

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

.
UNITED STATES CUSTOMS SERVICE .
AND .
UNITED STATES CUSTOMS SERVICE .
MIAMI, FLORIDA .
Respondents .
and . Case No. 4-CA-90748
NATIONAL TREASURY EMPLOYEES .
UNION .
Charging Party .
.

Peter A. Quinter, Esquire
Counsel for the Respondent
Steven P. Flig, Esquire
Counsel for the Charging Party
Richard S. Jones, Esquire
Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

On November 29, 1989, the General Counsel, by the Regional Director, issued a Complaint and Notice of Hearing which were duly served by certified mail upon Respondents. The Complaint alleged that Respondents violated Section 7116(a)(1) and (8) of the Statute by failing and refusing to comply with Section 7122(b) of the Statute when they refused to pay \$3,082.72 in attorney's fees to the Charging

Party (Union or NTEU) pursuant to a final and binding arbitrator's award.

The complaint gave the Respondents the requisite twenty days, until December 19, 1989, to file an Answer pursuant to section 2423.13 of the Authority's Rules and Regulations. Respondents did not file an Answer.

On or about January 4, 1990, Counsel for the General Counsel moved for summary judgment and submitted a supporting brief. The Regional Director transferred the motion to the Chief Administrative Law Judge pursuant to section 2423.22(b)(1) of the Regulations. On January 5, 1990 the Chief Judge gave the parties until January 22, 1990 to file responses to the motion. All Parties responded.^{1/} The motion and the responses were assigned to the undersigned for disposition pursuant to section 2423.19(t) and section 2423.22(b)(3) of the Regulations.

Positions of the Parties

The General Counsel urges that summary judgment is appropriate inasmuch as Respondents failed to file an answer. Under section 2423.13(b) of the Authority's Rules "failure to file an answer or to plead specifically to or to explain any allegation shall constitute an admission of such allegations and shall be so found by the Authority, unless good cause to the contrary is shown." The General Counsel claims that Respondents have not shown good cause; accordingly, the allegations in the complaint must be deemed admitted in their entirety. The General Counsel also urges, that, assuming Respondents have shown good cause for their failure to answer the complaint, there is no genuine issue as to any material fact.

Respondents, in answering the motion for summary judgment, urge that the motion be denied. Respondents claim that they received a letter dated September 11, 1989 from the Acting Regional Director, FLRA "requesting a response to the complaint" and that they "responded to the complaint by advising the FLRA that Customs would comply with the arbitration award." Respondents assert that during and after its contact with the Regional Office of FLRA in September 1989, the individual responsible for preparing the necessary

^{1/} Counsel for the General Counsel's unopposed motion to file a reply to Respondent's response is granted.

documents to accomplish the payment of attorney's fees was on maternity leave through November 1989. A longer than usual delay was occasioned by a less-experienced individual having to prepare the paperwork. A check was eventually sent, but was mistakenly made payable to the arbitrator instead of NTEU. This check had to be retrieved and a new one issued. The matter was not straightened out until January 1989. Respondents claim that NTEU received a check for \$3,080.72 on January 22, 1990, and that "the delay occasioned in this case was due not to any intentional action by the Customs Service to obstruct or not comply with the lawful award of the arbitrator, but rather to an unfortunate, but honest clerical error in processing the payment in question."

Discussion

Respondents have apparently confused their answer to the Acting Regional Director's September 11, 1989 request that they respond to the August 10, 1989 charge^{2/} with their duty to answer the November 29, 1989 complaint within twenty days after the complaint was served.^{3/} Respondent's action of advising the Acting Regional Director, in response to the charge, that they would comply with the arbitration award, cannot serve as an answer to the complaint. The complaint was issued two and a half months later in the face of Respondents' continuing failure to pay the attorney's fees. Respondents have provided no explanation as to why they did not answer the complaint.

Accordingly, good cause has not been shown for their failure to file an answer. Pursuant to section 2423.13(b) of the Authority's Regulations, the failure to file an answer shall constitute an admission of each allegation in the complaint and shall be so found. Based on the pleadings and these admissions, there is no genuine issue as to any material fact and the moving party, the General Counsel, is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c); Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky, 33 FLRA 3, 4 (1988).

^{2/} See 5 C.F.R. §§ 2423.6(b) and 2423.7(a)-(c) (1989).

^{3/} See 5 C.F.R. §§ 2423.13(a) and 2429.22 (1989).

Even assuming that Respondents had shown good cause for their failure to answer the complaint and that Respondents' counsel's representations are accepted as true,^{4/} there is still no genuine issue as to any material fact, and the General Counsel is entitled to summary judgment as a matter of law.

If a party fails to file exceptions to an arbitrator's award pursuant to section 7122(a) within the 30 day period established therein, the award, pursuant to section 7122(b) of the Statute, becomes "final and binding" and "(a)n, agency shall take the actions required by an arbitrator's award." Once an arbitration award becomes final and binding, the Authority only reviews matters of compliance with the award in an unfair labor practice proceeding.^{5/} The adequacy of compliance is determined by whether the respondent's construction of the award is reasonable, which depends on whether the construction is consistent with the entire award and consistent with applicable rules and regulations.^{6/} If there is a delay in complying, the Authority looks to whether the respondent acted promptly in light of all the facts and circumstances or engaged in dilatory tactics.^{7/} Here there was no difficulty in construing the award, and there were no unusual or complex circumstances. Respondents were simply required to pay the Union a precise amount, \$3,080.72, as reasonable attorney's fees.

Respondents make no representations that they attempted to comply with the award for the several months between May 17, 1989 (the date of the award) and August 10, 1989 (the date the Union filed an unfair labor practice charge to

^{4/} The recitation of the facts by counsel for Respondents rests on mere allegations without supporting affidavits. See Fed. R. Civ. P. 56(e).

^{5/} Department of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, N.Y., 22 FLRA 928 (1986).

^{6/} Department of the Treasury, IRS and Department of the Treasury, IRS, Austin Service Center, Austin, Texas, 25 FLRA 71 (1987); Department of Justice, 22 FLRA 928 (1986); U.S. Army Health Clinic, Fort Ritchie, Maryland, 9 FLRA 935, 946 (1981).

^{7/} Department of Health and Human Services, Social Security Administration, 22 FLRA 271 (1986).

seek enforcement). They simply urge that unfortunate clerical errors prevented payment between the time they were first contacted by the FLRA in September 1989 and the time payment was finally made on January 22, 1990.

Agencies, to be in compliance with the Statute, must act voluntarily and promptly under all the circumstances to comply with a final arbitrator's award. As the General Counsel points out, the duty to comply is not contingent on the filing and processing of an unfair labor practice charge. The issue is not whether an agency acted promptly in the face of an unfair labor practice charge for non-compliance with the award. This would frustrate the purposes and the policies of the Statute which provide for the expeditious processing of grievances, binding arbitration, and that an agency "shall take the actions required by an arbitrator's final award." 5 U.S.C. §§ 7121(b)(2), 7121(b)(3)(C), 7122(b).

It is concluded that Respondents engaged in dilatory tactics, failed to take actions required by an arbitrator's final award contrary to section 7122(b) of the Statute, and thereby did engage in unfair labor practices within the meaning of section 7116(a)(1) and (8) of the Statute, as alleged.

Based on the foregoing, the General Counsel's motion for summary judgment is granted, and I make the following concluding findings of fact, conclusions of law, and recommendations.

Findings and Conclusions

1.

(a) The charge was filed by the Union on August 10, 1989, and a copy thereof was served upon Respondent on or about August 9, 1989.

(b) The first amended charge was filed by the Union on November 17, 1989, and a copy thereof was served upon Respondent on or about November 16, 1989.

(c) The second amended charge was filed by the Union on November 29, 1989, and a copy thereof was served upon Respondent on or about November 27, 1989.

2.

At all times material herein, the Union has been and is now a labor organization within the meaning of Section 7103(a)(4) of the Statute.

3.

(a) At all times material herein, the Department of the Treasury has been, and is now an agency within the meaning of Section 7103(a)(3) of the Statute.

(b) At all times material herein, the United States Customs Service, herein called Customs Service, is a primary national subdivision of the Department of the Treasury within the meaning of Section 2421.5 of the Authority's Rules and Regulations.

(c) At all times material herein, the United States Customs Service, Region IV, Miami, Florida, herein called Region IV has been and is now an activity of the Department of Treasury within the meaning of Section 2421.4 of the Rules and Regulations.

4.

At all times material herein, the individuals listed below occupied the positions appearing opposite their names, and have been and are now supervisors and/or management officials within the meaning of Sections 7103(a)(10) and (11) of the Statute and/or are agents of Respondents:

Hank Alexander . . . Employee Relations Specialist

Rodney White Employee Relations Specialist

5.

(a) At all times material herein, the Union has been and is now the exclusive representative of certain employees of Respondent in an appropriate unit as set forth in a nationwide collective bargaining agreement which was effective on August 24, 1987.

(b) At all times material herein, National Treasury Employees Union, Chapter 171, herein called Chapter 171, is an administrative subdivision of the Union and an agent thereof for the purpose of representing Respondent Region IV's employees at its Jacksonville, Florida locations.

6.

At all times material herein, Steven P. Flig, herein called Flig, has occupied the position of attorney for the Union and as such is an agent of the Union.

7.

(a) On or about July 29, 1988, Arbitrator J. Earl Williams, herein called Arbitrator Williams, issued an Opinion and Award in the matter of an arbitration between Region IV and the Union.

(b) The Award described in subparagraph 7(a), above, provided, inter alia, that certain bargaining unit employees of Respondents be awarded backpay pursuant to the Backpay Act, 5 U.S.C. 5596 et. seq.

(c) No exceptions were filed to the Award described in subparagraph 7(a), above.

8.

(a) On or about August 5, 1988, the Union, by Flig, petitioned Arbitrator Williams to award the Union attorney's fees in the arbitration case described in subparagraph 7(a), above.

(b) On or about May 17, 1989, Arbitrator Williams issued an Opinion and Award granting the Union's petition described in subsection 8(a), above, and ordering Respondent Region IV to pay the Union \$3,080.72.

(c) No exceptions were filed to the Award described in subparagraph 8(b), above.

9.

Notwithstanding the actions described in paragraphs 7 and 8, above, Respondent refused to implement the Arbitrator's Opinion and Award described in subparagraph 8(b), above.

10.

By the acts and conduct described in paragraph 9, above, Respondents have failed and refused to comply with Section 7122(b) of the Statute, and thereby did engage in unfair labor practices within the meaning of Section 7116(a)(8) of the Statute.

11.

By the acts and conduct described in paragraphs 9 and 10, above, Respondents have interfered with, restrained and coerced, and are interfering with, restraining and coercing

employees in the exercise of their rights guaranteed by Section 7102 of the Statute, and thereby did engage in unfair labor practices within the meaning of Section 7116(a)(1) of the Statute.

12.

The acts and conduct of Respondents set forth above constitute unfair labor practices within the meaning of Sections 7116(a)(1) and (8) of the Statute.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the United States Customs Service and United States Customs Service, Region IV, Miami, Florida shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the May 17, 1989 final award of Arbitrator J. Earl Williams or with any arbitrator's final award issued pursuant to the Federal Service Labor-Management Relations Statute.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

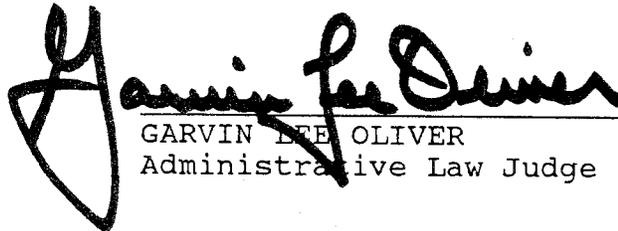
2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Comply with the May 17, 1989 final award of Arbitrator J. Earl Williams by paying the National Treasury Employees Union \$3,080.72 in reasonable attorney's fees and comply with any other arbitrator's final award issued pursuant to the Federal Service Labor-Management Relations Statute.

(b) Post at its facilities in Miami, Florida 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 Regional Commissioner 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, Atlanta, Georgia, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 11, 1990



GARVIN LEE OLIVER
Administrative Law Judge