FEDERAL LABOR RELATIONS AUTHORITY OALJ 14-13
Office of Administrative Law Judges
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2189 RESPONDENT AND JONATHAN JARMAN CHARGING PARTY	Case No. DA-CO-12-0111

Charlotte A. Dye
Carmen Byrd
For the General Counsel

Stefan Sutich
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

Based upon an unfair labor practice filed by Jonathan Jarman, an individual, a Complaint and Notice of Hearing was issued by the Regional Director of the Dallas Regional Office. The complaint alleges that the National Federation of Federal Employees, Local 2189 (Respondent/NFFE Local 2189/Union) violated § 7116(c) of the Statute when it denied membership to Jarman. (G.C. Ex. 1(c) & 1(d)). The Respondent timely filed an Answer denying the allegations of the complaint. (G.C. Ex. 1(g).

A hearing was held in Texarkana, Texas on August 21, 2012, at which time the parties were afforded an opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence, and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

Based upon the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

The Department of the Army, Red River Army Depot (RRAD/Agency) is located near Texarkana, Texas. There are five separate bargaining units located at RRAD; the largest is NFFE Local 2189, which primarily represents production employees, including those in Building 345. (Tr. 55, 103). The Red River Army Depot Labor-Management Forum (Forum) is comprised of six management members and five unions, including the Respondent and the International Guards Union of America, Local 124 (IGUA). Jarman began work as a contract security guard in July 2005 and was converted to a federal employee as a federal security guard in November 2007 and then a Police Officer for the Directorate of Emergency Services in April 2008. (G.C. Ex. 5; Tr. 21-24). In 2008, Jarman was elected as President of IGUA and served as President for nearly four years. Jarman also served as a Regional representative for IGUA. (Tr. 23). As President of IGUA, Jarman was a member of the Forum and was elected by the five unions to serve as their co-chair. The Commander of the RRAD served as the co-chair for management. (Tr. 24).

On April 6, 2011, Chief of Staff Teresa Weaver served Jarman (as co-chair of the Forum) with notice that the RRAD intended to hold a meeting the next day regarding a proposed shift change from a 4-10 schedule to a 5-8 schedule. (Tr. 24-25). Jarman then informed and met with the other four union presidents: Bill Roush for Respondent; Sid Jones for the Firefighters Union, Ron Starkey for the Electrical Workers Union, and Rodney White for the Pipefitters Union. (Tr. 25). During this meeting, all five unions expressed their preference to remain on a 4-10 schedule. The union presidents unanimously agreed that Jarman would make a PowerPoint presentation setting forth their position at the scheduled meeting. (Tr. 25-26).

On April 7, Jarman presented the PowerPoint slides to management. (Tr. 26). On April 13, the Commander held a meeting with the five union presidents regarding the proposed shift change. (Tr. 27). During this meeting, Rodney White, President for the Pipefitters Union , suggested that the employees be permitted to vote regarding their preference on the shift change because he believed that the general population, rather than a couple of people, should decide the issue. (Tr. 27, 80). The Commander stated that if all the unions agreed, then a poll could be conducted and he could live with the results. (Tr. 27). At that time, the five union presidents, including Bill Roush, the Respondent's president, agreed to take a vote of all the employees regarding the proposed shift change schedule. (Tr. 27-28).

Shortly after the meeting, however, Roush informed Jarman and White that NFFE Local 2189 was not going to allow the employees to vote on the shift change. (Tr. 28, 106). Roush had been instructed by the National Business Representative for NFFE Local 2189, John Griffin. Roush gave Jarman permission to call Griffin directly, which he proceeded to do. Jarman told Griffin that he thought the vote was a great idea and that the people would

overwhelmingly support retaining the 4-10 schedule. (Tr. 29). Griffin stated that he wanted to file a notice to bargain with the agency regarding the proposed shift change and that it would be unprecedented to allow the general population, rather than the union, to make the decision. (Tr. 29).

Following the April 13 events, Jarman posted a question on his Facebook page in which he asked: "If you worked in a production environment like at bldg. 345 at Red River Army Depot, would you think it would be better to work (4) 10 hour shifts Mon-Thur or (5) 9 hour?" (G.C. Ex. 3; Tr. 30, 56). Below the questions, Jarman posted three answer options: "(4) 10 Hours Shifts"; "(5) 8 Hour Shifts"; and "They're about the same." (G.C. Ex.3). Jarman posted the question so that it was only visible to his Facebook friends; that is, Facebook accountholders who Jarman had specifically accepted as his friend under his Facebook account. At the time, Jarman had approximately 200 Facebook friends, but only 20 or less worked at RRAD. (Tr. 30).

According to Jarman, he posted the question to get an understanding of the difference between a 5-8 and 4-10 scheduled because he had never worked a 4-10 schedule before. (Tr. 32). Jarman did not target the question to only his Facebook friends who actually worked at RRAD because he wanted to get a general idea of what a popular decision would be regarding the two shifts, regardless of where the individual worked. (Tr. 32, 55). Because of a share function on Facebook, Jarman's Facebook friends could click the "share" button below Jarman's question and allow other people – who were not specifically Jarman's Facebook friends – to view and answer the question, which they did. (Tr. 31). As a result, 182 individuals answered Jarman's question on Facebook, including people who were not Jarman's Facebook friends. (Tr. 31). All of Jarman's Facebook friends who worked at RRAD responded that they would prefer to remain on the 4-10 schedule. (Tr. 31).

On June 14, 2011, Jarman posted a note on his Facebook page regarding Respondent's decision to bargain over the shift change. (G.C. Ex. 4; Tr. 32-33). The note stated:

> The unions were served with demands for negotiation starting Monday the 19th over whether to move to (5) 8 hr shifts or stay on (4) 10 hr shifts. The commander was pretty gracious on April 13th when he offered to allow the workers to vote but only 4 of 5 unions agreed. NFFE's rep present even agreed at the time but for whatever reason, they think negotiating is a better idea. It's not.
>
> On Monday, we are going to face a cold, hard reality – that they never had to negotiate to begin with. Under their permissive rights, they can determine the shift without bargaining. I knew this all along, which is why I knew we were lucky to be given a vote. But, the giant egos of the two guys running that union have effectively crushed any chance of staying on (4) 10s.
>
> So, what can you do? Well, the chances are pretty grim, I can tell you that. The ONLY hope you have is if you people rise up and create a grassroots movement so strong that your National knows you will either have your vote or you will decertify them and get a new union. And, don't let anyone tell you that you can't decertify your union if they become corrupt. It happens all the time. Look at UnionFacts.org. There are step by step instructions on how to get rid of a corrupt union.

> And don't let anyone tell you a vote is illegal. It's not. You could even call it a "climate survey"... who cares?
>
> Maybe the guy drunk on power will put the bottle down for a minute and decide to ask the commander for a vote. I know the other 4 of us will. But you need 5 I would raise hell between now and Monday to get that [illegible].

(G.C. Ex. 4).

The note was initially visible to only Jarman's Facebook friends, but could be shared with others. (G.C. Ex. 4; Tr. 32-33). The Facebook note was circulated within the Union membership, but not specifically by Jarman. (Tr. 130). Respondent's President Bill Roush informed the National Business Representative Gary Johanson about Jarman's note when it was first posted. (Tr. 114-15).

The shift change issue was not immediately resolved and continued as an issue at RRAD for several months. In October 2011, the Commander determined not to go forward with the 5-8 shift change. (Tr. 57-58).

On November 20, 2011, Jarman began working as an Administrative Support Assistant to the Directorate of Emergency Services at RRAD, which was a promotion. (G.C. Ex. 5; Tr. 36). With his new position, Jarman was no longer in the bargaining unit represented by IGUA, but was in the bargaining unit exclusively represented by NFFE Local 2189. (Tr. 57-58).

In early November 2011, Jarman contacted representatives of Respondent to request assistance on the completing and submitting of a Standard Form 1187 to become a member of the Union. (Tr. 38-39). On November 8, Jarman contacted Chief Steward Billy Pettit by text message, inquiring how to the join the Union. (G.C. Ex. 8; Tr. 39, 60).

The 2001 master collective bargaining agreement between the Red River Army Depot and Respondent contains Article VIII, Voluntary Allotment of Union Dues, which includes, among other things, provisions regarding the process for commencing dues deduction by the Agency by submitting a Standard Form 1187, Request for Payroll Deductions for Labor Organization Dues; when deductions will begin after the receipt of a completed Standard Form 1187; and how employees may terminate a dues deduction allotment. (G.C. Ex. 7; Tr. 37-38). The Standard Form 1187 is a form an employee completes to authorize the agency to deduct from their pay regular dues of the labor organization. (G.C. Ex. 10; Tr. 37-38). Section A of the form is completed by an authorized official of the labor organization, while Section B is completed by the employee. (G.C. Ex. 10). Article VII, Section 1 of the parties' collective bargaining agreement permits the Agency to deduct union dues from an employee's biweekly pay, when an employee voluntarily executes a Standard Form 1187 and the Union submits the form to the Agency. (G.C. Ex. 7; Tr. 37-38).

In multiple text messages to Pettit, Jarman requested information on how much Union dues were and the fax number for Respondent so that he could complete and submit the Standard Form 1187 to the Union. Pettit provided Jarman with the Union's fax number, but no information regarding the dues. (Tr. 40, 61).

On December 1, Jarman completed Section B of the Standard Form 1187 and emailed the form to the Agency, through Mary Shelton, with a copy to Billy Pettit. (G.C. Ex. 9; Tr. 40-41; 62-63). In the email, Jarman requested to be enrolled in the local NFFE union and stated that he had left the dues area blank because he did not know how much they were. (G.C. Ex. 9; Tr. 40-41). The Respondent did not sign off on the form.

On December 7, Jarman emailed Pettit stating: "it's starting to seem like I'm not going to be able to join NFFE. Can I join please?" (G.C. Ex. 11; Tr. 42-43). On December 13, Jarman hand delivered a copy of the Standard Form 1187 to the Agency, through Mary Shelton. (Tr. 43). At that time the Agency processed the form and provided Jarman with a receipt in the amount of $25.31 for dues allotment to NFFE Local 2189. (G.C. Ex. 12; Tr. 43-44). Jarman believed that he was now a member of the Union.

On December 13, Respondent's Executive Board formed a committee to vote on Jarman's membership application. (Tr. 68). In attendance at the meeting were: Gary Johanson by telephone; President Bill Roush; Trustee Zephyr Bagby; Trustee Susan Curl; Trustee John Eastman; Acting Vice President Cebron O'Bier; Steward David Sharp; Secretary Sonny Young, and Steward David Hill. (G.C. Ex. 19; Tr. 69, 115). O'Bier served as Acting Vice President because David Hill had taken a temporary promotion. (Tr. 67, 102). Although Hill attended the meeting as a steward, he did not have a vote in the proceedings. (G.C. Ex. 19; Tr. 67-69). During the meeting, the Respondent made it clear that the issue with Jarman's application for membership was his June 14th Facebook note, which was distributed and reviewed by the E-Board members during the meeting. (Tr. 70, 73, 115-16). Jarman's Facebook note was the only statement by Jarman that was referenced regarding his membership application. (Tr. 74-75).

Over the telephone Gary Johanson explained to the E-Board about his involvement in the Williamson trial, including the expenses involved. (Tr. 116). Johanson advised that if the Union did not feel a person was an acceptable candidate for union membership, the candidate should not be accepted as a member because it was easier to deny a person membership at the outset than to hold a trial. (Tr. 116-17, 122). Johanson testified that he was fearful that Jarman would attempt to hollow the Union out from the inside like an Afghani soldier putting on a suicide vest and going to a Marine post. (Tr. 122). Johanson testified that although Jarman was not a member of the Union, or even an employee whose position was represented by the Union when he drafted the June 14th Facebook note, the Union still applied the IAM Constitution to him as though he were a member of the Union. (Tr. 121, 127).

The E-Board voted to deny Jarman membership to the Union for an indefinite period of time, but no less than five years. (G.C. Ex. 19; Tr. 75-76, 122-23, 131). Hill testified that he advised the E-Board that by voting to deny Jarman membership at the E-Board meeting and imposing an indefinite time frame, the Union was not following the IAM Constitution. (Tr. 76-77). Hill testified that the Constitution only allowed the E-Board to make a recommendation to the Union members, who could then vote to admit or deny Jarman's membership application. (Tr. 87).

Jarman did not receive any official notification from the Union regarding his membership status, but did begin to hear rumors that he had been denied membership in the Union. (Tr. 45). On December 21, Jarman emailed Johanson, stating that he had attempted to join the Union since he took his new position in November 2011, and that he had heard that he may have been banned from the Union for five years because of a disagreement with John Griffin over the shift change issue. (G.C. Ex. 13; Tr. 44-45). Jarman requested to know if he had been denied membership to the Union. (G.C. Ex. 13; Tr. 45). Jarman also stated that he still wanted to join NFFE and run for official office and stated that because he was a shrewd negotiator with popular appeal and had been president of IGUA Local 124, he believed he had a lot to offer NFFE. (G.C. Ex. 13; Tr. 45-47). Johanson did not respond the Jarman's email. (Tr. 45).

On January 3, 2012, Union President Bill Roush emailed the Agency requesting that it stop Jarman's dues deduction, which the Agency did on the same day. (G.C. Ex. 21).

At some point, Rodney White, President of the Pipefitter's Union, asked Union steward David Hill if he would look into why Jarman was not being admitted to membership in the Union. (Tr. 78). Hill agreed and spoke to Jarman. (Tr. 78). Hill then began to represent Jarman in his effort to obtain membership in the union. (Tr. 48, 67, 83). Hill testified that he believed Jarman deserved the opportunity to make his case because he did not believe that the Union had all the facts regarding Jarman's membership application and believed that the Union had not dealt with the issue properly. (Tr. 78-79, 82).

As a result, on January 11, 2012, Hill emailed Gary Johanson, with copies to Jarman, Pettit and White, stating that he want to set up a meeting to discuss the membership application. (G.C. Ex. 14; Tr. 47-48, 77-79). This proposed meeting never took place. (Tr. 49, 84).

On January 17, Hill informed Jarman that the Union was going to hold another meeting that day regarding his membership application because the previous meeting did not comply with the Union's governing documents. (Tr. 49, 84). Jarman asked Hill if he could attend the meeting. (Tr. 49, 85). Hill later informed Jarman that he had spoken with President Roush, who had told him that Jarman could not attend the meeting because he was not a member of the Union. (Tr. 49-50, 85). That same day, Jarman e-mailed Roush, disagreeing with the decision to not allow him to attend the Union meeting and stating that he thought he should have been allowed to attend. (G.C. Ex. 15; Tr. 50).

Approximately ten people attended the January 17 meeting, which consisted primarily of the E-Board members who had previously voted to deny Jarman membership, plus two or three other members. (Tr. 85-88). Roush passed out Jarman's June 14, Facebook note during the meeting. Apparently, there was no discussion that Jarman had not been a member of the NFFE bargaining unit when he drafted and posted the Facebook note. (Tr. 88, 133).

The Union membership unanimously voted to deny Jarman membership to the Union, with the option to reapply in six months. (G.C. Ex. 20; Tr. 89-90, 131). Hill later informed Jarman that he had attended the January 17, meeting and had voted, along with the other Union members, to deny Jarman membership to the Union. (G.C. Ex. 20; Tr. 50-51, 85, 91-92).

On January 17, Jarman emailed Johanson and Hill asking if they had a chance to speak about his membership to the Union and, if not, requested that the other union presidents join the meeting. (G.C. Ex. 19). Johanson responded on January 19, and requested to meet with Jarman the following week. (G.C. Ex. 19. Jarman emailed Johanson informing him that he had reserved a private office so they could meet. (G.C. Ex. 16; Tr. 51).

On January 26, Johanson informed Jarman that he was denied membership to the Union. Johanson showed Jarman a copy of his June 14, Facebook note and told him that he interpreted the note to mean that Jarman was rallying a petition against the Union to have it decertified. (Tr. 52, 133-34). Johanson did not inform Jarman how he had obtained a copy of the Facebook note. (Tr. 58). Jarman informed Johanson that he had not advocated to decertify the Union, but Johanson still told Jarman that he was denied membership to the Union and that his application could be reviewed every six months. (Tr. 52-54, 123). Johanson did not provide Jarman with any information on how to appeal the Union's decision. (Tr. 134). Johanson gave Jarman a check for the amount of dues he had previously paid to NFFE. (Tr. 53-54, 123).

In December 2010, IAM placed NFFE Local 2189 into trusteeship because it had accused Denny Williamson, a member and Chief Steward, of running a petition to decertify the Union in violation of Article L of the IAM Constitution. (Tr. 11, 112). The IAM constitution governs NFFE Local 2189. Article L includes, among other things, provisions regarding the improper conduct of officers, representatives, and members; the trial of officers or representatives; the trial of members; appointment of a trial committee; trial procedures; report of the trial committee; and appeal procedures. (G.C. Ex. 18). National Business Representative Gary Johanson was appointed, along with two other national business representatives, to investigate, prepare a report, and hold a trial regarding Williamson's alleged misconduct. (Tr. 111-12). Within several months, the investigation and trial of Williamson closed and IAM, through the International President, delivered a verdict. (Tr. 113). No petition was ever filed with the Dallas Region to decertify the Respondent.

The Union had three different trustees during this period: David Stamey, John Griffin, and Gary Johanson. (Tr. 106-08). In May or June 2011, Johanson was replaced with Griffin and began to provide advice to the Respondent as a part of his regular duties. (Tr. 110). Bill Roush served as the President of the Union during and after the trusteeship. (Tr. 108).

At the same time as the committee was reviewing Jarman's membership application, it was also reviewing the application of a female employee, who had been heavily involved in Williamson's decertification campaign. She had previously revoked her membership but was seeking to rejoin the Union. After much discussion, the committee voted unanimously to deny membership to both Jarman and the female employee. (Tr. 73-75, 115-18).

Section 7116(c) of the Statute states:

> 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.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated § 7116(c) of the Statute when it denied Jarman membership to the Union based on a critical statement Jarman posted on his Facebook account. The GC notes that Jarman's note criticized the Respondent's decision to bargain over the proposed shift change and was posted in June, five months before he was even in the bargaining unit represented by the Respondent.

The GC asserts that the Authority has interpreted the final proviso of § 7116(c) to allow a union to discipline a member, including the denial of membership or expulsion, for reasons unrelated to occupational standards and dues. Such ability to enforce discipline is subject to the requirement that the discipline be consistent with the provisions of the Statute. *Am. Fed'n of Gov't Employees, Local 2419*, 53 FLRA 835, 841-42 (1997) (*AFGE Local 2419*). The Authority has held that a union may deny an employee membership to the union where the employee's actions "threaten or attack the union's existence as an institution." *Id.* at 846. But "absent a threat to its continued existence, a union may not discipline an employee for mere criticism of its management or policies." *Id.* This rule is consistent with § 7102, which both clearly protects an employee's right to speak out, for or against the union, and recognizes the employees' "right to form, join, or assist any labor organization," freely and without fear of penalty or reprisal. *Am. Fed'n of Gov't Employees, Local 3475, AFL-CIO*, 45 FLRA 537, 549 (1992) (*AFGE Local 3475*); *Am. Fed'n of Gov't Employees, AFL-CIO*, 29 FLRA 1359, 1364 (1987) (*AFGE, AFL-CIO*).

The GC asserts that Respondent denied Jarman membership to the Union because he criticized the Union in a Facebook note. It argues that Jarman's note can only reasonably be interpreted as mere criticism of Respondent's decision to bargain over the shift change and did not constitute an attack on the Respondent's existence as an institution. As a general matter, employees who are dissatisfied with their exclusive representative may seek to decertify their existing exclusive representative. Consistent with this fact, Jarman simply

mentions that a union can be decertified if it becomes corrupt. He does not state that Respondent is a corrupt union or advocate that employees should decertify the union. (Tr. 19). Therefore, the GC concludes that Jarman's Facebook note constituted mere criticism of the Respondent and could not be used to deny him membership in the union.

Although Jarman referenced UnionFacts.org in his Facebook note, the GC asserts that this reference does not transform the note into an attack on Respondent's existence as an institution. UnionFacts.org does provide information on how to decertify a private sector union under the National Labor Relations Act, but does not mention the Statute or the Authority. Even if it did, that would not compel the conclusion that Jarman advocated the decertification of Respondent. He simply mentioned there was a website providing information regarding the decertification process in his Facebook note. Further, at the time of the posting, Jarman was not a member of the NFFE bargaining unit or a member of NFFE, and therefore, was not subject to the Respondent's constitution.

The GC further asserts that the Respondent's subjective fear of an attack on its existence as an institution, having recently undergone a decertification attempt, should not be considered a valid defense to its actions. There is no evidence that Jarman had been involved in the earlier decertification effort, no evidence that Jarman was orchestrating a plot to undermine the Respondent, and no evidence that Jarman was anything but sincere and genuine in his attempt to join and contribute to the Union that now represented him. Further, the Respondent's argument that § 7116(c) is broad enough to excuse its conduct of denying Jarman membership in the union for a statement he made five months before he was even a member of the bargaining unit it represented should be rejected.

Respondent

Respondent denies that it violated § 7116(c) of the Statute when it denied Jarman membership in the union. In *AFGE Local 2419*, 53 FLRA at 835, the Authority held that "a union can enforce discipline that denies membership for reasons unrelated to occupational standards and dues." *Id.* at 842. A union's right to enforce discipline is limited by the procedures under its constitution and bylaws. The Authority has also made it clear that discipline under this subsection may not be imposed "for statements critical of union leadership if an employee is not attempting to destroy or threaten the existence of the union." *Id.* at 845. The Authority further noted that "in light of the inherent tension between these important individual and institutional statutory rights, future cases will be evaluated on their specific facts and the arguments presented by the parties." *Id.* at 846.

The Respondent asserts that its decision to deny Jarman's membership was wholly consistent with NFFE's right to enforce discipline under § 7116(c). It should be clear that Jarman's Facebook post which encouraged NFFE members to "rise up" and decertify the union was not a mere criticism of Roush or Griffin which would be protected by the Statute. Rather, Jarman openly promoted UnionFacts.com, a rabidly anti-union website with a wealth of information on how to decertify a union but absolutely no instruction on how to form one. Jarman's open Facebook post which could be shared by anyone with anyone amounted to an action which attacks or threatens NFFE's existence as an institution. This was a threat to NFFE's continued existence, and NFFE took the threat seriously.

The Respondent further argues that, even if it is found to have violated § 7116(c) of the Statute, requiring NFFE to admit Jarman would violate the Union's First Amendment right to expressive association. The Respondent argues that the Authority's standard under § 7116(c) dictates that a union has the right to discipline, including the denial of membership, where an employee's actions threaten or attack the union's existence as an institution so long as the actions are not mere criticisms or the filing of an unfair labor practice charge, and so long as the union's discipline does not affect the employee's status as an employee. *AFGE Local 2419*, 53 FLRA at 846. The Respondent asserts that Jarman's Facebook post amounts to action, above and beyond mere criticism, which threatened NFFE's existence, especially in light of the particular facts surrounding this case and the contemporaneous decertification attempt just months before the posts. A finding that § 7116(c) requires NFFE to admit Jarman as a member will impose a greater burden on NFFE than allowed under Supreme Court precedent and will violate NFFE's First Amendment right of expressive association. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (*Boy Scouts*), in which the Supreme Court held that "[t]he forced inclusion of an unwanted person in a group infringes the groups' [First Amendment] freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. The Court looked at four factors, which in this matter, would be: (1) whether NFFE engages in "expressive association"; (2) whether the forced inclusion of Jarman would significantly affect NFFE"s ability to advocate public or private viewpoints; (3) whether Jarman's presence would significantly burden NFFE's desire not to express Jarman's viewpoints; and (4) whether forcing NFFE to accept Jarman as a member under 7116(c) would run afoul of NFFE's freedom of expressive association. The Respondent asserts that it meets these four factors and that even if its conduct was found to violate the Statute, it should not be required to admit Jarman as a member since this would violate NFFE's First Amendment right of expressive association.

ANALYSIS AND CONCLUSION

The facts in this matter are essentially not in dispute. In the spring of 2011, RRAD gave notice that it intended to change its work schedule from a 4-10 schedule to a 5-4-9 schedule. There are five bargaining unit employees at RRAD, with NFFE Local 2189 representing the majority of bargaining unit employees. The five unions opposed the change in schedule, but were unable to agree that a binding poll of unit employees could be used to resolve the issue. Jarman, at the time was president of IGUA and not a member of the NFFE Local 2189 bargaining unit, felt that an employee poll was the correct course of action and, in June, posted a statement on his Facebook account, asserting his position on the poll. As the evidence reflects, he also took issue with NFFE not agreeing to the poll, stating "NFFE's rep present even agreed at the time but for whatever reason, they think negotiating is a better idea. It's not." (G.C. Ex. 4). The Facebook post also states: "So, what can you do? Well, the chances are pretty grim, I can tell you that. The ONLY hope you have is if you people rise up and create a grassroots movement so strong that your National knows you will either have your vote or you will decertify them and get a new union. And, don't let anyone tell you that you can't decertify your union if they become corrupt. It happens all the time. Look at UnionFacts.org. There are step by step instructions on how to get rid of a corrupt union. Maybe the guy drunk on power will put the bottle down for a minute and decide to ask the commander for a vote. I know the other 4 of us will. But you need 5 I

would raise hell between now and Monday to get that 5th." (G.C. Ex. 4). There is no evidence that the Facebook post was ever deleted; no evidence that additional posts regarding this issue were made.

In November, Jarman changed jobs and became an employee in the NFFE Local 2189 bargaining unit. He immediately sought membership in NFFE Local 2189. He was denied membership in January 2012, based on his June Facebook posting.

As set forth by the Authority in *AFGE Local 2419*, 53 FLRA at 835, future cases are to be evaluated on their specific facts and the arguments presented by the parties, in light of the inherent tension between important individual and institutional statutory rights in these cases. So it is essential to understand that during 2011, NFFE Local 2189 had been placed in trusteeship due to an internal struggle with its Chief Steward who had sponsored a petition seeking to decertify the Union. Charges of misconduct were brought against the employee under Article L of the IAM Constitution, with a resulting investigation and trial. That employee was apparently removed from membership in Local 2189. Although no decertification petition was filed with the Dallas Region, it is apparent that Local 2189 was greatly concerned about the threat to its existence.

In *AFGE Local 2419*, the Authority deals with the question of when a union may discipline an employee, pursuant to section 7116(c), for words or actions that are asserted to be both protected and potentially detrimental to an exclusive representative's status. The Authority took the opportunity to review how the Statute deals with an employee's right to engage in protected activity vis-à-vis a union's right to enforce discipline against its members. The Authority has acknowledged that a "[u]nion's ability to enforce discipline is not unlimited" and "a union may not threaten or discipline a member because the member has filed unfair labor practice charges." *AFGE, AFL-CIO*, 29 FLRA at 1363, citing *Nat'l Ass'n of Gov't Employees, Local R5-66*, 17 FLRA 796 (1985) (*NAGE Local R5-66*) and *Overseas Educ. Ass'n*, 15 FLRA 488 (1984); see also *AFGE, Local 1857, AFL-CIO*, 44 FLRA 959, 968 (1992) (union violated Statute by disciplining a steward who assisted another employee in filing a ULP charge against the union.) Also in accord with the National Labor Relations Board, the Authority has found a violation of the Statute where employee words or actions amounted to mere criticism of union officials and the discipline for engaging in protected activity affected the employee's status as an employee. *AFGE Local 3475*, 45 FLRA at 549-51 (union violated Statute by attempting to have agency discipline an employee for allegedly using non-work time to prepare and distribute materials critical of local officials); *Overseas Educ. Ass'n*, 11 FLRA 378, 387 (1983) (union violated Statute by requesting agency to discipline an employee for distributing an open letter critical of the local president.)

The Authority determined that a union may discipline an employee when an employee's actions threaten or attack the union's existence as an institution. However, in accordance with previous Authority precedent: (1) a union may neither discipline an employee for merely filing unfair labor practice charges, nor (2) take actions against an employee that affect his or her status as an employee; additionally (3) absent a threat to its continued existence, a union may not discipline an employee for mere criticism of its management or policies. In *AFGE Local 2419*, the Authority did not find a violation, noting that the employee attended a meeting of bargaining unit employees held for the purpose of

discussing the dissolution of the local; he publicly announced at the meeting that he favored getting rid of the local, asserted that he would favor another union, and signed a paper reflecting his dissatisfaction with the local. These actions went beyond mere criticism of Local 2419 or its officials and threatened Local 2419's existence as an institution. As a result, Local 2419 properly exercised its statutory right to discipline the employee in a manner that did not affect his status as an employee. *AFGE Local 2419*, 53 FLRA at 846-47.

In reviewing Jarman's Facebook post, even in terms of Local 2189's recent threats, I cannot find that Jarman's actions reached a level beyond mere criticism. While he was clearly critical of Local 2189's decision regarding the employee poll, and did encourage employees to act, he did not actively pursue decertification of Local 2189 and, in fact, made no other Facebook comments. His actions, at a time when he was not even a member of that particular bargaining unit, were not sufficient to threaten Local 2189's existence as an institution. I further note that more than five months had passed by the time a vote was taken in January 2012 and the only evidence used against Jarman was the June Facebook post.

See also Am. Fed. of Gov't Employees, Local 987, Warner Robins, Ga., 46 FLRA 1048 (1992) *(AFGE Local 987)*, in which the Authority found that the union violated section 7116(c) when it denied an employee readmission to the union, even when the employee had allegedly misappropriated funds from the union and engaged in other misconduct before she applied for readmission. The union refused to process her membership application on the grounds that: (1) it had full power under its constitution to accept or reject applications for membership; (2) it may enforce discipline under its constitution; and (3) to require the employee's acceptance as a member and then compel it to litigate the charges against her would be costly and time-consuming. The Authority adopted the administrative law judge's conclusion that the union violated section 7116(c) by refusing to accept the employee as a union member because "[c]oncerns by the Union as to the burden imposed upon it to accept [the employee] as a member and then take steps to expel her, or the likely affect of her acceptance upon other members as well as its obligation to members, do not justify denying union membership to this employee." *Id.* at 1057. Under the circumstances of this case, the Union's similar concerns relating to Jarman's application for union membership do not justify denying him membership in the Union.

Therefore, I find that the Respondent violated § 7116(c) of the Statute by denying Jonathan Jarman membership in NFFE Local 2189.

Remedy

The GC seeks a posting and electronic dissemination of the Notice in this matter. The Respondent did not express an opinion. In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted both on bulletin boards and electronically, I will incorporate this in the Order. See *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

As set forth above, the Respondent did argue that being forced to allow Jarman membership in the union would violate its First Amendment right of expressive association, as set forth in *Boy Scouts*, 530 U.S. 640. The Respondent therefore argues that such a

remedy ordered pursuant to section 7116(c) of the Statute would be unconstitutional. In agreement with the GC, this is not the appropriate forum for such an argument as I do not have the authority to review the constitutionality of the Statute. *Miss. Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337, 339 (2001) (citing *NTEU v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993); *Puerto Rico Air Nat'l Guard, 156th Airlift Wing (AMC) Carolina, P.R.*, 56 FLRA 174, 182 (2000) ("the Authority's jurisdiction in ULP cases extends only to claims arising from the Statute, not constitutional claims.") (citing *NTEU v. King*, 961 F.2d 240, 243 (D.C. Cir 1992) (holding that a union's constitutional claim was not adjudicable in the administrative proceeding before the Authority).

The GC further seeks an order requiring that Respondent unconditionally offer to retroactively admit Jarman to membership as a member in good standing with NFFE Local 2189, with full rights of membership, effective the date Jarman originally submitted the Standard Form 1187 to the Union, on December 1, 2011, with no cost to Jarman for back dues, and, if tendered, accept payment of future dues uniformly required as a condition of retaining membership, covering the period beginning from Jarman's receipt of the unconditional offer of admission into the Union. I find this request consistent with Authority precedent, see *AFGE Local 987*, 46 FLRA at 1051; *NAGE Local R5-66*, 17 FLRA at 797.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the National Federation of Federal Employees, Local 2189, shall:

1. Cease and desist from:

(a) Denying membership to Jonathan Jarman or any other eligible employee in the exclusive collective bargaining unit represented by the National Federation of Federal Employees, Local 2189 (NFFE, Local 2189) at the United States Department of Army, Red River Army Depot, Texarkana, Texas, for any unlawful reason.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Unconditionally offer to retroactively admit Jonathan Jarman to membership as a member in good standing in the Union, with full rights of membership, effective the date Jarman originally submitted the Standard Form 1187 to the Union on December 1, 2011,

with no cost to Jarman for back dues, and if tendered, accept payment of future dues uniformly required as a condition of retaining membership from Jarman, covering the period beginning from Jarman's receipt of the unconditional offer of admission into the Union.

(b) If tendered, request that the United States Department of Army, Red River Army Depot, Texarkana, Texas, reinstate the deduction of regular and periodic dues from the pay of Jonathan Jarman to the NFFE, Local 2189.

(c) Post at the business office of NFFE, Local 2189, and in all normal meeting places, including all places where notices to members of, and bargaining unit employees represented by the NFFE, Local 2189 are located, 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 the National Federation of Federal Employees, Local 2189, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., June 30, 2014

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL MEMBERS AND EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Federation of Federal Employees, Local 2189, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT deny membership to Jonathan Jarman or any other eligible employee in the exclusive collective bargaining unit represented by the National Federation of Federal Employees, Local 2189 at the United States Department of Army, Red River Army Depot, Texarkana, Texas, for any unlawful reason.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL unconditionally offer to retroactively admit Jonathan Jarman to membership as a member in good standing in the Union, with full rights of membership, effective the date Jarman originally submitted the Standard Form 1187 to the Union on December 1, 2011, with no cost to Jarman for back dues, and if tendered, accept payment of future dues uniformly required as a condition of retaining membership from Jarman, covering the period beginning from Jarman's receipt of the unconditional offer of admission into the Union.

_____

National Federation of Federal Employees, Local 2189

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, Dallas Regional Office, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: 214-767-6266.