

<p>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2419, AFL-CIO</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>JAMES J. POWERS</p> <p style="text-align: center;">Charging Party/ An Individual</p>	<p style="text-align: center;">Case No. WA-CO-50021</p>

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 22, 1995**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: October 23, 1995

Washington, DC

MEMORANDUM

DATE: October 23, 1995

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2419, AFL-CIO

Respondent

and

Case No. WA-CO-50021

JAMES J. POWERS

Charging Party/
An Individual

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 2419, AFL-CIO Respondent and JAMES J. POWERS Charging Party/ An Individual	Case No. WA-CO-50021

Michael J. Schrier
Mark D. Roth (On the Brief)
Counsel for the Respondent

Susan L. Kane
Thomas F. Bianco
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent (Union or AFGE, Local 2419) violated sections 7102, 7116(b)(1), 7116(b)(8), and 7116(c) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7102, 7116(a)(1), 7116(b)(8), and 7116(c), when it expelled the Charging Party, Mr. Powers, from membership on July 8, 1994 for conducting himself at a meeting on March 9, 1994, in a manner that violated Article XVIII, section 2 (a) of the Union's National Constitution.

AFGE, Local 2419 contends that the Authority lacks jurisdiction over this case, as the matter involves internal union discipline under section 7120 of the Statute, and any complaint of violation of section 7120 should be filed with the Assistant Secretary of Labor. The Union claims that, assuming the Authority has jurisdiction to hear this matter, the Union's actions in disciplining its former Treasurer for advocating a secession from AFGE were well within the established parameters of labor law.

For the reasons set out below, a preponderance of the evidence does not establish the alleged violations.

A hearing was held in Washington, D.C. AFGE, Local 2419 and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Union and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

On July 8, 1994, AFGE, Local 2419, the exclusive representative of a unit of employees at the National Institutes of Health, advised the Charging Party, bargaining unit employee James J. Powers, that he was expelled from Union membership for actions he took that violated Article XVIII, Section 2(a) of the National Constitution. Mr. Powers was advised that such action was taken as a result of a trial committee recommendation and a vote of the membership to uphold that recommendation.

At all times material herein, Mr. Powers was a member of AFGE, Local 2419 until his July 8, 1994 expulsion. Mr. Powers had also been Treasurer of AFGE, Local 2419 from about 1993 until he resigned his office on or about March 23, 1994.

The AFGE National Constitution, referenced by the Union, provides in Article XVIII, Section 2:

Charges may be preferred for conduct detrimental or inimical to the best interests of the Federation. Offenses against this Federation include the following:

- (a) Advocating, encouraging or attempting to bring about a secession from the Federation of any local or of any member or group of members. Penalty

for conviction under this sub-paragraph shall be expulsion.

The Union had previously furnished Mr. Powers a copy of the relevant sections of the Constitution, advised him on May 24, 1994 that members of the Local had brought charges against him for conducting himself in a manner that violated Section 2(a) at a meeting on or about March 9, 1994, and that a trial would be held by the Union in his case on July 5, 1994.

AFGE, Local 2419 held a trial committee hearing as scheduled on July 5, 1994, at which evidence supporting the charges under Article XVIII, Section 2 was submitted. Mr. Powers did not testify or otherwise participate in the Union trial and never responded to or disputed, in either a written or oral manner, the charges against him. He did not pursue internal Union procedures to appeal his expulsion from the Union.

The complaint in this case also relates Mr. Powers' expulsion from the Union to his activities at a meeting in early March 1994. Paragraph 9 of the Complaint alleges:

On or about March 1, 1994, the Charging Party attended a meeting where he and other bargaining unit employees signed a paper indicating whether they were satisfied with the Respondent and expressed their opinions concerning, among other things, their satisfaction with the representation they had received by the Respondent.

At the hearing in this case, Mr. Powers, on behalf of himself and the General Counsel, and Mr. Douglas Duane Welch, on behalf of the Respondent, gave firsthand testimony concerning Mr. Powers' actions at the meeting in question. Mr. Welch testified that he gave essentially the same testimony at the Union disciplinary hearing of Mr. Powers.

The record reflects that on or about March 9, 1994, bargaining unit employee Michael McClain, who was not a member of AFGE, Local 2419, conducted a meeting with other bargaining unit employees in the maintenance shop of the power plant. About 25 employees attended. McClain began the meeting by

showing the employees a folder with a letter he had written. The letter read, in pertinent part, as follows:

I have observed in the plant that there is an abundance of conversation going on about the union

representation that we are receiving, both good and bad. So I started wondering to myself what are the pros and cons of having the union at all. So what I am in the process of doing is to take a poll to see what the majority of DES feelings are.

On the attached page is a survey/vote being taken by myself to see what your feelings are. Please sign and date next to your personal opinion on keeping the union.

McClain also passed around a piece of paper with a "Yes" column written on the one half of the paper and a "No" column written on the other half of the paper. Mr. Powers and a majority of the other employees present signed the "No" column of the survey. Mr. McClain did not inform the employees that he intended to use the signatures in connection with a formal petition to decertify the Union.¹

Some employees spoke in favor of the Union during the meeting, but most spoke against the Union. Some of the criticism of the Union was quite strong.

Mr. Welch, a bargaining unit employee who was a Union steward at the time of the meeting (and later became Union Treasurer when Mr. Powers resigned the position), testified that Mr. Powers spoke in favor of Mr. McClain's ideas and "went on to expound on the fact that he didn't think the [U]nion had the benefit of the men in mind. They had their own agenda and it may be better to get rid of the [U]nion, AFGE. He said that while unions were fine, he would lean more towards. . . sheetmetal, you know, boilermakers, another union instead of AFGE. . . . Mr. Powers was very vocal about the point that he thought it would be a wise decision to get rid of 2419 and get somebody else." (Tr.81)

Mr. Powers denied that he used the term "get rid of the Union." He testified that he signed the "No" side of Mr. McClain's form to indicate his displeasure with the Union, but did not encourage anyone else to sign the survey. Mr. Powers acknowledged that he spoke of his dissatisfaction with the direction the Union negotiations were going, and that he answered a question, "[W]hat [do] you do without . . . the [L]ocal or the [U]nion as it is?" Mr. Powers testified that his answer was, "[Y]ou can have another union come in. You can [have] personnel take care of

¹

The paper and signature list signed at the March 9, 1994, meeting were later incorporated into a decertification petition filed by Mr. Michael McClain on or about April 17, 1994.

you. . . . [T]here's a lot of things that can be done." (Tr. 112-13).

Based on my observation of the witnesses and their demeanor, the entire record, and the arguments of counsel concerning the credibility of the witnesses, I credit the testimony of Mr. Welch concerning Mr. Powers' actions at the March 9, 1994 meeting. Mr. McClain's cover letter also clearly indicated that he was taking a poll to see what the feelings of the majority were concerning "the pros and cons of having the union at all" and asked employees to "sign and date next to your personal opinion on keeping the union." Mr. Power's original and amended unfair labor practice charges also all state, "The subject of the meeting was to discuss dissolution of the AFGE Union within the bargaining unit." Therefore, I do not find, as urged by the General Counsel, that all Mr. Powers did at the March 1994 meeting was to express his dissatis-faction with the Union and sign a survey reflecting that opinion. (Tr. 12, General Counsel's brief at 9-10).

On or about March 23, 1994, Mr. Powers resigned his office as Treasurer of AFGE, Local 2419 of his own volition.

Approximately two or three weeks after the meeting, Richard A. Laubach, President, AFGE, Local 2419, asked Mr. Powers to remove his signature from McClain's survey and to sign a survey that he (Laubach) had prepared. Laubach's survey stated that the signatories effectively withdrew their signatures from McClain's survey. Laubach told Powers that it was unbecoming a Union officer to sign McClain's survey. He also told Powers that nothing would be done if he removed his signature from McClain's survey. Powers replied that he would not sign Laubach's survey. Laubach then said that he would do what he had to. Powers did not remove his signature from McClain's survey. The Union's disciplinary action against Mr. Powers, as set forth above, followed.

At least one other Union official, Mike Scafone, signed the "No" column of McClain's survey, but he also signed Mr. Laubach's survey on or about April 29, 1994. There is no evidence that Mr. Scafone spoke at the March 1994 meeting in the like manner of Mr. Powers or that he was disciplined by the Union.

Discussion and Conclusions

The issues for determination are (1) whether the Authority has jurisdiction over this case, (2) if so, whether

the Union violated section 7116(b) (1) of the Statute by expelling

Mr. Powers from membership in the Union for exercising his rights under section 7102 of the Statute, and (3) whether the Union violated section 7116(c) and 7116(b) (8) of the Statute by expelling Mr. Powers from membership in the Union for reasons other than failure to meet reasonable occupational standards or to tender dues.

Jurisdiction

In American Federation of Government Employees, AFL-CIO, 29 FLRA 1359 (1987), the Authority stated:

We recognize that under section 7116(c) of the Statute, a labor organization may discipline its members pursuant to procedures contained in its constitution or bylaws. In most cases, that discipline is not and should not be reviewed by the Authority. Contrary to the Union's position, however, the Union's ability to enforce discipline is not unlimited. Indeed, section 7116(c) itself recognizes that a union's actions must be consistent with the Statute. . . .

. . . .

. . . To threaten to discipline a member for the exercise of a right the member has under section 7102 is inconsistent with section 7102 and, therefore, beyond the legitimate interests of a union to regulate its internal affairs.

Therefore, contrary to the Union's position, I conclude that the Authority has jurisdiction to determine whether the Union's disciplinary action against Mr. Powers interfered with his

protected rights under section 7102 and violated section 7116 (b) (1) as alleged.

Alleged Section 7116(b) (1) Violation

Section 7102 of the Statute guarantees to each employee of the Federal Government the right, freely and without fear of penalty or reprisal, to form, join, or assist a labor organization, or to refrain from any such activity, and to be protected in the exercise of such right. A labor organization's interference with these rights is an unfair labor practice under section 7116(b) (1).

The record reflects that Mr. Powers, then a Treasurer of AFGE, Local 2419, at an employee meeting on March 9, 1994, signed a paper which could reasonably be interpreted as a "No" vote on "keeping the union" and "was very vocal about the point that . . . it would be a wise decision to get rid of 2419 and get somebody else." I conclude that Mr. Powers' conduct in this respect was not protected activity and the Union had reasonable grounds to bring a disciplinary enforcement action against him. As noted above, Article XVIII, Section 2 of the Union's Constitution provides:

Charges may be preferred for conduct detrimental or inimical to the best interests of the Federation. Offenses against this Federation include the following:

- (a) Advocating, encouraging or attempting to bring about a secession from the Federation of any local or of any member or group of members. Penalty for conviction under this sub-paragraph shall be expulsion.

In American Federation of Government Employees, Local 1920, AFL-CIO, 16 FLRA 464, 477 (1984) (AFGE, Local 1920), the Authority adopted the decision of the Administrative Law Judge, holding that a union steward was not engaged in protected activity when he "talked to two stewards . . . and attempted to sell them on the idea of bringing in the International Fire Fighters Union because it would represent them better than AFGE." The Authority agreed with the Judge that the union did not violate section 7116(b) (1) of the Statute when it removed the union steward from his position where a preponderance of the evidence established that the union, even in the absence of the steward's protected activity of giving testimony at an Authority hearing, would have removed the employee because of his efforts to promote acceptance of a rival union. See also American Federation of Government Employees, Local 987, 4 A/SLMR 510 (1974) (Union's efforts to have member discontinue distributing dues revocation cards did not violate the analogous section, section 19(b) (1), of Executive Order 11491, which governed labor relations in the Federal sector before the enactment of the Statute. The Assistant Secretary stated, "In my view, a labor organization is entitled to protect itself from those acts of its members which threaten its continued existence." (footnote omitted))

Since the evidence does not show that the Union's disciplinary action was initiated because Mr. Powers engaged in protected activity, the Union's use of procedures under

its constitution and bylaws to determine whether Mr. Powers should be expelled did not violate the Statute. Whether the disciplinary procedures themselves were consistent with the Statute, as required by section 7116(c), and, therefore, whether Mr. Powers received "fair and equal treatment under the governing rules of the organization and . . . fair process in [the] disciplinary proceedings," as required by section 7120, are matters within the jurisdiction of the Assistant Secretary of Labor for Labor Management Relations under section 7120(d) of the Statute and are not subject to review here. See 5 U.S.C. § 7120(d); 29 C.F.R. Part 458.2 (1994); American Federation of Government Employees, Local 2000, AFL-CIO, 8 FLRA 718 (1982).

Alleged Violations of Sections 7116(c) and 7116(b) (8)

Section 7116(c) provides:

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 except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

The General Counsel contends that the Union, by expelling Mr. Powers from membership for his actions during the March 1994 meeting, violated 7116(c) by denying membership to Mr. Powers for reasons other than his failure to meet reasonable occupational standards or failure to tender dues.

The Authority has held that a union commits unfair labor practices by summarily denying a bargaining unit employee's application for membership in the union, when the union's reason for the denial was neither of the only two permissible

grounds for such a denial under section 7116(c). American Federation of Government Employees, Local 2344, AFL-CIO, 45 FLRA 1004 (1992) (Local 2344), *review denied*, No. 92-1560 (D.C. Cir., November 3, 1994) (union violated section 7116(c) by refusing to admit to membership an employee who publicly vowed to destroy the union "from the inside"); American Federation of Government Employees, Local 987, Warner Robins, Georgia, 46 FLRA 1048 (1992) (Warner Robins), *enforced*, 15 F.3d 1097 (1994) (union violated section 7116(c) by denying membership until employee's financial discrepancies were cleared up). The Authority recognized, however, that once an employee is admitted to membership, the employee is subject to discipline by the union for misconduct consistent with the requirements of section 7116(c). Local 2344, 45 FLRA at 1011; Warner Robins, 46 FLRA at 1056-57.

Mr. Powers was a member and the Treasurer of AFGE, Local 2419 at the time of his alleged misconduct. He did not file an application for union membership that was summarily denied in violation of section 7116(c). Rather, Mr. Powers was expelled from union membership pursuant to the Union's authority to enforce discipline as clearly permitted by the last sentence of section 7116(c).

It is concluded that a preponderance of the evidence does not establish that AFGE, Local 2419 violated sections 7102, 7116(b) (1), 7116(b) (8), and 7116(c) of the Statute, as alleged.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, October 23, 1995

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CO-50021, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. Michael J. Schrier
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Dated: October 23, 1995
Washington, DC

