSA employee has been diagnosed with Cancer and must relocate to an area near the Mayo Clinic for special treatment. This would qualify as a hardship under Section B.5." (Union Exh. 5, pp. 2-3).

5. Ms. Karen Harrington was hired by SSA's Boston Region on July 14, 1991, in Rutland, Vermont, as a claims representative (Tr. 25). In April, 1993, having become engaged to a young man who worked in Keene, New Hampshire, Ms. Harrington applied for a hardship transfer to an office in southern New Hampshire (Tr. 26). Her request was not granted (G.C. Exh. 2, Union Exh. 15) and Ms. Harrington stated that she,

> ". . . understood that both the Union and the area director had agreed that my hardship as fiancee was not acceptable." (Tr. 29; see, also, hand written note on G.C. Exh. 2 and Union Exh. 15 and Tr. 63, 64).

6. Ms. Harrington's marriage was scheduled for, and took place on, August 27, 1994 (Tr. 42, 65); she and her

fiancé, in August, 1994, contracted for the purchase of a house in Rindge, New Hampshire, which purchase was finalized in September, 1994 (Tr. 32, 57). Accordingly, on August 11, 1994, in anticipation of her imminent marriage and finalization of the purchase of a house, Ms. Harrington made a second request for hardship transfer, to Keene or to Nashua, New Hampshire (G.C. Exh. 3, Attachments). As Ms. Harrington stated in her letter to the Regional Personnel Office, also dated, August 11, 1994,

> "My request for a transfer to the Keene branch office or the Nashua district office is based on a hardship.
>
> "I am getting married August 27, 1994 and will be residing in Rindge, NH. My fiancé is a sales engineer for the Kingsbury Corporation in Keene, NH and his company has no locations in the Vermont area. We are also in the process of purchasing a house in Rindge, NH. . . ." (G.C. Exh. 3, attachment).

Ms. Harrington [Emery], in her letter to Ms. Susan Conrad, Executive Vice President of Respondent, dated October 14, 1994, reiterated and elaborated a bit more fully her hardship position as follows:

> ". . . My spouse and the home we own are located in Rindge NH. It takes two hours and fifteen minutes to get to Rindge from Rutland VT, which is where I am currently working. This is a four and one half hour daily commute over mountain roads. This is impossible to do so I am staying in Rutland during the week and traveling home on the weekends. My spouse and I are unable to financially maintain two households, therefore I am staying with friends in Rutland. This situation is extremely strenuous on me, my marital relationship, and on my friends I am staying with. . . ." (G.C. Exh. 3, attachment; G.C. Exh. 5).

7. On August 22, 1994, the Area 4 Director, Mr. Manny [Immanuel] Nunez (Tr. 28) approved Ms. Harrington's request for a hardship transfer (G.C. Exh. 3; Tr. 37-38) and Mr. Nunez told her,

> ". . . I had to wait for the hardship, for the Union to agree with the hardship at that point. . . ." (Tr. 38).

8. A short time after the agency had approved her hardship request, Ms. Conrad called Ms. Harrington and asked questions about the distance of Rutland to Nashua, Keene and Rindge and asked again what her hardship was, which Ms. Harrington explained; and at the end of the conversation asked Ms. Harrington if she were a member of the Union (Tr. 38). Ms. Harrington testified,

> "And she asked at the end whether I would be a Union member or not. And I said no. And then she proceeded to say that she wasn't going to give me a big speech on it, but just stressed -- just said, you know, the importance of it. That's all." (Tr. 38).

Ms. Conrad readily confirmed that she called Ms. Harrington, she believed during the first week of September; that she called for additional details, which Ms. Harrington supplied; and conceded that,

> ". . . And at the end of the conversation I asked her if she was a Union member.
>
> "Q And what did she respond? How did she respond?
>
> "A She said no.
>
> "Q Did you say anything at that point?
>
> "A I said I wasn't going to give her any speeches about joining the Union, but she might want to consider it at a later time, that it's important." (Tr. 157-158).

9. Ms. Harrington testified that she and Mr. Phil Frassica, Union steward in Rutland (Tr. 39), were called to the office of Mr. John S. Rynne, District Manager and Ms. Harrington's supervisor, and told that he had received a telephone call from the Regional office that they had been notified by the Union that the Union had denied Ms. Harrington's hardship request and, accordingly, she would not be transferred on the agency's proposed effective date of October 11, 1994 (G.C. Exh. 3; Tr. 39).

10. Either the day of her notification or the following day, in an effort to learn why the Union had denied her hardship request and/or to learn what recourse

she had, Ms. Harrington had Ms. Susan Bourque[3], a former Union steward (Tr. 39), in her presence, call Mr. Andrew Krall, President of the Union. Mr. Krall told them there was no appeal and that no written document would be sent stating why the request had been denied (Tr. 39-40).[4]

11. About a week after Ms. Bourque called Mr. Krall, Mr. Frassica called Ms. Conrad and Ms. Harrington said that he relayed to her Ms. Conrad's response which was that, ". . . the Union and management were negotiating. What they were negotiating, he wasn't told. . . . that had to do with somebody from Fitchburg, Massachusetts, had a transfer to Nashua, and the Union was upset with management mysteriously moving certain transfer requests and are pretty much upset with management moving who they want to move through hardship." (Tr. 40-41).

About a week later, Ms. Harrington called Ms. Conrad, ostensibly to inquire the "negotiations" (Tr. 41), but also to ask what was being negotiated and to further advocate her hardship. In the course of her conversation, Ms. Harrington testified,

> "And then I asked her if I had been a Union member if things would have been treated differently, and she did say yes. And then she said, 'But we are working for you.'
>
> "And then I explained to her, 'But I don't understand how you're working for me because you denied my hardship and that's what's holding up my transfer.'. . .
>
> . . .
>
> "A I felt that maybe if I had been a Union member they wouldn't be using me -- well, they wouldn't be using me kind of like as a negotiation type to get maybe what they want for one of their Union members." (Tr. 41-42).

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[3] Phonetically spelled "Burke" in the transcript (Tr. 39); but see G.C. Exh. 3, attachment, G.C. Exh. 6).

[4] Mr. Krall readily acknowledged a conversation; however he believed the caller, Ms. Bourque, was an assistant steward (Tr. 222); he stated that, ". . . people were lobbying actively on her behalf for the Union to approve the hardship" (Tr. 222); but he made no reference to the absence of appeal or a written document. Indeed, Mr. Krall emphasized that he knew of someone who had long sought a transfer to Nashua and he felt he had a duty, ". . . not just to approve her hardship if we didn't think it really was one. . . ." (Tr. 223).

Ms. Conrad forthrightly admitted her statement to Ms. Harrington. She testified,

> ". . . And she asked me if she had been a Union member would her case have been handled differently.
>
> "And I told her -- I said yes, and I went on to explain that Union members usually contact the Union office way before they even put in for a hardship request, and they call for guidance and we provide whatever information we can for them, guidance, advice, and are able to advocate for their cases in that nature and pointed out as we are advocating in your case also.
>
> "There was another issue involved with the Union making a counter-proposal to management.
>
> "Q A counter-proposal on what, another case?
>
> "A Well, it included Karen's case. . . that the Union would approve a questionable case for management if the Union had a case that they would put forth that management would approve that was questionable.
>
> "And . . . and after I had spoken to Andy, the President of the Local, about it, we had decided that we would make a counter-proposal to management which would include posting two vacancies in two offices, transferring another case for another individual that management had not acted on that the Union felt they should have and that we would reconsider Karen's request." (Tr. 159-160)(see, also, Tr. 248).

12. On cross-examination, Ms. Harrington admitted that she had called Mr. Krall sometime in October, before she filed the charge (Tr. 71), and that Mr. Krall, inter alia, told her,

> "A All I recall is -- I'm not sure exactly what was said, but I know something about there was somebody in Fitchburg that wanted to go to Nashua.
>
> . . .
>
> "A He mentioned someone going to Fitchburg, and I mentioned something about, 'Well, should I put

in a request to go someplace else?' And he said yes, that would be a good idea." (Tr. 73).

Mr. Krall, most completely and, I believe, most accurately related that portion of his conversation with Ms. Harrington as follows:

> ". . . after telling her that I knew at least one other person who had been trying to get to Nashua for a long time, somebody who specifically worked in Fitchburg, Massachusetts. . .
>
> "A Okay. What I told her is that I thought that the Fitchburg office was really probably just as close to Rindge as Nashua and that there was an office in Gardiner (sic), Massachusetts, that was probably even closer to Rindge than Nashua.
>
> "And I had the idea at that point, and after speaking with Susan [Conrad], that, well, it might help for us to be able to take both of these employees if she was willing to expand her horizons and put in for a transfer to, say, Gardiner (sic) and Fitchburg, which would have been no worse of a commute than Nashua.
>
> "And that might have made it easier to create a posting in Nashua or Manchester. Because there's no way under the MOU that we could guarantee any one employee would get the job in Nashua or Manchester, because once a posting goes up, it's based on seniority, if not hardship. So all we could do is to try and create opportunity for more senior employees.
>
> "And what I was doing by suggesting that if she put in for more offices, it might be easier to work out some sort of a deal with the Agency." (Tr. 225-226).

Mr. Krall said Ms. Harrington was very enthusiastic about the suggestion when he made it and, ". . . said that she thought that she would put in those additional transfer forms" (Tr. 227), but a few days later called Mr. Krall and told him she wasn't going to do it,

> ". . . because if she got the transfer to Nashua, then she could get transferred back to Keene, where she really wanted to go, without having to go through the posting and the hardship process.

"Because it was her impression that Keene was a -- and it's correct. Well, it was correct that Keene is a branch of Nashua. So they were under the same management authority. But under the memorandum of understanding, if you move from one location to another, there would still have to be a posting or a hardship decision.

"So I told her that "Well, that's wrong, because you still have to have a posting to go from Nashua to Keene. . . ." (Tr. 227-228).

13. Ms. Harrington [Emery] called Ms. Conrad again on October 12, 1994, and on October 14, 1994, wrote Ms. Conrad updating her hardship request and asked for, ". . . something in writing from the union as to whether this hardship is approved or denied. If denied I would like a written explanation on why I do not meet the union's definition of a hardship. . . ." (G.C. Exh. 3, Attachment; G.C. Exh. 5; Tr. 42, 43).

14. Ms. Conrad replied by letter dated October 25, 1994 (G.C. Exh. 7), and stated as follows:

"I am writing to provide you with written documentation of the Union's position in your hardship reassignment request. As I previously informed you in our telephone conversations, your hardship issue does not meet the definition of hardship as described in the MOU under Section B.5.. Specifically, one of the factors in the decision is that your set of circumstances is not, at this time, so severe as to warrant a reassignment. Hardship criteria includes two factors, they are:

1. The employee's circumstances must be severe, and:

2. The employee's situation must jeopardize the employee's or his/her family's health or financial security.

"Employee inconvenience or a simple desire to relocate do not meet the severity test. Jeopardize means endanger or imperil. All reassignment vacancies must be announced in writing, so that every employee has a fair shot at putting in for the vacancy. Seniority is the rule and the hardship provision in the MOU is the

exception, and is intended to accommodate those employees who really need help.

"Please note that under Section D., Selection Procedures, in the MOU, it states that 'In the event the Employer and the Union cannot agree, the Employer may go forward with its selection.' The Union can then appeal any selections we view as incorrect, or not in compliance with current applicable provisions. Since the Agency has not gone forward with your transfer Karen, it would appear that SSA does not believe your case to be a true hardship. The Union will continue to assist all SSA employees in any way we can." (G.C. Exh. 7).

15. Also on October 25, 1994, Mr. Krall wrote a letter to Mr. Thomas Donnelly, AFGE Local 1164, re: "Letter of October 14, 1994, Karen Harrington Emery in reply to the letter dated October 13, 1994, signed by the Rutland employees (G.C. Exh. 6) which Ms. Harrington enclosed with her letter of October 14, 1994 (G.C. Exh. 5), which Mr. Krall asked that he show. ". . . to interested parties in your office." (G.C. Exh. 8). Mr. Krall stated as follows:

"I've enclosed a copy of the Memorandum of Understanding (MOU) governing SSA Field Office Reassignments. This agreement resulted from a national arbitration case. Field office vacancies are supposed to be filled via Solicitation Procedures outlined in Section C. The only exception is where both the union and management agree that a given employee has a hardship, defined as a set of circumstances so severe that they jeopardize the employee's or his/her family's health or financial security.

"Also note the Selection Procedures in Section D. of the MOU. Management is fully empowered to post a vacancy in Keene, Nashua or any other office. The position normally goes to the employee with the most seniority. If SSA decides to forego the seniority provisions (which they may do without union concurrence) and select a hardship applicant, the agency must provide the senior employee with a written rationale. That person then has appeal rights under the contract.

"If Keene employees wish to help Ms. Harrington Emery, I recommend that they

petition AD Manny Nunez to post an appropriate vacancy announcement. This will aid her, as well as fellow workers in other parts of the Region who waited years for more equitable reassignment/ transfer provisions. The officers of Local 1164 firmly support seniority, one of the cornerstones of unionism." (G.C. Exh. 8).

16. In the meantime, Ms. Harrington had filed her initial charge on October 24, 1994 (G.C. Exh. 1(A)) (however, notice was not given to the Union by the Regional Director until November 1, 1994 (G.C. Exh. 1(B))).

17. On January 5, 1995, the agency posted a vacancy for a GS-105-11 Claims Representative at Nashua, New Hampshire (G.C. Exh. 9; Tr. 49); Ms. Harrington was selected on the basis of hardship (Tr. 50-51); and one or more grievances were filed over her selection (Tr. 50).

Conclusions

As General Counsel states, there are two separate and distinct allegations in the Complaint. First, whether Respondent, Local 1164, violated §§ 16(b)(1), (2) and (8) of the Statute, ". . . when it denied the hardship transfer of Karen Harrington Emery (Charging Party) because Emery (herein, also, referred to as 'Ms. Harrington') was not a dues paying member of Respondent." (General Counsel's Brief, p. 2); and Second, whether Respondent, Local 1164, independently violated § 16(b)(1) of the Statute, when it ". . . asked Emery [Ms. Harrington] if she was a Union member and told her that her request for a hardship transfer would have been handled differently if she had been a Union member." (General Counsel's Brief, p. 2). These two issues will be considered in the inverse order of their statement.

1. Respondent's statements violated § 16(b)(1).

Ms. Conrad candidly admitted that she called Ms. Harrington about her hardship request and ended her conversation by asking Ms. Harrington if she was a member of the Union and when she said no, that said she wasn't going to give any speeches about joining the Union but she [Ms. Harrington] might want to consider it at a later time, that it's important. With equal candor, Ms. Conrad also admitted that when Ms. Harrington called her after the Union initially had refused to approve her hardship request and asked if she [Harrington] had been a Union member would her case have been handled differently, she [Conrad] had said, "Yes".

I am aware that Judge Fenton, in American Federation of Government Employees, Local 987, AFL-CIO, 4 FLRA 160 (1980), a case under Executive Order 11491, held, and in the absence of exceptions the Authority adopted his conclusions, commented, in part, as follows:

> "The duty of fair representation requires that a union represent all employees in a unit for which it is the exclusively recognized representative without hostility or discrimination, and to exercise its discretion in such matters honestly and in good faith. (footnote omitted) Thus, it must consider and process grievances of members and nonmembers alike, drawing no distinction on that or any unfair and invidious ground. I cannot read that obligation as foreclosing an appeal to the nonmember to join and avoid the free ride. The union official who utters such a statement of course invites suspicion, and if other circumstances fortify that suspicion, he risks an unfair labor practice finding. . . . A labor organization exists to proseletize (sic), and has every right to persuade nonmembers that its duty to represent them creates a corresponding duty on their part to support it. Success in this effort is indispensable to its capacity to function effectively as a representative of all employees. Absent other, rather convincing evidence of hostility to nonmembers, I conclude that such an appeal to Leggette is not evidence of an unwillingness to discharge its obligation." (id. at 168-169.)

While I share concern for a Union's need to proselytize, there is a time and place for it. As the Authority more recently has stated,

> "The standard for determining whether a union's statement violates section 7116(b)(1) of the Statute is an objective one. The question is whether, under the circumstances, employees could reasonably have drawn a coercive inference from the statement. . . . As in cases involving a violation of section 7116(a)(1) of the Statute, the standard for a section 7116(b)(1) violation is not based on the subjective perceptions of the employee or on the intent of the speaker . . .
>
> "Where a union is acting as the employees' exclusive representative, the Statute requires that the union's activities be undertaken without

> regard to union membership. . . . American Federation of Government Employees, Local 987, AFL-CIO, 35 FLRA 720, 724 (1990) (Emphasis supplied).

Mr. Krall well understood that when employees came to him for help he, ". . . looked at it as a good opportunity to promote . . . the Union." (Tr. 212). Without doubt, at that point the employee is most prone to manipulation. The issue here, therefore, is whether, as the Authority stated, ". . . employees could reasonably have drawn a coercive inference from. . . ." Ms. Conrad's statements. I fully agree with General Counsel that Ms. Conrad's questioning Ms. Harrington about Union membership, ". . . had no legitimate purpose . . . during this conversation . . ." and that, "The reasonable effect of such a question . . . would be to make it clear . . . that the Union would look more favorably on her hardship if she joined the Union. (General Counsel's Brief, p. 8). Further, Ms. Conrad's acknowledgment that her hardship request would have been treated differently if she [Harrington] was a Union member, as General Counsel stated, ". . . on its face . . . would reasonably tend to interfere with . . . [Harrington's] right not to join the Union." (General Counsel's Brief, p. 8).

Because the statements of Ms. Conrad violated § 16(b)(1) of the Statute, an appropriate cease and desist order and posting will be ordered.

> 2. A preponderance of the Evidence does not show that Respondent refused to approve Ms. Harrington's request for a hardship transfer because she was not a member of the Union.

The July 17, 1992, Memorandum of Understanding (MOU) (Union Exhibit 4) which, it is conceded, governs non-competitive reassignments, defines "hardship" as,

> "5. Hardship is defined as a set of circumstances that are so severe that they jeopardize the employee's or his/her family's health or financial security." (Union Exh. 4, Sec. B.5.)

It is said, "Beauty lies in the eye of the beholder." The same could be said of "hardship". That reasonable minds could differ is recognized by the MOU. Thus, by way of example, Sec. C.1.b. of the MOU states, in part, "If an employee alleges hardship and both management and the Council President (or designee) agree . . ."; and Sec. D of the MOU provides, in part, ". . . When selection or non-selection would create/aggravate a hardship for an employee,

the employee highest in the selection priority may be bypassed if mutually agreed to by the Employer and the Union . . . In the event the Employer and the Union cannot agree, the Employer may go forward with its selection. The Employer's assignment is subject to the parties' negotiated grievance/arbitration procedure." (Union Exh. 4, Secs. C.1.b. and D.).

The fact that the Union views "hardship" in a different manner than the Employer is of no moment under the Statute, whether or not an arbitrator would agree, provided only that the Union's view is rational and that it does not discriminate on the basis of Union membership. Quite simply, the Union views "hardship" as an involuntary circumstance, not caused by the employee's own action, which has so severe impact as to jeopardize the employee's or the employee's immediate family's health or financial security. The Union's Chief negotiator so testified (Tr. 126); the only examples set forth in AFGE's Instructions concerning the MOU dated September 13, 1992 (Union Exh. 5; Sec. B.5., pp. 2-3), are of circumstances beyond the control of the employee (involuntary reassignment of a spouse; and illness); and was the standard Ms. Conrad and Mr. Krall asserted they followed. General Counsel expresses no opinion concerning the Union's view of "hardship", i.e. in effect its engrafting the word "involuntary" into the definition of "Hardship" in § B.5. of the MOU to read "set of involuntary circumstances". Rather, General Counsel asserts: "The Union has offered no rational reason for its behavior. When the employee was a Union member, the Union fought for them. When the hardship was not medical and the employee was not a member, the Union denied the hardship." (General Counsel's Brief, p. 7). Further, General Counsel asserts,

> ". . . There are several other cases where the facts are virtually identical. Both the Union's Chief Negotiator for the MOU, Craig Campbell, and the Agency's representative on hardships, Kathy Bucholska, agreed that the cases of Karen Emery, Kelly Ann Mannering, and Mary Caulfield were the same. There was, of course, that one important difference -- Emery [Harrington] was not a Union member and was, therefore, not granted a hardship transfer; Mannering and Caulfield were Union members and were, therefore, granted hardship transfers by the Union. But, the Union did deny one other non-medical hardship request. That request was from Phyllis Albero. Again, we have a case of an employee intending to be married to someone who lives a distance from her home and

> wants to be able to live with her new husband. This case was not like the Mannering and Caulfield cases that the Union approved, rather this case was like Emery's case -- Albero was not a Union member, therefore, the Union denied her request." (General Counsel's Brief, p. 7).

Hardship transfer requests approved by the Union on June 24, 1994, are set forth on Union Exhibit 1; and hardship/reassignments from August 8, 1994, through August 14, 1995, are set forth on Union Exhibit 10.

Ms. Elizabeth Maciel (Union Exh. 1; Tr. 210-211), a non-member, worked in Hartford, Connecticut, and wanted to transfer to Pawtucket, Rhode Island, near her parents home in East Providence, Rhode Island, because her father, who was retired, was ill and her mother was retiring. Mr. Krall approved her request several seeks prior to June 24, 1994 (Tr. 212). Ms. Dorshung Patel, a member, worked in Indiana and wanted to transfer to Norwalk, Connecticut, because she was marrying a young man who lived in Westchester County, New York; Ms. Nancy Sweeney, a non-member, worked in Georgia and wanted to transfer to Worcester, Massachusetts, because her husband had been transferred to the Worcester area; Ms. Deborah Graham, a member, worked at Haverhill, Massachusetts, and wanted to transfer to Littleton, New Hampshire, because her husband had transferred there. The agency had approved the hardship transfer requests of Patel, Sweeney and Graham; but had denied the hardship request of Ms. Barbara Cotter, a member, who worked in Lowell, Massachusetts, and wanted to transfer to Haverhill, Massachusetts. The agency had found no hardship because the distance was only about 15-16 miles and involved only a short commute. Mr. Krall, after talking to Ms. Cotter, ". . . believed it was a hardship" (Tr. 216)[5] and told Mr. Frank Harrington, the agency's labor relations specialist (Tr. 86), and no relation to the charging party, after learning that management would not approve it, ". . . I thought it was just as compelling on its merits as the other cases they wanted to move and so that I was willing to move these other ones but only if they would approve Barbara Cotter, also. . . . What I conveyed to Mr. Harrington is that I would have trouble approving the others . . . if they didn't approve Barbara Cotter." (Tr. 215-216).

General Counsel concedes that,

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Mr. Krall stated that he learned of confidential matters which convinced him of her hardship. Mr. Krall discussed the matter off the record with Mr. Zaiger who thereafter withdrew his question: "what was her hardship" (Tr. 233).

> ". . . the Union did not consider Union membership when evaluating requests for hardship transfers based on medical issues:
>
> "Catherine Fantuccio . . .; Edna Read . . .; Alisa Pagliarulo . . .; Karen Traynor . . .; Irene Alfonso . . .; William Edwards . . .; Jatlin Parikh . . .; James Fitzgerald . . .; Christina Anthony . . .; Mary Totonelly . . .; and a 'Regional Swap' of non-member Kathy Alexander and member Robert Kantrowitz, both with medical issues. . . ." (General Counsel's Brief, p. 5).[6]
>
> As more fully set forth above, General Counsel asserts,
>
> ". . . the cases of Karen Emery [Harrington], Kelly Ann Mannering, and Mary Caufield were the same."

Except, as General Counsel contends, ". . . Emery [Harrington] was not a Union member . . .", and the Union refused to approve her hardship request; but, ". . . Mannering and Caulfield were Union members and were, therefore, granted hardship transfers by the Union."

I am aware that Mr. Campbeell stated, ". . . I don't think I have all the facts . . . I believe there's more facts there." (Tr. 136); but on the basis of information supplied him at the hearing, stated that as to Mannering[7], "I can distinguish some differences and I notice some similarities" (Tr. 142); and, "There are some differences" (Tr. 143); but he concluded,

> "A In me making a determination in terms of whether that meets a hardship under B-5, I would say there is no difference.

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Notwithstanding that General Counsel did not include Rosie Rodriguez-Robinson, a member, as a medical transfer (General Counsel's Brief, p. 5), General Counsel does not further mention Rodriguez-Robinson at page 7 of her Brief and, on balance, should be considered a medical request (Tr. 199) although strictly speaking, as Ms. Conrad stated, it was because, ". . . she was separated from her 18-month-old child and there were child care issues involved." (Tr. 199).

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Contrary to General Counsel's statement that Mr. Campbell, "When asked if there was any meaningful difference between the Emery case and the Mannering and Caulfield cases, Campbell replied, 'I would say there is no difference.' (Tr. 136, 140, 143)." (General Counsel's Brief, p. 5), I find no such reference by Mr. Campbell to the Caulfield case. Indeed, as to the Caulfield reassignment he stated, "A I'm familiar with the name. I probably need to be refreshed on it." (Tr. 136).

. . .

"Q So there is no hardship here.

"A There is no hardship.

"Q But the Union approved it.

"A It's my understanding they did." (Tr. 143).

And further, that Ms. Bucholska testified that she saw Emery [Harrington], Caulfield and Mannering requests as,

> ". . . basically similar in the respect that it involved either a fiancee or a spouse that was in another location, had work in another location, and the employee was requesting a reassignment to be with that spouse in that location where he had work." (Tr. 94).

Moreover, she said that if she had been the evaluator she would have approved all three (Tr. 104-105).

In evaluating their testimony, it is necessary to give weight to the fact that Mr. Campbell had only information shown in the file as to Mannering and the record further shows that the file was incomplete, as the testimony of Ms. Conrad, more fully discussed hereinafter, showed; and, as to Ms. Bucholska's evaluation, that the agency has a strong economic interest in approving hardship transfer requests because, if the Union joins by granting approval, it does not post the job, there is no solicitation (Tr. 131, 150, 213) and it does not have to pay relocation expenses (Tr. 131-132). Indeed, the record shows that the agency is far more circumspect in approving requests when it has no vacancy it wants to fill, as in its disapproval of Ms. Harrington's 1993 request (G.C. Exh. 2; Tr. 63-64), than when it desires to fill a vacancy, as in its approval of the request of Ms. Phyllis Albero (Union Exhibit 10; Tr. 200), i.e. the agency concluded that Ms. Harrington, as a fiancee, had not established hardship (Tr. 63); but that Ms. Albero, as a fiancee, had (Tr. 200).

Ms. Conrad credibly testified that the agency, on January 24, 1995, before the Union had acted on Ms. Mannering's hardship request, publicly announced that Ms. Mannering would, ". . . be transferring to this office [Somerville, Massachusetts] effective 4/3/95 . . ." (Union Exh. 25; Tr. 166-167); and the record is clear that, absent the agency's premature action, the Union might well have denied the request (Tr. 166, 167, 185, 234), even though her

fiancé worked at Hanscom Air Force Base for a private contractor and his duties required that he be on call during all hours and capable of being reached by a pager at all time (Union Exh. 12; Tr. 165). However, Ms. Conrad, after the case was initially presented to her (Tr. 185) was informed that Ms. Mannering's mother-in-law was seriously ill with brain cancer (Tr. 165, 185). Contrary to the General Counsel's assertion, the Union showed very rational reasons for approving Mannering's request but denying Harrington's. Indeed, it showed that Ms. Mannering's fiancé, unlike Ms. Harrington's fiancé, was required to reside in the vicinity of his employment at Hanscom Air Force Base, although it candidly stated that this showing, alone, constituted a questionalbe hardship. More significantly, the agency, without waiting for the Union's action, announced the transfer of Ms. Mannering. Because the agency had given notice of Mannering's transfer to every person in the Somerville Office (Tr. 186), the Union, wholly aside from membership considerations, was prodded to approve what otherwise was a questionable hardship request. Finally, the serious illness of her mother-in-law would have warranted approval of Ms. Mannering's request.

Ms. Harriet Caulfield requested a hardship transfer from Meridan, Connecticut, to Manchester, New Hampshire, because her fiancé, with whom she lived and shared household expenses in Meridan, was involuntarily transferred to Manchester. The Union treated Ms. Caulfield and her fiancé as husband and wife (Union Exhs. 10, 11) and approved the request because of the husband's involuntary transfer. This is the Union's basic position, namely, that, ". . . situations that were beyond the control of the employee and if they were severe . . . that those were true hardships." (Tr. 127). Not only is this a rational reason for approving Caulfild's request, but it was also a rational reason for denying Harrington's request which involved no circumstance beyond the control of the employee, <u>i.e.</u>, Ms. Harrington's fiancé/husband was <u>not</u> transferred anywhere. To the contrary, he was working in Keene, New Hampshire, throughout her employment in Rutland, Vermont (Tr. 52), and she was dating him, while he was working in Keene, even before she went to work for the agency in Rutland. (Tr. 52).

Ms. Elaine Jellison had been granted a hardship transfer from Maine to Law Vegas, Nevada, when her husband, who was in the military, was involuntarily transferred to Nevada (Tr. 177); subsequently, her husband was forced to retire (Tr. 176) and the Union approved her hardship request to return to Maine (Tr. 177). Ms. Megan Shelton's hardship request to move from Grand Rapids, Michigan, to Boston,

Massachusetts, was approved because her husband had been involuntarily transferred to Boston (Union Exh. 10; Tr. 193); and Mr. Francis Fink's hardship request to move from Baltimore, Maryland, to Connecticut was approved because his wife had been involuntarily transferred to Connecticut (Union Exh. 10; Tr. 197). Although Jellison, Shelton and Fink were members of the Union, contrary to General Counsel's assertion (General Counsel's Brief, p. 7), the hardship of each was based on a situation beyond the control of the employee: mandatory (involuntary) retirement from the military of Ms. Jellison's husband; and the involuntary transfer of Ms. Shelton's husband and Mr. Fink's wife. It is true that Ms. Phyllis Albero's request was denied and that she was a non-member; however, her hardship request, to move from Danbury, Connecticut to Providence, Rhode Island, was denied by the Union because, while she was to be married to a young man who worked in Pawtucket, Rhode Island, as in the case of Ms. Harrington, there was no circumstance beyond the control of the employee, such as: illness or involuntary transfer. Moreover, the record affirmatively dispells non-membership as a reason for the Union's action and shows that, to the contrary, Albero's request was denied in spite of intense Union pressure to grant it. Thus, her fiance, who was also a Claims Representative, was a member of the Union; and he, a steward in the Pawtucket office and at least one other Union member called Mr. Krall and strongly, indeed rancorously, demanded approval (Tr. 230).

Consequently, as to the non-illness hardship requests considered by the Union, to which General Counsel referred, the record shows that the Union followed a rational and wholly consistent standard, namely, when the request showed circumstances beyond the control of the employee, the Union approved the request; and when the request did not show circumstances beyond the control of the employee, the Union refused to approve the request, i.e., specificlaly the requests of Harrington and Albero. Moreover, the record shows that the Albero request was denied despite intense Union membership pressure to approve it.

The hardship request most like Ms. Harrington's which the Union approved was that of Darshung Patel, to which General Counsel made no reference whatever. Ms. Patel was a union member and wanted to move from Indiana because she was going to marry a young man who lived in Westchester County, New York (Tr. 213). Even though there was no circumstance beyond the control of the employee, the Union's approval was granted only as part of a package "deal" whereby the Union would approve the hardship requests of Patel, Sweeney and Graham, which the agency had approved,

only if the agency would approve the hardship request of Cotter, which the agency had denied. I conclude, therefore, that General Counsel has not shown by a preponderance of the evidence that the Union refused to approve the hardship request of Karen Harrington Emery because she was not a member of the Union.

Moreover, the record shows that, while the Union could not approve her hardship request, the Union sought to help her attain equivalent relief by urging her to broaden her request to include the Gardner and Fitchburg, Massachusetts, offices, which were as close, or closer, to Rindge, where the Emery's had located, than Nashua (Tr. 225-226). Ms. Harrington rejected this proposal, as she told Mr. Krall,

> ". . . if she got the transfer to Nashua, then she could get transferred back to Keene, where she really wanted to go, without having to go through the posting and the hardship process."

Even though Mr. Krall told her that while Keene was a branch of Nashua insofar as management authority was concerned, he told her,

> ". . . under the memorandum of understanding, if you move from one location to another, there would still have to be a posting or a hardship decision." TR. 228).

The Union's proffer of assistance negates any inference that the Union harbored ill-will toward Ms. Harrington because of her non-membership and, as noted above, the record shows that the Union followed a rational and consistent standard in considering hardship requests which was wholly unrelated to Union membership[8], to wit; if the request was bottomed on circumstances beyond the control of the employee and was severe, the Union approved the request; if the request were not bottomed on circumstances beyond the control of the employee, the Union refused to approve the request.

Having found that a preponderance of the evidence does not establish that the Union refused to approve the hardship request of Karen Harrington Emery because she was not a member of the Union, it is recommended that the allegations

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In concluding that the Union consistently applied a rational standard, not based on Union membership, I do not hold, nor should anything be taken to suggest, or infer, that the Union's standard for determining "hardship" under the MOU (Union Exh. 4) would, or would not be sustained in any arbitration pursuant to Section D. of the MOU. The meaning of "hardship", as set forth in the MOU, is not an issue and has not been decided.

of Paragraph 22 of the Complaint, that the Union thereby violated §§ 16(b)(1), (2) and (8) of the Statute, be dismissed.

Having found that the Union violated § 16(b)(1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the American Federation of Government Employees, AFL-CIO, Local 1164, Boston, Massachusetts, shall:

1. Cease and desist from:

(a) Questioning any bargaining unit employee about Union membership and/or soliciting membership by any bargaining unit employee when such employee is seeking assistance of the Union with respect to action the Union is responsible for as exclusive representative.

(b) Telling any bargaining unit employee that requested hardshp transfers are handled differently for members than for non-members.

(c) Interferring with, restraining, or coercing bargaining unit employees in the exercise of their right to join, or to refrain from joining, American Federation of Government Employees, AFL-CIO, Local 1164, or any other labor organization, freely and without fear of penalty or reprisal.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its local business offices, at its normal meeting places, and at all other places where notices to members and to employees of the Social Security Administration's Boston Region, including, but not limited to, Rutland, Vermont, Nashua and Keene, New Hampshire, and Gardner and Fitchburg, Massachusetts, are customarily

posted, 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 American Federation of Government Employees, AFL-CIO, Local 1164, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to members and other bargaining unit employees are customarily posted. Reasonable steps shall be taken by the American Federation of Government Employees, AFL-CIO, Local 1164, to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts

02110-1200, in writing, within 30 days from the date of this

Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 7, 1996
Washington, DC

NOTICE TO ALL MEMBERS AND EMPLOYEES

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 1164, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our members and employees that:

WE WILL NOT question any bargaining unit employee about Union membership and/or solicit his/her membership when the employee is seeking assistance with respect to any action for which we are responsible as exclusive bargaining representative.

WE WILL NOT tell any bargaining unit employee that requested hardship transfers are handled differently for members of the Union.

WE WILL NOT interfere with, restrain, or coerce bargaining unit employees in the exercise of their right to join, or to refrain from joining, American Federation of Government Employees, AFL-CIO, Local 1164, or any other labor organization, freely and without fear of penalty or reprisal.

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 Federal Service Labor-Management Relations Statute.

(American Federation of Government
Employees, AFL-CIO, Local 1164)

Date: 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 of the Federal Labor Relations Authority, Boston Region, whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. BN-CO-50066, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Linda I. Bauer, Esquire
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Dated: March 7, 1996
Washington, DC