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

OALJ 15-35

BROADCASTING BOARD OF GOVERNORS
OFFICE OF CUBA BROADCASTING
MIAMI, FLORIDA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1812

CHARGING PARTY

Case No. AT-CA-15-0097

Douglas J. Guerrin
For the General Counsel

Elizabeth A. Parish
For the Respondent

Timothy E. Shamble
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

The Respondent seeks to avoid the harsh penalty of summary judgment for its failure to file a timely answer by asserting, among other things, that it had good cause for that failure. Because the facts of this case do not constitute "extraordinary circumstances," as required by the Authority's Regulations, I find that the Respondent has not demonstrated good cause, and that the General Counsel is entitled to Summary Judgment in its favor. I also reject the Respondent's claim that the Authority lacks jurisdiction.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or Authority), 5 C.F.R. parts 2423 and 2429.

On April 24, 2015, the Regional Director of the Atlanta Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Broadcasting Board of Governors, Office of Cuba Broadcasting, Miami, Florida (the Respondent or Agency), violated § 7116(a)(1) and (8) of the Statute by refusing to comply with an arbitrator's award which had become final and binding. The Complaint advised the Respondent that an Answer was due no later than May 19, 2015, and it was served on H. Paul Vali, Labor and Employment Relations Division, Office of Human Resources, International Broadcasting Bureau, 330 Independence Avenue, S.W., Washington, DC 20237.

On May 26, 2015, Elizabeth A. Parish, the Respondent's Associate General Counsel, filed a Motion for an Enlargement of Time to Answer Complaint and to Postpone Hearing Date. In its motion, the Respondent stated that it did not receive the Complaint until May 12, 2015; that the office of the Respondent's General Counsel is understaffed and overburdened with litigation assignments, with a variety of other deadlines; and that an extension of time was needed to file its Answer and prepare for a hearing. The General Counsel (GC) of the FLRA opposed an enlargement of time, and on June 8, 2015, the Chief Administrative Law Judge denied both the motion to enlarge the time to file an Answer and the motion to postpone the hearing.

On June 8, 2015, the Respondent filed a Motion for Summary Judgment in its favor, and on June 9, 2015, the General Counsel filed its own Motion for Summary Judgment. On June 15, 2015, the Respondent filed an untimely Answer to the Complaint.

The GC's Motion for Summary Judgment asserts that because the Respondent failed to file a timely Answer, it had admitted all the allegations of the Complaint; accordingly, there were no factual issues in dispute, and the case was ripe for summary judgment in its favor. Based on the Respondent's admission of the facts alleged in the Complaint, it was undisputed that the Respondent had violated § 7116(a)(1) and (8) of the Statute by refusing to comply with a binding arbitrator's award.

In support of its Motion for Summary Judgment, Respondent submitted a variety of exhibits, including the decision and award of Arbitrator Suzanne R. Butler, the grievance upon which the decision and award was based, and documents relating to the Merit Systems Protection Board (MSPB) appeal of one of the employees covered in the grievance and arbitration. Based on these allegedly undisputed facts, the Respondent asserts several grounds on which the Authority lacks jurisdiction to decide the case or on which the Complaint should be dismissed. Specifically, it argues: (1) the Complaint is barred by § 7118(a)(4) of the Statute, because it is based on events that occurred more than six months

before the filing of the unfair labor practice charge; (2) the Authority has no jurisdiction because, under § 7116(d) of the Statute, the allegations in the Complaint were adjudicated by the MSPB; and (3) the Authority has no jurisdiction because the position in dispute in the underlying grievance is vacant.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

Section 2423.20(b) of the Authority's 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 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. Section 2429.23 provides, in pertinent part:

> (a) [t]he Authority or General Counsel, or their designated representatives, as appropriate, may extend any time limit provided in this subchapter for good cause shown . . . Requests for extensions of time shall be in writing and received by the appropriate official not later than five (5) days before the established time limit for filing . . . .
> (b) [t]he Authority or General Counsel, or their designated representatives, as appropriate, may waive any expired time limit in this subchapter in extraordinary circumstances. . . .

While the Regulations, on their face, afforded the Respondent notice of when its Answer was due and when to request an extension of time, the Regional Director also provided the Respondent with detailed instructions, in the text of the Complaint, 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. It is clear, from the content of the Respondent's Motion for an Enlargement of Time, that Respondent and its counsel were aware of the due date. Accepting the representation of counsel that the Respondent did not receive the Complaint until May 12, that still afforded counsel a full week in which to file its Answer or to file its request for an extension of time. Even with a full schedule of litigation assignments, that was a more than adequate amount of time to comply with the Regulations. Thus, the Respondent failed, in its motion for enlargement, to demonstrate "good cause" (within the meaning of § 2423.20(b)) for filing either a late Answer or a late request for extension of time file its Answer. Similarly, the facts outlined by the Respondent do not constitute "extraordinary circumstances" (within the meaning of § 2429.23(b)) justifying a waiver of the expired time limit. Accordingly, since the Respondent did not file a timely Answer to the Complaint, it is deemed to have admitted the allegations of the Complaint.

In *U.S. Dep't of Hous. & Urban Dev.*, 32 FLRA 1261 (1988), the Authority waived an expired time limit for filing a motion for reconsideration, as the representative of record was out of town on a family medical emergency for nearly a month, encompassing the period from before the Authority's original decision was served until several days after the motion for reconsideration was due. The representative filed the motion ten days after returning to the office and learning of the Authority's decision. The Authority considered these to be "extraordinary circumstances" justifying the late filing, within the meaning of § 2429.23(b). It also compared these circumstances to the facts in *Internal Revenue Serv., Indianapolis Dist.*, 32 FLRA 1235 (1988), where the attorney responsible for the case was out of town in training, but was informed thirteen days before the due date of a motion for reconsideration that his office had received the Authority's decision. Although the agency argued that its attorney had been "unable to review the Decision until returning" to his office, the Authority noted that the agency had notice of the decision and could have filed a timely motion. *Id.* at 1236. Thus it held that extraordinary circumstances did not exist to justify waiving the time limit. *See also U.S. Dep't of Hous. & Urban Dev., Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 n.2 (2002); *U.S. Dep't of Veterans Affairs Med. Ctr., Kan. City, Mo.*, 52 FLRA 282, 283-84 (1996).

The present case falls within the scope of the *IRS* decision and the others refusing to waive an expired time limit. As already noted, the Respondent had a week from the time it received the Complaint to file either an Answer or a request for extension of time. If the Respondent had filed a request for extension of time to file its Answer immediately after receiving the Complaint on May 12, and prior to May 19, citing its conflicting work assignments and shortage of attorneys, it would likely have demonstrated "good cause" for an extension of time. But having failed to do so, the facts outlined by Respondent's counsel do not constitute "extraordinary circumstances" warranting a waiver of the time limit for filing its Answer.

In accordance with § 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 American Federation of Government Employees, AFL-CIO, Local 1812 (the Union) 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, Elizabeth A. Parish occupied the position of Associate General Counsel for the Respondent and has been a supervisor or management official of the Respondent within the meaning of § 7103(a)(10) and (11) of the Statute and an agent of the Respondent acting on its behalf.

4. At all times material to this case, Luis Guardia has been an employee under § 7103(a)(2) of the Statute and a member of the bargaining unit described in paragraph 2.

5. On or about August 4, 2009, the Respondent notified the Union of an upcoming Reduction-in-Force (RIF) and identified eighteen bargaining unit positions to be abolished. Guardia's position was listed as one to be RIFed.

6. On or about November 4, 2009, the Union filed an Institutional Grievance against the Respondent for the RIF described in paragraph 5, identifying "All affected bargaining unit employees" as being at issue.

7. On or about December 9, 2009, the Respondent implemented the RIF described in paragraph 5. Guardia was RIFed at that time.

8. On various days in 2010 and 2011, the parties arbitrated the grievance described in paragraph 6. During the arbitration hearing, Guardia testified and the Respondent questioned Guardia as to his unit status.

9. The Respondent's brief to the arbitrator did not argue or suggest that Guardia was not a member of the unit of employees described in paragraph 2.

10. On or about November 19, 2011, Arbitrator Suzanne R. Butler issued her decision in which she sustained the grievance described in paragraph 6. In her decision, Arbitrator Butler found that the Respondent breached the parties' collective bargaining agreement and violated the Statute through the RIF described in paragraph 5. She ordered reinstatement and make-whole orders for all affected employees and specified that "all affected employees" included "all sixteen [16] RIFed employees."

11. On or about September 25, 2012, the Authority, in 66 FLRA 1012, denied the Respondent's exceptions to the decision described in paragraph 10. Neither the Respondent's exceptions nor the Authority's decision addressed Guardia's unit status.

12. On or about May 16, 2014, the D.C. Circuit Court of Appeals dismissed Respondent's appeal of the Authority's decision described in paragraph 11. Neither the Respondent's appeal nor the D.C. Circuit Court of Appeals' decision addressed Guardia's unit status.

13. On or about August 22, 2014, the Respondent, through Parish, informed the Union that it would not comply with the arbitration award described in paragraph 10 with respect to Guardia.

14. Since August 22, 2014, and continuing to date, the Respondent has refused to comply with the arbitration award described in paragraph 10 with respect to Guardia.

15. By the conduct described in 13 and 14, the Respondent has refused to comply with § 7121 of the Statute.

16. By the conduct described in paragraphs 13, 14, and 15, the Respondent has committed an unfair labor practice in violation of § 7116(a)(1) and (8) of the Statute.

CONCLUSIONS OF LAW

By virtue of its failure to answer the Complaint, the Respondent has admitted that it refused to comply with a final and binding order of an arbitrator. Section 7122(b) of the Statute requires agencies to comply with the final and binding decisions of an arbitration award, and the Authority has long held that the failure to take the actions required by an arbitrator's final award constitutes an unfair labor practice violating § 7116(a)(1) and (8). *U.S. Dep't of Transp., FAA*, 54 FLRA 480, 493-85 (1998) (*FAA*); *U.S. Dep't of Justice*, 20 FLRA 39, 43 (1985). Moreover, the Authority and the courts refuse to allow an agency to collaterally attack a final and binding arbitration award in an unfair labor practice proceeding for refusing to comply with the award. *See, e.g., U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 28-29 (2d Cir. 1986), *enforcing* 20 FLRA 39, above.

The various "jurisdictional" arguments raised by the Respondent in its Motion for Summary Judgment and in its Opposition to the General Counsel's Motion for Summary Judgment are simply collateral attacks on the arbitrator's award, and thus they cannot be raised in the instant proceeding. Central to the Respondent's arguments is its contention that employee Luis Guardia was not a member of the bargaining unit represented by the Union; therefore, the Respondent argues that Guardia was not affected by the arbitrator's nullification of the RIFs in dispute under the grievance, and that the arbitrator's order to reinstate all the RIFed employees did not cover Guardia. Similarly, it argues that Guardia's placement in the bargaining unit can only be made in a representation proceeding, not in an arbitration or an unfair labor practice proceeding. Respondent further argues that the Authority lacks jurisdiction here because the charge was filed more than six months after Guardia had been told that he was not in the bargaining unit.

It is clear from the arbitrator's opinion and award (Exhibit 3 of the Respondent's Motion for Summary Judgment), however, that the arbitrator explicitly ruled that Guardia (along with the other fifteen RIFed employees) must be reinstated with back pay. Guardia was listed on page 2 of the Award as a "RIFed Employee" who attended and

testified at the arbitration hearing. In the "Remedy" section of the opinion, the arbitrator writes: "For purposes of this case, the 'affected employees' are determined to include all sixteen (16) RIFed employees and Ms. Niurka Fernandez-Arteaga . . . ." *Id.* at 83 (footnote omitted). And in the "Award," the arbitrator ordered the Respondent to "[r]einstate to their previous positions without loss of seniority or benefits, all employees who were separated or who were affected by 'bumping' before the Union could fully negotiate and reach agreement with the Agency on impact and implementation of the OCB RIF." *Id.* at 94. There was no discussion by the arbitrator regarding which of the employees were members of the bargaining unit, nor did the arbitrator suggest in any way that her opinion only affected "bargaining unit employees;" rather, it simply referred to "employees" and "RIFed employees" – terms which applied to Guardia regardless of his bargaining unit status. The award can only be read as requiring the Respondent to reinstate Guardia, and its refusal to do so can only be understood as a refusal to comply with the award. If the Respondent viewed this aspect of the award as contrary to law or otherwise improper, it could have made that argument in its exceptions to the award. The Authority considered and rejected all of the Respondent's exceptions to the award, but none of those exceptions included an objection to the requirement that it reinstate Guardia or any other nonbargaining unit member. *See Broad. Bd. of Governors, Office of Cuba Broad.*, 66 FLRA 1012 (2012).

The unfair labor practice charge and complaint before me allege that the Respondent refused to comply with a final and binding arbitration award. The legal proceedings challenging the award ended on May 16, 2014, when the United States Court of Appeals for the District of Columbia Circuit dismissed the Respondent's petition for review. *Broad. Bd. of Governors, Office of Cuba Broad. v. FLRA*, 752 F.3d 453 (D.C. Cir. 2014). The Complaint alleges that the Respondent notified the Union on August 22, 2014, that it refused to comply with the award, and it is this date from which the six-month deadline for filing a charge is measured, pursuant to § 7118(a)(4) of the Statute. By filing the charge on November 26, 2014, the Union was well within the time allotted. Furthermore, the filing requirement of 7118(a)(4) is not jurisdictional matter. *U.S. Army Armament Research Dev. & Eng'g Ctr., Picatinny Arsenal, N.J.*, 52 FLRA 527, 532-34 (1996). Thus it is not appropriate for the Respondent to raise this issue here, in the context of its failure to answer the Complaint.

Respondent also objects to the Authority's jurisdiction because Guardia's case was heard by the MSPB. However, it should be noted that the Union's grievance protesting Guardia's RIF was filed on November 4, 2009 (Exhibit 2 to Respondent's Motion for Summary Judgment), and the MSPB appeal was filed on January 14, 2010 (Agency Exhibit B to Agency Position Statement, Exhibit 6 to Respondent's Motion for Summary Judgment). Pursuant to § 7121(2)(e) (1) of the Statute, Guardia had a choice of pursuing his case under the negotiated grievance procedure or a statutory appeal; he and the Union elected the grievance procedure by filing the grievance which resulted in Arbitrator Butler's award. If the Respondent believed that the arbitrator's award related to a matter covered by § 7121(f), it should have pursued an appeal (through the Director of the Office of Personnel Management) to the United States Court of Appeals for the Federal Circuit. *FAA*, 54 FLRA at 483-84. Instead, the Respondent chose to file exceptions to the award to the Authority, which either dismissed or denied all of its exceptions.

The Respondent finally asserts that the Authority lacks jurisdiction because Guardia's position had been abolished and is now vacant. This is an argument that should best have been resolved at the arbitration hearing, but there is no trace in the arbitrator's decision of this issue being raised. Guardia was treated by the arbitrator as a RIFed employee and, in that capacity, he was ordered to be reinstated. The case cited by the Respondent, *Dep't of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colo.*, 6 FLRA 52 (1981), is inapplicable the current unfair labor practice proceeding. The Authority simply held in that case that "[i]n making decisions involving appropriate units, the Authority will not resolve issues involving vacant positions." We are required here to determine whether the Respondent complied with an arbitration award, not to make any determination as to Guardia's bargaining unit status. As noted earlier, the arbitrator's award did not confine itself to reinstating only bargaining unit employees, but rather it ordered the reinstatement of all sixteen RIFed employees (of whom Guardia was one). This is neither the time nor the forum for the Respondent to continue using the RIF as an excuse to avoid reinstating Guardia.

The Respondent has been fighting to sustain its RIF of Guardia since 2009, and it has been rejected in all respects by an arbitrator, the Authority, and the Court of Appeals. The award became final and binding on May 16, 2014, and the finality of that decision precludes the Respondent from attacking it collaterally, which is precisely what it attempts to do in asserting its "jurisdictional" objections. Moreover, by failing to file an Answer to the Complaint, it has admitted all allegations of the Complaint and has waived the opportunity to demand a hearing and to further delay its compliance with the arbitrator's award. It has admitted, in other words, that it refused to comply with the arbitrator's award and that such refusal violated § 7116(a)(1) and (8) of the Statute.

Accordingly, I conclude that the Respondent violated § 7116(a)(1) and (8) of the Statute. As a remedy, it will be ordered to cease and desist from refusing to comply with Arbitrator Butler's award of November 19, 2011, to reinstate Luis Guardia with back pay and interest and without loss of seniority or benefits, and to post an appropriate notice of its unfair labor practice.

I therefore deny the Respondent's Motion for Reconsideration to Extend the Time to File an Answer to the Complaint, and I further deny the Respondent's Motion for Summary Judgment.

Accordingly, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment and issue 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 (the Statute), the Broadcasting Board of Governors, Office of Cuba Broadcasting, Miami, Florida, shall:

1. Cease and desist from:

(a) Failing and refusing to fully comply with Arbitrator Suzanne R. Butler's November 19, 2011, arbitration award by refusing to reinstate employee Luis Guardia with full back pay and interest and without loss of seniority or benefits.

(b) 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) Fully comply with Arbitrator Suzanne R. Butler's November 19, 2011, arbitration award by reinstating employee Luis Guardia with full back pay and interest and without loss of seniority or benefits.

(b) Post at the Broadcasting Board of Governors, where bargaining unit employees 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 presiding Governor and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The attached Notice shall also be disseminated to all bargaining unit employees by email or other electronic media customarily used to communicate with employees. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., June 29, 2015

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 Broadcasting Board of Governors, Office of Cuba Broadcasting, Miami, Florida, 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 fully comply with Arbitrator Suzanne R. Butler's November 19, 2011, arbitration award by refusing to reinstate employee Luis Guardia with full pay and interest and without loss of seniority or benefits.

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 fully comply with Arbitrator Suzanne R. Butler's November 19, 2011, arbitration award by reinstating employee Luis Guardia with full back pay and interest and without loss of seniority or benefits.

_____
(Agency/Respondent)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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, N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029, Ext. 6018.