AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 Respondent	
and NEDRA T. BRADLEY, AN INDIVIDUAL Charging Party	Case No. AT-CO-31253

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 **NOVEMBER 20, 1995**, 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: October 18, 1995
Washington, DC

MEMORANDUM DATE: October 18, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987

Respondent

and Case No. AT-CO-31253

NEDRA T. BRADLEY, AN INDIVIDUAL

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, LOCAL 987 Respondent	
and NEDRA T. BRADLEY, AN INDIVIDUAL Charging Party	Case No. AT-CO-31253

Stuart A. Kirsch, Esquire
For the Respondent

Richard S. Jones, 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: (a) whether Respondent's failure to comply with the Authority's order in a prior case, enforced by the Eleventh Circuit Court of Appeals, violated the Statute; (b) whether by notifying Nedra Bradley on August 23, 1993, that it was not going to allow her to become a member of Respondent for at least five years violated the Statute?

This case was initiated by a charge, filed on September 3, 1993 (G.C. Exh. 1(a)), which alleged violations

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[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)".

of §§ 16(b)(1) and (8) of the Statute and by an amended charge, filed on October 18, 1993 (G.C. Exh. 1(b)), which alleged violations of §§ 16(b)(1) and (8) and § 16(c) of the Statute. The Complaint and Notice of Hearing issued on December 15, 1993 (G.C. Exh. 1(c)), alleged violation of §§ 16(b)(1), (8) and 16(c) and set the hearing for a date, time and place to be determined. On January 28, 1994, the United States Court of Appeals for the Eleventh Circuit, in Case No. 93-8222, American Federation of Government Employees, Local 987, AFL-CIO v. Federal Labor Relations Authority, in an unpublished decision, granted the Authority's application for enforcement of its December 31, 1992, order in FLRA Case No. 4-CO-10021 (46 FLRA 1048 (1992)) (G.C. Exh. 1(e), attachment, "Exhibit 1"). By Order dated February 25, 1994, this case was set for hearing on March 23, 1994, in Warner Robins, Georgia (G.C. Exh. 1(h)); by Order dated March 18, 1994, the hearing was indefinitely postponed (G.C. Exh. 1(f)); by Order dated November 2, 1994 (G.C. Exh. 1(i)), the hearing was rescheduled for January 10, 1995, in Warner Robins, Georgia; and by Order dated December 7, 1994 (G.C. Exh. 1(j)), the place of the scheduled January 10, 1995, hearing was changed to Atlanta, Georgia.

On February 1, 1995, the Amended Complaint and Notice of Hearing issued (G.C. Exh. 1(l)), alleged violation of §§ 16(b)(1) and (8) and 16(c) of the Statute and set the hearing for March 13, 1995, in Atlanta, Georgia. By Order dated March 7, 1995 (G.C. Exh. 1(n)), upon agreement of all parties to submit this case for decision by Stipulation, the hearing was indefinitely postponed. By Order dated July 11, 1995, the Regional Director, pursuant to § 2429.1(a) of the Rules and Regulations, 5 C.F.R. § 2429.1(a), transferred the case to this Office for decision, together with the "Joint Stipulations Regarding Facts and Evidence", with attached exhibits, General Counsel Exhibits 1(a)-1(o) and Joint Exhibits 1-44, which were received on July 14, 1995. This matter was duly assigned to the undersigned and by Order dated July 18, 1995, an Order Fixing Briefing Schedule issued. General Counsel timely mailed a brief on August 7, 1995, received on August 10, 1995, and Respondent timely mailed its brief on August 21, 1995, received on August 24, 1995, which have been carefully considered. On the basis of the entire record, I make the following findings and conclusions:

Background

Ms. Nedra Bradley was employed as a records clerk at Robins Air Force Base and was a member of American Federation of Government Employees, Local 987 (hereinafter,

"Union") from 1967 to February 9, 1991. In 1972, she became Recording Secretary and served in that capacity for six years. In December, 1983, she was elected President of the Union and served in that capacity until October 17, 1989, at which time the national president of AFGE, Mr. John N. Sturdivant, suspended her from office for alleged misconduct, and on October 19, 1990, President Sturdivant issued a decision letter adopting a trial panel's recommendation that she be,

> ". . . suspended from holding any AFGE office at any level for a period of two years. Please be advised that the two-year suspension from holding office does not operate to suspend your rights of membership." (Jt. Exh. 2).

On October 29, 1990, Ms. Bradley submitted an SF 1188 to cancel her dues deduction authorization to the Union, effective February 9, 1991 (Jt. Exh. 5). This was her drop date from Union membership (46 FLRA at 1054).[2]

In the meantime, the United States Department of Labor (hereinafter, "DOL") conducted an investigation into alleged financial improprieties during Ms. Bradley's term of office as President and on February 20, 1991, DOL prepared and approved a Report of Investigation which asserted that its investiga-tion disclosed financial irregularities by Ms. Bradley (Jt. Exh. 7; Joint Stipulation, Par. 11).

On June 21, 1991, Ms. Bradley submitted a new SF 1187, authorizing deduction of dues, for the purpose of applying for membership (Jt. Exh. 8; Joint Stipulation, Par. 12; 46 FLRA at 1054). The Union did not accept or process Ms. Bradley's membership application (Joint Stipulation, Par. 13; 46 FLRA at 1054). This resulted in the unfair labor practice charge in Case No. 4-CO-10021 (Jt. Exh. 9) in which the Authority, on December 31, 1992, 46 FLRA 1048, adopted the findings, conclusions and recommended order, of Administrative Law Judge Naimark, that the Union's refusal to accept Ms. Bradley as a member, ". . . when she applied in June 1991 was unjustified and flouted section 7116(c) (footnote omitted) of the Statute. Denial of such membership was not based on her failure to pay dues . . . Accordingly, . . . [the Union] violated section 7116(b)(1) and (8) of the Statute by denying membership to Bradley." (46 FLRA at 1057) (Joint Stipulation, Pars. 14,

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The effective date of termination of dues withholding and the date of termination of union membership is not necessarily the same. Local 1858, American Federation of Government Employees, A/SLMR No. 275, 3 A/SLMR 274 (1973).

16, 19, 21). In his decision, Judge Naimark stated in part that,

> "It is quite clear, and not challenged by Respondent, that a union may not refuse membership to a unit employee who has met the prescribed occupational standards and tendered union dues. While the AFGE Constitution provides a procedure for suspending or expelling an individual from union membership, it is also conceded that no such process, as set forth in Article XVIII thereof, was invoked with respect to Bradley. . . ." (46 FLRA at 1056).
>
> ". . . While the Union may, it is true, discipline members and pass upon membership under its constitution, the latter sets forth a specific procedure and requirements to do so. Such procedure was not invoked by the Union nor did it take steps to expel Bradley from membership based on the charges considered by the Executive Council. . . ." (46 FLRA at 1056).

Accordingly, the Authority on December 31, 1992, Ordered the Union, inter alia, to:

> 1. Cease and desist from:
>
> (a) Denying membership to Nedra T. Bradley . . . except for failure (1) to meet reasonable occupational standards uniformly required for admission, or (2) to tender dues uniformly required . . . .
>
> 2. Take the following affirmative action . . .
>
> (a) Process Nedra T. Bradley's Request and Authorization for Voluntary Allotment of Compensation for Payment of Employee Organization Dues, Form SF-1187, unconditionally offer to admit her to full membership in the Union, and make her whole, consistent with applicable laws and regulations, for any loss of benefits she may have suffered by reason of its denial of membership to her.
>
> . . . ." (46 FLRA at 1049-1050; Jt. Exh. 18) (Emphasis supplied.)

The United States Court of Appeals for the Eleventh Circuit on January 2, 1994, without a published opinion,

Case No. 93-8502, enforced the Authority's Order, American Federation of Government Employees, Local 987, AFL-CIO v. Federal Labor Relations Authority, 15 F.3d 1097 (11th Cir. 1994). The Court's unpublished, per curiam, memorandum is Joint Exhibit 35. Therein, the Court stated:

> "We have previously granted the motion of the Union to dismiss its petition for review, but the Federal Labor Relations Authority's cross-application for enforcement is not moot. After considering the briefs and oral argument, we grant the Federal Labor Relations Authority's application for enforcement of its December 31, 1992 order. Our action is not intended to resolve any of the issues involving the Union's subsequent disciplinary action against Nedra Bradley that are currently pending in the related unfair labor practice proceeding.
>
> "Application for enforcement GRANTED." (Jt. Exh. 35).

Of course, the "related unfair labor practice proceeding" referenced by the Court is the present case (See, Respondent's Motion For Voluntary Dismissal, Jt. Exh. 32, Attachment 2).

Findings

1. By letter dated February 2, 1993, the Union's then president, Mr. Jim Davis, notified Ms. Bradley that,

> ". . . following an internal review of AFGE Local 987 records, you are indebted to the Local in the amount of $4900.93, based on unauthorized receipt or expenditure of funds and/or overpayments received during your tenure as Local 987 President and while a member of the Local from 1983 through 1990. . . ." (Jt. Exh. 19; Joint Stipulation, Par. 22).

Mr. Davis further notified Ms. Bradley that,

> ". . . while a member, and during your tenure as Local 987 President, you served as an officer in a company doing business as Federal Employee Advisor, Inc. (FEA), which I have reason to believe created a conflict of interest with your fiduciary duties as an officer and activities as a member." (id.)

Mr. Davis urged Ms. Bradley to take steps to restore the money to the Union and to explain her involvement in FEA and concluded by advising her that,

> ". . . Should the Local not receive back these monies due it within 20 days of your receipt of this letter, (or approve your agreement to repay these monies over time), or not receive back an explanation acceptable to the Local regarding your involvement with FEA . . . within the same time frame, I will have no recourse but to . . . initiate charges against you, pursuant to Article XVII (sic) of AFGE National Constitution." (id.)

2. By letter dated March 2, 1993 (Jt. Exh. 20; Joint Stipulation, Par. 22), Mr. Davis initiated formal charges against Ms. Bradley under Article XVIII of the AFGE National Constitution (Jt. Exh. 21).

3. The Union appointed an Investigative Committee, consisting of: Mr. Burl Jimmerson, Chairman; Mr. Jim Clements; and Ms. Kim Burke. The committee notified Ms. Bradley that she could present evidence in conjunction with the investigation; but she declined.[3] (Jt. Exh. 22; Joint Stipulation, Par. 24).

4. Upon completion of its investigation, the Investigative Committee issued its report in which it found:

> ". . . probable cause that the charges filed against Ms Bradley under Article XVIII Section 2 (C) (E) (F) (G) (H) (I) are warranted and verifiable." (Jt. Exh. 23).

The report and formal charges were served upon Ms. Bradley by certified mail (Joint Stipulation, Par. 24).

5. The Union's Executive Board, with Mr. Davis excluded as the initiator of the charges, served as the Trial Committee (TC) and on July 15, 1993, the TC notified Ms. Bradley, by certified mail, of a scheduled August 14, 1993, trial and the location thereof (Jt. Exh. 24). Ms. Bradley was afforded full opportunity to contest the charges and to present evidence (Joint Stipulation, Par. 25).

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[3] Ms. Bradley subsequently contended that she took this action on the advice of her personal attorney; however, she did not communicate this assertion to the Union until the Joint Stipulation was resolved in June, 1995 (Joint Stipulation, Par. 24).

6. The TC convened the hearing on August 14, 1993, but Ms. Bradley did not attend. The hearing proceeded without Ms. Bradley; minutes of the trial were kept (Jt. Exh. 25); the TC found that Ms. Bradley had engaged in the misconduct charged and made recommendations to the membership at a subsequent meeting (Jt. Exh. 26); and the membership decided that Ms. Bradley be suspended from membership for a period of five years after she restored to the Union the funds she had allegedly misappropriated (the Decision). (Joint Stipulation, Par. 27).

7. Ms. Bradley was notified of the Decision and of her appeal rights by letter dated August 23, 1993 (Jt. Exh. 27; Joint Stipulation, Par. 28).

8. Ms. Bradley, upon initiation of the formal internal Union charges against her, had filed at least four unfair labor practice charges [AT-CO-30493; AT-CO-30812; AT-CO-30991; and AT-CO-31162] and, after investigation the Regional Director refused to issue complaints and dismissed the charges (Jt. Exh. 28; Joint Stipulation, Par. 29).

Ms. Bradley appealed the Regional Director's dismissal of her charges and her appeal was denied by letter dated September 30, 1994 (Jt. Exh. 43; Joint Stipulation, Par. 42). In denying the appeal, Assistant General Counsel for Quality and Appeals, Michael D. Nossaman, stated, in part, as follows:

> "The Regional Director dismissed the charges because she found that the Local had not disciplined you and she concluded that the investigation was an internal union matter that did not violate the Statute. You argue that the Local's conduct was unlawful because AFGE had withdrawn your membership previously for the actions the Local investigated and the investigation was conducted only to prevent you from participating in the Local's affairs. Your membership was restored, however, pursuant to an order the Authority issued in American Federation of Government Employees, Local 987, Warner Robins, Georgia, 46 FLRA 1048 (1992), aff'd. sub nom. AFGE, Local 987, AFL-CIO v. FLRA, 15 F.3d 1097 (11th Cir. 1994). Thus, the Local had legitimate grounds for taking steps to determine whether other discipline was warranted. In addition, since the evidence does not show that the investigation was initiated because you had engaged in protected activity, the Local's use of

> its constitutional procedures to determine whether you should be disciplined did not violate the Statute. See American Federation of Government Employees, AFL-CIO, 29 FLRA 1359, 1363 (1987) . . . ." (Jt. Exh. 43) (Emphasis supplied).

9. By letter dated December 9, 1993, the Union informed Ms. Bradley that,

> "Pursuant to the FLRA's order in 46 FLRA 95 (Dec. 31, 1992) [sic No. 95; page 1048], AFGE Local 987 has returned you to full membership in the Local from June 21, 1991 until August 23, 1993, the date on which the Local informed you of the membership's decision to suspend your membership for five years commencing on the date of repayment of union funds. . . ." (Jt. Exh. 31; Joint Stipulation, Par. 31).

Between June 21, 1991, and December 9, 1993, Ms. Bradley's name did not appear on any document evidencing her membership in the Union; however, "After December 9, 1993, the Respondent adjusted its records to reflect Bradley's membership during the period June 21, 1991 to December 9, 1993." (Joint Stipulation, Par. 43).4 At no time between June 21, 1991, and December 9, 1993, did the Union receive any membership dues from Ms. Bradley; nor did Ms. Bradley tender, or offer to tender, any dues for that period. (Joint Stipulation, Par. 44).

10. By letter dated February 8, 1994 (Jt. Exh. 36), the Union notified the Regional Director that it had commenced posting and enclosed a copy of its December 9, 1993, letter to Ms. Bradley and the Order as posted (Jt. Exh. 36; Joint Stipulation, Par. 38) and by letter dated March 16, 1994, the Union certified completion of the posting (Jt. Exh. 37; Joint Stipulation, Par. 39).

11. Ms. Bradley was an employee of the Department of the Air Force, Warner Robins Air Logistics Center (the Center) at all times relevant until her retirement on August 26, 1994 (Joint Stipulation, Par. 2); however, the Union's rules, procedures, by-laws and charter provide that Center employees may hold membership, run for and hold

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I am fully aware of the divergence of the period of the retroactive restoration of membership stated by the Union in its letter to Ms. Bradley - June 21, 1991 - August 23, 1993 - and Paragraph 43 of the Joint Stipulation - June 21, 1991 - December 9, 1993.

office in the Union after retirement (Joint Stipulation, Par. 7).5

Conclusion

A. ALLEGED NON-COMPLIANCE WITH PRIOR AUTHORITY ORDER NOT JUSTICIABLE UNDER SECTION 16 AS A NEW UNFAIR LABOR PRACTICE

Paragraph 12 of the Amended Complaint alleges:

> "12. During the time period covered by this complaint, Bradley was not a member of Respondent because Respondent did not comply with the Authority's order described in paragraph 11 [i.e. in 46 FLRA 1048 (1992), the Authority, ". . . ordered Respondent to admit Bradley to membership."] (G.C. Exh. 1(l)).

Paragraph 14 of the Amended Complaint alleges, as applicable, that by the acts and conduct in Paragraph 12, the Union violated §§ 16(b)(8) and 16(c) of the Statute; and, in like manner, Paragraph 15 of the Amended Complaint alleges violation of § 16(b)(1) of the Statute.

The same conduct which gave rise to an order could, if it continues, constitute a new unfair labor practice, Harris-Woodson Co., 77 NLRB 819 (1948) [Employer refused to bargain in 1943, Board's Decision and Order, 70 NLRB 956 (1946) enf'd, 162 F.2d 97 (4th Cir. 1947); 1947, Complaint alleged inter alia, that employer continued to refuse to bargain in 1946; the Board held, ". . . the Union continued, as a matter of law, to be the exclusive representative . . . from August 26, 1946, the date of the Board's prior Decision and Order, to the date of the strike and thereafter . . . that the respondent continued to refuse to bargain . . . from August 26, 1946, to the date of the strike . . . and the strike was caused by such continuing refusal to bargain" [id., at 820]; but compliance with a Board or

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5 Ms. Bradley made no application for membership in 1993. Indeed, the only application after her June 21, 1991, SF 1187, which was involved in Case No. 4-CO-10021, 46 FLRA 1048 (1992), enf'd sub nom. AFGE Local 987, AFL-CIO v. FLRA, 15 F.3d 1097 (11th Cir. 1994), was an SF 1187 submitted the week of February 24, 1992, and withdrawn March 2, 1992 (Jt. Exh. 14; Joint Stipulation, Par. 18).

Authority Order may not be enforced as a new unfair labor practice.6

With respect to the National Labor Relations Act, Sections 10(e) and (f), 29 U.S.C.A. § 160(e) and (f), which are substantially like § 23 of the Statute, 5 U.S.C. § 7123, Mr. Justice Brandeis, in Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, (1938), stated, in part, as follows:

> ". . . No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And, until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court. . . ." (303 U.S. at 48-49).

To like effect, see the decision of Mr. Chief Justice Hughes in Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940), in which the Court stated, in part, as follows:

> "When the Board has made its order, the Board alone is authorized to take proceedings to enforce it. For that purpose the Board is empowered to petition the Circuit Court of Appeals for a decree of enforcement . . . The jurisdiction conferred upon the court is exclusive . . . Section 10(e) [Section 160(e)] . . . The Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order . . . Petitioner emphasizes the opportunity afforded to private persons by Section 10(f) [29 U.S.C. § 160 (f)] . . . But that opportunity is given to a person aggrieved by a final order of the Board which has granted or denied in whole or in part

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To be sure, there may be compliance proceedings. See, §§ 2423.30 and 2423.31 of the Authority's Rules and Regulations, 5 C.F.R. §§ 2423.30, 2423.31; Sec. 102.52, et seq., of the Rules and Regulations of the National Labor Relations Board; Honeycomb Plastics Corporation, 296 NLRB 124 (1989); Edward Cooper Painting, Inc., 297 NLRB 627 (1990).

> the relief sought. That is, it is an opportunity afforded to contest a final order of the Board, not to enforce it. . . .” (id. at 265-266) (Emphasis in original).

and further,

> “. . . If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt. . . .” (id. at 270).

Section 23(c) of the Statute, 5 U.S.C. § 7123(c), provides, in part, as does § 10(e) of the NLRA, 29 U.S.C. § 160(e), that,

> “. . . Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive . . . .”

Indeed, in Harris-Woodson Co., supra, the complaint alleged that the employer: refused after August 26, 1946, to bargain; that on October 4 and 7, 1946, employees had gone on strike because of the refusal to bargain; that the employees offered to return to work and applied for reinstatement on, or about, November 18, 1946, upon termination of the strike; and that the employer on, or about, November 18, 1946, refused to reinstate and discharged the employees. The Complaint concluded with a final count that the employer violated §§ 8(1), (3) and (5) of the NLRA “. . . by refusing and failing to comply with the Decision and Order of the Board in Matter of Harris-Woodson Co., Inc., 70 N.L.R.B. 956. . . .” (77 NLRB at 825). The Trial Examiner, James A. Shaw, whose conclusions were adopted by the Board, with regard to the allegation that failure to comply with a prior Board order constituted an unfair labor practice, stated:

> “. . . the refusal of an employer to comply with a Decision and Order of the Board is not in and of itself violative of the Act. The Board’s remedy in such a situation is recourse to the Courts as provided in Section 10(e) of the Act. The respondent likewise has a similar remedy under Section 10(f) of the Act, should it feel aggrieved by a Decision and Order of the Board. Since the Act provides a remedy to either party . . . by recourse to the Courts, hence mere failure to

comply with such an Order could not be deemed violative of the Act [footnote omitted]" (77 NLRB at 826).

The Fourth Circuit Court of Appeals in enforcing the Board's order stated, in part, as follows:

". . . it is manifest that the continuing refusal to bargain was not purged of its illegality because of the entry of an unfair labor practice order by the Board. The argument that the Board's order does not enforce itself but must be enforced by a decree of the Court of Appeals is beside the point. Refusal to bargain is made an unfair labor practice by statute, not by the Board's order. . . ." (National Labor Relaions Board v. Harris-Woodson Co., 179 F.2d 720, 723 (4th Cir. 1950).

The National Labor Relations Board visited the question again some twenty years after Harris-Woodson, supra, in The Black Hawk Corporation, 183 NLRB 267 (1970), where the Board stated, in part, as follows:

"The complaint in Harris-Woodson alleged, inter alia, that the respondent there had violated Section 8(a)(1) of the Act by failing to comply with a Board order in an earlier case . . . . The Board adopted the Trial Examiner's holding that, normally, refusal to comply with a Board decision and order in an unfair labor practice proceeding does not itself violate the Act, since the remedy in such cases is through recourse to the courts to secure enforcement of the order as provided in Section 10(e) of the Act. . . . In effect, the complaint in Harris-Woodson sought to have the Board enforce its own remedial order in the earlier unfair labor practice case. That is not the case here." (id. at 268) [the Board emphasized that in Black Hawk the issue was not a failure to comply with a prior Board order in an unfair labor practice case but the failure to honor the certificate of the Union as the collective bargaining representative. The Board stated, "The pendency of Respondent's petition for review of the earlier related unfair labor practice . . . does not constitute a valid defense to its refusal to bargain with the certified union." (id.)]

In the Order Fixing Briefing Schedule, I specifically requested the parties to, ". . . address why summary

judgment should not be granted in favor of General Counsel since the record shows plainly that Nedra T. Bradley was never unconditionally restored to membership." (Order, dated July 18, 1995). General Counsel purports to address the issue; but neither party comes to grip with the central and controlling questions, namely is the failure to comply with a prior Authority Decision and Order an unfair labor practice? I conclude that, plainly, it is not for the reasons set forth above. Moreover, as noted above, § 23(c) of the Statute specifically provides that,

> ". . . Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28." (5 U.S.C. § 7123(c)).

The jurisdiction of the Eleventh Circuit Court of Appeals with respect to the Authority's prior Order, i.e., 46 FLRA 1048, is exclusive, and, indeed, the Authority's order became, upon the grant of enforcement, the Court's Order. Whether, notwith-standing that it did not unconditionally restore Ms. Bradley to membership, the Union has complied with the Order, as the Union asserts it has, must be determined by the Court. In any event, refusal to comply with an Authority Order is not an unfair labor practice under § 16 of the Statute and the remedy is through recourse to the Court for contempt. Accordingly, the allegations of Paragraph 12 of the Complaint and the related allegations of Paragraphs 14 and 15 of the Complaint relating thereto are hereby dismissed.

B. Enforcement of discipline, including expulsion from membership, in accordance with a union's constitution and bylaws is not an unfair labor practice.

Although § 16(c) of the Statute first provides that,

> ". . . it shall be an unfair labor practice for an exclusive representative to deny membership to any employee . . . except for failure -
>
> (1) to meet reasonable occupational standards uniformly required for admission, or
>
> (2) to tender dues uniformly required . . . ."

subsection (c) then provides,

> "This subsection does not preclude any labor organi-zation from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter." (5 U.S.C. § 7116 (c)).

In American Federation of Government Employees, Local 2000, AFL-CIO, 8 FLRA 718 (1982) [Wilder M. Mixon] (hereinafter, referred to as "Mixon"), where the union expelled a member, I held that the concluding sentence of § 16(c) of the Statute, as does the proviso to Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158 (B)(1)(A), assures a union freedom of self regulation where internal affairs are concerned[7]; that, because the discipline, expulsion from the union, concerned wholly internal affairs of the union, the discipline was not cognizable under the unfair labor practice provisions of the Statute. The Authority adopted my conclusions and stated, in part, as follows:

> "In agreement with the Judge's conclusions, the Authority finds that the allegation in the complaint may not be litigated under section 7116 of the Statute. . . ." (8 FLRA at 718).

The substantially similar proviso of Section 8(b)(1)(A) of the NLRA and its construction and interpretation were reviewed at pages 728-735.

National Association of Government Employees, Local R5-66, 17 FLRA 796 (1985) [James A. Confer, Jr.] (hereinafter referred to as "Confer"), again involved expulsion of a member, this time, however, because he filed, or caused other employees to file, unfair labor practice charges against the union. I held that expulsion of Mr. Confer for engaging in such protected activity violated § 16(b)(1) of the Statute, and the Authority adopted my findings, conclusions and recommended Order except that it found it unnecessary to pass upon the allegation that the expulsion also violated § 16(b)(8) of the Statute (id. at 796, n.1), and stated, in part that,

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But such freedom of self regulation does not extend to, or encompass, the imposition of penalties for utilizing or participating in the Authority's processes, id. at 728; National Treasury Employees Union, Chapter 53, 6 FLRA 218 (1981); National Association of Government Employees, Local R5-66, 17 FLRA 796 (1985) [James A. Confer, Jr.].

> ". . . the Authority adopts the Judge's conclusion that the Respondent Union violated section 7116(b)(1) . . . by expelling James Confer, a Union member, because he filed or caused other employees to file unfair labor practice charges . . . against the . . . Union [footnote omitted]. The record supports the Judge's finding that Confer was removed from Union membership for engaging in such protected activity . . . ." (id. at 796).

For the purpose of this case, the power of unions to expel from membership was again reviewed at length at pages 805-813 and need not be repeated here. I concluded as follows:

> "The long history of the proviso to Section 8(b)(1)(A) of the NLRA; the conscious inclusion of substantially like language in Section 19(c) of Executive Order 11491; the interpretation and application of the concluding sentence of 19(c) by the Assistant Secretary in a manner wholly consistent with the proviso of 8(b)(1)(A) of the NLRA; and the clear Congressional intent that the concluding sentence of § 16(c) of the Statute reserved to labor organizations their long recognized right to enforce discipline in accordance with procedures under their constitution or bylaws "to the extent consistent with the provisions of this chapter," which, inter alia, includes the provisions of § 20 of the Statute, "Standards of conduct for labor organizations," leaves no doubt that a labor organization may impose discipline, including expulsion, for reasons other than the failure to tender dues, when internal affairs of the union plainly are involved." (id. at 813).

Paragraph 13 of the Complaint alleges that

> "13. On August 23, 1993, the Respondent, by Moore, notified Bradley that the Respondent was not going to allow Bradley to become a member of Respondent for at least five (5) years." (G.C. Exh. 1(l), Par. 13).

Paragraph 14 of the Complaint asserts that Bradley was denied membership in violation of § 16(c) of the Statute which violated § 16(b)(8) of the Statute; and Paragraph 15 of the Complaint asserts that the Union interfered with, restrained and coerced Bradley in violation of § 16(b)(1) of the Statute.

There is no dispute that Ms. Bradley was found guilty of two charges brought against her, namely, (a) receipt of a total of $4,900.93 to which she was not entitled; and (b) a conflict of interest by her involvement with Federal Employee Advisors; that she must repay the money owed; and that she was suspended from membership until the money was paid and for five years from the date of payment in full (Joint Stipulation, Par. 27; Jt. Exhs. 25, 26, 27). Nor is there any dispute that the discipline was imposed in accordance with procedures under the Union's constitution and bylaws and concerned wholly internal affairs of the Union.

General Counsel challenges the validity of the proceedings against Ms. Bradley on the ground that Article XVIII, Section 1 of the AFGE National Constitution (Jt. Exh. 21)[8] ". . . vests jurisdiction in a Local to convene a trial only if the person affected is a member. [footnote omitted] It is undisputed that during this time, Bradley was not a member of Respondent [footnote omitted] . . . ." (General Counsel's Brief, pp. 4-5). General Counsel concedes, as the Union asserts, ". . . the NLRB and the courts have uniformly held that a union has the authority to discipline former members" (General Counsel's Brief, p. 9; Union's Brief, p. 25), but asserts, "Those cases [Pattern Maker's Ass'n. of LA, 199 NLRB No. 14, 199 NLRB 96 (1972); NLRB v. District Lodge 99, IAM, 489 F.2d 769 (1st Cir. 1974); Local 1255 IAM v. NLRB, 456 F.2d 1214 (5th Cir. 1972); NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967)] are not applicable. For one thing, they both involve strike-breaking activity not even cognizable under the Statute. More important . . . Section 7116(c) . . . does not grant the Union such broad control over membership. There, only two specific reasons, enumerated in § 7116 (c) . . . that can justify denying some union membership in the federal sector [footnote omitted]." (General Counsel's Brief, pp. 9-10). General Counsel's assertions on each ground are utterly lacking in merit.

Taking them in reverse order, for reasons set forth above, the concluding sentence of § 16(c) of the Statute does reserve to labor organizations the right to enforce discipline in accordance with procedures under their constitution or bylaws, including expulsion and/or suspension from membership. Moreover, the concluding

8 "SECTION 1. Except as provided for under the powers of the National President in Article IX, Section 5, the local in which an individual member holds membership is the court of original jurisdictional for trial of charges against the locals' members and officers . . . ."

sentence of § 16(c) of the Statute is substantially similar to the proviso to Section 8(b)(1)(A) of the NLRA.

Second, even if only strike-breaking were involved, and other reasons for discipline have been involved, see, for example, Scofield v. NLRB, 394 U.S. 423 (1969), the relevant issue was not the conduct that gave rise to the discipline but, rather, whether the conduct in question occurred while a member. Meat Cutters Union Local 81, United Food and Commercial Workers, International Union (MacDonald Meat Co.), 284 NLRB 1084 (1987). Indeed, the Assistant Secretary of Labor for Labor-Management Relations, in Local 1858, American Federation of Government Employees (Redstone Arsenal, Alabama), A/SLMR No. 275, 3 A/SLMR 274, 277 (1973), a case under Executive Order 11491 and which did not involve strike-breaking, stated, in part, as follows:

> ". . . Under Section 19(c) of the Order,[6/] a labor organization has the right to enforce discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of the Order. Where an individual is a member of the labor organization at the time of the improper conduct, the labor organization may enforce discipline against the individual member irrespective of whether he subsequently has terminated his membership. Thus, in my view, the termination of membership in a labor organization does not extinguish a labor organization's right to enforce discipline against a former member for improper conduct prior to the termination of membership. . . ." (3 A/SLMR at 276-277).

6/ Section 19(c) provides, "A labor organiza-tion which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required to admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining member-ship. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order."

See, also, American Federation of Government Employees, Local 1650, Beeville, Texas (Naval Air Station, Chase Field, Beeville, Texas), A/SLMR No. 294, 3 A/SLMR 416, 418, n.2 (1973).

Moreover, the issue has arisen under the Statute. Thus, in American Federation of Government Employees, Local 945, AFL-CIO (Veterans Administration Medical Center, Tucson, Arizona) [Linda S. Moore], Case No. 8-CO-20006-2, 30 Adm. Law Judge Dec. Rep., Sept. 2, 1983, Judge Dowd stated, in part, as follows:

> ". . . Moore could not deprive the Union from jurisdiction to institute a disciplinary proceeding simply because she chose to resign voluntarily. In this regard, I am constrained to observe that the subject of the disciplinary proceeding was Moore's conduct during the period in which she actually was a member and officer. . . ." (slip opinion at p. 13).

Accordingly, I find that the Union had jurisdiction to institute disciplinary proceedings against Ms. Bradley; that the proceedings against her involved wholly internal Union affairs concerning her conduct while an officer and member of the Union. Therefore, such proceedings were lawful under the concluding sentence of § 16(c) of the Statute and the notice to Ms. Bradley on August 23, 1993, that she was suspended from membership until the money found owed the

Union was paid and for five years from the date of payment did not violate § 16(b)(1) or (8) of the Statute.[9]

Having found that whether the Union complied with the Order of the Authority in a prior case is not cognizable as an unfair labor practice under § 16 of the Statute as the remedy for non-compliance with an Authority Order (and now the Order of the Court) is through contempt proceedings; and that the Union's disciplinary action against Ms. Bradley for alleged wrongdoing while she was an officer and member did not violate §§ 16(b)(1) or (8) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. AT-CO-31253 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

9
Alternative, because Ms. Bradley retired from Warner Robins Air Logistics Center on August 26, 1994 (Joint Stipulation, Par. 2), I would dismiss this portion of the Complaint because Ms. Bradley is no longer an "employee" as defined in § 3(2) of the Statute. § 16 (b) makes it an unfair labor practice for a labor organization -

> "(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . ." (5 U.S.C. § 7116(b)(1)) (Emphasis supplied)

In like manner, § 16(c) of the Statute provides in pertinent part that,

> "(c) 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. . . ." (5 U.S.C. § 7116(c)) (Emphasis supplied).

Because it would be inappropriate to issue a remedial order in such a situation, American Federation of Government Employees, Local 1650, Beeville, Texas, A/SLMR No. 294, 3 A/SLMR 416, 418 (1973), it would not effectuate the purposes of the Statute to proceed further where the Complaint alleges a violation of § 16(b) and (c) as to a person who is no longer an employee within the meaning of the Statute and where the termination of the "employee" status is wholly unrelated to the alleged unfair labor practice.

Issued: October 18, 1995
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CO-31253, were sent to the following parties in the manner indicated:

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Dated: October 18, 1995
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