UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1840
Respondent

and Case No. DA-CO-50188

CAROL EYERMANN
Charging Party

Michelle Ledina, Esquire For the General Counsel
Mr. R.C. Rodriguez For the Respondent
Before: JESSE ETELSON Administrative Law Judge

DECISION

On June 30, 1995, the General Counsel of the Federal Labor Relations Authority (the Authority), by the Acting Regional Director, Dallas Region, issued a complaint and notice of hearing. The complaint alleges that the Respondent violated section 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by rescinding its earlier decision to take an employee's grievance to arbitration because the employee was not a member of the Respondent.

The complaint specifically advised the Respondent that it must file an answer with the Dallas Regional Director no later than July 25, 1995. The complaint also stated that, "[i]f the Respondent does not file an answer, the Authority will find that Respondent has admitted each allegation. See 5 C.F.R. § 2423.13."

On August 11, 1995, Counsel for the General Counsel filed a motion for summary judgment on the ground that the Respondent had not filed an answer and had, therefore, admitted all the allegations set forth in the complaint pursuant to 5 C.F.R. § 2423.13(b).

The Regional Director, Dallas Region, referred the motion for summary judgment to the Chief Administrative Law Judge, who issued an order on August 15, 1995, giving the parties until August 30, 1995, to file any pleadings or briefs with regard to the matter. The Chief Administrative Law Judge's order was served on the Respondent by certified mail and was received by Gilbert Berryhill, president of the Respondent, on August 18, 1995.

The Respondent filed no timely response. On September 14, 1995, a national representative of American Federation of Government Employees filed, on behalf of the Respondent, a motion for extension of time to

respond. The motion for extension of time states that Respondent's President Berryhill called the national representative's office on September 11 to request assistance with the previously scheduled September 15 hearing in this case. Upon reviewing the case file, the national representative discovered the Chief Administrative Law Judge's order, pursuant to which the hearing had been postponed indefinitely.

The basis for the motion for extension of time is that the Respondent's failure to file an answer, or any response to the Chief Administrative Law Judge's order, was a result of the local union officials' lack of knowledge of the requirements for processing such a matter. In view of this unfamiliarity with procedures, the national representative requests that the Respondent be given the opportunity to state its position on the complaint in this case. The national representative also states that he was advised that the General Counsel "did not oppose the motion, at this time." Counsel for the General Counsel informed him, however, that the (individual) Charging Party opposed the motion. The General Counsel filed a response stating that it does not oppose the motion.

As this motion was filed after the time limit had already expired, I am guided by the standard applied in the analogous situation, the expiration of a time limit established by the Authority's Rules and Regulations. Under § 2429.23(b) of the Rules and Regulations, expired time limits may be waived only in "extraordinary circumstances." This being the Authority's stated policy in the case of general time limits, I see no basis for applying a more lenient standard for waiving time limits set for particular actions in particular cases.

In a perverse way, the inattentiveness by the Respondent's responsible officials to the time limits clearly stated in the complaint and in the subsequent order by the Chief Administrative Law Judge is indeed an extraordinary circumstance.(1) However, this is not the kind of extraordinary circumstance the Authority had in mind. *See Department of the Treasury, U.S. Customs Service and U.S. Customs Service Region IX, Chicago, Illinois*, 34 FLRA 76 (1989). Even if the Respondents' officials' lack of knowledge of Authority procedures could in some circumstances excuse their inaction, that would not explain their failure to act on the clear instructions with which they were served. Presumptively, a party, however inexperienced, is chargeable with reading and understanding such instructions. A question of "extraordinary circumstances" might arguably be raised if there were reason to doubt the party's capacity to read and understand the instructions. No such suggestion has been made here.

Although the General Counsel has not opposed the motion for extension of time, the motion for summary judgment has not been withdrawn. That motion correctly states that the General Counsel is entitled to judgment in the absence of a timely answer. The motion for extension of time does not dispute the failure to answer, nor does it indicate that, given a further opportunity to respond to the motion for summary judgment, Respondent would present any additional reason for excusing the failure to answer. As the asserted reason for failing to answer is inadequate on its face, no legitimate purpose would be served by waiving the order's time limit for responding.

The allegations of the complaint having been admitted, there are no genuine issues of material fact and the General Counsel is entitled to summary judgment. *U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida*, 37 FLRA 603, 610 (1990). Accordingly, the General Counsel's motion is granted, and I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The following factual allegations of the complaint are admitted by operation of law because of the Respondent's failure to file an answer.

The American Federation of Government Employees, Local 1840 (the Respondent) is a labor organization under section 7103(a)(4) of the Statute.[(2)] It is the exclusive represen-tative of a unit of employees appropriate for collective bargaining at Randolph Air Force Base, Texas, an agency under section 7103(a)(3) of the Statute. The Respondent and Randolph Air Force Base are parties to a collective bargaining agreement covering employees in the bargaining unit described above.

The charge in this case was filed by Carol Eyermann. At the time the events giving rise to the charge occurred, Ms. Eyermann was an employee under section 7102(a)(3) of the Statute and was in the bargaining unit described above. A copy of the charge was served on the Respondent.

During the time period covered by the complaint, Gilbert Berryhill was the Respondent's president, Melvin Hicks was a chief steward, and each was acting on behalf of the Respondent. On June 29, 1994, Mr. Hicks, informed Ms. Eyermann that the Respondent voted to rescind its earlier decision to take Eyermann's grievance to arbitration. The Respondent took this action (rescission of the earlier decision) because Eyermann was not a member of the Respondent.[(3)]

Discussion and Conclusions

Section 7103(a)(9)(A) of the Statute defines a grievance by an employee as any complaint "concerning any matter relating to the employment of the employee." Section 7121(a)(1) of the Statute provides that, with certain exceptions, "any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability." Section 7121(b)(1)(C)(iii) requires that any negotiated grievance procedure referred to in subsection (a) "provide that any grievance not satisfac-torily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency."

I infer from the admitted facts and the above quoted provisions of the Statute that the grievance that the Respondent had decided to take to arbitration on Ms. Eyermann's behalf was a grievance within the meaning of Section 7103(a)(9) and that the contemplated arbitration was pursuant to the collective bargaining agreement. With the benefit of those inferences, I conclude that the Respondent's representation of Eyermann for purposes of her grievance was undertaken in the Respondent's role as exclusive representa-tive of unit employees. The Respondent was therefore subject to the requirement of section 7114(a)(1) of the Statute to represent Eyermann's interests in the matter over which the grievance was filed "without discrimination and without regard to labor organization membership." *U.S. Air Force, Loring Air Force Base, Limestone, Maine and American Federation of Government Employees, AFL-CIO, Local 2943*, 43 FLRA 1087, 1094 (1992).

By rescinding its decision to take Eyermann's grievance to arbitration because she was not a member, the Respondent discriminated within the meaning of section 7114(a)(1). By so discriminating, and also having admitted by its failure to file an answer, the Respondent violated sections 7116(b)(1) and (8) of the Statute. *Antilles Consolidated Education Association, (OEA/NEA) San Juan, Puerto Rico*, 36 FLRA 776, 786 (1990). I therefore recommend that the Authority adopt the following order.

ORDER[4]

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Respondent, American Federation of Government Employees, Local 1840, shall:

1. Cease and desist from:

(a) Failing or refusing to fairly represent Carol Eyermann, or any other unit employee, as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

(b) In any like or related manner interfering with, restraining or coercing unit employees in the exercise of their rights assured 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) Fairly represent all employees in its unit of exclusive recognition, as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

(b) Request that Randolph Air Force Base, Texas, reinstate Carol Eyermann's grievance for the purpose of taking it to arbitration, and, if the grievance is reinstated, pursue it with good faith and all due diligence.

(c) If Randolph Air Force Base refuses to reinstate the grievance, make Carol Eyermannn whole by paying her the difference between the award she received and the award she sought through her grievance.

(d) Post at its business offices and in all places where notices to members and bargaining unit employees at Randolph Air Force Base, Texas, are customarily posted, 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 President of the Respondent and shall be posted and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material.

(e) Submit appropriate signed copies of the Notice to the Commanding Officer of Randolph Air Force Base, Texas, for posting in conspicuous places where unit employees represented by the Respondent are located. Copies of the Notice should be maintained for a period of 60 days from the date of the posting.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Dallas 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, September 28, 1995

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JESSE ETELSON

Administrative Law Judge

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT fail or refuse to fairly represent Carol Eyermann, or any other unit employee, as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

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

WE WILL fairly represent all employees in our unit of exclusive recognition, as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

WE WILL request that Randolph Air Force Base, Texas, reinstate Carol Eyermann's grievance for the purpose of taking it to arbitration, and, if the grievance is reinstated, will pursue it with good faith and all due diligence.

WE WILL, if Randolph Air Force Base refuses to reinstate the grievance, make Carol Eyermannn whole by paying her the difference between the award she received and the award she sought through her grievance.

_____

(Labor Organization)

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 its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906 and whose telephone number is (214) 767-4996.

1. The complaint was served on the Respondent by ordinary mail. However, there has been no suggestion that the Respondent failed to receive it in time to allow it 20 days before filing an answer by July 25 as instructed.

2. I deem the complaint's designation of section 7103(a)(3) instead of (a)(4) to be a harmless inadvertence.

3. These facts being sufficient to establish the alleged violations, I find it unnecessary to consider the additional representations made in the General Counsel's memorandum in support of the motion for summary judgment. These representa-tions appear to be based on documents attached to the unfair labor practice charge. I need not decide, therefore, whether the Charging Party's verification of the statements in these documents make them the equivalent of affidavits, which then may be considered in support of the motion.

4. The affirmative remedy recommended here is adapted from the remedy requested by the General Counsel, and is consistent with the remedy granted by the Authority in *International Association of Machinists and Aerospace Workers, Local 39, AFL-CIO*, 24 FLRA 352 (1986), where a similar violation was found.