



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

OALJ 12-02

U.S. DEPARTMENT OF VETERANS AFFAIRS  
MEDICAL CENTER  
ST. LOUIS, MISSOURI

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 96

CHARGING PARTY

Case No. DE-CA-10-0465

Timothy Sullivan  
For the General Counsel

Elizabeth J. Martin  
For the Respondent

Diane Clines  
For the Charging Party

Before: SUSAN E. JELEN  
Administrative Law Judge

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

On April 22, 2011, the Regional Director of the Denver Region of the Federal Labor Relations Authority (the Authority) issued a Complaint and Notice of Hearing, alleging that the U.S. Department of Veterans Affairs Medical Center, St. Louis, Missouri (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 failed and refused to comply with section 7121 of the Statute by refusing to participate in the arbitration of a grievance and by bypassing the American Federation of Government Employees, Local 96 (Union/Charging Party). The complaint set forth a hearing date of June 20, 2011, and stated the Answer was due no later than May 17, 2011. The Respondent filed its Answer on May 17, 2011, in which it admitted all of the factual allegations of the complaint, but denied that it had violated the Statute as alleged.

On June 3, 2011, the General Counsel (GC) filed a Motion for Summary Judgment, asserting that the Respondent's answer admitted all of the material facts alleged in the complaint (G.C. Ex. 1, para. 1-18), but denying that the Respondent violated the Statute (G.C. Ex. 1, para 19-21). The GC asserted that there are no material facts in dispute and the motion for summary judgment is appropriate and should be granted. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 227 (1995)(VAMC). The Respondent has not filed a response to the Motion for Summary Judgment.

On June 7, 2011, the Respondent filed a Motion to Continue, with the Union's concurrence, requesting that the hearing be postponed for a period of three months or as appropriate until the Under Secretary for Health of the Department of Veterans Affairs has an opportunity to provide his determination. The Respondent stated that it has requested a determination under 38 U.S.C. §7422(b) by the Under Secretary that the actions and issues described in the complaint in this matter are excluded from collective bargaining. On June 10, 2011, the GC filed an Opposition to Respondent's Motion to Continue Hearing, asserting that there was no indication that a delay in the hearing would result in the issuance of the determination by the Under Secretary as anticipated by the Respondent. Moreover, at best, issuance of such a determination would dispose of the allegation concerning the Respondent's refusal to proceed to arbitration, but would not dispose of the bypass allegation.

Following a conference call with the parties, on June 14, 2011, I issued an Order Indefinitely Postponing Hearing, granting the Respondent's Motion while noting that the GC's motion for summary judgment is still pending before me.

The Authority has held that motions for summary judgment filed under section 2423.27 of its Regulations serve the same purpose and are governed by the same principles, as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 65 FLRA 1052 (2011); *VAMC*, 50 FLRA at 222; *Dep't of the Navy, U.S. Naval Ordnance Station, Louisville, Ky.*, 33 FLRA 3, 4-5 (1988)(*NOS, Louisville*), *rev'd on other grounds*, No. 88-1861 (D.C. Cir. Aug. 9, 1990). The motion is to be granted 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." *NOS, Louisville*, 33 FLRA at 4, quoting Rule 56(c). After reviewing the pleadings and exhibits submitted by the parties, I agree that there is no genuine issue of material facts with respect to the consolidated complaint before me.

Accordingly, it is unnecessary to hold a hearing in this case, and it is appropriate to decide the case on the motion for summary judgment. The summary of the undisputed material facts and my conclusions of law and recommendations are set forth below.

## DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

Based on the existing record, 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 C.F.R. Chapter XIV.
2. The Department of Veterans Affairs (DVA) Medical Center, St. Louis, Missouri (Respondent) is an agency under 5 U.S.C. §7103(a)(3).
3. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the DVA.
4. The American Federation of Government Employees, Local 96, AFL-CIO (Union/Local 96) is an agent of AFGE for the purpose of representing employees at the Respondent within the unit described above in paragraph 3.
5. The charge was filed by Local 96 with the Denver Regional Director on June 18, 2010.
6. A copy of the charge described in paragraph 5 was served on the Respondent.
7. At all material times, the persons listed below occupied the position opposite their name:
 

Rimaann O. Nelson	Acting Medical Center Director
Thresa Wilson	Nurse Manager
8. At all material times, the persons named in paragraph 7 were supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11) at the Respondent.
9. At all material times, the persons named in paragraph 7 were acting on behalf of the Respondent.
10. The AFGE and DVA are parties to a Master Collective Bargaining Agreement (Master Agreement) covering employees in the bargaining unit described in paragraph 3.

11. At all material times, Doris McKissick was an employee under 5 U.S.C. §7103(a)(2) and was in the bargaining unit described in paragraph 3.
12. On or about January 19, 2010, the Respondent, through Rimaann O. Nelson, issued Doris McKissick a Suspension For Seven (7) Calendar Days.
13. The Suspension described in paragraph 12 stated that the reasons sustaining the Suspension did not involve a question of professional conduct or competence, and therefore, Ms. McKissick was allowed to appeal the action under the negotiated grievance procedure contained in Article 42 of the Master Agreement described in paragraph 10.
14. On or about February 2, 2010, the Union filed a third-step grievance under the negotiated grievance procedure, on behalf of Doris McKissick, concerning the Suspension described in paragraphs 12 and 13.
15. On or about April 27, 2010, the Union invoked arbitration on the grievance described in paragraph 14.
16. On or about May 18, 2010, the Respondent, by Rimaann O. Nelson, issued Doris McKissick a letter stating that the Suspension (referenced in paragraphs 12 and 13) involved a question of professional conduct or competence, and that Ms. McKissick could only appeal the Suspension to the DVA's Disciplinary Appeals Board.
17. The letter described in paragraph 16 was served on Doris McKissick by her supervisor, Thresa Wilson, on or about May 18, 2010.
18. Respondent did not serve a copy of the letter described in paragraph 16 on the Union.

## **DISCUSSION AND ANALYSIS**

### **Section 7116(a)(1) and (8) allegation**

The GC argues that the Respondent has admitted that the Union filed a grievance over the Doris McKissick suspension. The Respondent further admits that the grievance was filed under the parties' negotiated grievance procedure and that the Union invoked arbitration over that grievance. Finally, the Respondent admits that it refused to participate in the arbitration of that grievance. Citing section 7121 of the Statute, the GC asserts that the Authority has repeatedly held that the refusal to participate in arbitration is an unfair labor practice. *Dep't of the Air Force, Langley AFB, Hampton, Va.*, 39 FLRA 966 (1991)(*Langley AFB*). The GC therefore argues that the Respondent violated 5 U.S.C. §7121 and committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1) and (8), unless it can demonstrate a

legal defense.

In its motion for summary judgment, the GC stated that it is expected the Respondent to argue that its refusal to arbitrate the grievance is grounded in the statutory authority of 38 U.S.C. §7422(b). In this regard the Secretary of the Department of Veterans Affairs (Secretary), may prescribe, by regulation, the hours and conditions of employment of agency employees referenced in 38 U.S.C. §7421(b). The Secretary's authority is subject to the right of these employees to engage in collective bargaining under the Statute. *See*, 38 U.S.C. §7422(a). Such collective bargaining, however, may not cover or have any applicability to any matter or question concerning or arising out of professional conduct or competence. *See*, 38 U.S.C. §7422(d). Accordingly, once the Secretary or his designee has made a determination under Section 7422(d) that a matter or question concerns or arises out of professional conduct or competence, and thus, is not subject to collective bargaining under the Statute, the Authority is deprived of jurisdiction over the matter or question at issue. *See, e.g., U.S. Dep't of Veterans Affairs Med. Ctr., Kansas City, Mo.*, 65 FLRA 809 (2011)(portion of arbitrator's award found to be invalidated by Under Secretary of Health's declaration that it pertained to matters regarding competence, within the meaning of Section 7422); *U.S. Dep't of Veterans Affairs, VAMC, Asheville, N.C.*, 57 FLRA 681, 683 (2002)(Authority dismissed unfair labor practice complaint after Under Secretary determined that Section 7422(d) removed the matter from the scope of collective bargaining).

The GC argues that, in this matter, the Respondent is not entitled to rely on the Secretary's authority as justification for refusing to arbitrate the Doris McKissick grievance, since the Secretary has made no determination that the actions and issues concerning the McKissick suspension involve matters excluded from collective bargaining under 38 U.S.C. §7422(d). As such, this defense is not available to the Respondent, and it should be found in violation of 5 U.S.C. §7121 and to have committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1) and (8) for refusing to proceed to arbitration.

As noted above, the Respondent did not file a response to the Motion for Summary Judgment. Further, although the Respondent first forwarded its request for 38 U.S.C. §7422(b) Determination from the Under Secretary for Health (Agency's Motion to Continue, Exhibit 2) in November 2010, no such determination has been issued as of this date.

### **Section 7116(a)(1) and (5) allegation**

The GC further alleges that the Respondent bypassed the Union, in violation of the Statute, by serving Doris McKissick with an amended final decision on the Seven Day Suspension, and by failing to serve a copy on the Union. In this regard, the Respondent admits that the Union was representing McKissick for purposes of addressing and contesting the suspension. In fact, the Union had filed a grievance under the negotiated grievance procedure over that suspension. Nevertheless, the Respondent further admits serving the amended final decision for the suspension on McKissick, but not on the Union. The amended final decision altered Ms. McKissick's appeal rights regarding the suspension.

The Authority has previously addressed similar bypass allegations. *See 438<sup>th</sup> Air Base Group (MAC), McGuire AFB, N.J.*, 28 FLRA 1112 (1987)(*McGuire*)(bypass when the agency delivered a final decision on a disciplinary matter to an employee who was represented by the union and where the agency knew the employee was represented); and *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 345 (1990)(*McClellan*)(bypass when the agency presented final decisions on disciplinary actions to employees who were represented by the union in oral and written responses to the discipline). There is no basis to distinguish the facts admitted by the Respondent in the present case from those found by the Authority to establish violations in *McGuire* and *McClellan*.

The Respondent did not respond to the GC's motion for summary judgment and thus did not present any position regarding the bypass allegation contained in the complaint.

### ANALYSIS

The evidence reflects that the Union filed a third-step grievance under the parties' negotiated grievance procedure, on behalf of a bargaining unit employee, regarding a seven day suspension. The Union invoked arbitration, but the Respondent has refused to participate in the arbitration of the grievance. Section 7121(a) of the Statute requires that collective bargaining agreements contain "procedures for the settlement of grievances, including questions of arbitrability." Additionally, section 7121(b)(1)(C)(iii) of the Statute requires that all such negotiated grievance procedures include procedures that "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration . . . ." The Authority has repeatedly held that a party refusing to arbitrate violates section 7116(a)(1) and (8) of the Statute. *See, e.g., Langley AFB*, 39 FLRA at 966; *AFGE, Local 1457*, 39 FLRA 519 (1991); and *U.S. Dep't of Veterans Affairs, Veterans Canteen Serv., Martinsburg, W. Va.*, 65 FLRA 224 (2010).

The Respondent has presented no defense regarding its failure to participate in the arbitration. Although it has apparently requested a determination by the Under Secretary of Health that the actions and issues described in the complaint are excluded from collective bargaining under 38 U.S.C. §7422(b), no such determination has been made at this time.

Therefore, I find that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing and refusing to proceed to arbitration on the grievance regarding Doris McKissick's seven day suspension.

Further, with regard to the allegation that the Respondent bypassed the Union in violation of section 7116(a)(1) and (5), I find that the evidence shows that the Respondent delivered an amended final decision on the suspension to the bargaining unit employee and not to the Union's designated representative. The amended final decision altered the

employee's appeal rights to the suspension. The Respondent presented no defense regarding this allegation. I find that the Respondent's conduct violated section 7116(a)(1) and (5) of the Statute by bypassing the Union, in accordance with the *McClellan* and *McGuire* decisions.

Having found that the Respondent violated the Statute as alleged in the complaint, the General Counsel's recommended remedy is appropriate in this case.

Accordingly, I 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), it is hereby ordered that the U.S. Department of Veterans Affairs Medical Center, St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Failing or refusing to arbitrate the grievance over Doris McKissick's suspension issued on January 25, 2010, after receiving notice from the American Federation of Government Employees, Local 96 (the Union) of its desire to proceed to arbitration.

(b) Failing or refusing to bargain in good faith with the Union by bypassing the designated Union representatives and furnishing or delivering amended disciplinary decisions or other responses only to the disciplined bargaining unit employees.

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

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

(a) Proceed to arbitration concerning the grievance over Doris McKissick's suspension after receiving notice from the Union of its desire to proceed to arbitration.

(b) Furnish or deliver all amended decisions or other responses involving disciplinary proceedings to the designated Union representatives at the same time as furnished or delivered to employees.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, U.S. Department of Veterans Affairs Medical Center, St. Louis, Missouri, 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 section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Denver 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., November 4, 2011.

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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 U.S. Department of Veterans Affairs Medical Center, St. Louis, Missouri, 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** fail or refuse to arbitrate the Doris McKissick grievance after receiving notice from the American Federation of Government Employees, Local 96 (the Union) of its desire to proceed to arbitration.

**WE WILL NOT** fail or refuse to bargain in good faith with the Union by bypassing the Union and serving amended final decisions on proposed disciplinary actions to employees represented by the Union without also serving copies of such amended final decisions on the designated Union representatives.

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

**WE WILL** arbitrate the Doris McKissick grievance.

**WE WILL** serve amended final decisions on proposed disciplinary actions to the designated Union representatives.

\_\_\_\_\_  
(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, Denver Regional Office, Federal Labor Relations Authority, and whose address is: 1391 Speer Boulevard, Suite 300, Denver, CO 80204, and whose telephone number is: (303) 844-5224.