FEDERAL LABOR RELATIONS AUTHORITY OALJ 13-01
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE U.S. DEPARTMENT OF THE AIR FORCE EDWARDS AIR FORCE BASE, CALIFORNIA RESPONDENT AND SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION CHARGING PARTY	Case No. SF-CA-11-0505

John R. Pannozzo, Jr.
For the General Counsel

Michael Wells
For the Respondent

Steve Oldenbeken
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Respondent failed to file an answer to the complaint issued in this matter. On June 27, 2012, the General Counsel filed a Motion for Summary Judgment. On July 2, 2012, the Respondent filed a timely Response, in which it argued that the General Counsel's requested remedies in its motion are not related to the allegations of the complaint and are not supported by the record. The Respondent also argued that there are material issues of fact regarding the General Counsel's proposed remedy and that summary judgment is not appropriate. The Respondent made no arguments regarding its failure to file an answer in this matter. Since the Respondent has not demonstrated good cause for why it did not file an answer to the complaint, I find that the General Counsel is entitled to summary judgment in its favor. The recommended remedy will be discussed later in this decision.

PROCEDURAL STANDARDS

Parties appearing before the Federal Labor Relations Authority (the Authority) are charged with knowledge of all pertinent statutory and regulatory filing requirements. *U.S. Envtl. Prot. Agency, Envtl. Research Lab., Narragansett, R.I.,* 49 FLRA 33, 37 (1994). Section 2423.20(b) of the Authority's Rules and Regulations requires a respondent to file and serve its answer to the complaint within 20 days of the date of service of the complaint, but, in any event, prior to the start of the hearing. Should a respondent fail to file an answer within the required time, absent a showing of good cause, the failure to file an answer constitutes an admission of the allegations of the complaint.

STANDARDS FOR SUMMARY JUDGMENT

On considering motions for summary judgment submitted pursuant to §2423.27 of the Authority's regulations, the standards to be applied are those used by the United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Dep't of Veterans Affairs, VAMC, Nashville, Tenn.,* 50 FLRA 220, 222 (1995). Rule 56(c) provides, in pertinent part, that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Upon review of the General Counsel's motion and the Respondent's response, I have determined that summary judgment is appropriate in this case.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. parts 2423 and 2429.

On May 24, 2012, the Acting Regional Director of the San Francisco Region of the Authority issued a Complaint and Notice of Hearing alleging that the Department of Defense, U.S. Department of the Air Force, Edwards Air Force Base, California (the Respondent), violated section 7116(a)(1) and (5) of the Statute by unilaterally changing SPORT Operating Instruction 13-2, paragraph 5.1.5, replacing "will normally" with "will be given".

The complaint was served on the Respondent by certified mail and specified that an answer was to be filed by June 19, 2012. The complaint also explained that a failure to file an answer would constitute an admission of the allegations in the complaint absent a

demonstration of good cause. The due date established by the complaint reflected the twenty (20) days a respondent is afforded to file an answer along with five (5) days added for service by mail as allowed by regulations. See 5 C.F.R. §§2413.20(b), 2429.21 and 2429.22.

As of this date, the Respondent has not filed an answer to the complaint. In its Response, the Respondent did not provide any explanation for its failure to file an answer.

On June 27, 2012, the General Counsel filed a motion for summary judgment, asserting that by its failure to answer the complaint by the required date, the Respondent admitted all of the allegations set forth therein, and thus, the Respondent violated the Statute as alleged. As the Respondent failed to answer the allegations of the complaint and has not shown good cause for its failure to file an answer, the Respondent admits the allegations of the complaint pursuant to application of 5 C.F.R. §2423.20(b). Accordingly, there is no genuine issue of material fact in dispute, and it is appropriate to resolve this case by summary judgment. I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. This unfair labor practice complaint and notice of hearing issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The Department of Defense, U.S. Department of the Air Force, Edwards Air Force Base, California (Respondent/Activity) is an agency under 5 U.S.C. §7103(a)(3).

3. The SPORT Air Traffic Controllers Organization (Union/Charging Party/SATCO) 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 the Respondent.

4. The charge was filed by the Charging Party with the San Francisco Regional Director on July 29, 2011.

5. A copy of the charge described in paragraph 4 was served on the Respondent.

6. During the time period covered by this complaint, the person listed below occupied the position opposite his name:

   Timothy B. Bryant Chief, SPORT Military Radar Unit Operations

7. During the time period covered by this complaint, Bryant was a supervisor or management official under 5 U.S.C. §7103(a)(10) and/or (11) at Respondent.

8. During the time period covered by this complaint, Bryant was acting on behalf of Respondent.

9. On January 31, 2011, the Respondent through Bryant, unilaterally changed SPORT Operating Instruction 13-2, paragraph 5.1.5's radar traffic advisory wording, from "will normally" to "will be given" regarding aircraft separation of 5 miles and 5,000 vertical feet.

10. Respondent implemented the change in working conditions described in paragraph 9 without advance notification and bargaining with the Charging Party to the extent required by law.

11. By the conduct described in paragraphs 9 and 10, the Respondent committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1) and (5) of the Statute.

DISCUSSION

By virtue of its failure to answer the complaint, the Respondent has admitted that it unilaterally changed SPORT Operating Instruction 13-2, paragraph 5.1.5's radar traffic advisory wording, from "will normally" to "will be given" regarding aircraft separation of 5 miles and 5,000 vertical feet, without advance notification and bargaining with the Union. The Respondent has further admitted that its actions violated section 7116(a)(1) and (5) of the Statute.

With regard to the remedy in this matter, the General Counsel (GC) attached a proposed remedial order to its motion for summary judgment, which it asserts is consistent with the remedy ordered by the Authority in other cases involving changes in working conditions. *See Veterans Admin. Med. Ctr., Phoenix, Ariz.,* 47 FLRA 419 (1993)(*VA Phoenix*).[1] The GC further asserts that *status quo ante* relief is appropriate in a summary judgment decision based on a failure to file an answer or respond to a motion. *U.S. Dep't of Def., Def. Distrib. Depot, Anniston, Ala.,* 61 FLRA 108, 109 (2005)(*Depot Anniston)*. The GC asserts that the Respondent failed to notify the Union about the change, and willfully failed to discharge its bargaining obligation. The GC references the de-certifications and loss of overtime which adversely impacted two controllers and which were a direct result of the change. By restoring the more flexible "will normally" language, the efficiency or effectiveness of the Respondent's operations would not be disrupted or impacted since that

[1] The Respondent argues that the GC's reliance on this case is misplaced, noting that the cited decision did not require the payment of monies to the affected employee despite a finding that the agency's change in the employee's work hours had directly affected the employee's livelihood. I note that *VA Phoenix* involved a stipulated record and that the GC only requested a cease and desist order, which the Authority approved. I do not find this case to be particularly helpful for either party.

language had been in effect for at least eight and a half months prior to the change. *Veterans Admin. Med. Ctr., Prescott, Ariz.,* 46 FLRA 471, 476-77 (1992); *Fed. Corr. Inst*., 8 FLRA 604, 606 (1982)(*FCI*). The controllers, who lost overtime, should be made whole with back pay, plus interest under the Back Pay Act., and the de-certifications be expunged from their employment records. *See Veterans Admin., West L.A. Med. Ctr., L.A, Cal.,* 23 FLRA 278, 280 (1986).

In its Response to the motion for summary judgment, the Respondent argues that the GC seeks to garner remedies that are in no way related to the allegations of the complaint. The Respondent asserts that the GC has no factual basis or supporting explanation for its assertion that two controllers were de-certified and lost over time pay as a result of the change in the language in the Operating Instruction at issue. The Respondent asserts that it will produce at hearing evidence to establish that the personnel actions taken against the two controllers were prompted solely by specific and serious deficiencies in the controllers' performances, and are outside of the timeframe involved in the language changes. The Respondent argues that there clearly exists a genuine issue of material fact and the GC is not entitled to judgment as a matter of law regarding the improperly sought-after rescissions of personnel actions and overtime pay claims.

In addition, the Respondent argues that the GC's request for a *status quo ante* remedy is inappropriate and unsupported. The agency's change in the language of the Operating Instruction was an exercise of a management right about which the agency had no obligation to substantively bargain. Assuming that the GC can prove the agency had an obligation to bargain with the Union over the impact and implementation of the change and failed to do so, the Authority must look to factors set out in *FCI*, 8 FLRA at 605. One factor to be used in determining the appropriateness of a *status quo* remedy is "whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations." *Id.* at 606. The Respondent attached a memorandum from the Chief of the Operations division, which asserts that the ordered change to the Operating Instruction language would have "grave if not catastrophic[]" consequences. (Agency Ex. 1 at 2).

After admitting its commission of these unfair labor practices, the Respondent sought to raise factual and legal issues related to the remedy sought by the GC. Having admitted its violation of section 7116(a)(1) and (5), the Respondent has admitted that it made changes to its Operating Instruction. This admission does not leave any room for contesting the same issue at a hearing.

However, the record evidence, as set forth by the GC's motion for summary judgment, contains no factual evidence regarding the requested *status quo ante r*emedy. The motion indicates that two employees were apparently de-certified and lost overtime

opportunities, but there is no evidence regarding the specifics, including the timing, of these events.[2] While the Respondent has admitted the violations set forth in the complaint, its failure to file an answer does not also include admissions regarding the elements of the proposed remedy.

Reviewing the elements of *FCI,* based on the Respondent's admission, it appears likely that: (1) no notice was given to the union by the agency. However, there is simply no evidence regarding (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation, and (4) the nature and extent of the adverse impact on unit employees. And, while the Respondent asserts that (5) such a remedy would disrupt the efficiency and effectiveness of the agency's operations, the GC has presented no evidence in response. With the lack of record evidence, any determination regarding the elements required under *FCI* would be speculative on my part. *Cf. Depot Anniston*, 61 FLRA at 109, in which the Authority upheld the *status quo ante* remedy granted by the administrative law judge, noting that the Respondent did not file an opposition to the GC's motion for summary judgment or its request for a *status quo ante* remedy or offer any evidence to the Judge demonstrating the inappropriateness of such a remedy.

Considering the evidence before me, I find that the General Counsel has not supported its request for *status quo ante* relief.

The GC also requested that the Respondent electronically distribute a copy of the Notice to all employees. The Authority has determined that the posting of a Notice on an electronic bulletin board is a nontraditional remedy. *U.S. Dep't of Justice, FBOP, FCI, Florence, Colo.*, 59 FLRA 165 (2003). Similarly, the GC's request for electronic distribution would be a nontraditional remedy. If there are no legal or public policy objections to a proposed nontraditional remedy, it must be reasonably necessary and effective to recreating the conditions and relationship with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violations. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996)(*Warren AFB*). In this case, the complaint offered no allegations about the legality, necessity or efficacy of distributing the Notice electronically to all employees and the Respondent has made no admissions regarding such matters. As the General Counsel presented no document, affidavit, applicable precedent, or other appropriate materials in support of the request for a nontraditional remedy, the findings mandated in the *Warren AFB* case cannot be made and ordering a nontraditional remedy is not appropriate. *Nat'l Ass'n of Air Traffic Specialists, Macon AFSS, Macon, Ga.*, 59 FLRA 261, 262 (2003).

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[2] While it is correct that the complaint does not mention the two employees who were allegedly impacted by the section 7116(a)(1) and (5) violations and who are at the heart of the *status quo ante* request, this is not an uncommon way to plead such allegations, and, would not negate an appropriate *status quo ante* remedy.

CONCLUSION

For the reasons set forth in this decision, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment and issue the following Order:

ORDER

Pursuant to §2423.41(c) of the Authority's Rules and Regulations and §7118(a)(7) of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Defense, U.S. Department of the Air Force, Edwards Air Force Base, California, shall:

1. Cease and desist from:

(a) Unilaterally changing the wording in SPORT Operating Instruction 13-2, paragraph 5.1.5 from "will normally" to "will be given", without first providing the SPORT Air Traffic Controllers Organization with advance notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Upon request, negotiate with the SPORT Air Traffic Controllers Organization, concerning the impact and implementation of its changes in the SPORT Operating Instruction 13-2, paragraph 5.1.5.

(b) Notify the SPORT Air Traffic Controllers Organization prior to changing conditions of employment of bargaining unit employees and, upon request, negotiate to the extent consonant with law and regulation.

(c) Post at the Department of the Air Force, Air Force Flight Test Center, Edwards AFB, California, where bargaining unit employees represented by the Union 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 Commander, 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.

(d) Pursuant to §2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, 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., October 12, 2012.

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 Defense, U.S. Department of the Air Force, Edwards Air Force Base, California, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the wording in SPORT Operating Instruction 13-2, paragraph 5.1.5 from "will normally" to "will be given", without first providing the SPORT Air Traffic Controllers Organization with advance notice and an opportunity to bargain to the extent required by the Statute.

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

WE WILL negotiate with the SPORT Air Traffic Controllers Organization, upon request, concerning the impact and implementation of our decision to change the SPORT Operating Instruction 13-2, paragraph 5.1.5.

WE WILL notify the SPORT Air Traffic Controllers Organization prior to changing conditions of employment of bargaining unit employees and, upon request, negotiate to the extent consonant with law and regulation.

_____
(Respondent/Activity)

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 any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, and whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: 415-356-5000.