

U.S. DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, JAMAICA PLAIN, MASSACHUSETTS Respondent	
and FRATERNAL ORDER OF POLICE Charging Party	Case No. BN-CA-30274

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 **JANUARY 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: December 6, 1995
Washington, DC

MEMORANDUM

DATE: December 6, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS
AFFAIRS, MEDICAL CENTER,
JAMAICA PLAIN, MASSACHUSETTS

Respondent

and

Case No. BN-

CA-30274

FRATERNAL ORDER OF POLICE

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

U.S. DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, JAMAICA PLAIN, MASSACHUSETTS Respondent	
and FRATERNAL ORDER OF POLICE Charging Party	Case No. BN-CA-30274

Alan L. Rosenman, Esquire
For the Respondent

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

Mr. Michael C. Giannetti
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION ON REMAND

My initial decision in this matter issued on July 14, 1994, and the Authority, on July 24, 1995, issued its decision and order Remanding Case, 50 FLRA No. 81, 50 FLRA 583, in which it stated, part, as follows:

" . . . Giannetti's letter to Spirio would constitute protected activity if Giannetti wrote it to assist a labor organization within the meaning of section 7102 of the Statute, and discipline taken against Giannetti for writing the letter would violate section 7116(a)(1) and (2) of the Statute. It is undisputed that Giannetti's letter was written on behalf of the Fraternal Order of Police, Greater Boston Lodge, to an official of the Respondent, an executive agency within the meaning of

section 7102. Therefore, we find that Giannetti was assisting the Fraternal Order of Police, Greater Boston Lodge when he sent the letter to Spirio. Whether the Fraternal Order of Police, Greater Boston Lodge, meets the definition of labor organization in section 7103(a) therefore becomes critical to determining if a violation of the Statute occurred [footnote omitted].

. . . .

“. . . we remand the case to the Judge for the purpose of reopening the record and according the parties the right to submit evidence . . . concerning whether the Fraternal Order of Police, Greater Boston Lodge, meets the definition of labor organization set forth in section 7103(a)(4) of the Statute. The Judge should make a determination on this question and issue a recommended decision and order resolving the complaint in accordance with his determination and our conclusions herein.

. . . .” (50 FLRA at 588-589).

Pursuant to the Order of the Authority, by Order dated July 25, 1995, this case was set for hearing on remand on September 6, 1995, pursuant to which a hearing was duly held on September 6, 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 General Counsel exercised. At the conclusion of the hearing, October 6, 1995, was fixed as the date for mailing post-hearing briefs and General Counsel and Respondent each timely mailed a Memorandum, or Brief, received on, or before, October 11, 1995, which have been carefully considered. On the basis on the entire record, I make the following findings and conclusions:

Findings

1. The Fraternal Order of Police, Greater Boston Lodge #1F (hereinafter, “FOP, Boston Lodge”) was chartered in July, 1989, by the national Fraternal Order of Police (G.C. Exh. 4-R; Tr. 9, 24). The Fraternal Order of Police (hereinafter, “FOP”) was, itself, organized at Pittsburgh, Pennsylvania on May 14, 1915 (G.C. Exh. 4-R).
2. Members of FOP, Boston Lodge pay dues monthly (G.C. Exhs. 1-R, 2-R); FOP, Boston Lodge pays a per capita tax to the Grand Lodge, FOP (G.C. Exh. 6-R), and FOP provides a number of services and benefits to members (G.C. Exh. 7-R).

3. FOP, Boston Lodge's Application for Membership represents that it, ". . . represents individual members from over 30 city, state, county, university and federal agencies, all positions and ranks. The Greater Boston Lodge covers the Metro Boston area and is the largest in Massachusetts." (G.C. Exh. 5-R)

As of August 29, 1995, FOP, Boston Lodge reported a total of 208 members (G.C. Exh. 3-R)¹ including: 25 employed by the Department of Veterans Affairs; two employed by the U.S. Marshal and one by the U.S. Marshal Service; two by the United States Department of State; one by United States Customs Service; three by "Postal Police"; two by General Services Administration; four by Federal Protective Service; and five by "DOD Police" (G.C. Exh. 3-R). Thus, while 45 of its members are employed by entities of Executive agencies of the Federal Government, the overwhelming bulk of FOP, Boston Lodge's member are not, i.e., most are employed as state, city or university police.

4. FOP, Boston Lodge is not the exclusive representative for employees of any federal agency, including, specifically employees of the Department of Veterans Affairs (Tr. 39, 41); however, Mr. Giannetti, who has been president of FOP, Boston Lodge since its inception (Tr. 9), stated,

"A We receive complaints from our membership, whatever agency it may, City, State, County, University or Federal; and what we do is, we forward those complaints to the proper authority

. . . .

"Q Have you had occasion prior to that letter to Chief Spirio, to make the complaints of your members at the V. A. Jamaica Plains know [sic] to any other Chiefs?

"A No.

"Q You didn't write letters to other Chiefs?

"A The V. A. Chiefs? No.

"Q V. A. Police?

"A V. A. Police, yes.

"Q What sort of letters were those?

¹

Mr. Giannetti testified that in 1992 FOP, Boston Lodge had "A little over 200" members (Tr. 32).

"A Those were more outlining issues that the V. A. Police at Jamaica Plain brought up to my attention that they would like their police association to address, and I sent him several letters.

"Q Were they, broadly speaking, related to working conditions?

"A Yes.

"Q What sort of complaints?

"A The issues that were other complaints from the other members were favoritism and assignments and so forth." (Tr. 25-26).

Mr. Giannetti denied he sought to bargain (Tr. 26) and asserts that FOP, Boston Lodge only "lobbies" (Tr. 25, 31); but conceded that FOP, Boston Lodge filed grievance, i.e., complaints about working conditions, with the V.A. Thus, the record further shows:

"Q . . . Are you the exclusive representative for any employees in the V. A.?

"A No.

"Q Do you represent any grievances to agencies, and by 'grievance' I mean under the statute, any complaint about working conditions?

"A We have filed complaints in the past, and do now.

. . .

"Q . . . What kind of issues do your members raise to you?

"A Safety issues mostly, and also benefit issues.

"Q Do you ever communicate those issues and complaints to agency officials?

"A We have." (Tr. 41-42).

5. FOP, Lodge #1, Rhode Island was certified by the Authority as exclusive representative of, "All Hospital Police employed by and assigned to Providence, Rhode Island Veterans Administration Hospital," on January 30, 1975 (G.C. Exh. 9-R; Tr. 22-23).

6. FOP is the exclusive representative of the U.S. Capitol Police; U.S. Park Police; U.S. Customs; and U.S. Postal Police (Tr. 30).

7. The Federal Law Enforcement Coalition of FOP consists of representatives from Federal agencies including Mr. Giannetti (Tr. 30), which communicates with the local Lodges through their representatives (Tr. 31). The Coalition currently is collecting signatures from V.A. Police Officers for a petition for FOP to replace the Union (AFGE) as the national representative of V.A. Police Officers (Tr. 29).

8. Mr. Giannetti at the hearing on remand, September 6, 1995, stated, "I just recently became a steward once again" (Tr. 9) of the Union, AFGE, Local 2143, the exclusive representative (Tr. 8).

Conclusions

§ 2 of the Statute provides as follows:

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." (5 U.S.C. § 7102).

§ 3 of the Statute provides, in pertinent part, as follows:

(a) For the purpose of this chapter--

. . .

"(2) 'employee' means an individual--

"(A) employed in an agency . . .

"(3) 'agency' means an Executive agency . . .

"(4) 'labor organization' means an organization composed in

whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

. . .

(C) an organization sponsored by an agency
(Emphasis supplied) (5 U.S.C. § 7103(a) (2), (3) and (4)).

§14 of the Statute, "Representation rights and duties," provides, in part, as follows:

"(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents . . .

"(2) An exclusive representative . . . shall be given the opportunity to be represented at--

(A) any formal discussion . . .

(B) any examination of an employee in the unit . . .

. . .

(5) The rights of an exclusive representative under the provisions of this subsection shall not . . . preclude an employee from--

"(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

"(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter." (5 U.S.C. § 7114(a) (1), (2) and (5) (Emphasis supplied)).

I. FOP, Boston Lodge is a labor organization as defined by § 3(a)(4) of the Statute.

I fully agreed with General Counsel that,

“. . . the record clearly establishes that the Greater Boston Lodge meets this definition.” (General Counsel’s memorandum, p.2), i.e., the definition of § 3(a)(4) of the Statute.

FOP, Boston Lodge was chartered by FOP (Tr. 9); it operates under a Constitution and By-Laws (G.C. Exh. 4-R; Tr. 24); its membership includes federal employees, inter alia, 25 employees of Respondent (G.C. Exh. 3-R); they pay dues (G.C. Exh. 1-R, 2-R), and FOP, Boston Lodge pays per capita taxes to FOP (G.C. Exh. 6-R); employees participate -- indeed, Mr. Giannetti, an employee of Respondent, has been president of FOP, Boston Lodge since its inception in 1989. Although it is true, as Respondent states, “The Constitution and By-Laws offered by General Counsel (Exhibit #4R) does not contain such enabling language” (Respondent’s Brief on Remand, p. 1), i.e., “that FOP ‘has as a purpose the dealing with an agency concerning grievances and conditions of employment’ as required by the statute” (id.), the record firmly demonstrates that both FOP and FOP, Boston Lodge have as a purpose the dealing with an agency. Neither the Constitution nor the By-Laws of FOP was offered as an exhibit; however, General Counsel Exhibits 7-R and 8-R show that FOP has a Labor Relations Committee; that it assists its local lodges in labor relations, collective bargaining, grievance proceedings and arbitration; it is the exclusive representative of the U.S. Capitol Police, U.S. Park Police, U.S. Customs and U.S. Postal Police (Tr. 30); the Federal Law Enforcement Collation of FOP, consisting of representatives from federal agencies, including Mr. Giannetti, is currently collecting signatures from V.A. Police officers for a petition for FOP to replace the Union as the national representative of V.A. police officers (Tr. 29); its Library of Congress Police Force Labor Committee sought to represent the special police officers of the Library of Congress, Library of Congress, 16 FLRA 429 (1984); and Fraternal Order of Police, Lodge #1, Rhode Island, was certified as the exclusive representative for all hospital police employed by and assigned to Providence Rhode Island Veterans Administration Hospital (G.C. Exh. 9-R). The Constitution and By-Laws of FOP, Boston Lodge states its purposes and objectives in broad, vague, general terms, such as: “to advocate and strive for uniform application of civil service merit system . . . to increase the efficiency of law enforcement profession. . . .” (G.C. Exh. 4-R, Art. 1, sec. 1); but Mr. Giannetti stated that

FOP, Boston Lodge receives complaints from its members and forwards those complaints to the proper authority, whether city, state, county, university or federal (Tr. 25); that it has filed complaints about working conditions with Respondent (Tr. 26, 41, 42); that these issues concerned, inter alia, safety issues, benefit issues, and assignments (Tr. 26, 42).

Accordingly, notwithstanding that FOP, Boston Lodge is not the exclusive representative for employees of any federal agency, it is a labor organization within the meaning of § 3(a)(4) of the Statute.

II. Resolution of the complaint in accordance with the Authority's conclusions.

I am aware that the Authority concluded,

" . . . Giannetti's letter to Spirio would constitute protected activity if Giannetti wrote it to assist a labor organization within the meaning of section 7102 of the Statute, and discipline taken against Giannetti for writing the letter would violate section 7116(a)(1) and (2) of the Statute." (50 FLRA at 588).

For reasons fully set forth hereinafter, I am convinced, with all due deference, that the Authority erred in its conclusion that Mr. Giannetti's letter would constitute protected activity if he wrote it to assist a labor organization and respectfully urge the Authority to reconsider its conclusion.

The Authority further stated,

" . . . It is undisputed that Giannetti's letter was written on behalf of the Fraternal Order of Police, Greater Boston Lodge, to an official of the Respondent, an executive agency within the meaning of section 7102. Therefore, we find that Giannetti was assisting the Fraternal Order of Police, Greater Boston Lodge when he sent the letter to Spirio. . . . (Id.).

In my initial decision, while noting that, ". . . § 2 protects the right of an employee, during non-worktime in non-work areas, to 'assist' a labor organization other than the exclusive representative. Department of Commerce, Bureau of The Census, 26 FLRA 719, 721 (1987); Social Security Administration, 45 FLRA 303, 323 (1992)" (50 FLRA at 596), I focused principally on Mr. Giannetti's right of

"free speech" under § 16(e) of the Statute. The Authority stated, "The Judge's reliance on section 7116(e) is misplaced . . . section 7116(e) does not apply here." (50 FLRA at 588).² Because I found that

2

With all deference, it would appear that the Authority misunderstood or misapplied the holding of Oklahoma City Air Logistics Center (AFLC) Tinker Air Force Base, Oklahoma, 6 FLRA 159 (1981). There, as pertinent, I had held:

" . . . §16(e) addresses two separate and distinct situations. First, the expression of any personal view, argument or opinion, excluding representational elections, which if the expression contains no threat of reprisal or force or promise or [sic] (of) benefit and is not made under coercive conditions, shall not constitute an unfair labor practice. Second, statements especially by agency management, in relation to representational elections which are protected only if such statement (1) publicizes the fact of an election and encourages employees to vote, (2) corrects the record with respect to any false or misleading statement, or (3) informs employees of the Government's policy relating to labor-management relations and representation, and shall not if the expression contains no threat of reprisal or force or promise or [sic] (of) benefit and is not made under coercive conditions constitute an unfair labor practice or constitute grounds for setting aside an election." (6 FLRA at 185).

The Authority stated, with respect to § 16(e), as follows:

"Thus the Judge concluded that the purpose and intent of section 7116(e) is two-fold. First, it is intended to assure neutrality in representation elections. Second, outside of a representational context, section 7116(e) protects the expression of personal views, arguments or opinions by management, employees, or union representatives as long as such expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions. The Authority hereby adopts the Judge's reasoning" (6 FLRA at 161).

In Department of Transportation, Federal Aviation Administration, Oakland Air Route Traffic Control Center, Fremont, California, 14 FLRA 201 (1984), the Authority emphasized that,

Mr. Giannetti's statements lost the protection of § 16(e) because of threats and promises of benefit, statements by, or on behalf of, an "out" Union were not considered in detail, although it was specifically noted that,

"Statements on behalf of a labor organization which interfere with the right of the exclusive representative to act for all employees in the bargaining unit are not protected and would constitute unfair labor practices." (50 FLRA at 600).

A. An employee's right to act for an "out" (rival) Union is limited by § 2 of the Statute.

§ 2 of the Statute specifically provides that,

Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization . . . and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials . . .

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." (5 U.S.C. § 7102).

Of course, § 14 of the Statute, with greater specificity, states,

"(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit . . . An exclusive representative is responsible for representing the interests of all employees in the unit it represents . . .

"(2) An exclusive representative . . . shall be given the opportunity to be represented at--
(A) any formal discussion . . .
(B) any examination of an employee in the unit" (5 U.S.C. § 7114(A) (1), (2)).

Indeed, an employee is precluded from being represented by an attorney or other representative except the exclusive representative, ". . . in the case of grievance or appeal procedures negotiated under this chapter." (5 U.S.C. § 7114 (a) (5)).

Because FOP, Boston Lodge is not the exclusive representative, it has no right to engage in collective bargaining, handling of employee grievances subject to the negotiated grievance procedure, or otherwise to deal with Respondent on behalf of employees represented by the Union.

B. An employee who acts for an "out" (rival) union in making demands on an employer is engaged in unprotected activity.

While each may, ". . . form, join, or assist any labor organization . . ." (5 U.S.C. § 7102), and is given great leeway in distributing information to employees, campaigning and speaking for an "out" union, such rights are not without limitation. For example, under the Statute, an agency may not furnish routine services or facilities to an out union until it has achieved "equivalent status" and then only to the extent that such customary and routine services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status. § 16(a)(3). An agency which permits an "out" union to use its facilities (there a conference room) before it had achieved "equivalent status" violates § 16(a)(3), Gallup Indian Medical Center, Gallup, New Mexico, 44 FLRA 217 (1992); the showing of interest was invalidated, U.S. Department of Health and Human Services, Public Health Service Indian Heal Service, Gallup Indian Medical Center, Gallup, New Mexico, 46 FLRA 1421, 1431 (1993); denial of non-employee union access where the union has not achieved equivalent status does not violate § 16(a)(1), Social Security Administration, 45 FLRA 303 (1992); U.S. Department of the Air Force, Barksdale Air Force Base, Bossier City, Louisiana, 45 FLRA 659 (1992); employee's right to distribute materials on behalf on an "out" union limited to non-worktime in non-work areas, Department of Commerce, Bureau of The Census, 26 FLRA 719, 721 (1987); but placing the logo and posting of other material of the "out" union on the employee's locker did not give rise to an "equivalent status" question where the employee was not acting as a labor organization and was not seeking to organize to rival the incumbent and agency had allowed employees in the past to post notices in the teacher's lounge, Department of Defense Dependents Schools, Mediterranean Region, Naples American High School (Naples, Italy), 21 FLRA 849, 850, 862 (1986).

I have grave reservations that an "out" union can treat with an agency in any manner without interfering with the right of the exclusive representative, as FOP, Boston Lodge readily concedes it did by filing grievances on behalf of employees of Respondent concerning such conditions of employment as favoritism (Tr. 26), safety issues, benefit

issues (Tr. 41-42), as the Authority seems to assume in its footnote 3 at p. 588 of its decision; but the fact that union literature may be distributed on behalf of a rival ("out") union in the employee cafeteria during non-work time within the protection of § 2 of the Statute, is a far cry from attempting to deal with the agency concerning conditions of employment. Nevertheless, even if it were assumed that an "out" (rival) union can submit grievances to an agency, and I specifically do not make any such decision, plainly, an employee who makes demands on behalf of an "out" (rival) union and accompanies those demands with threatened action by the "out" (rival) union, as Mr. Giannetti did in his letter of October 11, 1992 (G.C. Exh. 3), is engaged in unprotected activity.

Respondent can not lawfully engage in collective bargaining with any union other than the exclusive representative, AFGE. FOP, Boston Lodge's presentation to Respondent of demands concerning conditions of employment was an attempt to engage in collective bargaining and Mr. Giannetti's calling his activity "lobbying" is a meaningless ploy which can not, and does not, alter the plain and obvious nature of his activity. Moreover, FOP, Boston Lodge's demands were accompanied by threats of action if Respondent refused to agree to its demands.

To be sure, Respondent may ignore a demand by an "out" (rival) union -- indeed, it must do so or it would violate §§ 16(a)(3), (2) and (1), of the Statute; but here, FOP, Boston Lodge's demands were accompanied by threats and the threatened action was unprotected. National Labor Relations Board v. Local Union No, 1229, International Brotherhood of Electrical Workers, 346 U.S. 464 (1953) (sponsorship or distribution of handbills which made a sharp, public, disparaging attack on quality of employer's product and its business policies not protected; discharges were for cause; and reinstatement properly denied) (here FOP, Boston Lodge, inter alia, threatened to submit articles to the Federal Times in a personal attack on Acting Chief Spirio). Moreover, because AFGE is the exclusive representative, Mr. Giannetti had no right under § 2 of the Statute to present the views of FOP, Boston Lodge to Respondent or to attempt to engage in collective bargaining with respect to conditions of employment because FOP, Boston Lodge was not, and is not, the representa-tive chosen under the Statute. The Authority has already found that Mr. Giannetti was assisting, i.e., acting for, FOP, Boston Lodge when he sent the letter of October 11, 1992, to Respondent; and FOP, Boston Lodge thereby interfered with AFGE's right under the Statute and, further, sought to suborn Respondent's violation of the Statute by dealing with

it. Because Mr. Giannetti was not engaged in protected activity, Respondent's imposition of discipline did not violate § 16(a)(1) or (2) of the Statute.

It is true, of course, that when an employee exercises a protected right, whether under the Statute or under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, any discipline imposed for the exercise of that right presumptively is unlawful. Thus, discharge of any employee because he threatened to file a grievance violated § 8(a)(1) of the National Labor Relations Act, Keokuk Gas Service Co. v. NLRB, 580 F.2d 328 (8th Cir. 1978); U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma, 34 FLRA 385 (1990) (arbitrator's award vacated and grievance sustained because employee was disciplined for attempting to serve copies of unfair labor practice charges on named supervisors after the employee's work hours). Even when a protected right is exercised, whether under §§ 7 or 8 (c) of the NLRA or under §§ 2 or 16(e) of the Statute, the protection is not absolute. Gold Nugget, Inc., 215 NLRB 50 (1974); U.S. Department of the Air Force, Tinker Air Force Base, Oklahoma, 35 FLRA 1146 (1990) (arbitrator's award set aside because employee "clearly exceeded the bounds of protected activity." id. at 1153). The Authority therein stated, ". . . the proper question is whether the actions for which the grievant was disciplined constituted protected activity or exceeded the boundaries of protected activity under the Statute." (id. at 1152) (see, to same effect: U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma, 34 FLRA 385 at 388).

The critical distinction in this case is that FOP, Boston Lodge is not the exclusive representative and Mr. Giannetti was not exercising a protected right in assisting FOP, Boston Lodge. Judge Chaitovitz, whose decision was adopted by the Authority, Veterans Administration Regional Office, Denver, Colorado, 2 FLRA 855 (1980), in a case involving the right of an employee to act for a union, succinctly stated the test to be applied as follows:

" . . . employee-union officials, when acting in their union representative capacity, must be free to engage in any activity the union is privileged to engage in" (id. at 863) (Emphasis supplied).

FOP, Boston Lodge was not privileged to submit demands to Respondent concerning conditions of employment because it was not the representative chosen by the employees under the Statute and, because any such activity by FOP, Boston Lodge

was in contravention of the Statute. Mr. Giannetti's action on behalf of FOP, Boston Lodge, and in particular his "assisting" FOP, Boston Lodge by threats if Respondent refused to agree, was not protected by § 2 of the Statute and Respondent's imposition of discipline was not in violation of the Statute.

Accordingly, having concluded that Respondent did not violate §§ 16(a)(1) or (2) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. BN-CA-30274 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 6, 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. BN-CA-30274, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Alan L. Rosenman, Esquire
Assistant District Counsel
U.S. Department of Veterans Affairs
JFK Federal Building, Room 1675
Boston, MA 02203

Linda Bauer, Esquire
Richard D. Zaiger, Esquire
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

Michael C. Giannetti, President
Fraternal Order of Police,
Greater Boston Lodge
P.O. Box 6212
Boston, MA 02209

REGULAR MAIL:

Chief, Employee Relations
U.S. Department Veterans Affairs
150 South Huntington Avenue
Jamaica Plain, MA 02130

Dated: December 6, 1995
Washington, DC