FEDERAL LABOR RELATIONS AUTHORITY OALJ 12-01
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS
VETERANS ADMINISTRATION MEDICAL CENTER
MARTINSBURG, WV

RESPONDENT

AND

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, IAMAW, LOCAL LODGE 1798

CHARGING PARTY

Case No. WA-CA-11-0189

Douglas R. Guerrin
For the General Counsel

Brenda Bryd-Peleaz
For the Respondent

Janice Perry
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On August 2, 2011, the Regional Director of the Washington Region of the Federal Labor Relations Authority (the Authority), issued a Complaint and Notice of Hearing, alleging that the Department of Veterans Affairs, Veterans Administration Medical Center, Martinsburg, WV (the Respondent), violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute). The Complaint alleged that the Respondent refused to allow a bargaining unit employee to have a union representative at a meeting in which she was given a notice of proposed removal, and the Respondent failed to provide the National Federation of Federal Employees, IAMAW, Local Lodge 1798 (the Union/Charging Party), with a copy of the notice of proposed removal. The Complaint set

forth a hearing date of October 5, 2011, and stated that an Answer to the Complaint was due no later than August 29, 2011. The Complaint was served by certified mail on Brenda Byrd-Pelaez, Human Resource Management Service, Martinsburg VA Medical Center, 510 Butler Avenue, Martinsburg, WV 25405. The Respondent did not file an Answer to the Complaint.

On September 8, 2011, the General Counsel (GC) filed a Motion for Summary Judgment, based on the fact that the Respondent had failed to file an Answer to the Complaint and therefore, the Respondent had admitted all the allegations of the Complaint. Accordingly, the GC asserted that there were no factual or legal issues in dispute, and the case was ripe for summary judgment in its favor.

On September 14, 2011, the Respondent, by its representative Brenda Byrd-Pelaez, filed an opposition to the Motion for Summary Judgment, asserting that it had "inadvertently failed to respond" to the Complaint, and arguing that the "administrative oversight" should be treated as harmless error. The Respondent insists that it disputes the factual allegations of the Complaint and denies that it violated section 7116(a)(1), (5) or (8) of the Statute. Therefore, the Respondent submits that summary judgment is not warranted and requests that a hearing on the merits be held.

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.

In the text of the Complaint, 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 Prot. Agency, Environmental Research Lab., Narragansett, R.I.*, 49 FLRA 33, 34-36 (1994)(answer to a complaint and an ALJ's

order); *U.S. Dep't of Veterans Affairs Med. Ctr., Waco, Tex.*, 43 FLRA 1149, 1150 (1992) (exceptions to an arbitrator's award)*; U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 37 FLRA 603, 610 (1990)(*Customs*)(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, nor has it demonstrated any "good cause" for its failure to do so. In *U.S. Dep't of Transp., Fed. Aviation Admin., Houston, Tex.*, 63 FLRA 34, 36 (2008), the Authority held that the respondent's misfiling of the complaint, resulting in its filing an answer two weeks after the deadline, did not demonstrate "extraordinary circumstances" that might constitute "good cause" for the late filing. *See also U.S. Dep't of Veterans Affairs Med. Ctr., Kansas City, Mo.*, 52 FLRA 282, 284 (1996) and the cases cited therein. Rather, it has admitted its failure to file an Answer and stated that this was "inadvertent," and that it was an "administrative oversight."[1] The Respondent asserts that its oversight was harmless, because the GC knew from Respondent's earlier position statement (apparently submitted in response to the charge) that Respondent denied the allegations in the Complaint. A similar argument failed, however, in the *Customs* case, 37 FLRA at 610. Respondent's position statement is not a part of the record, and in any case, it would not satisfy the requirements of 5 C.F.R. § 2423.20(b).

In accordance with section 2423.20(b) failure to file an answer to a complaint constitutes an admission of each of the allegations of the complaint. Accordingly, there are no disputed factual issues in this matter, and the case can be resolved by summary judgment. Based on the existing record, I make the following findings of fact, conclusions of law, and recommendations:

FINDINGS OF FACT

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

2. The Charging Party is a labor organization as defined by 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining.

3. At all times material to this case, Dr. Jonathan Fierer occupied the position of Chief of Staff at the Respondent and has been a supervisor and/or management official of the Respondent within the meaning of 5 U.S.C. § 7103(a)(10) and (11).

4. The Respondent and the Union are parties to a collective bargaining agreement covering employees in the bargaining unit described above.

[1] Respondent does not explain its actions further, nor does it offer any documentation, but in the circumstances of this case, such an explanation would not help its case.

5. Dr. Ning Shen, a Staff Pathologist, is a member of the bargaining unit described above.

6. In February 2010, Union President Janice Perry met with the Respondent's HR Manager, Arthur Hicks, and Dr. Shen about Respondent's decision not to renew Dr. Shen's privileges to practice medicine. Mr. Hicks encouraged Dr. Shen to resign.

7. Dr. Shen thereafter hired an attorney.

8. On February 11, 2011, Dr. Fierer asked Dr. Shen to come to his office for a meeting.

9. Dr. Shen asked Dr. Fierer to reschedule the meeting because she could not locate the Union President, Janice Perry.

10. Dr. Fierer denied Dr. Shen's request to reschedule and told her that she did not need union representation.

11. Dr. Shen brought Union Treasurer Sam Welty with her to the meeting. Dr. Fierer refused to allow Mr. Welty to attend the meeting, stating that he needed to talk to Dr. Shen alone. Dr. Fierer then met with Dr. Shen alone.

12. Dr. Fierer handed Dr. Shen a notice of proposed removal signed by Ann Brown, Director of the Martinsburg VAMC.

13. The Respondent did not give the Union a copy of the notice described in paragraph 12 simultaneously or in advance of hand delivering it to Dr. Shen.

14. The notice informed Dr. Shen that her separation from federal service was "being considered due to pre-employment suitability allegations," and that if the allegations were sustained, the Respondent would remove Dr. Shen from federal service.

15. By the conduct described in paragraphs 9 through 14, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1), (5) and (8).

CONCLUSIONS OF LAW

Since the earliest days of the Statute, the Authority has held that "disregard of an exclusive representative and attempts to deal with employees individually concerning grievances, personnel policies and practices is an act in derogation of the exclusive bargaining representative's rights to represent employees." *Internal Revenue Service, Wash., D.C.*, 4 FLRA 488, 497 (1980). This principle was stated slightly differently, but with similar effect, in *Dep't of Health & Human Serv., Soc. Sec. Admin., Baltimore, Md.*, 39 FLRA 298, 311 (1991): "Agencies unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship." In both cases, the Authority stated that such actions not only violate section 7116(a)(1) and (5), but also constitute an independent violation of section 7116(a)(1), as "it demeans the union and inherently interferes with the rights of employees to designate and rely on the union for representation." *Id.* at 311.

From the language of these two decisions, it is clear that an agency is obligated to notify the employees' exclusive representative regardless of whether the matter involves a grievance under the parties' negotiated grievance procedure. The Authority recognized this explicitly in *438th Air Base Group (MAC), McGuire Air Force Base, N.J.*, 28 FLRA 1112, 1122 (1987), when it stated, in relation to the bypassing of a union, "it makes no basic difference whether it is representing the employee in a grievance, protesting the treatment of an employee, or in a disciplinary proceeding, protecting the employee from possible mistreatment."

In this case, the Respondent's Chief of Staff met with a bargaining unit employee and delivered to her a notice of proposed removal, without a representative of the Union being present and without giving a copy of the notice to the Union. Indeed, a Union representative was deliberately excluded from the meeting in which the notice was delivered. In these circumstances, it is clear that the Respondent unlawfully bypassed the Union, interfering with the rights of both the Union and the employee.

Accordingly, I conclude that the Respondent refused to bargain in good faith with the Union in bypassing the Union and meeting directly with Dr. Shen and furnishing the notice of proposed removal only to Dr. Shen, and that the Respondent interfered with the rights of its employees to rely on the Union for representation, in violation of section 7116(a)(1) and (5) of the Statute.[2] As a remedy, the Respondent will be ordered to cease and desist from such activity and to post a notice to its employees regarding its conduct.

[2] The GC has not demonstrated, however, that this conduct violated section 7116(a)(8), and I do not find such a violation.

I therefore recommend that the Authority grant the General Counsel'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 (the Statute), the Department of Veterans Affairs, Veterans Administration Medical Center, Martinsburg, WV, shall:

1. Cease and desist from:

(a) Bypassing the National Federation of Federal Employees, IAMAW, Local Lodge 1798 (the Union), the exclusive representative of certain of its employees, by delivering a notice of proposed disciplinary action to an employee without providing a copy to the employee's designated Union representative.

(b) Interfering with the right of employees to designate and rely on the Union to represent them regarding proposed disciplinary actions.

(c) In any like or related manner, interfering with, restraining, or coercing 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) Furnish or deliver all communications pertaining to proposed disciplinary actions to an employee's Union representative at the same time as those communications are furnished or delivered to the employee, when the employee has designated the Union to represent him or her in that matter.

(b) Post at its facilities 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 Medical Center Director, 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 section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Washington 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 6, 2011.

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RICHARD A. PEARSON
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 Veterans Affairs, Veterans Administration Medical Center, Martinsburg, WV, 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 bypass the National Federation of Federal Employees, IAMAW, Local Lodge 1798 (the Union), the exclusive bargaining representative of certain of our employees, by delivering a notice of proposed disciplinary action to an employee without providing a copy of the correspondence to the employee's designated Union representative.

WE WILL NOT interfere with the right of employees to designate and rely on the Union to represent them regarding proposed disciplinary actions.

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

WE WILL furnish or deliver all communications pertaining to proposed disciplinary actions to an employee's Union representative at the same time as those communications are furnished or delivered to the employee, when the employee has designated the Union to represent him or her in that matter.

_____
(Agency/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, Washington Regional Office, Federal Labor Relations Authority, and whose address is: 1400 K Street, NW., 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.