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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO (SACRAMENTO AIR LOGISTICS CENTER) NORTH HIGHLAND, CALIFORNIA

Respondent

and

ELOISE F. HOLDAHL

Charging Party

Case No. 9-CO-10021

Daniel Minahan, Esq.
For the Respondent

Stefanie Arthur, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION ON APPLICATION FOR ATTORNEY FEES

Statement of the Case

The Authority issued its decision in this case on December 9, 1992 wherein it dismissed the Complaint having found Respondent (herein sometimes the Union) did not violate the Statute. Thereafter, counsel for the Union filed an application for attorney's fees pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, and section 2430 of the Authority's Rules and Regulations. By order dated January 15, 1993 the Authority referred the matter to the Office of Administrative Law Judges for processing and this case was assigned to the undersigned for disposition. Subsequently, counsel for the General Counsel filed a motion to dismiss counsel for Respondent's application for award of attorney's fees.

Section 2430.3(a) of the Authority's Rules and Regulations provides:

> (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.

Counsel for the Union contends the position of the General Counsel, in alleging the Union's conduct of refusing to represent a unit employee who was not a member of the Union in connection with the employee's receipt of a notice of proposed suspension, was not substantially justified. Counsel for the Union argues the law has been settled for a number of years that in proceedings where a union does not act as the exclusive representative of an employee, it is not obligated to represent that employee in a proceeding and the Union may refuse to represent the employee because the employee is not a member of the Union.

In the case herein the Complaint alleged the Union violated section 7114(a)(1) of the Statute when it refused to represent the Charging Party in connection with a proposed disciplinary action because she was not a member of the Union.[1/] The Authority dismissed the Complaint based upon its holding in Fort Bragg Association of Education, National Education Association, Fort Bragg, North Carolina, 28 FLRA 908 (1987) (Fort Bragg), and Antilles Consolidated Education Association (OEA/NEA), San Juan, Puerto Rico, 36 FLRA 776 (1990), (Antilles). In Fort Bragg the Authority adopted the standard that a labor organization's responsibilities to

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1/ Section 7114(a)(1) of the Statute provides:

> (a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

represent employees under section 7114(a)(1) of the Statute will depend upon whether the union's representational activities on behalf of employees are grounded in the union's authority to act as exclusive representative and the Authority held it would not extend a union's Statutory representational obligations to situations where the union is not acting as the exclusive representative. In Fort Bragg the union refused to represent nonmember employees, on a non-fee basis, in a law suit the union was bringing on behalf of members, who were teachers, concerning their status as Federal employees in a particular school system. The Authority, in dismissing the complaint which alleged the union's conduct interfered, restrained, and coerced employees in their section 7102 rights,[2/] stated that in Fort Bragg and future cases it would analyze a union's responsibilities under section 7114(a)(1) of the Statute in the context of whether the union's representational activities on behalf of unit employees are grounded in the union's authority to act as exclusive representative. The Authority went on to state, at 918:

> Where the union is acting as the exclusive representative of its unit members, we will continue to require that its activities be undertaken without discrimination and without regard to union membership under section 7114(a)(1). We will not, however, extend those statutory obligations to situations where the union is not acting as the exclusive representative, nor will we continue to decide these cases based on whether or not the union's activities relate to conditions of employment of unit employees. Previous Authority decisions to the contrary will no longer be followed.

In Antilles the union was found to have violated its duty of fair representation with regard to its administration of a dental/optical insurance plan by requiring that nonmembers pay an administrative fee not required of members. Antilles reaffirmed that the duty to represent employees applies only to activities the union undertakes as exclusive representative but further held that since the union had negotiated not only the contents of the insurance plan but also authority to administer the plan, the union's activities were undertaken in its capacity as exclusive representative. Accordingly, the

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2/ Section 7102 of the Statute provides, in relevant part:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.

union's charging nonmembers a fee for administering the insurance plan was held to violate its duty to unit employees under section 7114(a)(1) of the Statute to administer the insurance plan without regard to labor organization membership.

In arguing that the General Counsel was "substantially justified" in issuing the Complaint in this case, counsel for the General Counsel contends, _inter alia_, as urged when litigating the underlying case, that neither _Ft. Bragg_ nor _Antilles_ gave clear guidance for the situation herein. Thus, the General Counsel argues that _Ft. Bragg_ did not specifically address the issue of a union's obligation to represent non-members during the proposal stage of a disciplinary proceeding and the Authority had previously found a union had violated the Statute by such conduct in _National Treasury Employees Union_, 10 FLRA 519(1982), _enf'd_ 721 F.2d 1402 (D.C. Cir. 1983). The General Counsel further contends that since the Union had negotiated provisions in the parties' collective bargaining agreement relative to disciplinary actions covering unit employees, based upon the Authority's decision in _Antilles_ the Union had assumed a contractual duty to represent all bargaining unit employees regardless of Union membership.

I find and conclude the position of the General Counsel was substantially justified in litigating the case herein. There was no dispute on the facts which gave rise to the allegations of the Union's failure in its duty of fair representation and these facts were placed in the record before the Authority. While the General Counsel did not prevail before the Authority on that which it urged should be the law in this case, I find the General Counsel's position was a reasonable one. True, in _Ft. Bragg_ the Authority expressly stated that it would not extend a union's duty of fair representation to include situations where the union is not acting as the exclusive representative and that decisions of the Authority to the contrary would not be followed, and in _Antilles_ the Authority clearly reaffirmed the analytical framework enunciated in _Ft. Bragg_. However, in _Antilles_ the union's conduct in requiring a fee from nonmembers to participate in an insurance plan was found to violate the duty of fair representation since the union administered the plan it negotiated with the agency by virtue of its status as the exclusive collective bargaining representative.

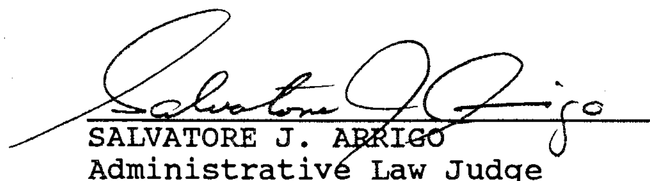
In the case herein the nature of proposed discipline given to the unit employee involved was for a three day suspension. 5 U.S.C. 7501, 7503 provides that an employee against whom such an action is proposed is entitled to be represented by an "attorney or other representative". Accordingly, the Union was clearly not the exclusive representative of the affected

employee for this action. However, the Union negotiated into its agreement with the Agency various provisions generally dealing with disciplinary matters. Section 5.09 of the agreement provides that all disputes dealing with disciplinary matters under Article 5 of the agreement, except suspensions which exceed 14 days and certain other removal actions, would be processed under the negotiated agreement. While, proposed letters of reprimand, suspension or removal are excluded from the negotiated grievance procedure, at some stage, contractually, the negotiated grievance procedure is available to unit employees to challenge the discipline. There is, therefore, a facial appearance, somewhat akin to Antilles, of redress of discipline imposed by the agency through the Union negotiated agreement.

Further, prior to the case herein the Authority had expressed its newly articulated approach to matters of fair representation and a union's exclusive standing in only two areas. One dealt with a union's law suit on behalf of members and the other with a union's contractual obligation concerning administering an employee insurance plan. Neither case dealt with the obligations of a union towards a nonmember concerning a direct employer - employee confrontation in a workplace, which is a far more common situation than that present in Ft. Bragg or Antilles. In my view it was therefore reasonable for the General Counsel to question the applicability of existing Authority law to the facts of the case and provide the Authority with an opportunity to explicate the full reach of its holding, especially where, as here, the existing cases on the subject were few in number and involved relatively unusual fact situations.

Accordingly, in all the circumstances herein I conclude that based upon the Authority's standards, the position of the General Counsel in prosecuting this case was substantially justified. See American Federation of Government Employees, Local 495, AFL-CIO (Veterans Administration Medical Center, Tucson, Arizona), 22 FLRA 966 (1986). Therefore, I recommend that the Authority reject counsel for the Union's application for attorney's fees made pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504.

Issued, Washington, DC, May 28, 1993.



SALVATORE J. ARRIGO
Administrative Law Judge