

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

U.S. DEPARTMENT OF ENERGY, WASHINGTON, D.C. Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case Nos. WA-CA-70333 WA-CA-80228

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before 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 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 **OCTOBER 28, 1998**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: September 28, 1998
Washington, DC

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

MEMORANDUM

DATE: September 28, 1998

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF ENERGY,
WASHINGTON, D.C.

Respondent

and

CA-70333
CA-80228

Case Nos. WA-
WA-

NATIONAL TREASURY EMPLOYEES
UNION

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 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 motions, exhibits, and any briefs filed by the parties.

Enclosures

98-39

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

<p>U.S. DEPARTMENT OF ENERGY, WASHINGTON, D.C.</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>NATIONAL TREASURY EMPLOYEES UNION</p> <p style="text-align: center;">Charging Party</p>	<p>Case Nos. WA-CA-70333 WA-CA-80228</p>

Aleshia Duncan
Representative of the Respondent

Eileen Hennessey
Counsel for the Charging Party

Patricia Armstrong
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The consolidated unfair labor practice complaint alleges that the Respondent failed and refused to comply with section 7115(a) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7115(a), and thereby violated section 7116(a)(1) and (8) of the Statute, by failing to process the SF-1187 dues withholding requests of six bargaining unit employees and by discontinuing the dues withholding of sixteen other bargaining unit employees.

By Order dated August 17, 1998, the Chief Administrative Law Judge granted the Respondent's motion for an extension of time within which to file its answer to the complaint. The Chief Administrative Law Judge extended the Respondent's time for filing an answer to August 26, 1998. The Respondent did not file an answer within the required period.

On August 31, 1998, Counsel for the General Counsel moved for summary judgment and supported the motion by reference to section 2423.20(b) of the Authority's Rules and Regulations. 5 C.F.R. § 2423.20(b) (1997). Section 2423.20 (b) 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 Respondent did not show good cause for failing to file an answer, but did respond to the motion for summary judgment on September 3, 1998, in part, as follows:

The agency is in agreement with this Motion. We have been working to resolve this matter. Specifically, we have returned all employees to bargaining unit status and transmitted retroactive payment for dues owed for all employees named in the complaint, with one exception. I am working with the respective parties in the agency to complete payment for the last employee.

The agency will continue to update Ms. Armstrong and Ms. Hennessey, National Treasury Employees Union, on our efforts to resolve this matter.

Efforts to resolve the matter by settlement were unsuccessful. The Respondent failed to participate in a scheduled prehearing conference held on September 2, 1998 pursuant to section 2423.24(d) of the Authority's Rules and Regulations.

Based on the allegations of the complaint, the admissions by operation of section 2423.20(b) of the Authority's Rules and Regulations, and all the pleadings and exhibits, it appears that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law. See *U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida*, 37 FLRA 603, 610 (1990). Accordingly, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Respondent, the U.S. Department of Energy, Washington, D.C., is an agency under 5 U.S.C. § 7103(a)(3).

The Charging Party, the National Treasury Employees Union, a labor organization under 5 U.S.C. § 7103(a)(4), is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

Chapter 228 is an agent of the Charging Party for representing bargaining unit employees at Respondent's Germantown, Maryland facility. Chapter 213 is the agent of the Charging Party for representing bargaining unit employees at the Respondent's Headquarters facility in Washington, D.C.

On the dates specified opposite their names, Chapter 228 submitted a completed SF-1187, dues withholding request, to the Respondent for each of the following employees in the bargaining unit.

<u>Name</u>	<u>Date SF-1187</u>
Phillip Altomare	2/28/97
Lydia Chang	7/9/97
Gene Chou	7/24/97
Jonathan Kang	8/8/97
Ram Lahoti	8/13/97
Joseph Payer	7/8/97

On October 21, 1997, Chapter 228 renewed its request to Respondent to commence dues withholding for Phillip Altomare, Lydia Chang, Gene Chou, Jonathan Kang, Ram Lahoti, and Joseph Payer.

Since the dates of submission of the SF-1187s by the employees listed above until the date of the complaint (June 12, 1998), the Respondent has failed and refused to process the dues withholding requests.

During the time period specified opposite their names, the following employees in the bargaining unit had their dues withholding discontinued by the Respondent.

<u>Name</u>	<u>Date Dues</u>	<u>Date Dues</u>
	<u>Withholding</u>	<u>Withholding</u>
	<u>Discontinued</u>	<u>Resumed</u>

Karen E. Alozie	1/18/97	9/28/97
Veronica Bellamy	1/18/97	9/28/97
Deborah D. Black	1/18/97	9/28/97
Deborah Collins	1/18/97	9/28/97
Shirley Derflinger	1/97	9/28/97
Larry Dewey	1/18/97	9/28/97
Dan Funk	1/97	9/28/97
Henry Himpler	4/97	1/18/98
Suzanne Iannucci	1/97	9/28/97
Marvin Mielke	1/97	9/28/97
Genoa Mitchell III	1/97	9/28/97
Bonny Overton	1/18/97	Present
Edward Rizkalla	6/97	1/98
Janet Smith	1/18/97	9/28/97
Lillian Walker	1/18/97	9/28/97
William Weaver	1/97	1/18/98

The Respondent and Charging Party's collective agreement

became effective on August 7, 1996 for a period of three years. Article 9 of the collective bargaining agreement is entitled "Dues Withholding." Section 9.11(C) provides, in pertinent part, that "[w]hen the employer fails to commence dues withholding in a timely manner, or otherwise fails to remit dues owed, the employer will pay the full amount to the NTEU and recoup the funds from the employee's salary through an adjustment subject to the employee's right to seek waiver of overpayment."

Discussion and Conclusions

Section 7115(a) of the Statute provides that "if an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment." The Authority has interpreted this provision of the Statute as an "absolute duty on agencies to honor the current assignments of unit employees by remitting regular and periodic dues deducted from their accrued salaries to their exclusive representatives." *Lowry Air Force Base, Denver, Colorado*, 31 FLRA 793, 797 (1988). An agency's obligation under section 7115 is mandatory and nondiscretionary. *American Federation of Government Employees, Council 214 v. FLRA*, 835 F.2d 1458 (D.C. Cir. 1987). An agency must process dues assignments expeditiously. *Department of Justice, United States Attorney's Office, Los Angeles, California*, 17 FLRA 1005, 1006 (1985) (citing *Department of Health and Human Services, Social Security Administration*, 13 FLRA 625 (1984) and *Department of Health and Human Services and Social Security Administration, Region IX, San Francisco, California*, 12 FLRA 250 (1983)). An agency's failure to honor an employees for dues checkoff under section 7115 constitutes a violation of section 7116(a) (1) and (8) of the Statute. See *Defense Logistics Agency*, 5 FLRA 126, 132-33 (1981).

In the instant case, the Respondent failed to process the SF-1187 submitted by employees Phillip Altomare, Lydia Chang, Gene Chou, Jonathan Kang, Ram Lahoti and Joseph Payer. The Respondent also unilaterally discontinued dues withholding for the following bargaining unit employees: Karen Alozie, Veronica Bellamy, Deborah Black, Deborah Collins, Shirley Derflinger, Larry Dewey, Dan Funk, Henry Himpler, Suzanne Iannucci, Marvin Mielke, Genoa Mitchell III, Bonny Overton, Edward Rizkalla, Janet Smith, Lillian Walker and William Weaver. By failing to deduct Union dues from the salary of these unit employees, the Respondent

failed to comply with its obligation to deduct dues allotment under section 7115(a). Therefore, the Respondent committed an unfair labor practice in violation of section 7116(a) (1) and (8) of the Statute.

The General Counsel has requested a cease and desist order, an appropriate posting, and that the Respondent also be required to reimburse the Charging Party the dues it failed to withhold from employees during the relevant time period. The remedy requested by the General Counsel is appropriate. The Authority has long held that the remedy for failing to comply with section 7115(a) properly includes a requirement that an agency reimburse a union for the dues it would have received but did not as a result of the unlawful conduct. *Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island*, 16 FLRA 1124, 1127 (1984).

I also agree with Counsel for the General Counsel that the doctrine of sovereign immunity does not apply to prevent the Respondent from reimbursing the Charging Party. The dues money to be remitted to the Charging Party was not intended to be from Government appropriations, but from authorized deductions from employees' pay pursuant to section 7115 of the Statute. The Respondent has contractually agreed that in cases where it has failed to remit or withhold the dues in a timely manner, it will pay the Charging Party the dues and recoup the funds from the employees' salary through an adjustment subject to the employees' right to seek waiver of overpayment. The reimbursement remedy imposed is consistent with this contractual provision, the Statute, and Authority precedent.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Energy, Washington, D.C. shall:

1. Cease and desist from:
2. Refusing to comply with the provisions of section 7115 of the Federal Service Labor-Management Relations Statute by refusing to honor or discontinuing valid written assignments from unit employees for the payment of regular and periodic dues to National Treasury

Employees Union, the exclusive representative of the unit employees.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

3. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reimburse the exclusive representative, National Treasury Employees Union, in an amount equal to the regular and periodic dues it would have received from the pay of employees named in the Complaint in Case Nos. WA-CA-70333 and WA-CA-80228.

(b) Commencing with the first pay period after the date of this Order, deduct regular and periodic dues from the pay of employees named in the Complaint in Case Nos. WA-CA-70333 and WA-CA-80228 and any other bargaining unit employee who may in the future complete a valid written dues assignment for such purpose and make an appropriate allotment of such dues to the exclusive representative.

(c) Post at its Headquarters and Germantown, Maryland facilities 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 Secretary of the Department of Energy, 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 are posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by other material.

(d) Pursuant to section 2423.41 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, 1255 22nd Street, NW, Suite 400, Washington, DC 20037-1206, in writing within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 28, 1998

GARVIN LEE OLIVER
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 U.S. Department of Energy, Washington, D.C. 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 comply with the provisions of section 7115 of the Federal Service Labor-Management Relations Statute by refusing to honor or discontinuing valid written assignments from bargaining unit employees for the payment of regular and periodic dues to the National Treasury Employees Union, the exclusive representative of the unit employees.

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

WE WILL reimburse the National Treasury Employees Union in an amount equal to the regular and periodic dues it would have received from the pay of employees named in the Complaint in Case Nos. WA-CA-70333 and WA-CA-80228 who executed valid written dues assignments but which dues it did not receive as a result of our unlawful refusal to honor the employees' valid written dues assignments for such purpose.

(Agency)

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 Washington Region, Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW, Suite 400, 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 GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. WA-CA-70333 and WA-CA-80228 were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Patricia A. Armstrong
Counsel for the General Counsel
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REGULAR MAIL:

National President
National Treasury Employees Union
901 E Street, NW, Suite 600
Washington, DC 20004

Dated: September 28, 1998
Washington, DC