OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEE, LOCAL 2876

Respondent

and

Case No.
WA-CO-50218

MAUREEN BLAKEY, JOCELYN BOYER, PATRICIA FLETCHER, ANTOINETTE KALOZ, IVA KREBS, VIVIAN MACHOSKIE AND CHERYL TRAINOR

Charging Parties

Marilyn BlandfordThomas F. Bianco, Esqs. For the General Counsel
Hugh J. Hassan, Esq. For the Respondent
Neal H. Fine, Esq. For the IntervenorBefore: ELI NASH, JR.
Administrative Law Judge

Statement of the Case

On January 30, 1995, Maureen Blakey, Jocelyn Boyer, Patricia Fletcher, Antoinette Kaloz, Iva Krebs, Vivian Machoskie and Cheryl Trainor (herein the Charging Parties) filed an unfair labor practice charge, against the American Federation of Government Employees, Local 2876 (herein the Respondent). The charge was first amended on August 23, 1995 and a second amended charge was filed thereafter, on September 12, 1995. Subsequently, on September 26, 1995, the Washington, D.C. Regional Director for the Federal Labor Relations Authority (herein the Authority) issued a Complaint and Notice of Hearing alleging that the Respondent failed to comply with section 7114(a)(1) and thereby, violated section 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute, as amended, (herein the Statute) by declining to arbitrate a grievance filed by the Charging Parties under a collective bargaining agreement because they were not members of the Respondent.[(1)]

A hearing on the Complaint was conducted in Washington, D.C. at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. The Government Printing Office (herein the GPO) filed a motion to intervene on November 28, 1995. Although that motion was denied by the Chief

Administrative Law Judge on November 29, 1995, GPO renewed its motion and the under-signed allowed it to intervene at the hearing where it examined, cross-examined witnesses and filed a brief in this matter. Timely briefs were filed by the parties which all have been duly considered.

___Upon the entire record, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings and conclusions.

Finding of Facts

1. GPO employees work a variety of work schedules including the following: full-time, part-time and intermittent. Employees working the first two types of schedule listed-above have a scheduled or fixed tour of duty while employees working the intermittent schedule normally work only when needed and not a fixed schedule. For purposes of this case, it need only be said that the full-time and part time employees are eligible for and entitled to many benefits that are not available to an intermittent employee. Although some intermittent employees do not desire conversion, for various reasons of their own, others for obvious reasons, including the availability of benefits, want conversion as quickly as possible.

2. A GPO employee may have either a competitive appointment or an excepted appointment regardless of the type schedule he or she works. An excepted appointment employee working an intermittent schedule may however, try to convert to a permanent appointment by supervisory request and need not take a test or otherwise fulfill any competitive procedures. New GPO supervisors do receive instructions about the various types of appointments and may even obtain advice from the personnel office regarding converting employees from one type appointment to another, but there is absolutely no assurance whatsoever that a particular supervisor will know when to take the necessary steps to convert an eligible employee on an intermittent schedule to a permanent position.

3. Each of the individual Charging Parties was employed by GPO and classified as intermittent before eventually being converted to a full or part-time classification. Their conversions took place at various time during the 1980s and 1990s. For instance, both Iva Krebs and Vivian Machoskie worked an intermittent schedule before they were converted. On separate occasions both Krebs and Machoskie, each went to the GPO Personnel Department sometime in October 1993, seeking information about her retirement credit. Each might have been told by an employee in the Personnel Department that she should have been converted to part-time status long ago. This same person it seems mentioned to Machoskie that "she should pursue it further: that we had a very good case." Krebs and Machoskie were not aware of the availability of such a conversion or that

it had been available for quite a while, and it was they who passed the information on to the remaining Charging Parties.

4. Upon learning of the possibility of conversion sometime in October 1993, Patricia Fletcher, then an intermittent employee asked her supervisor to take steps to convert her to a permanent part-time employee. Fletcher also contacted Lois Garrity, the Union's chief steward and arranged a meeting for October 26, 1993. Four of the Charging Parties met with Garrity and Diane Atkins, the Union's treasurer at the arranged date, and obviously wanted to grieve GPO's failure to give them part-time appointments. Garrity seemed enthusiastic about filing the grievance and, according to Fletcher, Garrity conveyed a feeling to them that the grievance was "winnable." Garrity then inquired whether the Charging Parties were members of the Union. When they replied that they were not, Garrity according to Fletcher, said that she would like them to become Union members and "she felt if we did not join the Union, our grievance would probably not go beyond step three into arbitration."

5. Sometime in December 1993, Fletcher and Krebs met with Garrity a second time. While the meeting was ostensibly to provide information requested by Garrity and to sign forms designating Garrity as their grievance representative, Garrity, again according to Fletcher, said that, "she would like us to join the Union," and this time stated that if they did not become dues paying members the "chances were slim that [the grievance] would ever go to arbitration."

6. On February 9, 1994, Garrity and Union vice president William Lehman met with all of the grievants including Fletcher, Blakey, Krebs, Kaloz, Machoskie and Trainor. During this meeting, Garrity according to Fletcher, renewed her request that the grievants join the Union and brought out forms for them to fill out. Also during this meeting, at least two employees, Trainor and Machoskie, who had been Union members discussed their views as to why they "had dropped out of the Union." Fletcher says that Garrity, although appearing to be angered, did respond by trying to say that the Union had changed and there had been some changes for the better. Finally, Garrity mentioned the cost of arbitration while repeating her request that they all join the Union. None of the Charging Parties joined the Union.

7. A grievance was filed on behalf of the Charging Parties on April 13, 1994. The grievance alleged that GPO violated the Federal Part-Time Career Employment Opportunities Act, 5 U.S.C. Chapter 34, Federal Personnel Management Letter 430-2, and an attachment to that Letter (herein called the Act). The Union not only requested retroactive part-time appointments but, all pay and benefits lost during the period when these grievants should have, but did not have such appointments, as well as a cessation of such conduct by GPO.[(2)]

8. The grievance was denied on July 6, 1994, at step three, which is the last step before arbitration. Although the response to the grievance was due 10 days from the May 24, 1994 grievance meeting, Respondent needed extra time to answer because it needed to research the issue. The denial was based on GPO's analysis of the issue which led it to conclude that the Act did not apply to GPO. It appears that there was no discussion of any issues involved that were outside the grievance filed by Garrity. Finally, it seems that the Charging Parties were not even aware that a grievance had been filed on their behalf until late July 1994, when Fletcher and Krebs happened to run into Garrity in the GPO cafeteria. When they inquired about the grievance, Garrity told them that it had been turned down by, [GPO]", and she allegedly said, "But I feel you have an excellent case, and if it went to arbitration," and she added, "I feel you would have an 80 percent chance of winning." It appears that at the time she made this statement, Garrity no longer was chief steward and seemingly had been transferred to a post outside of the Washington, D.C. area, sometime in July or August 1994. While Garrity earlier informed Union President Phyllis Irions that she was working on a grievance for 10 intermittent employee, it does not appear that Irions was kept informed of the nature of the grievance, that a grievance had been filed or even that the grievance had been turned down by GPO. Before leaving the area Garrity apparently turned over her files, including the grievances filed by these intermittent employees to the National Union. It does not appears that Garrity discussed the outcome of the grievance or any other action to be taken on the grievance with Irions or with any other Union official before her departure.

9. Irions says that after she received calls from Fletcher and the FLRA Regional office, she retrieved the grievances from the Union's National Office. When Irions began working on what she described as the grievance, she did not know exactly what the status of the grievance was for there were separate grievances that Garrity had consolidated and filed as one grievance. By the time Irions did present the grievance to the membership, at the regularly scheduled Union meeting on October 18, 1994, she too felt that the grievance was "winnable". Although Irions may have thought, the grievance was winnable, the question of whether or not to take it to arbitration was considered to be a decision to be made by the membership. After Irions explained that the grievants had refused to become dues-paying members, a motion was made "to **not** take this case to arbitration at the union's expense." The moving person explained that the reason for the motion was that, "these women are not dues' members." Although numerous high ranking Union officers were present at this meeting there is no evidence that any of those officers considered the motion inappropriate. While Irions states that substantial discussion occurred surrounding the grievance, and there were several reasons why the membership did not approve taking this grievance to arbitration, it is undenied that at least one of the reasons for refusing to take this particular grievance to arbitration was that the grievants were not Union members. Irions also testified that she was aware that there was a time

factor with which she had to deal but she knew that she had to get permission from the membership before she could proceed.

Conclusions

A. Positions of the parties.

The Union does not deny that problems did occur during processing of the grievance herein but, disavows that its action violated the Statute since every failure to process a grievance through arbitration does not automatically establish wrongdoing on the part of an exclusive representative. *Vaca v. Sipes,* 386 U.S. 171 (1967). The Union also joins GPO[3] in asserting that the Act involved in the case does not apply to the agency therefore, the grievants were not entitled to reclassification and furthermore, even assuming any sort of entitlement the time limit issue established by the parties collective bargaining agreement, at this stage, definitely bars arbitration.

GPO not only raises issues of timeliness over both the grievance and arbitration of the matter, it contends there is no duty to represent the Charging Parties here because such a duty is imposed only when a union's activity is grounded on the union's authority as the exclusive representative. GPO submits that the Act at issue in this case cannot be enforced through the parties' grievance machinery, but probably only through the judicial process. In these circumstances, GPO believes that the Union is relieved from any duty to represent employees seeking to change their classification through the parties' grievance machinery.

The General Counsel insists that the only reason for refusing to arbitrate the grievance was the status of the grievants who were not dues paying union members. Thus, the General Counsel maintains that the breach of the duty of fair representation which allegedly occurred here would normally constitute a violation of section 7116(b)(1) and (8) of the Statute. More importantly, the General Counsel seeks a remedy which would either obtain a waiver of the time requirements from the GPO in order to arbitrate the grievance, or in the alternative, have the Union make these employees whole for any compensation and benefits that might have been due them had they been converted to permanent part-time status in 1978, as requested in the grievance filed on their behalf. Respondent already has stated that it will not waive any time limits or agree to arbitrate the violation of a statute since in its opinion the Act under which the grievants would necessarily be reclassified does not apply to it.

B. Background evidence establishes existence of that Union policy of not processing grievances of nonmembers.

The record in this case reveals that the membership status of the grievants was clearly a concern at all stages of the processing of this grievance. The record clearly demonstrates that chief steward Garrity, who was the Union's agent while processing the grievances of these intermittent employees (which she consolidated into one grievance) repeatedly mentioned the membership status of the grievants. It is also undenied that Garrity told the grievants that she wanted them to become members of [Respondent], and that if they did not, the grievance she intended to file had only a slim chance of being taken to arbitration. Garrity's statements occurred more than once over a period of time when she met with the intermittents.

While some of Garrity's statements may have occurred outside the six-month period set out in section 7118, even those may be used as background to show that the Union did have a policy, as early as the time Garrity first met with the intermittents in October 1993, of not processing the grievances of nonmembers to arbitration with the same energy, vigor, intensity or drive that goes into the processing of a grievance for a member. Irions testified that the policy of being a member to get a grievance beyond step three was exclusively the idea of Garrity. The evidence shows however, that while Garrity was spreading her original idea, other Union officials were present when such statements were made to the intermittents. Absent a denial by the other officials it is reasonable for the grievants to have thought that their grievance would not be fairly handled if they were not members. Furthermore, none of these officials sought to dispel Garrity's notion that membership was required, leading one to reasonably believe that they all thought her representation to these employees was indeed the policy of the Union. Regardless of Irions testimony, this was the policy applied by the membership in considering and refusing to endorse arbitration and there is no question that the decision of the members was based on the membership status of the grievants. In fact, even as Irions herself so cogently put it, ". . . that's the first thing that always comes out of their mouth, 'Are they Union members?' Are they Union members?'" In this instance, the questions were followed by a vote.

The statements made by Garrity certainly create an impression that if these employees joined the Union their chances of better representation would be enhanced. This would be so whether or not the Union carried out its threat of refusing to vigorously process nonmembers' grievances to arbitration. *American Federation of Government Employees, Local 987,* 35 FLRA 563 (1990). While Garrity's statements could reasonably have led these grievants to believe that they would not receive full processing of their claim unless they were members could be intimidating, her statements are not alleged or litigated as statutory violations. Also,

her earlier statements occurred well outside the statutory 6 month period set out in section 7118 of the Statute. In July however, she told Fletcher and Krebs that there was an 80 percent chance of winning their grievance if "it went to arbitration." Clearly a request to arbitrate the grievance would have been timely in July since GPO did not issue its answer on the step three grievance until July 6, 1994. The failure to act here is also attributable to the Union since it was the discriminatory action of its agent who continually voiced the policy that these nonmembers had a slim chance of winning if they did not become members of the Union.

Based on the foregoing, it is found that the statements Garrity repeatedly made to these employees and in the presence of other high level Union officials while processing the intermittents grievances clearly demonstrates that the Union had a policy of not pursuing nonmembers' grievances to arbitration.

C. Was the Union membership vote not to invoke arbitration on the Charging Parties grievance consistent with the policy expressed by Garrity of not arbitrating nonmembers' grievances and therefore, a violation of section 7116(b)(1) and (8) of the Statute.

In my view, the record evidence demonstrates that the Union did not approve the instant grievance for arbitration based on the policy repeatedly expressed by Garrity. The testimony of Irions discloses that the one reason the grievance was not approved for arbitration was the nonmember status of the grievants. Although asserting that other reasons existed, Irions failed to articulate any reason on the record that overcomes the nonmember reason. Assuming some other valid reason did exist, there is no doubt that one of the reasons for not invoking arbitration was the membership status of these grievants.

Concerning the issue of timeliness of the Union's actions, it need only be said that the Union is charged with the responsibility of acting within contractually established limits. Timeliness is almost always of critical importance in grievance matters. Since this is the case and timeliness is of critical importance at every stage of grievance handling, it is reasonable to conclude here that the Union was more interested in the membership status of these individuals than with timeliness. Furthermore, it is abundantly clear that concern about the nonmember status of the grievants surfaced during times that a timely request for arbitration could have been made. Thus, timeliness was never mentioned as a reason for refusing to go forward with the grievance. In all the circumstances, the testimony and minutes of the October 18, 1994 meeting cannot be ignored and that evidence clearly discloses that at least one reason for not pursuing the grievance any further was the discriminatory consideration that these women were not "dues' members."

Coupled with Garrity's statements especially that the grievants chance for successes were "slim" if they were not members seems to confirm that the foremost reason that arbitration was not approved was that the intermittents were nonmembers.

Based on the foregoing, it is found that by failing to invoke arbitration of a grievance filed by the Charging Parties because they were not union members, the Respondent failed to comply with section 7114(a)(1) and thereby, violated section 7116(b)(1) and (8) of the Statute as alleged.

D. The remedy.

In addition to the normal cease and desist order and notice posting, the General Counsel seeks an order requiring the Union to petition GPO to waive time limits and participate in the arbitration of this matter, as well as one making the Charging Parties, whole for any compensation and benefits they might have accrued had GPO converted them to permanent part-time status, in 1978, as requested by the grievance filed on their behalf in this matter.

In its intervention GPO made it clear that it would not waive time limits to participate in an arbitration of this matter since it does not think that the Act in question applies to GPO.[(4)] GPO was adamant that the grievants could not obtain satisfaction from an arbitrator since the Act was not a part of the collective bargaining agreement. Respondent not only raised questions of whether the back pay remedy asserted by the General Counsel where the weight of the evidence does not indicate that union intervention would result in the substantive relief sought by the grievants (compensation and benefits that might have accrued had they been converted to permanent part-time status in 1978).

I agree with the General Counsel that normally, an exclusive representative who violated the Statute in the manner described above, should be required to seek a waiver of time limits in order to satisfy the grievance through the arbitration process. Such an act would be a futility in this case since Respondent in intervening has already stated that it will not waive any time limits and will not participate in an arbitration of this matter. Consequently, I will not recommended that the Union engage in such an empty gesture.

On the other hand, I agree with the Respondent and GPO that a real question exists to whether these employees are entitled to retroactive compensation and benefits in this matter. The General Counsel ignores the fact that the Act was not a part of the parties' collective bargaining

agreement and therefore, a legitimate doubt as to whether the matter was ever arbitrable exists. Accordingly, the undersigned rejects the remedy proposed by the General Counsel as not effectuating the purposes and policies of the Statute.

With all the uncertainties about entitlement such a remedy could result in an unwarranted windfall. My recommen-dation for a remedy in this case comes close to that expressed by me in *Service Employees International Union, Local 556, AFL-CIO,* 17 FLRA 862 (1985) where it was found that such a remedy was unwarranted where the weight to the evidence did not indicate that intervention by the Respondent would have resulted in the substantive relief sought by the grievants. Since it was the Union who assured these employees that they had a winnable situation, I recommend that it provide, in a timely manner, representation to examine not only any statutory appeals procedures but also, any judicial procedures such as before the Office of Personnel Management or the federal court system, that are now available to assist these employees in obtaining whatever compensation and benefits might be due to them after a timely conversion under the Federal Part-Time Career Employment Opportunities Act, 5 U.S.C. Chapter 34, Federal Personnel Management Letter 430-2. Furthermore, it is recommended that Respondent provide the results of its examination to each of the grievants and that it perform such action in a timely fashion. Finally, when the Union finds the proper arena for this grievance, it should provide representation to any of the Charging Parties who wishes to process the matter further.

Based on all of the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the American Federation of Government Employees, Local 2876, Washington, D.C. shall:

1. Cease and desist from:

(a) Refusing to invoke arbitration on a matter because the grievants are not members of the American Federation of Government Employees, Local 2876.

(b) In any like or related manner interfere with, restrain, or

coerce its employees in the exercise of the rights assured them 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 the interest of all employees in the bargaining unit without regard to union membership.

(b) Upon request, provide employees Maureen Blakey, Jocelyn Boyer, Patricia Fletcher, Antoinette Kaloz, Iva Krebs, Vivian Machoskie and Cheryl Trainor with Union representation, so that they might seek to process their grievances or file appeals or court actions with regard to their reclassifi-cations, and provide them whatever services the American Federation of Federal Employees, Local 2876 would have provided had it not acted discriminatorily.

(c) Post at its business offices and its normal places including all places where notices to members and employees of the Government Printing Office 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 American Federation of Government Employees, Local 2876, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and 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) Submit appropriate signed copies of such notices to the Public Printer, of the Government Printing Office, Washington, D.C. for posting in conspicuous places where bargaining unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of the posting.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Washington, D.C. Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., April 26, 1996

_____

Eli Nash, Jr.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the American Federation of Government Employees, Local 2876 violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT refuse to invoke arbitration on a matter because the grievants are not members of the American Federation of Government Employees, Local 2876.

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

WE WILL represent the interest of all employees in the American Federation of Government Employees, Local 2876 bargaining unit without regard to union membership.

WE WILL upon request, provide employees Maureen Blakey, Jocelyn Boyer, Patricia Fletcher, Antoinette Kaloz, Iva Krebs, Vivian Machoskie and Cheryl Trainor with Union representation, so that they might seek to process their grievances or file appeals or court actions with regard to their reclassifi-cations, and provide them whatever services the American Federation of Federal Employees, Local 2876 would have provided had it not acted discriminatorily.

_____

(Labor Organization)

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 its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW, 4th Floor, Washington, DC 20037 and whose telephone number is (202) 653-8500.

1. The Complaint was amended at the hearing to reflect Respondent as a member of the AFGE-Printing Craft Joint Council, Washington, D.C. which represents the bargaining unit involved herein.

2. Although some of the grievants had already been converted to part-time position, none had received the retroactive relief sought by the Garrity grievance.

3. GPO intervened in this case basically to protect its interest in the parties collective bargaining agreement. The General Counsel argues that because of its intervention, GPO became a full party and, therefore, subject to the jurisdic-tion of the administrative law judge, at least for remedy purposes. This assertion is clearly wide of the mark. The General Counsel had ample opportunity to include the GPO as a party to this case at any stage prior to the hearing and, furthermore at the hearing itself. The General Counsel obviously did not see the GPO as a necessary party to this litigation until GPO intervened to protect its interest. To raise this issue after the hearing and seek to include the agency only for remedy purposes when it has not been charged with any violation of the Statute is not only unthinkable but, improper. It is found therefore, that including GPO as a party for the limited purpose of exacting a remedy against it would be inappropriate.

4. The GPO cites several cases, *Anderson v. United States, 764* F.2d 849 (1985) and *Bird v. United States*, 281 Ct. Cl. 869 (1982). These cases, it is asserted support its position that the employees here have no right to damages for wrongful classification. In addition the Union cited a host of Comptroller General of the United States decisions which it maintains denied claims of intermittent employees to leave and benefits similar to those in the instant case.