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

U.S. AIR FORCE, LORING AIR FORCE BASE, LIMESTONE, MAINE Respondent	
and	Case No. 1-CA-90364
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2943 Charging Party	
and	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2943 Respondent	
and	Case No. 1-CO-90030
OTIS J. CLAIR, JR. Charging Party	

Peter A. Grossi
Representative of Local 2943

Otis J. Clair, Jr.
Pro se

Major W. Jan Faber, Esq.
Counsel for Loring Air Force Base

Peter F. Dow, Esq.
Counsel for the General Counsel

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

The Consolidated Complaint alleges that Respondent Loring violated Section 7116(a)(1) and (2) and that Respondent Local violated Section 7116(b)(1), (2), and (8) when they entered into, and implemented, a Memorandum of Settlement which provided for the distribution among bargaining unit employees of $125,000.00 in compensation for asbestos exposure, in a manner which was affected by unlawful considerations of memberships and status in Respondent Local, and/or which treated one or more bargaining unit employees differently from other similarly situated bargaining unit employees. Essentially, Respondent Loring delegated to Respondent Local the task of apportioning such monies (made available as a lump sum) among the employees it exclusively represents and, it is claimed, knowingly permitted the Local to disproportionately dispense such monies to officers and members of the Local.

Respondent Local denied the allegations; however the man who was at relevant times either its President or Vice President, admitted in his testimony that the apportionment was, in fact, not a fair one, among members and nonmembers alike. Respondent Loring admits that it agreed to distribution of the fund by the Local, but denies it was aware of, or agreed to, or was otherwise responsible for, the manner in which the Local had distributed the money.

A hearing was held in Limestone, Maine. All parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file briefs. Based upon 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 September 15, 1986 Respondent Local filed Grievance No. 547, claiming that bargaining unit employees assigned to the Civil Engineering Squadron had been exposed to hazardous levels of asbestos over an open-ended period. It requested that the affected employees be provided physical examinations and environmental differential pay (EDP).

An earlier similar grievance (No. 543) had been processed, and the parties followed the pattern there set, which had caused no problems. Management developed a

questionnaire of highly questionable usefulness, which asked whether, when and where an employee had been involved in asbestos removal. It asked for the applicant to describe "each and every time you were exposed. . . . Please be specific as to dates, time of day, place (Bldg) and circumstances". It did not provide the time-frame which was determined to be allowable, notwithstanding the great specificity otherwise sought in responses. Distribution of the questionnaires was left entirely to the Union, as was their collection. Distribution began in October 1986, and a deadline for receipt was set for December 17, 1987, and advertised in the December 8 edition of the Loring Bulletin.

Sixty-three employees, including seven supervisors, responded in time, and copies of their responses were forwarded to management.1/ The responses were understandably rarely precise. Most employees appear simply to have guessed, with estimates ranging from 0 to 22,140 hours and usually covering many years outside the FY 1980-1986 period of possible recovery (which, again, had not been made known to applicants). As an example, one employee claimed exposure from 1966 to 1969 and from September 1975 through 1986, for a total of "12,000 hours or more". The arithmetic used appears obvious: he was credited with three (rather than 4) years for the first period and 11 years for the second. This was averaged out at 857 hours per year, and then multiplied by six for the allowable years, yielding 5143 "allowable hours". Another, (Gilbert Conroy) received zero hours because he specifically claimed 12 years of exposure ending in 1978 in describing "each and every time . . . (he) . . . was exposed", notwithstanding that he also said that his family was exposed to his asbestos contaminated clothing from 1966 to 1986.2/ Four men claimed more than twice as many hours of exposure as they could possibly have worked within the claimed time frames (and were reduced to the 1744 hours per year permitted as productive work time under OMB Circular A-76). I note these only as examples of the apparent accuracy of such "records" as were used in determining that amount of EDP to which any individual was entitled.

1/ The record does not show whether, or for how long any of these supervisors may have been in the bargaining unit prior to filing of the grievance.

2/ Conroy figures prominently in General Counsel's effort to show discrimination.

The Air Force then conducted what has been labelled an "in-depth audit" in the summer of 1988. As noted, a statute of limitations confined its exposure to backpay to the period from September 30, 1980 to September 30, 1986. Four claimants were eliminated because they failed to claim exposure during that period. Four others had their claims more than cut in half to conform to the described 1744-hour annual maximum. Unfortunately for this entire effort, and for any effort to determine the relative degree of any individual's exposure, no work records for the six years exist.3/

The Air Force was required, then, to use its 1987 work records in order to estimate the amount of work subject to hazardous asbestos exposure during the six preceding years. It took the jobs claimed to be subject to exposure in the questionnaires and broke them into four categories: job-orders, overhaul work orders, repair and minor construction work orders and regularly scheduled maintenance, or recurring work. It then determined the number of hours of work in each category in 1987 which could have possibly caused exposure. The total was 74,491.4 hours. On the apparent assumption that 1987 was representative of the six preceding years, this figure was multiplied by six to yield a total of 446,948.4 hours. Because the Civil Engineering Squadron estimated that 212 positions could have involved exposure, it divided that total by 212 to arrive at an "estimated" exposure per person of 2,108.2 hours, and a total of 124,383.8 hours for the 59 remaining claimants over the course of six years. The estimate constitutes about 55 percent of the hours of exposure claimed by employees (228.070 hours).

The next step in this "in-depth" analysis was to assign one of four EDP factors or rates to these hours: $1.00 per hour as claimed by the Local; $.67 per hour, an average government rate; $.22 per hour, the rate accepted by the Local in the previous settlement; and $.61, the median between the Local's request and its last settlement. As applied to the amount claimed and the amount calculated the rates yielded amounts ranging from $27,364.44 to $228.070.00. Thus was the issue crudely joined, with unverifiable and

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3/ As the Audit (GC Exh. 8) put it at paragraph 14: "There is no way of doing a by-name extraction of the number of hours worked in jobs that could have caused exposure to asbestos."

perhaps self-serving claims valued at $1.00 per hour on the one hand, and a measurement of "possible" exposure based on an attempt at extrapolation, and valued at the $.22 per hour rate of the last settlement, on the other.

These amounts then became the starting points for negotiating a lump-sum settlement. The union sought $300,000.00 (including "interest"). On September 26, 1988 the Base Commander offered to establish a $23,000.00 fund "to be divided, by the Union, among the grievants represented by Local 2943." In October he upped the ante to $35,000, and it eventually grew to $125,000.00. On April 12, 1989 he signed an agreement with Local Vice President Roger Gagnon, providing that the Local would determine the amount of money to be disbursed by Civilian Personnel to each grievant, in final settlement of any and all claims by the Local on behalf of itself "and its bargaining unit members" for asbestos-based EDP through the date of the agreement.4/ The Union was to provide a list of grievants and the amount due each from the fund to Civilian Personnel, and any payments made were to "be consistent with law, rule, regulation and decisions of the Comptroller General".

Allocation had occurred and was made known to Loring before the Agreement was signed. The mechanics of the apportionment are far from clear, as it was done, in the main, by Union President Bruce Labbe, who did not appear at the hearing.5/ Labbe had handled the payouts pursuant to Grievance No. 543. The only witness to Labbe's role was Vice President Roger Gagnon. Gagnon testified that he recommended to Labbe that the lump sum be equally divided among the claimants, and that Labbe disagreed on the ground that some had suffered more exposure than others. Gagnon claims to have asked that Labbe not give him more than he was entitled to, measured by the number of hours of exposure

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4/ Respondents Labor Relations Specialist testified that the questionnaires and audit were "tools" used to negotiate the lump sum, and were never used to negotiate any division of the fund. He assumed the Union would have called a meeting to accomplish the division. Thus the questionnaires measured the gross claim and the audit was used to reduce it. There is no evidence of any serious effort to validate individual claims.

5/ Labbe was asked to appear, declined, and was not subpenaed.

as a percentage of all hours. Labbe drew up a list of 51 claimants and the "proposed" split of the $125,000.00, which was submitted to the Base Commander on March 13, 1989.

That list did not contain any of the nine supervisors among the 63 applicants. It does not contain the names of two men who had claimed no exposure during the allowable period (J. R. Cyr and P. Johndro), but does list V. Keaton and G. Conroy, who likewise allegedly claimed no allowable time. It also does not list J. Gagnon, who claimed only 857 hours. Thus the Union's initial proposal eliminated 12 of the 63 claimants, and totalled 51.

One matter leaps from the list to the attention of anyone who merely glances at it. President Labbe and Vice-President Gagnon, out of 63 claimants, or 51 recognized by the Union as entitled, took together $13,000. or more that 10 percent of the fund. This fact did not escape the attention of top management nor did the fact that the supervisors had been omitted. Labor Relations Specialist Elmer Dumond questioned the fact that only 51 employees were on the list, whereas it had been understood that 59 employees were entitled (i.e., 63 applicants minus four who had claimed no allowable exposure time). The list was rejected for this reason, although Dumond most unconvincingly claims he had not noticed that any of the missing persons were supervisors. Whatever, the rejection provoked an angry reaction from Labbe and Gagnon, who made it clear that it was not the Union's job to represent supervisors. After some pulling and tugging, with Respondent "threatening" to go to arbitration over the grievance, and Gagnon "threatening" to file an unfair labor practice charge alleging that Loring was interfering in the Union's internal affairs, Labbe stepped aside and Gagnon reworked the list in order to come up with money for the supervisors.

Gagnon set aside $3200 for seven of the nine supervisors. This, of course, required him to take that amount from monies already allocated on the first list. He accomplished this by reducing Robert Godfrey (a Union member) from $3,000.00 to $2,000.00, Joe Apodaca (who had on January 31, 1989, dropped out of the Union) from $5,000.00 to $3,000.00, and member Gilbert Conroy (who allegedly had claimed no allowable exposure) from $4,400.00 to $3,000.00. In addition, Gagnon increased member Joe Ala's share from $1,000.00 to $1,300.00, member Raymond Mulherin's share from $1,500.00 to $2,000.00 and member Chanel Bernier's share from $700.00 to $1,100.00. Of the four claimants who had no allowable hours, P. Johndro and J. R. Cyr were eliminated,

the aforementioned Conroy received $3,000.00 and Union Chaplain Vaughn Keaton received $2,000.00. Johndro was a member and Cyr may have been.

The absence of architect Labbe leaves us with little direct evidence concerning the original allocations. Gagnon, as noted, said he recommended an even split of the fund by Labbe, but that Labbe rejected such an approach as unfair. While conceding it was not fair, Gagnon asserted there was no way to come up with a fair distribution given the available information. He said that he never acknowledged or accepted "this whole thing". In his view the effort to work back from fiscal year 87 job orders would not produce a true measure of exposure from 1980 to 1986 "because after we went to OSHA . . . the people were trained and they were working properly equipped - so that year to me did not properly reflect what happened." He conceded that he and Labbe got too much because of Labbe's belief they were entitled to be compensated for the work they did on the grievance. He conceded also that it was unfair to give Chaplain Keaton $2,000.00, member Conroy $4,400.00 and to give Third Vice President Saucier $4,100.00 based on their applications.

With respect to his own alteration of the original list, required in part to accommodate the supervisors, he insisted rather convincingly that considerations of membership had not influenced him, but admitted that his changes were in the main arbitrary. He was, of course, pressed on his decision to cut nonmember Apodaca from $5,000.00 to $3,000.00. Claiming to have been unaware of Apodaca's resignation, he at first said he could not explain why he had done it. Under rather aggressive examination he managed to come up with a reason - the fact that he had recalled that Apodaca had, sometime in 1985, been injured and transferred to office work devoid of exposure. (He seemed unaware, as one would expect of a person who did not accept the "whole thing," of the fact that Labbe had given Apodaca considerably more than his percentage share as reflected in the audit). Ultimately, he admitted the cut from Apodaca's share was not fair - a concession which is arguably to be understood in terms of his view that the entire process, as it affected members and nonmembers, was unfair.

The revised list was accepted by Loring and a settlement agreement executed on April 12, 1989. At no time did the parties discuss the relative shares (if any) allocated to the applicants, and the agreement specifically provided that the fund was "to be divided by the union among the grievants

represented by Local 2943". While there were internal management discussions about the apparent lion's share going to Labbe and Gagnon, this matter was never broached to the Union's leadership.6/ Nor was there any effort on the Union's part to post the list or otherwise share with its membership or those it represented and the "proposed" distribution, except at a poorly attended regular meeting.7/ Gripes were received, but nobody formally complained or sought a different distribution. Gagnon generally rebuffed inquiries by attributing the allocation to Labbe, and referring people to him. Labbe was known to be difficult to reach, being deep in the woods on disability leave, and often away from his unlisted telephone.

Although discrete violations were pleaded, i.e., discrimination based on considerations of membership or office, and, quite independently, discrimination flowing from disparate treatment grounded in arbitrary conduct, hostility or bad faith, the effort to prove the violations was in every instance based on membership considerations. Specifically, General Counsel focused on the following:

> (1) Labbe and Gagnon, who at least exploited their offices to reward themselves for their work on the grievance;
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> (2) Apodaca, whose share was severely cut in Gagnon's redistribution, allegedly because he had resigned from the Union;
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> (3) Union Chaplain Keaton, who received $2,000.00 although he failed to claim any allowable hours of exposure;
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> (4) Union member Conroy, who received $4,400.00 (before Gagnon reduced it to $3,000.00) notwithstanding General Counsel's claim that he, too, had no allowable hours;

6/ Dumond admitted that he discussed Labbe's and Gagnon's shares with Col. Dent, that "we suspected an impropriety at that time," but that Dent told him to stay out of it.

7/ Of 51 unit employees who received compensation for exposure, it appears that six were nonmembers. The only unit employee with allowable hours who received nothing was a member (J. Gagnon).

(5) Third Vice President Saucier, who received $4,100.00, considerably more than his proportion should have been if measured by his share of the "allowable" hours.

No effort was made to establish that, independent of Union considerations, there were large deviations from shares which would be commensurate with allowable claimed hours, and that such deviations, or disparate results were the consequence of actionable arbitrary or hostile action. Some very large discrepancies exist which were never examined. For example, five men employed in the heat plant apparently subject to maximum exposure (this is where Apodaca also worked until his injury) all received over $5,000.00. All were members. Four received $5,300.00 and one (a candidate for office) received $5,400.00 Their claimed allowable hours ranged from 2496 to 7954. The man with the fewest claimed hours was compensated from about two to about three times as much per hour as the others. If the claimed hours are at all useful as a measurement of entitlement, it would appear that a serious question would thereby be posed concerning fair representation.

There are other complicating factors. Apodaca was cut from $5,000.00 to $3,000.00. However, member Godfrey was also cut, from $3,000.00 to $2,000.00. Also cut were members Keaton and Conroy. Apodaca's final share was at the median of all those who received less than the "indicated" share, and the original amount conferred by Labbe was sixteen percent more than would have resulted from application of the allowable hours "standard." Such apparent generosity undercuts the notion that an inference of hostility to nonmembers should be drawn from Labbe's nonappearance. Finally, it may be noted that one man had allowable hours and yet received nothing. He was a member.

Discussion and Conclusions

A. The allegations against the Local

Section 7114(a)(1) of the Statute requires an exclusive representative to represent all unit employees "without discrimination and without regard to labor organization membership".

The purpose of the latter factor is self-evident. In the absence of membership considerations, it is less clear just what kinds of conduct constitute breaches of the duty to represent without discrimination. The Authority set

forth its standard for determining whether such a breach has occurred in National Federation of Federal Employees, Local 1453, 23 FLRA 686, 691. There is said:

> Based upon the clear language of the Statute and the applicable legislative history, we find that where union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the Union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee. As discussed above, this standard is consistent with that used in Executive Order cases and with that used by the National Labor Relations Board in deciding similar cases. See Office and Professional Employees International Union, Local No. 2, AFL-CIO, 268 NLRB 1353 (1984).

Failure to discharge the duty imposed by Section 7114(a)(1) violates Section 7116(b)(1) and (8), the latter prohibiting a failure or refusal "to comply with any provision of this subchapter." Insofar as Section 7114(a)(1) prohibits a failure to represent based on union membership considerations, it would, in circumstances like those here, appear to duplicate Section 7116(b)(2) which makes it an unfair labor practice for a union "to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this Chapter". That is to say, the Union here did not engage in conduct beyond the agency's control, such as a failure to grieve or to pursue a grievance to arbitration; rather the Union was given and exercised what is normally a management function: the power to distribute hazardous duty pay. If it discriminated against employees based on some aspect of union membership, or the lack thereof, or otherwise "deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit," such conduct could be viewed not only as violative of Section 7116(b)(1) because it interfered with,

restrained and coerced employees in the exercise of their Statutory right to form, join or assist a union or refrain therefrom,[8/] but also as violative of Section 7116(b)(2) because the Union thereby caused the Agency "to discriminate against any employee in the exercise by the employee of any (statutory) right". While I know of no Authority decision on this latter point, the NLRB has construed a virtually identical provision (8(b)(2)) of the NLRA as outlawing actions taken against employees "upon considerations or classifications which are irrelevant, invidious or unfair". Miranda Fuel Co., Inc., 140 NLRB 181, enf. denied, 326 F.2d 172 (CA 2, 1963). In doing so it observed (at page 189), as is particularly relevant there that "(i)t is immaterial whether the situation be viewed as one where the Union caused Miranda to reduce the seniority, or, having been delegated the power, the union did so itself".

In Breininger v. Sheet Metal Workers, 110 S. Ct. 424, at 436, the Supreme Court seems to have left open the question whether, under the NLRA, a breach of the duty of fair representation is, necessarily, an unfair labor practice, as opposed to being grounds for civil suit. The Court rejected the "proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice," the latter posing a problem because 8(b)(2) explicitly requires union action vis a vis the employer which encourages membership. The Court observed that "(p)egging the duty of fair representation to the Board's definition of unfair labor practices would make the two redundant, despite their different purposes, and would eliminate some of the prime virtues of the duty of fair representation-flexibility and adaptability". Of course, unlike the Board, the Authority has a provision - 7114(a) - which specifically imposes the duty on unions, and very clearly it, as opposed to the Courts, has exclusive jurisdiction over fair representation claims, Karahalios v. NFFE, 130 LRRM 2737. In the private sector pre-emption does not apply to such claims, and it was the Courts rather than the Board which created and elaborated upon the duty. Thus, it appears that there is no necessary connection between the Board's unfair labor practice powers, and the duty, i.e., a violation of the duty found by a court may not be, ipso facto, a ULP. Unlikely as this outcome would appear to be, when viewed in the light of general court acceptance of the Miranda doctrine, it does

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8/ See Antilles Consolidated Education Association, 36 FLRA 776, 798.

seem to throw light on the question here posed: whether 7114(a), as enforced through 7116(b)(8) and 7116(b)(1) and (2) are redundant. The Authority has answered, so far as those cases involving discrimination based on membership considerations are concerned, that they are not, i.e., it will find 7116(b)(8) as well as a 7116(b)(1) in such cases. Does it follow that, where discrimination is not based on membership considerations, but on some other impermissible ground, that a (b)(1) and (b)(2) as well as a (b)(8) will be?

To attempt to be more concrete, General Counsel here has put into issue the question whether the allocations were attended by discrimination not based on membership, but rather on other "deliberate and unjustifiable" discrimination. If a decision is made to give employee A a small share because of personal hostility or disapproval of his lifestyle, does such conduct interfere with the exercise of statutory rights protected by 7116(b)(1) and (2), or is it comprehended only by 7114(a)(1)? Armed with the latter, the Authority need not attempt to force such a case into the mold of Section 7116(b)(2), as the Board had to do with the results indicated in the Second Circuit's reversal of Miranda.

Whatever, in the private sector discrimination based on arbitrary, hostile or bad faith grounds is generally deemed to cause or tend to result in unlawful encouragement of union activity. Even though the Statute speaks in 7116(b)(2) of "causing or attempting to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter," i.e., the right to engage in or refrain from union activity - a like provision in the NLRA has been held to apply not only to membership discrimination, but to situations where a union induces an employer to discriminate on the basis of any invidious or arbitrary classification.

The record here is unavoidably an amorphous mess. We are confronted with unverifiable claims and an absence of work records which preclude any reasonable reconstruction of events or any measurement of individual exposure. Examination of the questionnaires, which failed even to mention the relevant six years at issue, gives the reader little comfort respecting their usefulness. The record is likewise barren of any statements indicative of a disposition on the part of Labbe or Gagnon to discriminate against nonmembers or in favor of union members or officers. Finally, we do not have the explanation of Labbe, architect of the allocation. While the General Counsel requests that adverse inferences

be drawn from his failure to appear and describe his handling of this collosal mess (and in particular his and Gagnon's shares), I am reluctant to treat the Union's failure to subpena him (a perhaps long and costly effort) as a confession that it has violated the law in the nebulous ways charged.9/ Nor is it clear to me that this fund could have been carved up in a manner not subject to attack as arbitrary and unfair. It is not surprising that the Base avoided becoming involved in such a hopeless and divisive tasks. Nevertheless, it is necessary to determine as best we can, from such records as we have, to what extent the violations alleged have occurred.

General Counsel contends that the Local violated § 7116(b)(1), (2) and (8) by allocating the money in a manner affected by considerations of Union membership and office, and involving deliberate and unjustifiable differences in treatment among unit employees. It relies specifically, as regards the original division, on the fact that Labbe and Gagnon reserved large shares for themselves, as compensation for carrying the burden of working out the settlement and the distribution; that Union Chaplain Keaton and member Conroy got $2,000.00 and $3,000.00 in the absence of any entitlement, and that Third Vice President Saucier got more than his share. And it asserts that this was compounded by the reallocation following resolution of the controversy over supervisors. Thus Gagnon took $4,400.00 from three men, cutting recent resignee Apodaca from $5,000.00 to $3,000.00, member Godfrey from $3,000.00 to $2,000.00, and allegedly unentitled member Conroy from $4,400.00 to $3,000.00. General Counsel of course focuses on the treatment of nonmember Apodaca.

9/ While General Counsel argues that distribution was affected by considerations of membership and office, as well as plain unfairness or arbitrary conduct, the facts amassed focus totally upon differences in allocation based upon the former. Nevertheless, the remedy sought appears to be a total recalculation of the allocations made, apparently on the basis that the questionnaires/claims, as constrained by the "audit," are the only reliable measure of exposure to asbestos. I take the General Counsel as requesting reallocation based upon that proportion of the fund which each individual's "allowable" claimed hours represents of the total allowable claimed hours.

The Local concedes "overly generous" payments were made to Labbe and Gagnon. Nevertheless it contends Labbe and Gagnon sought the Agency's approval of its proposals, and asserts it had to rely on the Base's expertise, its development of the questionnaire, the extensive audit, and its professed intention (GC Exh. 3) "to document the merits of each employee's individual claim". It also relies, as does General Counsel in the CA case, upon the language of the settlement agreement, i.e., that "(a)ny payments will be made consistent with law, rule, regulation and decisions of the Comptroller General". From this it argues that the Base is the real culprit here, and should be held fully (or at a minimum, jointly) responsible for whatever inequities occurred in the distribution. It further argues that the evidence will not support the allegation that union membership was an operative discriminatory factor here. It notes that Gagnon candidly admitted that some of his reallocation was arbitrary, that he cut two Union members, as well as Apodaca, and that his claim to be unaware of Apodaca's resignation should be accepted. Perhaps most tellingly, the Local argues that it was under "no statutory obligation to insure that each grievant in the group got an amount of money mathematically proportional to the number of hours claimed by each grievant".

In essence, then, the Local contends it was free to depart from the math, i.e., not to follow slavishly the claims, but to use its discretion, and was entitled to rely on the Base, which possessed the resources and expertise, to carry out its promise to examine the merits of each claim and ensure that the payments ultimately made were justified by law. Moreover, it argues, even if the approach to the task was negligent, the evidence reveals neither bad faith nor ill-will to nonmembers, and it therefore violated no law.

Conclusions Concerning The Case Against The Local

This record permits few easy answers, given the subjective, unverifiable and inherently untrustworthy nature of the claims on which it is bottomed, the poor "guesstimate" quality of such information as was secured, and the lack of any effort to check out claims against the reality. The "in depth audit," so far as we can tell, operated as a check only on the gross amount of the claims, except for limited application where more hours were claimed than could have been worked, or hours were claimed outside the pay off period. The audit's purpose and methodology seem clearly to have been to cut the gross claims down to size, rather than to compare or validate individual claims. Nor were the

relative shares the subject of negotiations. The result of the audit/negotiations was simply to cut the guess claim by about one-half. We are left to guess how any employee would know when and for how long he was exposed to compensable levels of exposure. While one engaged in asbestos removal with substandard equipment or training may know he was exposed, a claim of exposure in a room nearby or not so nearby is highly problematical. And who among us can approximate, even, when we did what over a six year period?10/

For example, again, it appears from this record that the men in the heating plant or shop suffered maximum exposure, and that this explains the rates of compensation exceeding $5,000.00 (excluding Labbe and Gagnon). Yet, while compensation ranged from four men who received $5,300.00 to one (an officer candidate) who received $5,400.00 their claimed allowable hours ranged from 2496 to 7954, the latter figure belonging to the active union candidate. He got far fewer dollars per claimed allowable hour of exposure than any of the other four, and one Harry Boucher (2496 hours claimed) got compensation ranging from about twice to three times as much as the others. If the General Counsel's assumption that allowable hours are the only guide we have through this maze, and are therefore an appropriate measure, has any merit, then this disparity in compensation would appear to be one inviting inspection from the vantage point of § 7114(a)(1)'s deliberate and unjustifiable differences in treatment. But this and like matters were not raised.

The question then arises whether there is any merit in the allegation that similarly situated unit employees were treated differently in deliberate and unjustifiable ways, on the basis of factors other than membership considerations. Although the complaint comprehends each of these discrete allegations, the evidence specifically marshalled to prove them rested solely on member-nonmember, or membership-officer distinctions in treatment. Again, the Statute requires an exclusive representative to represent unit employees without discrimination and without regard to union membership.

10/ There is also, as noted, very serious reason to question, in any event, the reliability of such claims. Recent events teach us that even prestigious educational institutions inappropriately bill the federal treasury. Can we take seriously rough guesses which are subject to no check on their accuracy or the author's veracity?

Putting aside, for the moment, the latter category of cases, I conclude that the General Counsel did not even attempt to prove a failure to discharge the duty of fair representation within the group of members or the group of nonmembers. That is to say, there was no effort to establish that any invidious distinctions were drawn between various categories of people, or, in the Authority's words, that it acted arbitrarily or in bad faith toward unit members for reasons having nothing to do with Union office or membership.11/

Notwithstanding what I see as a failure to press such a case, this record is not without evidence that such may have been the case. Gagnon was subjected to skillful and searching cross-examination by Counsel for the General Counsel, all of which appeared to be designed to force him to admit that certain officers or members were unfairly favored. He admitted that he and Labbe received too much, did not otherwise attempt to speak for Labbe, but denied he mistreated Apodaca on membership grounds while otherwise admitting that his reshuffling of the allocations was arbitrary.

Examined by me at some length about his admission that the allocation was unfair, he said:

> I mean I admit to this Court that the list that we came up with and gave to management was our responsibility. And I admit that it was not done fairly among union members or nonmembers - I mean both --.

When asked in what respects he saw it as unfair, aside from the generous shores given to Labbe and to him, and Labbe's refusal to accept his advice that it be evenly distributed, it answered "none." Upon further cross-examination he admitted his cut in Apodaca's share was not fair, and that the $2,000.00 share to Keaton was not fair.

While the examples used all had to do with distinctions allegedly based on membership considerations, his general

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11/ Note that the Union, in its brief, defends against the allegation that membership was the basis for claimed discrimination, apparently reading the record as I do. But see Antilles Consolidated Education Association, supra, where the Authority based its decision on broad complaint allegations, notwithstanding that the General Counsel took a narrower approach in the trial, brief and relief requested.

admissions of arbitrariness or unfairness in the treatment of both members and nonmembers arguably would establish the § 7116(b)(1) and (8) case. I am not persuaded such words should be accepted in isolation and at face value as having that consequence. Thus, Gagnon's admission that heard Labbe were, in effect, paid for handling the grievances requires the conclusion that nobody else was fairly treated. His expressed conviction that an equal division was the fair approach has the same result, notwithstanding that an even distribution among people not randomly subject to even exposure would itself be indefensible. And his refusal to acknowledge "this whole thing" - the questionnaires and audit - as any proper measure of exposure indicates that he viewed any less-than-equal distribution as necessarily arbitrary and unavoidably unfair.

In sum, I conclude the prosecutor neither pressed nor proved that the Local treated anyone in an unlawfully arbitrary way for reason unconnected with Union membership or office. I accordingly recommend that the § 7116(b)(8) allegation be dismissed, insofar as it is based upon such theory.

There does, however, appear to be persuasive evidence that § 7116(b)(1) and (2) and (8) violations occurred based upon favoritism toward those holding Union office. The evidence clearly shows that the then President and Vice President took advantage of their offices to "compensate" themselves for the work involved. The evidence is less clear for the others, as it depends upon relative shares given, which in turn must depend upon an examination of the allowable hours as a measure of entitlement. I've already concluded that they are generally a very unreliable yard-stick, and it is clear there is no strong relationship between "allowable hours" and actual payout, even among union members, as demonstrated by the five heat plant members.

The amount paid, as a percentage of the amount claimed, varies enormously among claimants, from a low of 84 percent to a high of +410 percent (excluding Keaton, who received $2,000.00 for no claimed hours). The former was a nonmember, and the latter a member but not an officer. In such a context we must examine the individuals who General Counsel asserts suffered discrimination or were granted preference.

Apodaca, as noted, was cut from $5,000.00 to $3,000.00 by Gagnon at the same time he cut members Godfrey ($3,000.00 to $2,000.00) and Conroy ($4,400 to $3,000.00), several

months after Apodaca resigned from membership. Ten members suffered approximately equal or greater cuts in their shares if measured by their claimed hours, and conversely, other nonmembers with respect to whom no issue was made, in the main, suffered larger percentage losses than he did. There is no independent evidence of hostility to him (or them) or even of knowledge that he had quit. He had in fact originally been given more than his entitlement as General Counsel proposes to measure it, casting further doubt on the existence of any concern or hostility by the Local's officials. And finally, there is my impression that Gagnon, in many respects a candid witness (as even General Counsel remarked, perhaps for tactical reasons) was telling the truth when he denied that Apodaca's resignation motivated the cut. In short, the treatment of Apodaca makes no more or less sense than most of this allocation, a quandary stemming from the quality of the evidence which was available. I find that the General Counsel has not proved, by a preponderance of the evidence, that Apodaca was punished for leaving the Local.

My approach to Third Vice President Saucier is the same, with one difference. Saucier received 323 percent of his allowable hours. Four members received comparable or greater "improvements" on their claims, as did of course, Gagnon, Keaton and Conroy. One officer received a very modest increase. Here, unlike the case of Apodaca, we have no explanation for the share provided Saucier. Given my findings concerning the evidentiary value of the "allowable hours," I cannot rely on the large deviation from the norm, alone, as strong evidence of discrimination. If I do, I must contrast it with the cases of Harry Boucher (+386%), Robert Godfrey (+350%), Robert Doak (+410%), Jim Cavagnaro (+323%) and Boyd Nelson (+273%), none of whom was an officer. The range of possible explanations, on this record, appears to be limitless, given the absence of any particularized and reliable evidence as to who suffered what exposure. Again no issue was raised about these "discrepancies," or those already described, for example, among heat plant members. The issue then, is whether the obvious grounds for suspicion are strong enough to conclude that a prima facie case has been made, so as to require a rebuttal, i.e., the testimony of Labbe, or to call for a finding that his failure to appear warrants the conclusion that he favored Saucier because of the latter's office. The latter finding would perhaps make out a prima facie case, so that the absence of rebuttal would be fatal to the party which failed or refused to present the witness.

Ordinarily, failure to call a witness, or to produce documents or records under one's control warrants an inference that production would be harmful. Here, a Union represented by a layman failed to subpena, but did request Labbe's appearance and testimony. The matter was not explored by any party, except for purposes of a stipulation that the Union asked Labbe to appear, that he declined and that the Union did not attempt to compel his attendance. It is not even clear the Union knew it had power to subpena him. Had it done so, and been met with continued refusal, would it have escaped application of the inference absent enforcement in District Court? Is "control" over a witness established by the availability of legal means to compel his attendance? I think not. In no other sense was Labbe under the control of the Union. General Counsel's argument, as I understand it, is that the inference is warranted solely because no effort was made to compel Labbe's appearance, for it is not even claimed that he is in any other way under the Union's thumb. In the absence of anything more than an apparent claim that the availability of compulsory process will do, and given equal availability to the prosecutor, I decline to draw an adverse inference.

There remain the cases of Keaton and Conroy. Union Chaplain Keaton failed even to claim any exposure at relevant times. This, then, is not a matter of sifting through competing and unreliable claims, or even of ignoring them and using ones own judgment as to relative exposure levels. This is a man who claimed very little exposure, ending some four years before the allowable six years began. A prima facie case exists for a finding that Keaton's office explains, in the absence of any other apparent reason, the decision to compensate him for exposure he never even claimed to have experienced. As earlier noted, I find Conroy's case difficult. He claimed considerable exposure, although indicating it ended about two years before the allowable period. He nevertheless claimed his family was exposed to asbestos on his work clothes throughout the allowable period. It is entirely conceivable that he transposed the numbers indicating his exposure ended in '78 rather than '87. Aside from such conjecture it is clear that his questionnaire indicates entitlement, notwithstanding that he was erroneously credited with none. I cannot on this record conclude that a preponderance of the evidence establishes that he received favored treatment simply because, like 88 percent of the employees involved, he was a Union member.

In sum, I concluded that the General Counsel has demonstrated, as convincingly illustrated in the cases of

Labbe, Gagnon and Keaton, that Respondent Local failed to represent all unit employees without regard to union membership, and, through the use of power delegated to it over allocation of hazardous duty pay, caused the Agency to discriminate against employees because of their exercise of their rights "to form, join or assist any labor organization, or to refrain from any such activity".

B. The Allegation Against Loring Air Force Base

The Base clearly gave the Local complete control over distribution of EDP. Having found that a preponderance of the evidence establishes that Union's officers Labbe, Gagnon and Keaton received favorable treatment based on the offices they held, it follows that the Base, through delegation of such payment authority to the Local, discriminated against the other claimants concerning employment conditions in a manner which unlawfully encouraged membership in the Local. Membership in this context means more than mere membership. It also includes any action which encourages greater fealty or loyalty to the labor organization.12/ Thus it comprehends favoritism toward or discrimination in employment terms against, an employee because he/she holds, or does not hold, union office, or in order to enforce obligations of membership, such as adherence to union rules.

When a union operates a hiring hall,13/ or is empowered to make seniority determinations for an employer,14/ and engages in unlawful discrimination, it is taken as thereby having caused the employer to discriminate. Such was the case here, and there can be no doubt concerning the Base's responsibility for the consequences of Union's conduct. If there is a need to show that it knew what was going on, it is clear that it had noticed the Labbe-Gagnon share of the fund was suspicious. It was privy to the entire arrangement and took no part in the attempt to determine how it should be distributed.

12/ See, e.g., Automobile Workers Local 594 v. NLRB, 776 F.2d 1310.

13/ Wolf Trap Foundation, 287 NLRB 1040, 127 LRRM 1129. Here the Board abandoned the strict liability approach, and held one of the employers involved was not responsible where it had no knowledge of union's discriminatory conduct and could not reasonably be charged with notice of such conduct.

14/ Fruin-Conlon Corp., 571 F.2d 1017.

It defends its avoidance of that responsibility on the ground that any interference with the Union's proposed distribution would have been an intrusion into internal union affairs violative of 7116(a)(1). It thus sees itself as confronted with a Hobson's choice: an unlawful meddler if its acts, and an accessory to the Union's violation if it fails to act. It contends, in effect, that it was entitled to rely upon the Union's compliance with the law, that it must assume the exclusive representative will faithfully discharge its obligation fairly to represent all unit employees. Otherwise, were it to interject itself into a "fair and just" division of the fund, it would be required, it claims, to bypass the Union and negotiate directly with employees, thus subverting the Statute's purpose and obviating the need for an exclusive representative.

It further argues that its nonintervention in the task of allocation is supported by Havas v. CWA, 509 F. Supp. 144 (N.D.N.Y., 1981). That case involved a suit by non-union employees subject to an agency shop, asserting that the union and employer infringed upon the First Amendment freedoms of association and expression by using the fees coercively collected for purposes unrelated to collective bargaining, contract administration and grievance adjustment. The case against the employer was dismissed on the ground that no law requires it to supervise or monitor such union expenditures or otherwise imposes an affirmative duty to inform employees of their rights and obligations under the agency shop agreement.

I conclude that the Base's arguments are off the mark, confusing conditions of employment with internal union affairs. Environmental differential pay is obviously a condition of employment rather than a private affair of the Union's and is one normally handled by the employer. The parties could not lawfully negotiate for distribution of such pay to union members only, or to union loyalists only, or to union officers only, when no relevant distinction exists (here exposure) upon which to legitimately draw such lines. Thus, an employer who complies with such a demand violates the Statute by engaging in "discrimination in connection with . . . conditions of employment" which encourages membership in a labor organization. Dues or agency fees collected under a valid union security arrangement pose a different problem. While their payment is a condition of employment in the sense that failure to pay is cause for removal, the way in which the union spends such monies is an internal affair, a matter between the union and those from whom it exacts them, and an employer

has no right to intrude into such matters. This is a far cry from delegating control over wages and ignoring their distribution.

In sum, I find the Local and the Base have violated Section 7116(b)(1), (2) and (8), and 7116(a)(1) and (2). They are jointly and severably liable for remedying the violations, including such recalculation and redistribution of the lump sum fund as may be necessary to remedy the overpayments I have found.15/ As I have found overpayments to Labbe, Gagnon and Keaton, it must follow, no matter how darkly through this looking glass, that somebody else got less than what they deserved. Here, in the absence of reliable records, such an undertaking is akin to that of putting Humpty Dumpty back together again. But then, that is a matter for compliance. I cannot, on this record, issue a make whole order to identified people. Perhaps the parties, in a joint cooperative effort, can recoup the overpayment and can fairly redistribute it. Should such effort fail they remain jointly and severally liable for making whole those whose shares were reduced in order to unlawfully compensate Labbe, Gagnon and Keaton.

Upon the foregoing findings of fact and conclusions of law I recommend that the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that:

A. American Federation of Government Employees, AFL-CIO, Local 2943, shall:

1. Cease and desist from:

(a) Exercising delegated authority over the allocation of environmental duty pay in a discriminatory manner, granting preference to certain officials of Local 2943.

15/ There is some authority for making the Base only secondarily liable for making whole those who were injured by overpayments. See Exxon Company, 253 NLRB 213. As Respondent here turned over such a fundamental term of employment as wages to the Local, and ignored highly suspicious circumstances in the allocations made, joint liability appears to be fully warranted.

(b) Interfering with, restraining or coercing employees in the exercise of their rights to refrain from joining, freely and without fear of penalty or reprisal, AFGE Local 2943. Such right includes the right to refrain from active union membership or from holding union office.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Represent all employees in units of exclusive recognition without regard to membership in AFGE Local 2943, that is, without respect to whether a person is a good, bad, indifferent or non-member, and without respect to whether a person holds office in the Local.

(b) Together with Loring Air Force Base recalculate as fairly as is possible the EDP, if any, due Mr. Labbe, Mr. Gagnon and Mr. Keaton, and attempt to recoup such monies for distribution to those such recalculation would indicate received less than their share. In the event recoupment efforts fail, make whole with Loring Air Force Base those employees such recalculation determines to have suffered by reason of the preference given the Local officers named above.

(c) Preserve and, upon request, make available to agents of the Authority for examination and copying all records necessary and useful for the recalculation and resdistribution required by this Order.

(d) Post at its business offices and its normal meeting places, including all places where notices to members and other employees of the Loring Air Force Base, Limestone, Maine, are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of Local 2948, American Federation of Government Employees, AFL-CIO, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to members and to other employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Submit appropriately signed copies of such Notices to the Commander, Loring Air Force Base for posting in conspicuous places where unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Boston Region, Federal Labor Relations Authority, 10 Causeway Street, Room 1017A, Boston, MA 02222-1046, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

B. Loring Air Force Base, Limestone, Maine, shall:

1. Cease and desist from:

(a) Discriminating in the distribution of environmental duty pay by permitting Local 2943, the exclusive bargaining agent, to give preference to certain officials of Local 2943 over mere members or nonmembers.

(b) Interfering with, restraining or coercing employees in the exercise of their rights to refrain from joining, freely and without fear of penalty or reprisal, AFGE Local 2943, or any other exclusive representative. Such right includes the right to refrain from active union membership or from holding union office.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Together with AFGE Local 2943, recalculate as fairly as is possible the EDP, if any, due Mr. Labbe, Mr. Gagnon and Mr. Keaton, and attempt to recoup such monies for distribution to those such recalculation would indicate received less than their share. In the event recoupment efforts fail, make whole with AFGE Local 2943, those employees such recalculation determines to have suffered by reason of the preference given the Local officers names above.

(b) Preserve and, upon request, make available to agents of the Authority for examination and copying all

records necessary and useful for the recalculation and resdistribution required by this Order.

(c) Post at its business offices and its normal meeting places, including all places where notices to its employees are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Boston Region, Federal Labor Relations Authority, 10 Causeway Street, Room 1017A, Boston, MA 02222-1046, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, July 22, 1991

JOHN H. FENTON
Chief Administrative Law Judge

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT exercise delegated authority over the allocation of environmental duty pay in a discriminatory manner, granting preference to certain officials of Local 2943.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights to refrain from joining, freely and without fear of penalty or reprisal, Local 2943, American Federation of Government Employees, AFL-CIO. Such right includes the right to refrain from active union membership or from holding union office.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL represent all employees in units of exclusive recognition without discrimination and without regard to membership in Local 2943, American Federation of Government Employees, AFL-CIO.

WE WILL, together with Loring Air Force Base recalculate as fairly as is possible the EDP, if any, due Mr. Labbe, Mr. Gagnon and Mr. Keaton, and attempt to recoup such monies for distribution to those such recalculation would indicate received less than their share. In the event recoupment effects fail, make whole with Loring Air Force Base those employees such recalculation determines to have suffered by reason of the preference given the Local officers names above.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Boston Region, whose address is: Federal Labor Relations Authority, 10 Causeway Street, Room 1017A, Boston, MA 02222-1046, and whose telephone number is: (617) 565-7280.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate in the distribution of environmental duty pay by permitting Local 2943, the exclusive bargaining agent, to give preference to certain officials of Local 2943 over mere members or nonmembers.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights to refrain from joining, freely and without fear of penalty or reprisal, AFGE Local 2943, or any other representative. Such right includes the right to refrain from active union membership or from holding union office.

WE WILL NOT in any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, together with Loring Air Force Base recalculate as fairly as is possible the EDP, if any, due Mr. Labbe, Mr. Gagnon and Mr. Keaton, and attempt to recoup such monies for distribution to those such recalculation would indicate received less than their share. In the event recoupment effects fail, make whole with Loring Air Force Base those employees such recalculation determines to have suffered by reason of the preference given the Local officers names above.

_____
(Activity)

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