UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 30, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
PHOENIX, ARIZONA

Respondent

and Case No. DE-CA-03-0302

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Charging Party

Pursuant to sections 2423.27(c) and 2423.34(b) of the Rules and Regulations, 5 C.F.R. §§ 2423.27(c) and 2423.34(b), 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 are the Motion For Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER PHOENIX, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	Case No. DE-CA-03-0302

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is a ttached 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 **MAY 3, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

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PAUL B. LANG
Administrative Law Judge

Dated: March 30, 2004
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER PHOENIX, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	Case No. DE-CA-03-0302

Michael Farley, Esq.
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Statement of the Case

On February 20, 2003[1], the American Federation of Government Employees, Local 2382 (Union) filed an unfair labor practice charge against the Department of Veterans Affairs, Veterans Affairs Medical Center, Phoenix, Arizona (Respondent). On September 30, 2003, the Regional Director of the Denver Region of the Federal Labor Relations

[1] The signature of the Union representative who signed the charge was dated February 20, 2002. This was obviously an error since the alleged unfair labor practice occurred after that date.

Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by failing to participate and cooperate in arbitration proceedings. A hearing was set for January 15, 2004.

After having answered the Complaint the Respondent filed a motion for summary judgment and stay of proceedings; the General Counsel responded by filing a cross-motion for summary judgment and the Respondent filed a response in opposition to the motion of the General Counsel. The Chief Administrative Law Judge granted the joint motion of the parties to indefinitely postpone the hearing pending consideration of the outstanding motions.

Positions of the Parties

The General Counsel maintains that the Respondent failed to participate and cooperate in arbitration proceedings when its representatives left the arbitration hearing after stating that they were making a "special appearance" for the sole purpose of challenging the jurisdiction of the Arbitrator. According to the General Counsel, the Respondent should at least have ensured that its representatives were present throughout the hearing.

The Respondent maintains that its actions did not amount to an unfair labor practice because it neither delayed nor otherwise impeded the arbitration process. The Respondent further argues that the General Counsel is not entitled to question the Respondent's strategy and, by so doing, is attempting to interfere with the Respondent's exercise of its management rights within the meaning of § 7106 of the Statute. The Respondent argues that, if the Union felt that the Arbitrator's award was flawed by the absence of the Respondent's representatives at the hearing, it should have filed exceptions to the award.

Finally, the Respondent argues that the filing of the underlying unfair labor practice charge is no more than a tactic by the Union to advance a claim for attorney's fees.

Findings of Fact

The pertinent facts, as set forth below, are undisputed:

1. The Respondent is an "agency" as defined in § 7103 (a)(3) of the Statute.

2. The Union is a "labor organization" as defined in § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees of the Department of Veterans Affairs (VA) which includes employees of the Respondent and which is suitable for collective bargaining.

3. By memorandum of August 23, 2002, Paul H. West, the Respondent's Associate Medical Director, informed Lee A. Dawson, a member of the bargaining unit, that he would be suspended from September 3, 2002, through October 2, 2002.

4. By memorandum of September 5, 2002, from Randy Brumm, the President of the Union, to West, the Union submitted a grievance on behalf of Dawson.

5. The grievance was denied by the Respondent at various steps after which the Union requested that it be referred to arbitration. The parties selected Sherman B. Kellar to be the Arbitrator. By letter dated December 22, 2002, to counsel for the respective parties the Arbitrator confirmed that the hearing would be held on February 18, 2003, at a location to be selected by the parties. The Respondent provided a room for the hearing and arranged for the presence of a court reporter.

6. On February 7, 2003, Victoria Holbrook, a representative of the Respondent, sent an e-mail message to Brumm containing a list of nine employees who had been

informed by the Respondent that their testimony would be required at the arbitration hearing. The Union did not send such a list to the Respondent.

7. By memorandum of February 13, 2003, West informed Dawson that his suspension was cancelled and that all of his lost pay and benefits would be restored.

8. By telefaxed letter dated February 13, 2003, Patricia L. Howe, Staff Attorney for VA, on behalf of Gregory G. Ferris, Regional Counsel for VA, informed the Arbitrator that Dawson's suspension was being withdrawn, that the arbitration hearing would no longer be necessary and that the court reporter had been cancelled. The Arbitrator was asked to submit a bill for the Respondent's half of his fees and expenses. The letter further stated that Minahan and Shapiro, PC, the law firm representing the Union, had been informed of the withdrawal of the suspension. Minahan and Shapiro, PC was shown as having received a copy of the letter by telefax.

9. On February 13, 2003, Barrie M. Shapiro of Minahan and Shapiro, PC telefaxed a letter to the Arbitrator, with copy by telefax to Howe, stating that the Respondent was not entitled to unilaterally cancel the arbitration hearing and that the Union desired to go forward with the hearing. On the same date, Howe reiterated the Respondent's position to the Arbitrator by means of a letter transmitted by telefax.

10. By letter dated February 14, 2003, to representatives of the respective parties the Arbitrator ruled that the Respondent was not entitled to unilaterally cancel the arbitration hearing and that the hearing would be held on February 18, 2003, as previously scheduled.

11. The arbitration hearing was held on February 18, 2003. Shapiro represented the Union. The Respondent was represented by Howe and Jeanne S. Morris. After the hearing was opened the Arbitrator asked Howe and Morris to be seated. Howe then stated that they were entering a special appearance for the sole purpose of challenging the

Arbitrator's jurisdiction. The Arbitrator informed them that he had jurisdiction and that he would decide the matter based upon the evidence to be presented at the hearing. Howe and Morris thereupon left the room and the Union proceeded to submit testimony and documentary evidence.

12. Both the Union and the Respondent submitted post-hearing briefs to the Arbitrator.

13. On June 9, 2003, the Arbitrator issued an award in which he sustained the grievance and ordered that Dawson be made whole for all lost pay and benefits. The Arbitrator also ordered the Respondent to refrain from disciplining Dawson for the incident which gave rise to his suspension. The Respondent was further ordered to expunge references to the suspensions[2] from Dawson's personnel records, to post an appropriate notice and to provide remedial training to supervisors. The Union's request for compensatory damages was denied.

14. On January 13, 2004, the Authority dismissed the Respondent's exceptions to the award on the grounds that the award could only be appealed to the United States Court of Appeals for the Federal Circuit in view of the fact that the arbitration proceedings were instituted in lieu of an appeal to the Merit Systems Protection Board (MSPB). Therefore, the award could only be reviewed as if it were a decision of the MSPB.[3] There is no evidence that the Union sought review of the award.

15. By letter of August 29, 2003, the Regional Director of the Denver Region of the Authority informed Shapiro that the issuance of a complaint was not warranted with regard to an unfair labor practice charge that the

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[2] Dawson had first been suspended for 10 days and later for 30 days for the same incident.

[3] The Authority's Order Dismissing Exceptions is set forth in *United States Department of Veterans Affairs, Carl T. Hayden Medical Center, Phoenix, Arizona and American Federation of Government Employees, Local 2382 (Kellar, Arbitrator)*, 59 FLRA No. 10 (2004).

Union had filed against the Respondent based upon the Respondent's notification to a bargaining unit employee that his testimony was no longer required at the arbitration hearing regarding Dawson's suspension. On December 18, 2003, the General Counsel dismissed the Union's appeal of the refusal of the Regional Director to issue a complaint.

Discussion and Analysis

Summary Judgment is Appropriate in This Case

In *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995) the Authority held that the criteria for granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure are to be used in considering motions for summary judgment submitted pursuant to § 2423.7 of the Rules and Regulations of the Authority.

Rule 56(c) provides that summary judgment is to be "rendered forthwith" if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Since each of the parties is relying on its own interpretation of the legal significance of undisputed facts, summary judgment is appropriate.

The Legal Framework

§ 7121 of the Statute requires that every collective bargaining agreement include procedures for the settlement of grievances; such procedures are to include binding arbitration which may be invoked either by the agency or the union. In *Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, DC*, 10 FLRA 316, 320 (1982) (*Dept. of Labor*) the Authority held that the failure of a party to proceed to and participate in arbitration is inconsistent with the intent of § 7121 and is an unfair labor practice in violation of § 7116(a)(1) and (8) of the Statute. Although the Authority has never defined the minimum requirements of participation, it has held that a party may proceed to arbitration on an *ex parte*

basis, *Dept. of Labor*, 10 FLRA at 319 and that an Arbitrator's award is not rendered deficient by the refusal of a party to attend the hearing, *U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York and American Federation of Government Employees, Local 2612* (Rinaldo, Arbitrator), 39 FLRA 117, 1123 (1991).

As set forth in the General Counsel's brief in support of its cross-motion, there are numerous cases in which parties have been held to have violated the Statute by their failure to participate in one or more aspects of the arbitration process, *e.g.*, selection of the Arbitrator. I am, however, aware of no case (and none has been cited by the General Counsel) in which a party has been found to have violated the Statute solely by virtue of having left the arbitration hearing prior to its completion.

The Extent of the Duty to Participate

The General Counsel maintains that the duty to cooperate and participate in the arbitration process logically includes some degree of attendance and participation at the arbitration hearing. Assuming that the General Counsel is correct, his position begs the question of the degree of attendance and participation that is required. In his brief he states:

> Counsel for the General Counsel proposes that a standard be applied which would require the parties to remain present throughout the arbitration hearing, unless the parties agree otherwise, or they waive any objections to their counterpart's absence from the hearing. Essentially, this would involve a minimum requirement that the parties attend the entire arbitration hearing, but with no obligation to call witnesses or otherwise present a case.

(GC Memorandum, 11)

That statement is a tacit admission that the General Counsel would have the Authority go beyond established precedent and establish a new standard for compliance with the intent of § 7121 of the Statute. The Authority is, of course, free to change or expand its construction of the Statute. An Administrative Law Judge, on the other hand, is not authorized to make or change policy and is bound by the precedent established by the Authority's decisions.

In each of the cases cited by the General Counsel, including *Dept. of Labor*[4], the respondent either interfered with or prevented the charging party's exercise of its right to obtain an award by an Arbitrator or failed to meet an affirmative obligation.[5] Here, there is no indication that the Union was in any way impeded in the presentation of its case or that the Arbitrator was prevented from reaching a decision. As a practical matter, the position of the Union could only have been improved by the failure of the Respondent to cross-examine witnesses or to present evidence on its own behalf. The General Counsel's far-fetched assertions that the departure of the Respondent's representatives demonstrated contempt for the arbitration process is, in effect, a comment on the wisdom or appropriateness of the Respondent's strategy and amounts to

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[4] In *Dept. of Labor* the agency refused the union's request that the grievance be referred to arbitration, thus depriving the union of its rights under § 7121 of the Statute.

[5] In *Health Care Financing Administration*, 22 FLRA 437, 439 (1986), a case cited by the General Counsel, the Authority noted that the result might have been different if the agency had signified its willingness to be bound by and share the costs of the Arbitrator's decision. In this case, the Respondent asked the Arbitrator to send a bill for its share of his fees and expenses. While the Respondent did not specifically state that it would be bound by the Arbitrator's decision, its appearance at the hearing and its subsequent filing of exceptions to the award imply that the Respondent might contest the award but would comply. Indeed, by reinstating Dawson, the Respondent had "complied" with much of the award before it was issued.

no more than conjecture.[6] It is not alleged, and the transcript of the arbitration hearing does not show, that the Respondent's representatives acted in a disrespectful or disruptive manner at the arbitration hearing. The most that can be said is that the Arbitrator and the Union's representatives were annoyed by the departure of the Respondent's representatives. It is difficult to imagine a rationale for the General Counsel's assertion that the failure of the Respondent's representatives to attend the entire hearing had any other effect on the Union.

The General Counsel maintains that the Respondent's conduct is the equivalent of action that was found to be unlawful in *Department of the Army, 83rd United States Army Reserve Command, Columbus, Ohio*, 11 FLRA 50 (1983). In the cited case the agency informed the Arbitrator that it considered the scheduled hearing to be cancelled and the hearing did not take place. That action is obviously different from that of the Respondent which provided a room for the hearing, rescheduled the court reporter and appeared at the hearing after the Arbitrator had rejected its jurisdiction argument.

This was not a situation in which the Respondent's representatives stormed out of the hearing or acted in a manner which could be expected to have intimidated the Union's representatives or witnesses. Rather, the Respondent took the position that the continued presence of its representatives at the hearing would have prejudiced its challenge to the jurisdiction of the Arbitrator. Whatever the merits of that position, it was one which the Respondent was entitled to take. To conclude otherwise would be to construe § 7121 of the Statute as limiting the right of a party to determine its own strategy in arbitration. There is nothing to indicate that the statutory language was intended to have such an effect.

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[6] The General Counsel also contends that the presence of the Respondent's representatives would have been useful to ensure that its employees were available to attend the hearing. Yet, the General Counsel does not contend that its witnesses were unavailable.

The action of the Respondent in informing employees that they need not attend the arbitration hearing is of no consequence in this case in view of the fact that the General Counsel affirmed the refusal of the Regional Director to issue a complaint on the basis of that action. Furthermore, that incident is outside the scope of both the unfair labor practice charge and the complaint.

In view of the foregoing, I have concluded that the Respondent did not commit an unfair labor practice by causing its representatives to leave the arbitration hearing after expressing their challenge to the jurisdiction of the Arbitrator. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that:

1. The motion of the Respondent for summary judgment be, and hereby is, granted.

2. The cross-motion of the General Counsel for summary judgment be, and hereby is, denied.

3. The complaint be, and hereby is, dismissed.

Issued, Washington, DC, March 30, 2004.

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PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by PAUL B. LANG, Administrative Law Judge, in Case No. DE-CA-03-0302, were sent to the following parties in the manner indicated:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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Dated: March 30, 2004
Washington, DC