FEDERAL LABOR RELATIONS AUTHORITY OALJ 12-03
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER MARTINSBURG, WV RESPONDENT AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES, IAMAW, LOCAL LODGE 1798 CHARGING PARTY	Case No. 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.

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

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.

[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.