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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1909 FORT JACKSON, SOUTH CAROLINA Respondent	
and	Case No. 4-CO-80046
ARMY AND AIR FORCE EXCHANGE SERVICE, DALLAS, TEXAS Charging Party	

Linda J. Norwood, Esquire
For the General Counsel

Stuart Kirsch, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on June 21, 1988, by the Army and Air Force Exchange Service (hereinafter called the Charging Party or AAFES), a Consolidated Complaint and Notice of Hearing was issued on January 26, 1989, by the Regional Director for Region IV, Federal Labor Relations Authority, Atlanta, Georgia. The Complaint alleges that the American Federation of Government Employees, AFL-CIO, Local 1909, Fort Jackson, South Carolina (hereinafter called the Respondent or AFGE), violated section 7116(b)(5) of the Federal Service Labor-Management Relations Statute, (herein-

after called the Statute), by virtue of its actions in failing and refusing to pay[1] its one-half portion of the fee for the services of an arbitrator employed pursuant to the contractual grievance procedures.

A hearing was held in the captioned matter on November 2, 1989 in Columbia, South Carolina. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on November 29 and December 1, 1989, respectively, which have been duly considered.[2]

Upon the basis of the entire record, including my observation of the sole witness and his demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The Complaint alleges and Respondent either specifically admits or fails to deny that:[3]

1/ The consolidated complaint was based upon charges filed in Case No. 4-CO-80052 and the instant case. Subsequently, the instant case, i.e. 4-CO-80046, was severed on August 29, 1989, and by notice dated October 24, 1989, set for hearing on November 2, 1989. Case No. 4-CO-80052 also involved a fee due to an arbitrator. However, unlike the instant case, it concerned the failure of Respondent to follow a subsequent arbitrator's award ordering Respondent to pay a fee due another arbitrator for work previously performed. Judge Etelson granted the General Counsel's motion for summary judgment and found in Case No. 4-CO-80052, decided on June 21, 1989, that Respondent violated the Statute by virtue of its action in failing to comply with the arbitrator's order directing Respondent to pay the fee of the other arbitrator. No exceptions were filed to his decision.

2/ To the extent that Respondent's post hearing brief relies on a document not in evidence, such document and argument predicated thereon will not be considered.

3/ Section 2423.13(b) of the Authority's Rules and Regulations provides that the "Failure to file an answer or to plead specifically to or explain any allegation shall constitute an admission of such allegation and shall be so found by the Authority. . . ."

1. At all times material herein, the American Federation of Government Employees, AFL-CIO, (AFGE), Washington, D.C., has been and is now the exclusive representative of certain employees of the Charging Party in a worldwide consolidated unit between Headquarters, AAFES, Dallas, Texas, and AFGE, effective by its terms from on or about April 27, 1987, for at least a three-year term.

1(a). At all times material herein, AFGE, AFL-CIO, Local 1909, has been and is now an agent of AFGE for the purposes of representing employees at Fort Jackson, South Carolina in the unit described above.

2. At all times material herein LeRoy Riley occupied the position of President of Respondent and as such was and is now an agent of Respondent.

3. Until on or about April 27, 1987, a local collective bargaining agreement between the Fort Jackson, Exchange, Army and Air Force Exchange Service, For Jackson, South Carolina, and Local 1909, American Federation of Government Employees, AFL-CIO, was in effect.

3(a). The agreement provides in Article XXXVII, Section 3, that:

> The arbitrator's fee and the expenses of arbitration, if any, shall be borne equally by the Employer and the Union.

4. On or about April 27, 1987, a Master Labor Agreement went into effect.

4(a). Subparagraphs 3(a) and 5(c) of the Master Labor Agreement state in pertinent part:

> (1) Article 44, Section 2: ---The arbitrator's fee shall be divided equally.
>
> (2) Article 4, Section 5: ---Local agreements existing on the effective date of this Master Agreement shall cease to exist upon the effective date of the renegotiated Local Agreements. If no request to bargain a Local Agreement is made by either party, within the 60 days specified in Section 4b(1) above, the Local Agreement existing at the

> time the Master Agreement is effective shall cease to exist. Any existing MOA/MOU which interprets a provision of a Local Agreement which no longer exists hereunder will also cease to exist.

5. Since on or about March 9, 1988, Respondent has failed to pay its one-half portion of the fee for the services of Arbitrator William Haemmel in FMCS Case No. 87-23629.

The record indicates that FMCS Case No. 87-23629 involved the separation of employee Della Mae Bowie. The arbitrator was called upon to determine whether Ms. Bowie had been discharged or had voluntarily resigned. If the former, the arbitrator then had to decide whether just cause existed for such discharge. On March 9, 1988, Arbitrator Haemmel issued his decision wherein he found that the Grievant had been unjustly discharged.

On March 10, 1988 the Arbitrator submitted his bill for the proceeding in the amount of $2413.98 to the Exchange and Respondent. The Respondent's share of the bill amounted to $1206.99. As of the date of the hearing, November 2, 1989, Mr. LeRoy Riley, President of Local 1909, admitted that no payments on the bill had been made. Further, Mr. Riley originally testified on direct that he had not contacted Arbitrator Haemmel in an attempt to work out a payment plan as he had in the past with other arbitrators. However, as noted below, he changed his testimony in this latter regard. On cross-examination Mr. Riley further stated that when he became the President of the Local it was deeply in debt to the National, the Internal Revenue Service and a former landlord. These obligations have consumed most, if not all, of the monthly dues paid in by the unit employees. At the time of the hearing the Local had a check book balance of $42.32.

Since 1986, according to the uncontested testimony of Mr. Riley, the Union has invoked arbitration approximately five times.[4/] Prior to invoking arbitration the Union

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4/ The arbitration decision described in footnote one involved an arbitration proceeding wherein an arbitrator had been directly appointed by the FMC. The parties had a

(footnote continued)

entered into oral agreements with the employees involved providing that the respective employees would pay the costs of their respective arbitration proceeding. A similar arrangement was made in the case of Ms. Bowie. However, according to Mr. Riley, Ms. Bowie has not lived up to the agreement, hence the instant unfair labor practice complaint. Mr. Riley also acknowledged at the hearing that arbitration had since been invoked on behalf of another employee and that the Union, in order not to be faced with payment problems similar to those which it faced with Ms. Bowie, had made the affected employee pay the arbitrator's anticipated fee in advance.

Further according to Mr. Riley he received a check in the amount of $100 from Ms. Bowie on August 15, 1988 which was to be sent as a partial payment to Arbitrator Haemmel. When he contacted Mr. Haemmel about the partial payment he was told that he, Mr. Haemmel had turned the matter over to Mr. Luther Jones, Charging Party's representative. While it is not entirely clear from the record when it occurred, it appears that Mr. Riley contacted Mr. Jones about making payments to Mr. Haemmel and was informed that Mr. Jones did not want to hear Mr. Riley's name mentioned. No further attempt was made to forward the $100 check to Arbitrator Haemmel. Nor was there any evidence that the Union had attempted to secure any additional funds from Ms. Bowie.

Discussion and Conclusions

The General Counsel takes the position that the contract language regarding the Union's obligation to pay one-half of

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(footnote 4 continued)

dispute as to the arbitrator's fee which went through the grievance procedure and wound up in another arbitration proceeding to determine which party or parties were liable for the original arbitrator's fee. The second arbitrator found that both parties were liable for the fee, and issued a decision ordering the payment of the fee. When the Union did not pay its share of the fee the Army and Air Force Exchange Service filed an unfair labor charge against the Union. Thereafter, as noted above, Judge Etelson found a violation of the Statute and ordered the Union to comply with the decision of the second arbitrator. At the time of the hearing, while the Union had acknowledged the debt and its intention to make monthly payments thereon, no payments had as yet been forthcoming.

the arbitrator's fee is clear and unequivocal. In such circumstances the Union's failure to take any meaningful action toward paying the arbitrator its share of the fee is a patent breach of the contract which, considering its nature, constitutes a repudiation of the contract in violation of section 7116(b)(5) of the Statute. According to the General Counsel, the failure to pay the arbitrator makes the grievance procedure, which is mandated by the Statute, a nullity since such action will make it difficult to secure arbitrators in the future and thereby deny both the employees and management the opportunity to have their grievances decided by an independent body.

The General Counsel takes the further position that since the Complaint alleges the Union's action in not paying the arbitrator to be a continuing violation, he is entitled to rely on pre-charge and post-charge events in order to establish the Union's bad faith.

In this latter connection, it should be noted that a continuing violation was only alleged in the complaint in connection with the Union's failure to follow the arbitrator's award in Case No. 4-CO-80052 decided earlier by Judge Etelson. The instant case, i.e. 4-CO-80046, does not allege a continuing violation.

Respondent takes the position that inasmuch as its failure to pay the arbitrator was not intentional, but rather due to a lack of funds, its failure to pay did not amount to a repudiation of the collective bargaining agreement in violation of the Statute.

In support of its position, Respondent points out that prior to proceeding to arbitration in this, as well as a number of other prior arbitration cases, it informed the employees involved of the Union's dilemma, i.e. lack of funds, and secured from them the promise to pay all the Union's share of the costs for the respective arbitrations. In only the instant case did the employee fail to make the required payment. Further, according to the Union, in order to insure that such a situation does not arise again in the future, it has adopted the procedure of obtaining the anticipated costs of the arbitration in advance from the affected employee.

Additionally, the Union questions when the requisite payment must be paid to the arbitrator in order to escape an unfair labor practice finding. Noting in the instant case

that the charge was filed after only ninety days of nonpayment.

Finally, the Union points out that when it did receive some monies from Ms. Bowie, the Charging Party frustrated its efforts to make a partial payment on the arbitrator's fee.

The parties appear to be in agreement that every contractual breach does not necessarily constitute a repudiation of the collective bargaining agreement in violation of the Statute.5/ The parties further appear to agree that only those patent breaches which evidence a repudiation of the collective bargaining contract are violative of section 7116(b)(5) of the Statute.

While there can be no doubt that the Union has not fulfilled the obligation imposed by the collective bargaining agreement to pay one-half of the arbitrator's fee, there is no evidence that it has rejected such obligation and intends not to pay. Rather the record evidence establishes that the failure to pay the arbitrator was due to lack of funds. Moreover, I find, based on the credited testimony of Mr. Riley, that the Union only assented to participate in the arbitration proceeding upon the prior agreement of Ms. Bowie to assume the cost of the proceeding. According to Mr. Riley similar agreements with other employees had been arranged for in the past and in all cases the employees involved had lived up to their promises and supplied the necessary funds to pay the arbitrators involved in their respective grievances. Further, according to Mr. Riley, in order to prevent a repeat of the situation encountered with Ms. Bowie, the Union has now insisted that any employee desiring to arbitrate a grievance must pay the estimated costs in advance.

Finally, according to the uncontested testimony of Mr. Riley, when the Union did finally receive a partial payment from Ms. Bowie and attempted to secure some sort of payment schedule, Mr. Jones, the Charging Party's representative to whom Mr. Riley was referred by the Arbitrator, refused to consider any sort of arrangement and declined to talk with Mr. Riley.

5/ U.S. Customs Service, Region VII, 10 FLRA 251; Internal Revenue Service, 12 FLRA 445.

Accordingly, in view of the above considerations, I can not find that the Union's failure to timely pay its share of the arbitrator's fee constituted a repudiation of the collective bargaining agreement in violation of section 7116(b)(5) of the Statute. Rather, it appears that the Union has recognized its contractual obligations and taken steps to insure that in the future it will have sufficient funds in hand prior to proceeding to arbitration on behalf of the unit employees.

Having found that the Respondent did not violate the Statute, as alleged, it is recommended that the Federal Labor Relations Authority issue the following order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint, should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., April 26, 1990

BURTON S. STERNBURG
Administrative Law Judge