

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: November 16, 2006

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
HOUSTON, TEXAS

Respondent

and

Case No. DA-CA-06-0453

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION, AFL-CIO

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION HOUSTON, TEXAS Respondent	
and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO Charging Party	Case No. DA-CA-06-0453

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 18, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

DATED: November 16, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION HOUSTON, TEXAS Respondent	
and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO Charging Party	Case No. DA-CA-06-0453

Nora E. Hinojosa, Esq.
For the General Counsel

Kile J. Pitts
For the Respondent

Marc Shapiro
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On September 28, 2006, the Regional Director of the Dallas Region of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing, alleging that the Department of Transportation, Federal Aviation Administration, Houston, Texas (the Respondent) violated section 7116(a) (1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), by issuing an official of the National Air Traffic Controllers Association, AFL-CIO (Union) a Letter of Reprimand. The complaint was served on Respondent by certified mail. The complaint specified that, in accordance with the Authority's Rules and Regulations, the Respondent must file an Answer to the complaint no later than October 23, 2006, and that a failure to file an answer shall constitute an admission of the allegations of the complaint. A hearing was scheduled for December 5, 2006, in Houston, Texas.

The Respondent did not file an answer, either in person or by mail, within the required period of time. An answer was filed by the Respondent on November 3, 2006, with an explanation that the complaint was misfiled in its office. The Respondent did not file a request for an extension of time to file its answer.

On November 6, 2006, Counsel for the General Counsel (GC) filed a Motion and Argument in Support of Summary Judgment, based on the Respondent's failure to timely file an answer to the complaint. The GC notes that section 2423.20(b) of the Authority's Rules and Regulations provides that "[a]bsent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission." The GC also notes that section 2423.21 sets out the procedure for filing a motion to extend the filing deadline. The GC argues that the Respondent did not request an extension of the filing deadline and that its explanation that the complaint had been misfiled in its office is not good cause under the Regulations. The GC therefore asserts that by its failure to answer the complaint, the Respondent has admitted all of the allegations therein. Since there are no factual or legal issues in dispute, the GC submits that the scheduled hearing is not necessary and the record demonstrates that the Respondent violated section 7116(a)(1) and (2) of the Statute.

On November 9, 2006, the Respondent filed an Agency Response To Motion For Summary Judgment. The Respondent argues that it submitted an answer to the Complaint on November 3, 2006, and it denies that the response was submitted only after the Office of the General Counsel notified the Respondent of its intent to file a Motion for Summary Judgment. The Respondent asserts that it was not aware of the GC's Motion for Summary Judgment until November 7, 2006, when it was discussed during the Settlement Conference. The Respondent cited *National Association of Government Employees, Local R1-32, Bedford, Massachusetts*, 54 FLRA 348 (1998) (NAGE), in which the General Counsel offered the union an unrequested extension of two weeks to file an answer. The Respondent also notes that it has removed the Letter of Reprimand from the employee's file, as stated in an attached copy of a memo to the employee. In consideration of all of the above, the Respondent requests that the Motion for Summary Judgment be denied and, in view of the fact that the Letter of Reprimand has been withdrawn, that the Complaint be denied.

Discussion of Motion for Summary Judgment

Section 2423.20(b) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.20(b), provides, in pertinent part:

(b) Answer. Within 20 days after the date of service of the complaint, . . . the Respondent shall file and serve, . . . an answer with the Office of Administrative Law Judges. The answer shall admit, deny, or explain each allegation of the complaint. . . . Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission.

The Rules and Regulations also explain how to calculate filing deadlines and how to request extensions of time for filing the required documents. See, e.g., sections 2429.21 through 2429.23.

It is undisputed that the Respondent's answer was not timely filed. Therefore, the issue is whether the Respondent has shown "good cause" for its late submission. The Respondent, as noted above, stated in its answer that the complaint issued by the Dallas Regional Director was misfiled in the Respondent's office. Apparently, the Respondent is arguing that this was the cause of the delay in its response; the Respondent specifically denies that it filed the answer only when it discovered the GC was filing a Motion for Summary Judgment.

In the text of the Complaint and Notice of Hearing, the Regional Director provided the Respondent with detailed instructions concerning the requirements for its answer, including the date on which the answer was due, the persons to whom it must be sent, and references to the applicable regulations. The plain language of the notice leaves no doubt that Respondent was required to file an answer to the Complaint.

Moreover, the Authority has held, in a variety of factual and legal contexts, that parties are responsible for being aware of the statutory and regulatory requirements in proceedings under the Statute. *U.S. Environmental Protection Agency, Environmental Research Laboratory, Narragansett, Rhode Island*, 49 FLRA 33, 35-36 (1994) (answer to a complaint and an ALJ's order); *U.S. Department of Veterans Affairs Medical Center, Waco, Texas and American Federation of Government Employees, Local 1822*, 43 FLRA 1149, 1150 (1992) (exceptions to an arbitrator's award); *U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami*,

Florida, 37 FLRA 603, 610 (1990) (failure to file an answer due to a clerical error is not good cause sufficient to prevent a summary judgment).

In this case the Respondent has not filed an answer as required by the Regulations.¹ Nor has the Respondent presented any "good cause" for its failure to do so. The assertion that the complaint was misfiled in the Respondent's office does not support a finding of good cause or relieve the Respondent of its responsibilities for being aware of statutory and regulatory requirements. In accordance with section 2423.20(b) of the Authority's Rules and Regulations, failure to file an answer to the Complaint constitutes an admission of each of the allegations of the Complaint. *Department of Veterans Affairs Medical Center, Asheville, North Carolina*, 51 FLRA 1572, 1594 (1996). Accordingly, there are no disputed factual or legal issues in this matter.

¹

I have considered the Authority's decision in *NAGE, supra*, in which the ALJ noted that the GC had offered an unrequested two week extension for the agency to file its answer to the complaint. The Authority's Regulations clearly set forth the requirements with regard to filing answers, and the GC offer in that case did not change such requirements. Further, the agency still did not file an answer or explain its failure to do so, and the Authority ultimately upheld the ALJ's granting of the GC motion for summary judgment.

The uncontested facts establish the following:

Findings of Fact

1. The Respondent is an agency as defined by 5 U.S.C. § 7103(a)(3).

2. The National Air Traffic Controllers Association, AFL-CIO (Union) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent.

3. During the time period covered by the complaint, Victor Smith occupied the position of Operations Supervisor and was a supervisor and/or management official under 5 U.S.C. § 7103(a)(10) and (11), and was acting on behalf of the Respondent.

4. Luke A. Ball is an employee under 5 U.S.C. § 7103 (a)(2) and is in the bargaining unit described above.

5. During the time period covered by this complaint, Ball held the positions of Facility Representative (Union President) from July 2000 through June 30, 2005, and Acting Facility Representative from approximately July 7, 2005 through July 21, 2005.

A. On July 18, 2005, while acting in his capacity as a Union official, Ball met with Operations Manager Jody Dowd to discuss being recalled to work while on official time, and having his official time canceled and reinstated without notifying him.

B. On March 10, 2005, Ball met with the Air Traffic Manager and Assistant Air Traffic Manager concerning Ball having altered a facility notice, titled General Shift Guidance, dated March 4, 2005, to read as the Union had negotiated it.

C. On the week before June 15, 2005, Ball informed bargaining unit employee Richard Fisher of a change the Union had negotiated with the Agency concerning the Cru-Art (the automated time and attendance system), which was that Operations Supervisors would be making the shift changes on the Cru-Art.

6. On December 13, 2005, the Respondent, by Victor Smith, issued Ball a Letter of Reprimand.

7. Respondent took the action in paragraph 6 above based on Ball's protected activity.

In conclusion, the Respondent has admitted that it discriminated against bargaining unit employee Ball by issuing him a Letter of Reprimand on December 13, 2005, in violation of section 7116(a)(1) and (2) of the Statute. Following the legal framework set forth by the Authority in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterykenny*), the GC has established that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and, such activity was a motivating factor in the issuance of the Letter of Reprimand. Therefore, the GC has established a *prima facie* case. Respondent has not established that there was a legitimate justification for its action and that the same action would have been taken even in the absence of protected activity. *Letterykenny; Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109 (2001).

Consequently, it can only be found that the Respondent has admitted that it has violated section 7116(a)(1) and (2) of the Statute by issuing a Letter of Reprimand to a bargaining unit employee in retaliation for his protected activity.

Respondent has not shown good cause for its failure to file a timely answer to the Complaint. The Respondent has not filed a request for an extension of time to file an answer in this matter and its submitted answer is therefore untimely and not considered. I find that the Respondent violated section 7116(a)(1) and (2) of the Statute, as alleged, and the General Counsel's Motion for Summary Judgment is, hereby, granted.

Remedy

Counsel for the General Counsel proposed a recommended remedy requiring the Respondent to recognize its obligations under the Statute, to remove the Letter of Reprimand from the employee's personnel file, to cease and desist from interfering with, restraining or coercing employees in the exercise of rights assured by the Statute, and to post an appropriate Notice To All Employees. The Respondent asserts that it has removed the Letter of Reprimand and, therefore, the Complaint in this matter should be dismissed. Since I have found that the Respondent has violated the Statute as alleged in the Complaint, I find the GC's recommended remedy to be appropriate, although I will note in the order that the Letter of Reprimand has been rescinded.

Accordingly, I recommend that the Authority grant the GC's Motion for Summary Judgment and issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of Transportation, Federal Aviation Administration, Houston, Texas, shall:

1. Cease and desist from:

(a) Issuing a Letter of Reprimand against Union President Luke Ball, or any other bargaining unit employee, because the employee engaged in protected activity.

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

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

(a) Rescind the Letter of Reprimand issued to Luke Ball on December 13, 2005, and expunge from all records.

(b) Post at its facilities where bargaining unit employees 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 Federal Aviation Administration, Houston, Texas, Facility Manager, 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.

(c) Pursuant to §§ 2423.41(e) of the Authority's Regulations, notify the Regional Director, Dallas Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 16, 2006.

SUSAN E. JELEN
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 Department of Transportation, Federal Aviation Administration, Houston, Texas, has violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by the Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT discriminate against Luke Ball, or any other bargaining unit employee, because the employee engaged in activity protected by the Statute.

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

WE HAVE rescinded the Letter of Reprimand issued to Luke Ball, Union President, on December 13, 2005, and **WE WILL** expunge all references from his records.

(Activity)

Date:

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, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, TX 75202-1906, and whose phone number is: 214-767-6266.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-06-0453, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Nora E. Hinojosa, Esq.

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Acting Director of Labor Relations
NATCA, AFL-CIO
1325 Massachusetts Avenue, NW
Washington, DC 20005

DATED: November 16, 2006
Washington, DC