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

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 pursuant to 5 C.F.R. § 2430.12(b).

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

Any such exceptions must be filed on or before **APRIL 20, 1998**, 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 17, 1998
Washington, DC

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

MEMORANDUM DATE: March 17, 1998

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 2430.12(b) of the Rules and Regulations, 5 C.F.R. § 2430.12(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 Respondent's application for attorney fees, and the record in this case which was transferred to this Office on January 12, 1998.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

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
ON APPLICATION FOR ATTORNEY FEES

Statement of the Case

This is a proceeding for attorney fees by Respondent under the Equal Access to Justice Act, 5 U.S.C. § 504 (hereinafter referred to as, "EAJA") and the Rules and Regulations of the Federal Labor Relations Authority thereunder, 5 C.F.R., Part 2430 (5 C.F.R. § 2430.1, et seq.).

The Authority issued its decision in this case on September 10, 1997, 53 FLRA 364 (1997), in which it held, in part, as follows:

> "We agree with the Judge's conclusion that the failure to comply with an Authority remedial order is not itself an unfair labor practice. Issues of noncompliance with an Authority remedial order that has been enforced in a court of appeals are properly dealt with in contempt proceedings before the court. . . .
>
> "We also agree with the Judge's recommended holding that a union's right to enforce discipline

under the second sentence of section 7116(c) of the Statute extends to discipline, such as the suspension and restitution here at issue, of a nonmember for conduct occurring while the individual was a member. . . .” (53 FLRA at 369). Thereafter, on September 17, 1997, Respondent mailed its Application For Attorney Fees; On October 21, 1997, General Counsel mailed his Answer To Respondent’s Application For Attorney Fees; and on January 9, 1998, the Authority issued an Order Referring Case to the Office of Administrative Law Judges for further processing pursuant to 5 C.F.R. § 2430.7 (a); and the application has, pursuant to § 2430.7(a) of the Rules and Regulations, been referred to the undersigned as the Administrative Law Judge who heard the proceeding upon which the application is based.

The American Federation of Government Employees, AFL-CIO, filed an undated petition for amendment of the Authority’s Rules and Regulations, pursuant to §§ 2429.28 and 2430.5, which was postmarked September 17, 1997, and received by the Authority on September 23, 1997, and which has been docketed by the Authority as O-MC-18. This petition seeks to increase the maximum rate for attorney fees under the EAJA, which rate, pursuant to § 2430.4(a) of the Rules and Regulations, may not exceed $75.00 per hour, whereas, § 504(b)(1) of the EAJA, 5 U.S.C. § 504(b)(1), was amended in 1996 to permit fees not in excess of $125.00. Further, the petition seeks not only to have the maximum rate for attorney fees apply to future cases, but also to its application herein.

1. Applicable Law and Regulations

§ 504(a)(1) of the EAJA provides, in relevant part, as follows:

> “(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances made an award unjust. . . .” 5 U.S.C. § 504(a)(1) (Emphasis supplied).

The Authority’s implementing Rules and Regulations provide, in part, as follows:

§ 2430.1 Purpose.

". . . An eligible party may receive an award when it prevails over the General Counsel, unless the General Counsel's position in the proceeding was substantially justified, or special circumstances make an award unjust. . . ." (5 C.F.R. § 2430.1) (Emphasis supplied).

"§ 2430.2 Proceedings affected; eligibility for

award.

"(a) The provisions of this part apply to unfair labor practice proceedings pending on complaint against a labor organization at any time since October 1, 1981.

"(b) A respondent in an unfair labor proceeding which has prevailed in the proceeding, or in a significant and discrete portion of the proceeding, and who otherwise meets the eligibility requirements of this section, is eligible to apply for an award of attorneys fees and other expenses allowable under the provisions of § 2430.4 of these rules.

"(1) Applicants eligible to receive an award in proceedings conducted by the Authority are any partnership, corporation, association, or public or private organization with a net worth of not more than $5 million ($7 million in cases involving adversary adjudications pending on or commenced on or after August 5, 1985) and not more than 500 employees. . . ." (5 C.F.R. § 2430.2)

"§ 2430.3 Standards for awards.

"(a) An eligible applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete portion of the proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that its position in initiating the proceeding was reasonable in law and fact. . . ." (5 C.F.R. § 2430.3(a)) (Emphasis supplied).

"§ 2430.4 Allowable fees and expenses.

"(a) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. . . ." (5 C.F.R. § 2430.4).

Plainly, Respondent was the prevailing party in the adversary unfair labor practice proceeding for which attorney fees are sought and the application and supporting documents establish, which General Counsel does not dispute,

that applicant meets all eligibility requirements of the EAJA and the Authority's implementing Rules and Regulations. There is

no contention that Respondent unduly or unreasonably

protracted the proceeding. Nor does General Counsel challenge the amount of attorney fees sought. General Counsel's position is that its position in initiating and litigating the proceeding was reasonable. In American Federation of Government Employees, Local 1857, AFL-CIO (Sacramento Air Logistics Center), North Highland, California, 48 FLRA 900, (1993)(hereinafter, "AFGE, Local 1857"), the Authority stated,

> "In order to avoid the imposition of attorney's fees under the EAJA, the General Counsel has the burden of proving that his position was 'substan-tially justified.' 5 U.S.C. § 504(a)(1). The U.S. Supreme Court has stated that 'substantially justified' means having a 'reasonable basis both in law and fact[,]' or 'justified to a degree that could satisfy a reasonable person.' Pierce v. Underwood, 487 U.S. 552, 565 (1988). As there were no facts in dispute, the only question before us is whether the General Counsel propounded a theory that has a reasonable basis in law. In this regard, we note that in American Federation of Government Employees, Local 495, AFL-CIO (Veterans Adminis-tration Medical Center, Tucson, Arizona), 22 FLRA 966 (1986), the Authority stated that the EAJA was not intended to deter the General Counsel from advancing 'novel or untested legal theories and cases . . . .' Id. at 977." (48 FLRA at 901).

The "position" of the government includes the action on which the litigation is based, as well as the positions the government takes during the litigation. *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330, 1331 (9th Cir. 1992). The prevailing party may recover a partial award if the agency's position was not substantially justified in only one portion of the proceedings. *Europlast Ltd. v. NLRB*, 33 F.3d 16, 17 (D.C. Cir. 1994) (citing *McDonald v. Washington*, 15 F.3d 1126, 1129-30 (D.C. Cir. 1994)); *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F. 2d 1143 (D.C. Cir. 1988).

2. General Counsel's positions were not justified

The facts in this case were stipulated by the parties. Therefore, as in American Federation of Government Employees, Local 1857, AFL-CIO, supra, "As there were no facts in dispute, the only question before us is whether the General Counsel proposed a theory that has a reasonable basis in law." (48 FLRA at 901).

(a) Alleged non-compliance with prior Authority Order.

Paragraph 12 of the Amended Complaint[1] alleged:

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

Paragraph 14 of the Amended Complaint alleged that by the acts and conduct in Paragraph 12, Respondent violated §§ 16 (b)(8) and 16(c) of the Statute, 5 U.S.C. §§ 7116(b)(8) and (c); and Paragraph 15 of the Amended Complaint, in like manner, alleged violation of § 16(b)(1) of the Statute, 5 U.S.C. § 7116(b)(1).

No doubt recognizing that neither the failure to comply with an Authority remedial order nor non-compliance with an Authority remedial order enforced in a Court of Appeals constituted a reasonable basis for its litigation of this proceeding[2], General Counsel asserts that his position really was that, ". . . discipline by expulsion while the Union was under a remedial order to re-admit the employee to membership. . . ." was the violation litigated. (General Counsel's Answer To Respondent's Application For Attorney Fees (hereinafter referred to as, "G.C.'s Answer")), p. 8. This assertion, at best, is a negative pregnant. Indeed, the transparency of the assertion is shown by the quite specific language of Paragraph 12 of the Complaint, ". . . . Respondent did not comply with the Authority's order. . . ." (G.C. Exh. 1(l)); and by General Counsel's

[1] The original Complaint issued on December 15, 1993 (G.C. Exh. 1(c)). Thereafter, 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. FLRA, 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)). More than a year later, the Amended Complaint herein was issued on February 1, 1995 (G.C. Exh. 1 (l)).

[2] For reasons stated by the Authority herein, 53 FLRA at 369; by the Supreme Court, Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 48-49 (1938); Amalgamated Utility Workers v. Consolidated Edison Company, 309 U.S. 261, 265-266 (1940); and, by virtue of § 23(c) of the Statute, 5 U.S.C. § 7123(c).

further statement, by way of example, ". . . based on the plain language of the remedial order . . . and undisputed fact that the Union had not unconditionally restored her membership prior to taking

discipline. . . .” (G.C.’s Answer p. 10). General Counsel,

notwithstanding his effort to obscure his purpose, was seeking to enforce the prior order of the Authority by asserting that discipline pursuant to § 16(c) of the Statute, 5 U.S.C. § 7116(c), was unlawful because Respondent had not complied with the prior order. As the Authority stated, the failure to comply with an Authority remedial order is not itself an unfair labor practice and it most assuredly does not become an unfair labor practice because Respondent takes action authorized by the Statute, i.e. ". . . enforcing discipline in accordance with procedures under its constitution or bylaws. . . ." (5 U.S.C. § 7116 (c)). The Order of the Authority, in 46 FLRA 1048, was enforced by the Court of Appeals for the Eleventh Circuit and if it were not complied with the Authority could have asked the Court to punish the violation of its decree as a contempt. The jurisdiction conferred upon the court is exclusive. 5 U.S.C. § 7123(c).

(b) Enforcement of discipline in accordance with a union's constitution and bylaws is not an unfair labor practice.

Paragraph 13 of the Amended Complaint alleged that,

> "13. On August 23, 1993, the Respondent . . . 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 Amended Complaint asserted that Bradley was denied membership in violation of § 16(c) of the Statute, 5 U.S.C. § 7116(c), which violated § 16(b)(8) of the Statute, 5 U.S.C. § 7116(b)(8); and Paragraph 15 of the Amended Complaint asserted that Respondent interfered with, restrained and coerced Bradley in violation of § 16(b)(1) of the Statute, 5 U.S.C. § 7116(b)(1).

The parties stipulated that Respondent, in accordance with its constitution and bylaws, brought disciplinary charges against Ms. Bradley for conduct alleged to have occurred while she was an officer and member; that Respondent conducted its disciplinary proceedings in strict compliance with its constitution and bylaws; that, as the result of the disciplinary proceedings, the membership decided that Ms. Bradley be suspended from membership for a period of five years after she restored to the Union funds she had allegedly misappropriated; and Ms. Bradley was notified of the decision, and of her appeal rights, which Ms. Bradley did not exercise, by letter dated August 23, 1993.

General Counsel made three assertions: First, that § 16(c), ". . . does not grant the Union such broad control

over membership. There, only two specific reasons . . . [failure to meet reasonable occupational standards uniformly required for admission; or failure to tender dues] . . . can justify denying . . . union membership in the federal sector." Second, Article XVIII, Section 1 of the AFGE National Constitution, ". . . vests jurisdiction in a Local to convene a trial only if the person affected is a member" and Ms. Bradley was not a member when the disciplinary proceedings were undertaken. Third, disciplinary proceedings against a non-member are impermissible under § 16(c) of the Statute.

Because the law is clear, as decisions of the Assistant Secretary under the substantially like provision of Section 19 of Executive Order 11491, decisions of the Authority, under § 16(c) of the Statute, and decisions of the National Labor Relations Board and of the Courts under the substantially like provision of § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A), e.g., Local 1858, American Federation of Government Employees (Redstone Arsenal, Alabama), A/SLMR No. 275, 3 A/SLMR 274, 277 (1973) (hereinafter, "Redstone Arsenal"); 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 (hereinafter, "VA Med. Center, Tucson"); American Federation of Government Employees, Local 2000, AFL-CIO, 8 FLRA 718 (1982); National Association of Government Employees, Local R5-66, 17 FLRA 796, 805-813 (1985); International Typographical Union, 86 NLRB 951 (1949); Meat Cutters Union, Local 81, United Food and Commercial Workers International Union (McDonald Meat Co.), 284 NLRB 1084 (1987); Scofield v. NLRB, 394 U.S. 423 (1969), show, the concluding sentence of § 16(c) that, "This subsection does not preclude any labor organization from enforcing discipline under its constitution or bylaws to the extent consistent with the provisions of this chapter": (a) specifically authorizes disciplinary action, including suspension from union membership, for reasons other than the failure to meet occupational standards or the failure to tender dues; (b) disciplinary action against a non-member is authorized for conduct occurring while a member; and (c) a local union has jurisdiction to institute proceedings against a non-member for conduct while the person was a member.

General Counsel's principal argument was that the proceedings against Ms. Bradley were invalid because she was not a member when the proceedings were brought. But, the principle long had been established that discipline of a

non-member is permitted for conduct that occurs while a member. Thus, the Assistant Secretary of Labor for Labor-Management Relations, in Redstone Arsenal, supra, stated, in part, as follows:

“. . . Under Section 19(c) of the Order [footnote

> omitted] 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).

In the only previous case under the Statute, Judge Dowd, in VA Med. Center, Tucson, supra, in like manner, held that a union has jurisdiction to institute disciplinary proceedings against a non-member for conduct while a member, stating, in part, that,

> ". . . Moore could not deprive the Union from jurisdiction to institute a disciplinary proceeding simply because she chose to resign voluntarily.
> . . ." (slip opinion at p. 13).

Further, the National Labor Relations Board and the Courts consistently had held that under the substantially like proviso to § 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A), a union can lawfully discipline former members for improper conduct that occurred while he, or she, was a member, e.g., Pattern Makers Ass'n of LA, 199 NLRR 96 (1972); Meat Cutters Union, Local 81, United Food and Commercial Workers International Union (McDonald Meat Co.), 284 NLRB 1087 (1987); NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967); Scofield v. NLRB, 394 U.S. 423 (1969).

Consequently, I rejected General Counsel's assertion and the Authority agreed, stating, in part, that,

> "We also agree . . . that a union's right to enforce discipline under the second sentence of section 7116(c) of the Statute extends to discipline, such as the suspension and restitution here at issue, of a nonmember for conduct occurring while the individual was a member. . . ." (53 FLRA at 369).

General Counsel does not raise this issue in his Answer to Respondent's Application For Attorney Fees as justification for prosecuting this case. Nevertheless, because it constituted a major part of General Counsel's case, I have

considered this phase of his case. Litigation of an issue,

well settled in Executive Order law, in decisions under the Statute and in cases under the substantially like provision of the NLRA, solely on the basis that the Authority, as a body, has not passed on it, means that General Counsel, vis-a-vis liability for attorney fees under the EAJA, acts at his peril. Having failed at all levels, General Counsel's position was not substantially justified within the meaning of the EAJA.

3. Litigation of novel or untested legal theories

The Office of Administrative Law Judges, long before there was an EAJA, has always been well aware of the need for what we have called "elucidating litigation" to flesh out and illuminate provisions and applications of this and other statutes or, as the Authority stated in AFGE, Local 1857, supra, ". . . whether the General Counsel propounded a theory that has a reasonable basis in law. . . .", 48 FLRA at 901, as, ". . . General Counsel must not be deterred from advancing novel or untested legal theories. . . . Indeed, the 'special circumstances' proviso of the EAJA was intended to prevent deterrence.", American Federation of Government Employees, Local 495, AFL-CIO (Veterans Administration Medical Center, Tucson, Arizona) [Linda S. Moore], 22 FLRA 966, 977 (1986) (this was the application for attorney fees in VA Med. Center, Tucson, supra, to which no exceptions were filed).

The fallacy of General Counsel's argument here is that his "theory", that discipline under § 16(c) of the Statute is subject to compliance with a prior Authority Order, has no reasonable basis in law. The decision, not to enforce its order through contempt proceedings, created no right to enforce that order through unfair labor practice procedures. As stated above, the Statute, which in this regard is wholly like the provisions of § 10(e) of the NLRA, 29 U.S.C. § 160 (e), gives the Authority no power whatsoever to enforce its orders; rather, enforcement is placed in the United States Courts of Appeals. § 23, 5 U.S.C. § 7123. Indeed, ". . . Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive. . . ." § 23 (e), 5 U.S.C. § 7123(e). Of course, here, the record was filed with the Court of Appeals for the Eleventh Circuit before the original Complaint issued and more than a year before the Amended Complaint issued, the Court had issued its decision enforcing the Authority's December 31, 1992, Order. Accordingly, the General Counsel, without power to enforce the prior Authority Order and utterly devoid of jurisdiction of the prior order, nevertheless prosecuted the asserted non-compliance with that Order as an unfair labor practice. Whether the Union had, or had not, complied with

the prior Authority Order was not within the province of the Authority to determine because, “. . . the jurisdiction of the court shall be exclusive and

its judgment and decree shall be final. . . .” [except for

review by the Supreme Court]. § 23(c), 5 U.S.C. § 7123(c); Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 270 (1940). The Union should not have been forced into the expense of defending against General Counsel's action which was not substantially justified nor were special circumstances shown that would make an award unjust.

4. Attorney Stuart A. Kirsch's affidavit and attached Statement of Hours show a total of 141 hours expended on behalf of Respondent from September 8, 1993, through September 15, 1997. From the stated, "Nature of Service Rendered", the following hours, by the nature of the activity involved, appear to have involved Case No. 4-CO-10021; are not hours of service in this Case; and, accordingly, should be excluded:

Date	No. of Hours
2-8-94	1.0
3-6-94	.5
3-16-94	.5
4-12-94	.5
4-21-95	.5
4-25-94	1.0
4-27 & 28-94	4.0
12-14-95	.5
	8.5 hours

In the absence of any specific showing to the contrary, I conclude from Mr. Kirsch's affidavit and Statement of Hours that he expended 132.5 hours on this matter and that such time was reasonably expended.

Under the EAJA, the Union may recover market rate for fees up to the statutory limit. The market rate has been shown to be in excess of the statutory limit. Accordingly, the statutory limit, as applicable here, is $75.00 per hour[3]

[3] The 1996 amendment to EAJA increased the statutory limit to $125.00, but is applicable only to adjudications commenced on or after the date of enactment, March 29, 1996. (P.L. 104-121, 110 STAT. 862). Section 233 of P.L. 104-121 provided,

> "The amendments . . . which amended this section and Section 2412 of Title 28 . . . shall apply to civil actions and adversary adjudications commenced on or after the date of the enactment of this subtitle [Mar. 29 1996]." (5 U.S.C.A. § 504) (Emphasis supplied).

. Multiplying the number of hours found reasonably expended (132.5) by $75.00 results in a fee of $9,937.50. Based on the

foregoing, it is recommended that the Authority issue the

following:

ORDER

As provided in 5 U.S.C. § 504 and in 5 C.F.R. § 2430.14 of the Rules and Regulations of the Authority, the Authority grants an award to the AFGE Legal Representation Fund in the amount of $9,937.50.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 17, 1998
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:

CERTIFIED MAIL, RETURN RECEIPT	**CERTIFIED NOS.**
Stuart A. Kirsch, Esquire Union Representative American Federation of Government Employees, AFL-CIO 510 Plaza Drive, Suite 2510 College Park, GA 30349	**P 600 696 227**
Richard S. Jones, Esquire Federal Labor Relations Authority Marquis Two Tower, Suite 701 285 Peachtree Center Avenue Atlanta, GA 30303-1270	**P 600 696 228**

Dated: March 17, 1998
Washington, DC