



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

OALJ 15-07

NATIONAL INSTITUTES OF HEALTH
NATIONAL INSTITUTE OF ENVIRONMENTAL
HEALTH SCIENCES, RESEARCH TRIANGLE
PARK, NORTH CAROLINA

RESPONDENT

AND

Case No. AT-CA-14-0458

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2923

CHARGING PARTY

Brian R. Locke
For the General Counsel

Marlin J. Jenkins
For the Respondent

Bill Jirles
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On October 8, 2014, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority/FLRA) issued a Complaint and Notice of Hearing alleging that the National Institutes of Health, National Institute of Environmental Health Sciences, Research Triangle Park, North Carolina (Respondent) violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute). The Complaint alleged that the Respondent failed to bargain in good faith when it unnecessarily delayed negotiations of the collective bargaining agreement.

The Complaint indicated that a hearing on the allegations would be held on December 10, 2014, and advised the Respondent that an Answer to the Complaint was due no later than November 3, 2014. The Complaint was served by first class mail on Respondent's designated agent, Lisa Powers, Employee and Labor Relations, Workforce Relations Division, Office of Human Resources, National Institutes of Health, 31 Center Drive, MSC 2211, Building 31, B3C07, Bethesda, MD 20892. The Respondent failed to file an Answer, on or before November 3, 2014, as directed by the Complaint.

On November 7, 2014, Counsel for the General Counsel (GC) filed a Motion for Summary Judgment (MSJ) based upon the Respondent's failure to file an Answer to the Complaint, contending that by application of 5 C.F.R. § 2423.20(b), the Respondent admitted all the allegations of the Complaint. Accordingly, the GC asserted that there were no factual or legal issues in dispute and summary judgment pursuant to 5 C.F.R. § 2423.27(a) is proper.

On November 13, 2014, the Respondent filed its Response to the GC's MSJ and requested that its attached Answer be accepted as timely filed. In support of its response the Respondent asserted that the complaint was not received in the Respondent's offices until October 21, 2014, and that they were not contacted about the complaint prior to receiving it. Respondent does not dispute that the complaint stated the deadline for filing an answer was November 3, 2014. Major Jenkins was assigned by the Respondent to answer the complaint; Major Jenkins is a member of the Maryland Army National Guard and was activated during part of this time without prior notice to his agency. Upon completing his active service obligation, he returned to work on Thursday, November 6, 2014, and on that date, contacted the GC to ask for an extension of time to answer the complaint, which the GC refused. Major Jenkins asserts that the Respondent had no prior knowledge of his absence nor could they have foreseen his military service would disrupt the answer to the complaint.

On November 14, 2014, the GC filed a Reply to the Respondent's Response to its MSJ. The GC asserts that the Respondent reassigned this case to a new representative that it must have known would not be able to respond to the complaint in a timely manner. The GC further asserts that, on or before November 3, 2014, the Respondent knew, or should have known, that Major Jenkins was not available to file an answer. The Respondent, however, failed to take any effort to avoid this problem. The GC also denies that the Respondent was not informed of the complaint until it was actually received, noting that there were several conversations between the GC and Powers involving the case, prior to issuance of the complaint. The GC was not aware that the case had been reassigned to Major Jenkins until November 6, 2014, after the due date to answer the complaint.

The GC further asserts that Respondent has failed to state basic critical information regarding when exactly it reassigned the case to Major Jenkins and the actual dates of Major Jenkins' deployment. The GC argues that it appears that the Respondent reassigned this case to Major Jenkins even though it must have known he would be unable to provide an answer.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

The relevant portion of the Authority's Rules and Regulations provides:

(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 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. Emtl. Prot. Agency, Emtl. 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 VA 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) (failure to file an answer due to a clerical error is not good cause sufficient to prevent a summary judgment).

In this case, while the Respondent has requested that its Answer be accepted as timely filed, it has not demonstrated any "good cause" for its initial failure to file its answer on or before November 3, 2014. In *U.S. Dep't of Transp., FAA, Hous., Tex.*, 63 FLRA 34, 36 (2008), the Authority held that the agency's misfiling of a 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 VA Med. Ctr., Kan. City, Mo.*, 52 FLRA 282, 284 (1996) and the cases cited therein. In this specific case, the Respondent was aware of the deadline for submission of its answer to the complaint, but reassigned the case to a representative who was not available. Respondent has failed to furnish any reasonable explanation, and in the absence of good cause, application of the admission provision of 5 C.F.R. § 2423.20(b) is appropriate. Respondent's request that its answer be considered timely filed is Denied. Thus, Respondent has admitted each of the allegations set forth in the Complaint. Accordingly, there are no disputed factual issues in

this case, and summary judgment in favor of the General Counsel is justified. Therefore, the hearing in this matter is not necessary. Based on the existing record, I make the following findings of fact, conclusions of law, and recommendations:

FINDINGS OF FACT

1. The charge in this proceeding was filed by the American Federation of Government Employees, Local 2923 (Union) on June 13, 2014.
2. A copy of the charge was served on the Respondent.
3. The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute.
4. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.
5. At all material times, the persons listed below held the positions set opposite their names and have been agents of Respondent acting upon its behalf:

Chris Long, NIEHS Deputy Executive Director
Jeryl McDowell, NIH Labor Relations Specialist
Lisa Powers, Employee and Labor Relations

6. In March 2013, the Union ratified a new collective bargaining agreement. The new collective bargaining agreement was submitted to the Respondent for agency head review pursuant to section 7114(c)(2) of the Statute.
7. On April 18, 2013, the Respondent notified the Union that it was rejecting Section 10.2 of Article 16 of the collective bargaining agreement. It did not reject any other provision.
8. On March 11, 2014, Bill Jirles, the Union's president, and Chris Long, the Respondent's representative for negotiations, met to discuss proposals regarding Section 10.2. During these discussions, the parties decided to split Section 10.2 into Sections 10.2 and 10.3.
9. On March 24, 2014, the Respondent, through Long, and the Union, through Jirles, tentatively agreed to final language for Sections 10.2 and 10.3.
10. On March 26, 2014, the Respondent, through Long, notified the Union, through Jirles, that it was submitting the proposal discussed in paragraph 9 to management review.

11. Between March 26 and May 30, 2014, the Union, through Jirles, requested updates from the Respondent, through Long, several times. The Respondent, through Long and other management officials, repeatedly responded that management was still reviewing the proposal discussed in paragraph 10.
12. On or about May 20 and 21, 2014, the Union, through Jirles, met with the Respondent, through Powers and McDowell, to mediate a variety of issues, including the collective bargaining agreement. During the mediation, Jirles suggested implementing the rest of the collective bargaining agreement and continue negotiating over Sections 10.2 and 10.3.
13. During the meeting described in paragraph 12, the Union, through Jirles, asked for the status of the agency head review of the proposal described in paragraph 10. The Respondent, through Powers and McDowell, stated that they could not discuss the proposal because it was at agency head review.
14. On June 6, 2014, the Respondent, in contradiction to its assertions described in paragraph 13, notified Jirles that the Respondent had not submitted the proposal described in paragraph 9 for agency head review.
15. On June 10, 2014, the Respondent, through Powers, proposed to implement the collective bargaining agreement after agency head review, but only if the Union withdrew Article 16 in its entirety.
16. Before June 13, 2014, the Respondent did not approve, reject, or submit alternatives to the tentative agreement discussed in paragraph 9.
17. By the conduct described above, the Respondent failed to bargain in good faith in violation of section 7116(a)(1) and (5) of the Statute.

CONCLUSIONS OF LAW

By the conduct described in the facts set forth above, as drawn from the Complaint containing allegations to which the Respondent failed to file an Answer or otherwise demonstrate good cause for such failure, the Respondent admits that it failed to bargain in good faith as alleged. That duty to bargain includes an obligation to "approach the negotiations with a sincere resolve to reach a collective bargaining agreement" and "to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]" 5 U.S.C. § 7114(b)(1) and (3). *See U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 36 FLRA 524 (1990) (In determining whether a party engages in bad faith bargaining, the Authority looks to the totality of the circumstances.) Therefore the Respondent violated § 7116(a)(1) and (5) of the Statute.

As a remedy, the Respondent is ordered to engage in good faith negotiations with the Union, including providing a response to the Union regarding the March 24 tentative agreement. I recommend that the Authority grant the General Counsel's Motion for Summary Judgment and adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the National Institutes of Health, National Institute of Environmental Health Sciences, Research Triangle Park, North Carolina, shall:

1. Cease and desist from:

(a) Failing to negotiate with the American Federation of Government Employees, Local 2923 (Union) in good faith.

(b) Attempting to negotiate over issues that have already been resolved.

(c) 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) Engage in good faith negotiations over the collective bargaining agreement.

(b) Notify the Union of its decision regarding the March 24 tentative agreement regarding Sections 10.2 and 10.3 of Article 16.

(c) 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 Director of NIEHS, 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) In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(e) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta 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 20, 2014



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 National Institutes of Health, National Institute of Environmental Health Sciences, Research Triangle Park, North Carolina, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT engage in bad faith bargaining by failing to make a decision over a tentative agreement to unnecessarily delay negotiations with the American Federation of Government Employees, Local 2923 (Union) over the collective bargaining agreement.

WE WILL NOT insist on negotiating over matters that have already been resolved by the parties;

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 make a decision regarding the tentative agreement over Sections 10.2 and 10.3 of Article 16 of the collective bargaining agreement.

(Agency/Respondent)

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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.