

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

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| U.S. DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT PHILADELPHIA DISTRICT PHILADELPHIA, PENNSYLVANIA Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2012 Charging Party | Case No. BN-CA-04-0463 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to 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 **MARCH 7, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: February 3, 2005
Washington, DC

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

MEMORANDUM

DATE: February 3, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION SECURITY
DIRECTORATE, BUREAU OF IMMIGRATION
AND CUSTOMS ENFORCEMENT
PHILADELPHIA DISTRICT
PHILADELPHIA, PENNSYLVANIA

Respondent

and

Case No. BN-CA-04-0463

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2012

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), 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

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

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| U.S. DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT PHILADELPHIA DISTRICT PHILADELPHIA, PENNSYLVANIA <p style="text-align: center;">Respondent</p> | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2012 <p style="text-align: center;">Charging Party</p> | Case No. BN-CA-04-0463 |

Gerald M. Greene
For the General Counsel

DeWayne Wicks
For the Respondent

Ivan LeBron
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

On July 6, 2004, the American Federation of Government Employees, Local 2012 (Union) filed an unfair labor practice charge against the U.S. Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Immigration and Customs Enforcement, Philadelphia District, Philadelphia, Pennsylvania (Respondent). On October 29, 2004, the Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §§7121, 7122 and 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by failing to comply with a final and binding arbitration

award. The Complaint and Notice of Hearing included a notice to the Respondent that its answer was to be filed in person or by mail no later than November 23, 2004.

On December 13, 2004, the General Counsel filed a Motion for Summary Judgment on the grounds that the Respondent has not filed an answer¹ and that its failure to do so constitutes an admission to the allegations of the Complaint. Pursuant to §2423.27(b) of the Rules and Regulations of the Authority, the Respondent's response to the motion was to have been filed by December 28, 2004, allowing for five additional days for service by mail and not counting intervening holidays and weekends in accordance with §§2429.21 and 2429.22 of the Rules and Regulations. As of the date of this Decision, the Respondent has not filed a response to the General Counsel's motion, nor has the Respondent submitted motions to extend either of the filing deadlines in accordance with §2423.21 of the Rules and Regulations.

The Standards for Summary Judgment

In considering motions for summary judgment submitted pursuant to §2423.27 of the Rules and Regulations of the Authority, the criteria to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 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

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An examination of the case file maintained by the Office of Administrative Law Judges confirms that an answer has not been received.

moving party is entitled to a judgment as a matter of law.²

Upon review of the General Counsel's motion I have determined that the summary judgment process is appropriate for this case. I will therefore proceed to consider the motion on its merits.

Findings of Fact and Conclusions of Law

In accordance with §2423.20(b) of the Rules and Regulations of the Authority the failure of the Respondent to file an answer to the Complaint constitutes an admission of its allegations. I will, therefore, adopt the following factual and legal allegations of the Complaint:

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

2. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization under 5 U.S.C. §7103 (a) (4) and the exclusive representative of a unit of employees appropriate for collective bargaining at the U.S. Department of Homeland Security (DHS).

3. The American Federation of Government Employees, Local 2012, (the Charging Party), is an agent of AFGE for the purpose of representing employees of the Respondent within the bargaining unit described in paragraph 4.

4. The charge was filed by the Charging Party with the Boston Regional Director on July 6, 2004, and a copy of the charge was served on the Respondent.

5. During the time period covered by this complaint, the persons listed below occupied the positions opposite their names:

Glenda Walker Supervisor, Payroll Branch, Office of Human Resources and Development, Administrative Center, Dallas

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The General Counsel has attached exhibits to his motion consisting of the unfair labor practice charge with the forwarding letter to the Respondent and the Union, the Complaint and Notice of Hearing and the Arbitrator's award. Although I will take official notice of the unfair labor practice charge, the forwarding letter and the Complaint and Notice of Hearing, I will not consider the arbitration award because it has not been authenticated by an affidavit and is therefore not in evidence.

Douglas Hooper Head, Payroll Branch, Office of Human Resources and Development, Administrative Center, Dallas

6. During the time period covered by this complaint, the persons named in paragraph 5 were supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11).

7. During the time period covered by this complaint, the persons named in paragraph 5 were acting on behalf of the Respondent.

8. At all times material to this complaint, DHS and AFGE and have been subject to a collective bargaining agreement covering the employees in the bargaining unit described in paragraph 2.

9. On December 23, 2004, Arbitrator Kinard Lang³ issued an award pursuant to the collective bargaining agreement described in paragraph 8 on a grievance filed by the Charging Party concerning the removal of employee David W. Savina.

10. The award described in paragraph 9 provided, in relevant part, that Savina be made whole for lost wages and overtime by payment of backpay.

11. The Office of Personnel Management did not file a petition for judicial review of the award described in paragraph 9 and 10.

12. The award described above in paragraph 9 and 10 became final and binding on or about February 23, 2004, upon expiration of the period of time for filing a petition for judicial review under 5 U.S.C. §7703(d) and 5 U.S.C. §7121 (f).

13. Since on or about February 23, 2004, the Respondent has failed to pay David W. Savina backpay as required by the award described in paragraph 9 and 10.

14. Since on or about February 23, 2004, the Respondent has failed to comply with the award described in paragraph 9 and 10.⁴

³

To the best of my knowledge Arbitrator Lang is not related to me.

⁴

Savina has apparently been reinstated since the General Counsel is only seeking an award of backpay.

15. By the conduct described in paragraph 13 and 14, the Respondent has failed and refused to comply with a final and binding arbitration award as required by 5 U.S.C. §7121 and 7122.

16. By the conduct described in paragraphs 13 through 15, the Respondent committed an unfair labor practice in violation of 5 U.S.C. §7116(a) (1) and (8).

Discussion and Analysis

The Consequences of the Respondent's Failure to Respond to the Complaint and the Motion

Parties appearing before the Authority are charged with knowledge of the pertinent statutory and procedural filing requirements, *U.S. Environmental Protection Agency, Environmental Research Laboratory, Narragansett, Rhode Island*, 49 FLRA 33, 37 (1994). Accordingly, the Respondent is bound by the above-cited portions of the Rules and Regulations of the Authority regarding filing deadlines and the consequences for its failure to meet those deadlines.

The Effect of the Arbitration Award and of the Respondent's Failure to Implement It

As indicated above, the arbitration award became final after the expiration of the 60 day period within which the Respondent could have sought judicial review. It was at that point that the Respondent's duty to implement the award began. When an agency disregards portions of the award, it has failed to comply as required by §7122(b) of the Statute and has committed an unfair labor practice in violation of §7116(a) (1) and (8) of the Statute, *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 38 FLRA 99, 104 (1990).

The Remedy

Regardless of the language of the arbitration award, the Respondent's obligation to provide back pay to Savina is limited by the provisions of the Back Pay Act, 5 U.S.C. §5596(b), *U.S. Department of Defense Education Activity, Arlington, Virginia and Federal Education Association* (Babiskin, Arbitrator), 56 FLRA 768, 773 (2000). Although the merits of the award are not properly before me, the award is only enforceable to the extent that it complies with the Back Pay Act. The recommended order will contain language to that effect.

In view of the foregoing, I have concluded that the Respondent committed an unfair labor practice in violation of §§7121, 7122 and 7116(a)(1) and (8) of the Statute by failing to fully implement the award of Arbitrator Lang dated December 23, 2003.⁵ Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41 of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Immigration and Customs Enforcement, Philadelphia District, Philadelphia, Pennsylvania, shall:

1. Cease and desist from:

(a) Failing or refusing to promptly and fully comply with the final and binding award of Arbitrator Kinard Lang dated December 23, 2003, to the extent consistent with the provisions of the Back Pay Act, 5 U.S.C. §5596(b), by failing or refusing to make David W. Savina whole for all lost wages, overtime, allowances and differentials less any amounts earned by Savina through other employment during the relevant period.

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

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

(a) Promptly and fully complying with the final and binding award of Arbitrator Kinard Lang dated December 23, 2003, and subject to the provisions of the Back Pay Act, 5 U.S.C. §5596(b), by making David W. Savina whole for all lost wages, overtime, allowances and differentials as directed by the Arbitrator, less any amounts earned by Savina through other employment during the relevant period.

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In the Complaint and Notice of Hearing the General Council has alleged that the award was issued on December 23, 2004. That was obviously a typographical error since the unfair labor practice charge and the Complaint and Notice of Hearing were issued before that date. In view of the allegation as to when the award became final, I will assume that the correct date is December 23, 2003.

(b) Post at facilities at the U.S. Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Immigration and Customs Enforcement, Philadelphia District, Philadelphia, Pennsylvania, where bargaining unit employees represented by the American Federation of Government Employees, Local 2012 are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt, such forms shall be signed by the senior management representative at the aforesaid facilities and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that these Notices are not altered, defaced or covered by any other material.

(c) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, February 3, 2005

PAUL B. LANG

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 Homeland Security, Border and Transportation Security Directorate, Bureau of Immigration and Customs Enforcement, Philadelphia District, Philadelphia, Pennsylvania has 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 fail or refuse to promptly and fully comply with the final and binding award of Arbitrator Kinard Lang dated December 23, 2003, to the extent consistent with the provisions of the Back Pay Act, 5 U.S.C. §5596(b), by failing or refusing to make David W. Savina whole for all lost wages, overtime, allowances and differentials, less any amounts earned by Savina through other employment during the relevant period.

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 promptly and fully comply with the final and binding award of Arbitrator Kinard Lang dated December 23, 2003, and subject to the provisions of the Back Pay Act, 5 U.S.C. §5596(b), by making David W. Savina whole for all lost wages, overtime, allowances and differentials as directed by the Arbitrator, less any amounts earned by Savina through other employment during the relevant period.

(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 its provisions, they may communicate directly with the Regional Director, Boston Regional Office,

Federal Labor Relations Authority, whose address is: 99
Summer Street, Suite 1500, Boston, MA 02110-1200, and whose
telephone number is: 617-424-5731.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by
PAUL B. LANG, Administrative Law Judge, in Case No. BN-
CA-04-0463, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

Gerald M. Greene
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

CERTIFIED NOS:

7000 1670 0000 1175 5035

DeWayne Wicks
Bureau of Immigration and Customs
Enforcement
U.S. Department of Homeland Security
7701 N. Stemmons Freeway
Dallas, TX 75247

7000 1670 0000 1175 5042

Ivan LeBron
AFGE, Local 2012
10 Patriot Drive
Dover, DE 19904

7000 1670 0000 1175 5066

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC. 20001

DATED: February 3, 2005
Washington, DC