

MEMORANDUM

DATE: February 15, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON  
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS  
VETERANS AFFAIRS MEDICAL CENTER  
HAMPTON, VIRGINIA

Respondent

and

Case No. WA-

CA-30881

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2328, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Final Rules and Regulations, 5 C.F.R. § 2423.26(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 is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER HAMPTON, VIRGINIA  Respondent	
and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2328, AFL-CIO  Charging Party	Case No. WA-CA-30881

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented to the undersigned Administrative Law Judge pursuant to the Statute and the Final Rules and Regulations of the Authority, the undersigned herein serves his 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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision, is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MARCH 18, 1996**, and addressed to:

Federal Labor Relations Authority  
Office of Case Control  
607 14th Street, NW, 4th Floor  
Washington, DC 20424-0001

JESSE ETELSON  
Administrative Law Judge

Dated: February 15, 1996  
Washington, DC

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 HAMPTON, VIRGINIA  Respondent	
and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2328, AFL-CIO  Charging Party	Case No. WA-CA-30881

Thomas J. McKeever, Esquire  
Barry Tapp, Esquire  
For the Respondent

Susan L. Kane, Esquire  
For the General Counsel

Before: JESSE ETELSON  
Administrative Law Judge

**DECISION**

The Regional Director of the Federal Labor Relations Authority (the Authority) for the Washington Regional Office issued a complaint alleging that the Respondent (VAMC) violated sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute). More specifically, the complaint alleges that VAMC refused to comply with section 7131(c) of the Statute when it "required" employee Deola Smith, who had received a *subpoena ad testificandum* issued by the Regional Director, to use annual leave, "rather than granting her official time under [section] 7131(c)" so that she could attend an unfair labor

practice hearing as directed by the subpoena.<sup>1</sup> The answer to the complaint admits all of the factual allegations except that it denies that VAMC "required" Smith to use annual leave. The answer denies that the Authority has jurisdiction over this matter, or jurisdiction to have issued the subpoena, and asserts that the Statute does not apply because the "matter" involved is one of "professional conduct or competence."

Counsel for the General Counsel filed a motion for summary judgment with an accompanying supporting memorandum. The Regional Director referred the motion to the Chief Administrative Law Judge, who assigned the case to me and issued an order providing that any pleadings or briefs filed by the parties with regard to this matter must be filed in this office by December 23, 1995. In response to that order, VAMC filed a "Special Appearance to File Motion to Dismiss and to Oppose FLRA's Motion for Summary Judgment." Counsel for the General Counsel filed copies of the "General Counsel's Response to Respondent's Request for Reconsideration" of the Authority's decision in *Department of Veterans Affairs, Veterans Affairs Medical Center, Hampton, Virginia*, 51 FLRA 84 (1995), the unfair labor practice case in which the subpoena was issued to Deola Smith.

### **Jurisdiction**

VAMC contends that the Authority lacks jurisdiction in the "matter" that the instant case involves because it lacked jurisdiction over the subject matter of the case in which the subpoena was issued to employee Smith, and was thus without jurisdiction to issue the subpoena.

The Authority has decided that it had jurisdiction in the earlier case. That decision is controlling for me, pending the Authority's decision on VAMC's request for reconsideration. The Authority's jurisdiction in the instant case, however, does not depend on the ultimate determination as to its jurisdiction in the earlier case.

The jurisdictional dispute in the earlier case has to do with the fact that 38 U.S.C. § 7422 insulates certain

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While the complaint does not allege expressly that Smith was an employee (referring to her instead as "the Charging Party's designated representative") the complaint's references to "annual leave" and "official time under [section] 7131(c)" make the allegation that she is a statutory "employee" implicit. The record as a whole also makes it clear that her status as such is not in dispute.

actions of the Secretary of Veterans Affairs from "[review] by any other agency." See 51 FLRA at 88. VAMC argues that the Authority lacked "subject matter jurisdiction" in the earlier case. Assuming that there is merit to that argument, however, it does not follow that the Authority had no jurisdiction "to conduct proceedings" in that case. The complaint in that case alleged that VAMC violated sections 7116(a)(1) and (8) of the Statute. In section 7118, Congress charged the General Counsel of the Authority with the obligation to investigate charges of unfair labor practices and charged the Authority with the obligation to hear and decide cases in which the General Counsel has determined that issuance of a complaint is warranted. See also *U.S. Department of Veterans Affairs, Veterans Administration Medical Center, San Francisco, California*, 40 FLRA 290, 297 (1991) (charging party's status as a professional medical employee subject to title 38 of the United States Code does not deprive the Authority of jurisdiction to resolve complaints alleging violations of section 7116(a) of the Statute).

The Authority's General Counsel, as required by section 7118, proceeded to investigate the charge in the earlier case and, finding issuance of a complaint warranted so as to bring the issues presented by the case before the Authority, did so. VAMC obviously disagrees with the General Counsel's decision to have proceeded that far, but the arguments that might support such disagreement do not affect the General Counsel's, or the Authority's, jurisdiction to proceed.

VAMC apparently did not move in advance of the hearing in the earlier case to dismiss the complaint for lack of subject matter jurisdiction. Such a motion, if successful at the outset, would have precluded a hearing. Even if not initially successful, it might have delayed a hearing at least until the jurisdictional issue was resolved at the highest available appellate level. Instead (and this is not intended as a criticism) VAMC appeared specially at the scheduled hearing solely for the purpose of contesting jurisdiction. 51 FLRA at 94 n.1. By this time, however, the Regional Director (acting for the General Counsel) had issued the *subpoena* to Smith, and VAMC had denied Smith's request for official time. The ultimate disposition of the question of the Authority's jurisdiction over the subject matter of the earlier complaint does not affect the jurisdiction of the General Counsel to prepare for hearing, including his issuing the *subpoena*. I conclude, therefore, that there is no basis for the contention that the Authority lacks jurisdiction over the instant case.

Assuming, however, that the General Counsel was without jurisdiction to issue the *subpoena*, that would still not affect the Authority's jurisdiction in the instant case, in the relevant sense of the term -- that is -- the authority to hear and decide this case. The earlier lack of jurisdiction would, rather, go to the merits of the instant complaint.

### **Existence of Genuine Issues of Material Fact**

As stated above, the only allegation of fact that VAMC disputes is that it "required" Smith to use annual leave. VAMC does not dispute, however, that it refused to allow her official time, but instead permitted her to use annual leave for the 16 hours requested to attend the hearing. Smith also testified at that hearing, without contradiction or other basis for dispute, that she actually used annual leave for her attendance.<sup>2</sup> I find that she did so. As it is the refusal of official time that is the gist of the alleged violation, I conclude that the denial that Smith was "required" to use annual leave does not raise a genuine issue of material fact. Therefore, the case is appropriate for summary judgment, and I make the following findings of fact, conclusion of law, and recommendation.

### **Findings of Fact**

The Charging Party (the Union) is a labor organization and the agent of the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the Department of Veterans Affairs. VAMC is a statutory agency whose employees are represented by the Union.

On July 6, 1993, the Regional Director of the Authority's Washington Regional Office issued a *subpoena ad testificandum* to the Union's designated representative, Deola Smith, to testify in an unfair labor practice hearing in *Veterans Affairs Medical Center*, Case No. WA-CA-21066 (the decision in which case was later reported at 51 FLRA 84). Deola Smith is a statutory employee. On or about July 6, 1993, after receiving the *subpoena*, employee Smith requested from VAMC 16 hours of authorized absence to

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The transcript of that hearing was made part of the record in the instant case.

testify at the hearing. Smith attached to her request a copy of the *subpoena*.<sup>3</sup>

On or about July 6, 1993, Acting Chief Nurse Janice Webb, a supervisor or management official acting on behalf of VAMC, informed Smith that she would not be granted official time to attend the hearing but could use annual leave instead.<sup>4</sup>

### **Discussion and Conclusion**

An agency violates section 7131(c) of the Statute and section 2429.13 of the Authority's Rules and Regulations by refusing to grant an employee official time for her appearance at an unfair labor practice hearing pursuant to a subpoena issued by a designated agent of the Authority. Such refusal further violates section 7116(a)(1) and (8) of the Statute. *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 26 FLRA 674, 677 (1987), *enforcement denied as to other matters* 877 F.2d 1036 (D.C. Cir. 1989).<sup>5</sup> As VAMC has done precisely that, I conclude that it has, as alleged in the complaint, refused to comply with section 7131(c) and committed an unfair labor practice in violation of section 7116(a)(1) and

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This finding is based on Smith's undisputed testimony at the hearing in the earlier case, corroborated by the representation on her July 6 request for authorized absence (GC Exh. 11), that a copy of the *subpoena* was attached. This representation is persuasive at least that VAMC was made aware of the existence of the *subpoena*.

4

By its admission that it would not grant Smith official time, VAMC renders academic any distinction between "official time" and the "authorized absence" Smith requested. Thus, in view of the record as a whole, this admission compels a finding that, regardless of its understanding of the request for "authorized absence," VAMC refused to grant Smith official time.

5

However, the Authority later clarified its position regarding such violations by limiting its application to situations where the employee is participating for, or on behalf of, a labor organization. *7th Infantry Division (Light), Fort Ord, California*, 47 FLRA 864, 871 (1993).



(8) of the Statute. Accordingly, I recommend that the Authority issue the following order.<sup>6</sup>

#### ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Department of Veterans Affairs, Veterans Affairs Medical Center, Hampton, Virginia, shall:

1. Cease and desist from:

(a) Denying official time to its employees for attendance and participation in unfair labor practice proceedings before the Federal Labor Relations Authority when and to the extent that such attendance and participation has been deemed necessary by a designated agent of the Authority.

(b) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of their 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) Grant Deola Smith official time for the hours for which she used annual leave in order to attend the unfair labor practice hearing in Case No. WA-CA-21066.

(b) Post at all locations at its Hampton, Virginia, facility, where bargaining unit employees represented by the American Federation of Government Employees, Local 2328, AFL-CIO, 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 Deputy Assistant Secretary for Human Resources Management, and shall be posted and maintained for

6

Counsel for the General Counsel requests that the usual Notice to be posted be signed by the Secretary of Veterans Affairs because the denial of official time was based on instructions from the Department's central office. As this was a labor relations matter, I believe that responsibility for the instruction came within the office of the Deputy Assistant Secretary for Human Resources, whom I therefore find to be the appropriate signing official. See *U.S. Department of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 992 (1993).

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 section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Washington 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, DC, February 15, 1996

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JESSE ETELSON  
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY  
AND TO EFFECTUATE THE POLICIES OF THE  
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT deny official time to our employees for participation in unfair labor practice proceedings before the Federal Labor Relations Authority when and to the extent that such participation has been deemed necessary by a designated agent of the Authority.

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

WE WILL grant Deola Smith official time for the hours for which she used annual leave in order to attend the unfair labor practice hearing in Case No. WA-CA-21066.

(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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Regional Office, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-30881, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

Thomas J. McKeever, Esquire  
Barry Tapp, Esquire  
Office of the General Counsel  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

Susan L. Kane, Esquire  
Federal Labor Relations Authority  
Washington Regional Office  
1255 22nd Street, NW, 4th Floor  
Washington, DC 20037-1206

Ms. Deola Smith  
718 Macneil Drive  
Newport News, VA 23602

Hannah Harris, President  
American Federation of Government  
Employees, Local 2328, AFL-CIO  
P.O. Box 5458  
Hampton, VA 23667

**REGULAR MAIL:**

National President  
American Federation of Government  
Employees, AFL-CIO  
80 F Street, NW  
Washington, DC 20001

Dated: February 15, 1996  
Washington, DC