66 FLRA No. 146

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
MARTINSBURG, WEST VIRGINIA
(Respondent)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS
LOCAL LODGE 1798
(Charging Party)

WA-CA-11-0258

_____

DECISION AND ORDER

July 17, 2012

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1), (2), and (4) of the Federal Service Labor-Management Relations Statute (the Statute) by issuing letters of reprimand to a Union official in retaliation for her protected activity. The Judge granted the GC's motion for summary judgment and found that the Respondent violated the Statute as alleged.

For the following reasons, we deny the Respondent's exceptions and adopt the Judge's findings, conclusions, and recommended Order.

II. Background and Judge's Decision

The facts are set forth in detail in the Judge's decision and are only briefly summarized here.

The GC issued a complaint alleging that the Respondent violated § 7116(a)(1), (2), and (4) of the Statute by issuing a proposed letter of reprimand and a formal letter of reprimand to a Union official in retaliation for her protected activity.[1] Judge's Decision (Decision) at 2; Complaint at 4. The complaint stated that failure to file an answer by the time limit set forth in § 2423.20(b) of the Authority's Regulations [2] would constitute an admission of the complaint's allegations. Decision at 2; Complaint at 4-5.

The day before the answer was due, the Respondent filed a motion requesting an extension of time to file its answer and postponement of the hearing (extension request). Decision at 2. In support, the Respondent claimed that it could not file an answer because of its counsel's limited ability to work due to a work-related injury that pre-dated the complaint. The Respondent also claimed that other work considerations and the pendency of an allegedly related representation case before the Regional Director (RD) who issued the complaint prevented it from filing an answer. *Id.* The GC opposed the Respondent's extension request. Order Denying Extension of Time to File Answer at 1.

The Chief Administrative Law Judge (CALJ) denied the Respondent's extension request. Decision at 2. An extension of time was not warranted, the CALJ found, because the Respondent's counsel continued to work at home despite her injury, the Respondent had other attorneys to work on the case, and the limitations on the Respondent's counsel's ability to work and her other work assignments "were internal matters between [her] and her supervisor." *Id.* The CALJ also found that it was inappropriate to raise such conflicts the day before the answer was due. *Id.* In addition, he determined that the pendency of an allegedly related representation case did not justify extending the time limit for filing an answer. *Id*. Further, he found that the Respondent had not set forth the other parties' positions on its motion as required under § 2423.21(a) of the Authority's Regulations.[3] Order Denying Extension of Time to File Answer at 2.

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[1] It is undisputed that the RD initially dismissed the charge before issuing the complaint following an appeal to the General Counsel. Exceptions at 3; Opp'n at 5.

[2] Section 2423.20(b) 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 . . . . Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission. Motions to extend the filing deadline shall be filed in accordance with § 2423.21.

5 C.F.R. § 2423.20(b).

[3] Section 2423.21(a) provides that "[m]otions for an extension of time . . . shall include a statement of the position of the other parties on the motion." 5 C.F.R. § 2423.21(a).

After the Respondent failed to file an answer,[4] the GC filed a motion for summary judgment. Decision at 3. The GC claimed that there were no "factual or legal issues in dispute" because the Respondent admitted all of the complaint's allegations under § 2423.20(b) when it did not file an answer. *Id.* The Respondent opposed the GC's motion, claiming that it had "good cause" for failing to file an answer. *Id.* According to the Respondent, on the day the Respondent filed its extension request, the Respondent's counsel took extended medical leave and was unable to do any further work on the answer. The Respondent argued that this constituted good cause within the meaning of § 2423.20(b).

In ruling on the GC's motion for summary judgment, the Judge noted that the relevant Authority Regulations were §§ 2423.20(b)[5] and 2429.23(a) and (b).[6] *Id.* at 3-4. The Judge found that the Respondent conceded that it was aware of the due date for filing its answer, and it failed to file its extension request at least five days before that due date, as required under § 2429.23(a)[7] of the Authority's Regulations. *Id.* at 4. The Judge found that the facts of this case warranted refusing to waive the expired time limit for filing the Respondent's answer. *Id.* at 5 (citing *IRS, Indianapolis, Dist.*, 32 FLRA 1235 (1988)). In the Judge's view, although the Respondent's counsel suffered from medical problems that impaired her ability to work, it was "apparent that [her] other work assignments were as much the cause of her problem, if not more, than her medical issues." *Id.* at 5. Citing the CALJ's findings, the Judge found that the Respondent should have assigned another attorney to the case and "should have been addressing [its counsel's] workload conflicts long before" the answer was due. *Id.* Based on the foregoing, the Judge found that no extraordinary circumstances existed for waiving the expired time limit for filing the Respondent's answer, and therefore concluded that the Respondent did not establish good cause for failing to file an answer. *Id.*

Applying § 2423.20(b), the Judge found that the Respondent's failure to file an answer constituted an admission of the complaint's allegations. *Id.* Accordingly, he found that there were no disputed factual or legal matters to resolve. *See id.* at 7-10. And, for these reasons, he granted the GC's motion for summary judgment and found that the Respondent violated § 7116(a)(1), (2) and (4) of the Statute as alleged. *Id.* at 8. As a remedy, the Judge recommended a cease and desist order, rescission of the letters of reprimand to the Union official, and a notice posting. *Id.* at 8-10.

III. Positions of the Parties

A. Respondent's Exceptions

In its exceptions, the Respondent makes a number of claims relating to its failure to file an answer. The Respondent contends that the Judge erred by relying on the CALJ's denial of its extension request. Exceptions at 1. Specifically, the Respondent asserts that the CALJ denied the extension request "after the close of business" on the date the answer was due, and this prevented it from filing a timely answer. *Id.* at 10. The Respondent also argues that it "implicitly" requested the GC's position on the extension request when it "asked [the GC] . . . for an enlargement of time" to answer. *Id.* at 9; *see also id.* at 10-11. The Respondent claims that the GC's refusal to consent to additional time was in "bad faith," and notes that the GC did not oppose the request until after the Respondent filed its motion. *Id.* at 9.

The Respondent also contends that its failure to file an answer was justified because the RD had not issued a decision on a related representation case, *id.* at 9, and the RD's initial decision to dismiss the charge "caused confusion regarding who was going to handle" the case on behalf of the Respondent, *id.* at 8. The Respondent also contends that the Judge "blamed" it for not submitting its answer after the due date, and asserts that it was not aware, nor do the Authority's Regulations indicate, that it could have filed an untimely answer. *Id.* at 11.

In addition, the Respondent excepts to the Judge's "factual conclusions" regarding the complaint's merits. *Id.* at 1-2.

Further, the Respondent asserts that the Judge erred in finding that the Respondent violated § 7116(a)(1), (2), and (4) of the Statute. *Id.* at 2, 7-8. Specifically, the Respondent argues that, as the GC incorrectly claimed violations of § 7116(a)(1), (5), and (8) in its motion for summary judgment, the Judge erred in finding violations of § 7116(a)(1), (2),

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[4] The Respondent first submitted an answer as part of its exceptions. *See* Exceptions, Attach. at 3.

[5] *See supra* note 2.

[6] The relevant portion of § 2429.23 provides:

> (a) . . . the Authority . . . or [its] designated representatives, as appropriate, may extend any time limit provided in this subchapter for good cause shown . . . . Requests for extensions of time shall be . . . received by the appropriate official not later than five (5) days before the established time limit for filing . . . .
>
> (b) . . . the Authority . . . or [its] designated representatives, as appropriate, may waive any expired time limit in this subchapter in extraordinary circumstances. Request[s] for a waiver of time limits shall state the position of the other parties . . . .

5 C.F.R. § 2429.23.

[7] *See supra* note 6.

and (4) because the GC did not previously raise those claims to the Judge. *Id.* at 7-8.

Finally, the Respondent argues that the Judge erred in recommending rescission of the letters of reprimand and a notice posting. *Id.* at 2.

B. GC's Opposition

The GC asserts that the CALJ properly denied the Respondent's extension request, and the Judge properly found that no extraordinary circumstances existed for waiving the expired time limit for filing the request. In the GC's view, the Respondent fails to address the Judge's finding that the Respondent's counsel's workload conflicts should have been addressed prior to the day before the answer was due. Opp'n at 4. In addition, the GC disputes the Respondent's contention that the CALJ's denial of the motion after the answer was due prevented the Respondent from filing a timely answer. *Id.* The GC notes that the Respondent failed to file its motion at least five days before the answer's due date, as required under § 2429.23(a) of the Authority's Regulations, and as such, any delay is attributable to the Respondent and not the CALJ. *Id.* Further, the GC argues, the Respondent's contention that the GC opposed the motion in "bad faith" is inaccurate because the Respondent never requested the GC's position on the motion as required by § 2423.21(a).[8] *Id.*

The GC also claims that the allegedly related representation case had no impact on the decision in this case because the Respondent admitted the facts of the complaint by failing to file a timely answer. *Id.* at 3. Had the Respondent filed a timely answer, the GC asserts, the Respondent could have argued that the RD needed to decide the allegedly related pending representation case before she decided to issue a complaint in the ULP case. *Id.* As to the RD's initial decision to dismiss the charge before issuing the complaint, the GC argues that this had no impact on the Respondent's ability to file an answer. *Id.* at 5.

In addition, the GC contends that the Respondent cannot now argue that the Judge erred in his factual findings because the Respondent admitted the complaint's allegations under § 2423.20(b) when it failed to file an answer. *Id.* at 2-3.

Further, the GC contests the Respondent's claim that the Judge made erroneous legal conclusions. *Id.* at 2. The GC claims that, although it cited incorrect subsections of § 7116(a) at the end of its motion for summary judgment, there is no dispute that it correctly cited § 7116(a)(1), (2), and (4) both in the complaint and at the beginning of its motion for summary judgment. *Id.*

As to the Respondent's remedy argument, the GC asserts that the recommended remedy is consistent with the remedy ordered by the Authority in similar cases. *Id.* at 5.

IV. Analysis and Conclusions

A. The Judge did not err in failing to find "good cause" for the Respondent's failure to file an answer.

To the extent the Respondent's explanation for its failure to file an answer constitutes an exception, we understand it as a claim that the Judge erred in finding that the Respondent failed to establish "good cause" for failing to file its answer. *See U.S. Dep't of Transp., FAA, Houston, Tex.*, 63 FLRA 34, 35-36 (2008) (*FAA*) (citing 5 C.F.R. § 2423.20(b)).

The Authority's Regulations provide that, in ULP proceedings, an answer to a complaint must be filed within twenty days of service of the complaint. 5 C.F.R. § 2423.20(b). "[A]bsent a showing of good cause . . . , failure to file an answer or respond to any allegation shall constitute an admission." *Id.* The standard for waiving an expired time limit is set forth in § 2429.23(b), which permits waiver of an expired time limit "in extraordinary circumstances." 5 C.F.R. § 2429.23(b); *U.S. Dep't of Housing & Urban Dev., Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 n.2 (2002).

It is undisputed that the Respondent did not file an answer within twenty days of service of the complaint. Decision at 2; Exceptions at 11; Opp'n at 4. The Judge therefore considered whether "extraordinary circumstances" existed for waiving the expired time limit, and found that they did not. Decision at 4-5. Based on his finding that extraordinary circumstances did not exist, the Judge concluded that the Respondent did not demonstrate "good cause" under § 2423.20(b) for failing to file an answer. *Id.* at 5. For the reasons that follow, we find that the Respondent's good-cause claims do not establish that the Judge erred.

The Respondent argues that the Judge erred in relying on the CALJ's denial of its extension request in finding that it lacked "good cause" for its failure to file an answer. Exceptions at 10. Specifically, the Respondent argues that the CALJ prevented it from filing a timely answer by denying its extension request after "close of business" on the date the answer was due. *Id.* But the Respondent neither challenges the Judge's finding that its extension request was untimely under § 2429.23(a), nor argues that extraordinary circumstances existed warranting waiver of the applicable time limit. In

[8] *See supra* note 3.

addition, the Respondent cites no regulation that requires a judge to respond to an extension request before the due date of the filing for which the party is seeking an extension. Accordingly, we reject this claim.

The Respondent also argues that, contrary to the CALJ's finding, it set forth the GC's position in its extension request as required by § 2423.21(a). Exceptions at 9-11. But the record shows that the Respondent neither requested nor ascertained the GC's position. *Id.*, Attach. at 1. Although the Respondent e-mailed the GC's counsel, stating that it "need[ed] to ask [the GC] for an extension of time to respond to the complaint," it did not ask the GC for its position on the extension request, as required under § 2423.21(a). *Id.* Moreover, to the extent the Respondent was asking the GC to grant it an extension of time, under § 2424.21(b) of the Authority's Regulations,[9] only an administrative law judge – and not the GC – can grant a request for an extension of time to file an answer. Accordingly, we reject this claim.

The Respondent's other arguments in its exceptions also do not establish that the Judge erred by finding that the Respondent failed to show "good cause" for its failure to file an answer. For example, the Respondent argues that a representation case pending before the RD prevented the Respondent from filing an answer. Exceptions at 9. But the Respondent does not explain how any law or regulation prohibits the simultaneous processing of a ULP and a representation case, even if they are related. The Respondent also asserts that the RD initially dismissed the Union's ULP charge, "caus[ing] confusion regarding who was going to handle" the case on behalf of the Respondent. *Id.* at 8. But there is no dispute that the complaint was properly issued. And nothing in the Authority's case law or Regulations supports a finding that, because the RD initially dismissed the charge, the Respondent is relieved of its obligation under § 2423.20(b) to file an answer to a subsequent complaint that is properly issued. Further, the Respondent claims that the Judge "blamed" it for not submitting its answer after the due date, and asserts that it was not aware, nor do the Authority's Regulations indicate, that it could have filed an untimely answer. *Id.* at 11. Even if true, the Respondent does not explain how this claim establishes that the Judge's good-cause determination is erroneous. Moreover, not only is there nothing in the Authority's Regulations precluding submission of an untimely document, but § 2429.23(b) specifically provides that parties may request waiver of an expired time limit. 5 C.F.R. § 2429.23(b). And Authority precedent is clear that parties appearing before the Authority are charged with knowledge of all pertinent statutory and regulatory filing requirements. *See, e.g., U.S. Envtl. Prot. Agency, Envtl. Research Lab., Narragansett, R.I.*, 49 FLRA 33, 35 (1994).

Based on the foregoing, we deny the Respondent's exceptions claiming that the Judge erred in finding that the Respondent lacked "good cause" for failing to file an answer.

B. The Judge did not make erroneous factual findings.

The Respondent argues that the Judge made erroneous factual findings. Exceptions at 1-2. However, a respondent admits the factual allegations of a complaint under § 2423.20(b) when the respondent fails to file a timely answer and does not demonstrate "good cause" for its "failure to file." 5 C.F.R. § 2423.20(b); *FAA*, 63 FLRA at 35-36. As the Respondent failed to file a timely answer and did not demonstrate "good cause" for its failure, the Judge properly found that the Respondent admitted the complaint's factual allegations. The Respondent cannot now challenge them on exceptions. *See FAA*, 63 FLRA at 35-36. Accordingly, we deny the Respondent's claim that the Judge made erroneous factual findings.

C. The Judge did not err in finding that the Respondent violated § 7116 (a)(1), (2), and (4) of the Statute.

The Respondent argues that, as the GC incorrectly claimed violations of § 7116(a)(1), (5), and (8) in its motion for summary judgment, the Judge erred in finding violations of § 7116(a)(1), (2), and (4) because the GC did not previously raise those claims to the Judge. Exceptions at 7-8.

There is no dispute that the complaint and the first section of the GC's motion for summary judgment correctly cite § 7116(a)(1), (2), and (4). Regarding the incorrect citation, the Judge relied on the complaint and the part of the GC's motion that correctly cite § 7116(a)(1), (2), and (4) in finding that the Respondent violated those subsections. Complaint at 4; GC's Mot. for Summary Judgment at 1; Decision at 7. Accordingly, we deny this exception.

D. The Judge's remedy is not deficient.

The Respondent asserts that the Judge erred in recommending as a remedy rescission of the letters of reprimand and a notice posting. Exceptions at 2. The Authority denies claims that are unsupported by evidence or argument as bare assertions. *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 355, 360 (2009). As the Respondent provides no

[9] Section 5 C.F.R. § 2423.21(b) provides that "[p]rehearing motions . . . shall be filed with the Administrative Law Judge."

evidence or argument to support this claim, we deny it as a bare assertion. *See id.*

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Disciplining employees for conduct that is protected under the Statute or for participating in proceedings before the Federal Labor Relations Authority.

(b) In any like or related manner, interfering with, restraining, or coercing 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) Rescind the letter of proposed reprimand to Janice Perry dated March 21, 2011, and the formal letter of reprimand to Ms. Perry dated April 7, 2011.

(b) Post at the Respondent's 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 Medical Center Director, Martinsburg, WV, 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.

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

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, Veterans Affairs Medical Center, Martinsburg, West Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT discipline bargaining unit employees for conduct that is protected under the Statute or for participating in proceedings before the Federal Labor Relations Authority.

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

WE WILL rescind the letter of proposed reprimand to Janice Perry dated March 21, 2011, and the formal letter of reprimand to Ms. Perry dated April 7, 2011.

_____
(Agency/Activity)

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

This notice must remain posted for 60 consecutive days from the date of this 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, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW, Second Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.

Office of Administration Law Judges

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
MARTINSBURG, WEST VIRGINIA
(Respondent)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
INTERNATIONAL ASSOCIATION
OF MACHNISTS AND AEROSPACE WORKERS
LOCAL LODGE 1798
(Charging Party)

WA-CA-11-0258

Douglas R. Guerrin
For the General Counsel

Xan DeMarinis
For the Respondent

Janice Perry
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Respondent[1] seeks to avoid the harsh penalty of summary judgment for its failure to file an Answer by asserting 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.

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 *et seq*. (the Statute), and the Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. parts 2423 and 2429.

On September 30, 2011,[2] the Regional Director of the Washington Region of the Authority issued a Complaint and Notice of Hearing, alleging that the Department of Veterans Affairs, Veterans Affairs Medical Center, Martinsburg, WV (the Respondent/Agency), violated section 7116(a)(1), (2) and (4) of the Statute. The Complaint alleged that the Respondent issued a letter of reprimand to Janice Perry, President of the National Federation of Federal Employees, IAMAW, Local Lodge 1798 (Charging Party/Union) because Perry had assisted another employee with several complaints filed against that employee, and because Perry had filed an unfair labor practice charge. The Complaint advised the Respondent that an Answer was due no later than October 25, and it was served by certified mail on Diane Duhig, Office of Regional Counsel, U.S. Department of Veterans Affairs, 1722 I Street, N.W., Suite 302, Washington, DC 20421.

On October 24, Ms. Duhig, on behalf of the Respondent, filed a Motion to Enlarge Time to Respond to Complaint and Notice of Hearing. The motion asserted that the unfair labor practice case is related to a representation case pending at the Washington Regional Office (Case No. WA-RP-11-0040), concerning the bargaining unit status of the employee whom Perry had assisted. Accordingly, Respondent requested that it not be required to answer the complaint until 30 days after the issuance of the Regional Director's decision in the representation case. Respondent also indicated that Ms. Duhig had suffered a work injury on September 20, reducing her ability to work by over 25% and requiring her to work at home, and that her ability to prepare the answer has been further hindered by the need to work on several other cases.

On October 25, the Chief Administrative Law Judge denied the Respondent's motion to extend the time to file an answer, as well as its request to postpone the hearing. The Chief Judge noted that Ms. Duhig was continuing to work at home, that the Respondent had other attorneys to work on the case, and that the limitations on her ability to work and her conflicting work assignments were internal matters between the attorney and her supervisor. He stated that it was particularly inappropriate to raise such workload conflicts the day before the answer was due. Moreover, he found that the pending representation case did not justify postponing either the answer or the hearing in this case.

As of the issuance of this decision, the Respondent has still not filed its answer to the complaint.

[1] The Respondent's name has been corrected to reflect the proper title.

[2] Unless otherwise noted, all dates are in 2011.

On November 3, the General Counsel (GC) filed a Motion for Summary Judgment, based on the fact that the Respondent had failed to file an answer to the complaint and therefore, the Respondent had admitted all the allegations of the complaint. Accordingly, the GC asserted that there were no factual or legal issues in dispute, and the case was ripe for summary judgment in its favor.

On November 8, the Respondent, by its new counsel, filed an Opposition to the Motion for Summary Judgment, asserting that it had good cause for failing to file a timely answer, and that even if the factual allegations of the complaint are true, there are disputed issues of material fact that warrant a hearing. Respondent asserts that on the same day that Ms. Duhig filed the Motion to Enlarge, her medical problems caused her to go out on extended medical leave, preventing her from doing any further work to prepare the Respondent's answer. Respondent's new counsel asserts that the agency has been "working diligently to assign a new attorney to this case" and to prepare an answer, and Respondent argues that this constitutes good cause, in accordance with section 2423.20(b) of the Authority's Regulations, for its failure to answer. Opposition to Motion for Summary Judgment at 2.

The Respondent also contends that a factual dispute remains as to whether Union President Perry reasonably believed that the person she assisted was in the bargaining unit. Respondent reiterates its position that WA-RP-11-0040 will resolve the question of Dr. McKenney's bargaining unit status, which in turn is essential to determining whether Perry was engaged in protected activity. However, Respondent further argues that "regardless of Ms. Perry's belief, it was clear that the Agency had a legitimate reason to impose discipline" on her. *Id.* at 3. Therefore, the Respondent submits that summary judgment is not warranted and requests that a hearing on the merits be held.

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 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 . . . .

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. It is clear that Respondent and its counsel were aware of the due date, as they noted it in their Motion to Enlarge. It should be noted that this motion was filed one day before the answer was due, not the minimum of five days that is required by section 2429.23(a). While the Respondent explained that Ms. Duhig's medical problems reduced (but did not eliminate) her ability to work, this does not explain or justify waiting until the day before the due date to file its motion. And while Ms. Duhig apparently was unable to work at all after she filed the Motion to Enlarge, the Respondent did not advise the parties of this fact until November 8, when its new counsel filed its Opposition to the Motion for Summary Judgment. It has still failed to file an answer, a month after its due date. The changed circumstances arising from Ms. Duhig's leave of absence may have justified a brief extension of time beyond October 25, but not an additional month to file an answer.

In *U.S. Dep't of Housing & 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 section 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 United States Dep't of Housing & Urban Dev., Kentucky State Office, Louisville, Ky.*, 58 FLRA 73, 73 n.2 (2002); *U.S. Dep't of Veterans Affairs Med. Ctr., Kansas 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. Although Ms. Duhig suffered from medical problems that impaired her ability to work, she indicated in her Motion to Enlarge that she was working at about 75% capacity and that her office received the complaint 20 days before she filed the Motion to Enlarge. It is apparent that Ms. Duhig's other work assignments were as much the cause of her problem, if not more, than her medical issues, and the Chief Judge stated in his Order Denying Extension of Time to File Answer that it was the Respondent's responsibility to assign another attorney to assist Ms. Duhig in preparing a timely answer. In light of the fact that Ms. Duhig had incurred her work injury on September 20, prior to the Respondent's receipt of the complaint, Respondent should have been addressing her workload conflicts long before October 24. Accordingly, I conclude that there are no extraordinary circumstances warranting a waiver of the time limit for filing the Respondent's answer, and the Respondent has not demonstrated good cause for failing to file its answer.

In accordance with section 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 Charging Party 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, Michael Evanko was the Chief of Pharmacy and Timothy Cooke was the Associate Director of the Respondent, and they were supervisors or management officials within the meaning of 5 U.S.C. § 7103(a)(10) and (11).

4. The Respondent and the Union are parties to a collective bargaining agreement covering employees in the bargaining unit described above.

5. At all times material to this case, Janice Perry has been an employee within the meaning of 5 U.S.C. § 7103(a)(2), a member of the bargaining unit described above, and the President of the Union.

6. On or about February 4, an employee of the Respondent filed a Report of Conduct against Dr. Kevin McKenney, also an employee of the Respondent.

7. On or about February 7, two other employees of the Respondent filed EEO complaints against McKenney.

8. On or about February 9, Chief of Staff Dr. Jonathan Fierer forwarded the Report of Contact to Dr. Charles Winfrey, Co-Chair of the Respondent's Threat Assessment Team (TAT). On the same day, EEO Manager Hope Light forwarded the EEO complaints to Winfrey.

9. On or about February 10, Psychology Chief Dr. Marsha Mills told McKenney to report to her office for a Clinical Psychology Screening. At the screening, McKenney requested union representation from Perry. The Respondent refused that request, and Mills proceeded to conduct the screening.

10. On or about February 10, Winfrey and Dr. Paul McCusker, Co-Chair of the TAT, distributed to other members of the team, via email, documents about McKenney along with their comments

and recommendations with respect to complaints against McKenney. Dr. George Pellegrino is the Union's representative on the TAT. Perry was not included among the recipients of the February 10 email from Winfrey and McCusker.

11. On or about February10, McCusker forwarded the TAT email with attached documents to Sandra McMeans, President of the National Nurses Union at the Respondent. That same day, McMeans forwarded the TAT email with attached documents to Perry.

12. Believing McKenney's position was in the bargaining unit, Perry printed out the documents attached to the TAT email and hand-delivered them to McKenney on February 10.

13. On or about February 11, VA Police began an investigation of McKenney.

14. On or about February 11, another employee filed a Report of Contact against McKenney, complaining about his approaching employees with copies of other employees' letters about him.

15. On or about February 14, Richard Love, Respondent's Chief of Police, met with the TAT co-chairs and officials from three unions, including Perry, to discuss the TAT process. Chief Love also discussed Medical Center Memorandum 0001-26, entitled "Workplace Violence Prevention Program."

16. On February 14, Perry filed an unfair labor practice charge against the Respondent for its failure to honor McKenney's request for union representation at the Clinical Psychology Screening on February 10.

17. On or about March 21, Perry received a letter of proposed reprimand signed by Chief of Pharmacy Evanko for failure to safeguard sensitive information, in reference to her having disclosed to McKenney documents forwarded to her on February 10.

18. On or about April 7, Perry received a formal letter of reprimand signed by Associate Director Cooke.

19. The Respondent took the action in paragraphs 17 and 18 because Perry engaged in the activity described in paragraphs 12 and 16.

20. By the conduct described in paragraphs 17, 18, and 19, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1), (2) and (4).

CONCLUSIONS OF LAW

By virtue of its failure to answer the complaint, the Respondent has admitted that it issued a formal letter of reprimand to Union President Perry because Perry had given some documents to McKenney relating to complaints that had been made against McKenney, and because Perry had filed an unfair labor practice charge against the Respondent. Respondent has further admitted that its actions against Perry violated section 7116(a)(1), (2), and (4) of the Statute.

After admitting its commission of these unfair labor practices, the Respondent sought (in its Opposition to the Motion for Summary Judgment) to raise factual and legal issues in defense of its reprimand of Ms. Perry, and by asserting these issues the Respondent argues that summary judgment is not appropriate. Respondent submits that there are genuine issues of fact regarding Perry's belief that she represented McKenney and regarding the Agency's motivation for reprimanding Perry. If these issues had been raised in a timely answer to the complaint, a hearing would indeed be warranted to resolve them. But as noted already, the Respondent has admitted that its reprimand of Perry violated section 7116(a)(1), (2) and (4), thereby waiving its opportunity to dispute these allegations. By admitting to a violation of section 7116(a)(1), the Respondent admits that it interfered with Perry in the exercise of her statutory rights. By admitting to a violation of section 7116(a)(2), Respondent admits that reprimanding Perry discriminated against her and discouraged membership in a labor organization. And by admitting to a violation of section 7116(a)(4), Respondent admits that reprimanding Perry discriminated against her because Perry had filed an unfair labor practice charge. These admissions do not leave any room for contesting the same issues at a hearing.

Accordingly, I conclude that the Respondent violated section 7116(a)(1), (2) and (4) of the Statute. As a remedy, the Respondent will be ordered to cease and

desist from such activity, to rescind the March 21, 2011 letter of proposed reprimand and the April 7, 2011 formal letter of reprimand to Ms. Perry, and to post a notice to its employees regarding its conduct.

I therefore 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 Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Veterans Affairs, Veterans Affairs Medical Center, Martinsburg, WV, shall:

1. Cease and desist from:

(a) Disciplining employees for conduct that is protected under the Statute or for participating in proceedings before the Federal Labor Relations Authority.

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

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

(a) Rescind the letter of proposed reprimand to Janice Perry dated March 21, 2011, and the formal letter of reprimand to Ms. Perry dated April 7, 2011.

(b) 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 Medical Center Director, Martinsburg, WV, 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.

(c) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Washington 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., December 6, 2011.

_____

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 Department of Veterans Affairs, Veterans Affairs Medical Center, Martinsburg, WV, 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 discipline employees for conduct that is protected by the Statute or for participating in proceedings before the Federal Labor Relations Authority.

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

WE WILL rescind the letter of proposed reprimand to Janice Perry dated March 21, 2011, and the formal letter of reprimand to Ms. Perry dated April 7, 2011.

_____
(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, Washington Regional Office, Federal Labor Relations Authority, and whose address is: 1400 K Street, NW., 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.