

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

MEMORANDUM

DATE: March 29, 2004

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
JACKSON, MISSISSIPPI

Respondent

and

Case No. AT-CA-04-0032

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Charging Party

Pursuant to sections 2423.27(c) and 2423.34(b) of the Rules and Regulations, 5 C.F.R. §§ 2423.27(c) and 2423.34(b), 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 are the Motion For Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER JACKSON, MISSISSIPPI Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	Case No. AT-CA-04-0032

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented 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 **APRIL 28, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

—
SUSAN E. JELEN
Administrative Law Judge

Dated: March 29, 2004
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER JACKSON, MISSISSIPPI Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	Case No. AT-CA-04-0032

Brent S. Hudspeth, Esq.

For the General Counsel

Before: SUSAN E. JELEN

Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On January 29, 2004, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing, alleging that the Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi (the Respondent) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to comply with section 7114(a)(2)(B) of the Statute by refusing to allow a representative of the American Federation of Government Employees (AFGE or Union) to ask questions or otherwise participate in an examination of a bargaining unit employee who reasonably feared discipline and requested Union representation. The complaint further alleges that

the Respondent violated section 7116(a) (1) of the Statute by making statements to this effect to the Union representative. The complaint was served on Respondent by certified mail and the certified mail receipt, demonstrating service upon the Respondent, was returned to the Atlanta Region. (G.C. Ex. 1(b) and 1(c)) The complaint specified that, in accordance with the Authority's Rules and Regulations, the Respondent must file an Answer to the complaint no later than February 23, 2004, and that a failure to file an answer shall constitute an admission of the allegations of the complaint. A hearing was scheduled for May 13, 2004.

The Respondent did not file an answer, either in person or by mail, within the required period or at any time thereafter.

On March 5, 2004, Counsel for the General Counsel filed a Motion for Summary Judgment, asserting that by its failure to answer the complaint, the Respondent has admitted all of the allegations therein. Since no facts are in dispute, the General Counsel submits that the record demonstrates that the Respondent violated section 7116(a) (1) and (8) of the Statute.

The Respondent has failed to file any response to the General Counsel's Motion for Summary Judgment within the time period provided by Regulations. See 5 C.F.R. § 2423.27 (b).

Discussion of Motion for Summary Judgment

Section 2423.20(b) of the Authority's Rules and 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 Rules and 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 this case the Respondent has not filed an answer as required by the Regulations. In accordance with section 2423.20(b) of the Rules and Regulations, this failure constitutes an admission of each of the allegations of the Complaint. *Department of Veterans Affairs Medical Center, Asheville, North Carolina*, 51 FLRA 1572, 1594 (1996). Furthermore, the Respondent has not filed any response to the Motion for Summary Judgment. Accordingly, there are no disputed factual or legal issues in this case and it is appropriate to resolve this case 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 (AFGE) is the exclusive representative of a bargaining unit at the Department of Veterans Affairs, and the Union is an agent of AFGE for purposes of representing employees at the Respondent's facility in Jackson, Mississippi.

3. During the time period at issue in the complaint, Leonard T. Outlaw (Outlaw) occupied the position of Chief, Police Services at Respondent's Jackson, Mississippi facility. Outlaw was a supervisor or management official under 5 U.S.C. § 7103(a)(10) and (11) and was acting on behalf of the Respondent.

4. During the time period at issue in the complaint, Mary McElroy (McElroy) was an employee under 5 U.S.C. § 7103 (a) (2) and was in the bargaining unit represented by AFGE.

5. On September 24, 2003, the Respondent, through Outlaw, conducted an examination of McElroy, concerning McElroy's alleged forgery of an Agreement to Medicate form.

6. The examination described in paragraph 5 above was in connection with an investigation, McElroy reasonably believed that the examination could result in disciplinary action, and McElroy was accompanied to the examination by AFGE representative Cathie McQuiston (McQuiston).

7. During the examination described in paragraphs 5 and 6 above, the Respondent, through Outlaw, advised McQuiston that she was not permitted to ask any questions or otherwise participate at the examination.

Discussion and Conclusions

Section 7114(a) (2) (B) provides that an exclusive representative of an appropriate unit shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. The purposes underlying section 7114(a) (2) (B) and the benefits intended for the various parties cannot be achieved if the union representative is prohibited from taking an active role in assisting an employee in presenting facts at an examination. Consequently, under section 7114(a) (2) (B), representation includes the right of the union representative to take an "active part" in the defense of the employee. *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 440 (1990). Failure to allow active participation violates section 7116 (a) (1) and (8). *Headquarters, National Aeronautics and*

Space Administration, Washington D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C., 50 FLRA 601 (1995). As noted above, Respondent admitted by its failure to file an answer that it did not allow the Union representative to actively participate in the examination at issue. Therefore, Respondent violated section 7116(a) (1) and (8) when it refused to allow the Union representative to ask questions and otherwise participate in the examination.

Section 7116(a) (1) makes it an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute. Statements made by management officials may violate this section. The standard for determining whether a management statement violates section 7116(a) (1) is an objective one. *Ogden Air Logistics Center, Hill Air Force, Base, Utah*, 34 FLRA 834, 837 (1990); *Marine Corps Logistics Base, Barstow, California*, 33 FLRA 626, 637 (1989). The test is whether, under all the circumstances, the statement could reasonably tend to interfere with, restrain, or coerce employees in exercising their rights under the Statute. *Equal Employment Opportunity Commission, Jackson Area Office, Jackson, Mississippi*, 34 FLRA 928, 933 (1990). Management statements restricting rights protected by the Statute would tend to interfere with the exercise of rights under the Statute. Therefore, as admitted by its failure to answer the complaint, Respondent violated section 7116(a) (1) of the Statute when it informed the Union representative that she could not ask questions or otherwise participate in the examination.

Remedy

As a remedy in this matter, the General Counsel requests a facility-wide posting signed by the Medical Center Director.

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, it is hereby ordered that the Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee to take part in an investigatory examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the employee's exclusive representative to actively participate in such examination.

(b) Telling any representative of the American Federation of Government Employees, the exclusive representative of a unit of employees, that they cannot ask questions or otherwise participate in any investigatory examination conducted pursuant to section 7114(a)(2)(B) of the Statute.

(c) In any like or related manner, interfering with, restraining or coercing its 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) Post at its Jackson, Mississippi facility, where bargaining unit employees represented by the American Federation of Government Employees, Local 589, 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 Medical Center Director, 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.

(b) Pursuant to section 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, DC, March 29, 2004.

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 Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi, 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 require any bargaining unit employee to take part in an investigatory examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the employee's exclusive representative to ask questions and actively participate in such examination.

WE WILL NOT tell any representative of the American Federation of Government Employees, the exclusive representative of a unit of employees, that they cannot ask questions or otherwise participate in any investigatory examination conducted pursuant to section 7114(a)(2)(B) of the Statute.

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 allow a representative of the American Federation of Government Employees to ask questions and fully participate in any investigatory examination conducted pursuant to section 7114(a)(2)(B) of the Statute.

(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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: Marquis Two Tower, 285 Peachtree Center Avenue, Suite 701, Atlanta, GA 30303, and whose telephone number is: 404-331-5380.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. AT-CA-04-0032, were sent to the following parties in the manner indicated:

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CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Brent S. Hudspeth, Esq.
3673

7000 1670 0000 1175

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AFGE Representative
80 F Street, NW
Washington, DC 20001

REGULAR MAIL:

President

AFGE

80 F Street, NW

Washington, DC 20001

Dated: March 29, 2004

Washington, DC