

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

MEMORANDUM

DATE:

November 13, 2009

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION, GREAT LAKES REGION
DES PLAINES, ILLINOIS

Respondent

AND

Case
No. CH-CA-08-0266

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION,
AFL-CIO

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. §2423.27(c), 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 is a 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

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION GREAT
LAKES REGION
DES PLAINES, ILLINOIS

Respondent

AND

Case No. CH-CA-08-0266

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION, AFL-CIO

Charging Party

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted 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 **DECEMBER 14, 2009**, and addressed to:

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

SUSAN E. JELEN

Administrative Law Judge

Dated: November 13, 2009
Washington, DC

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

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION GREAT
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Respondent

AND

Case No. CH-CA-08-0266

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION, AFL-CIO

Charging Party

Sandra LeBold
For the General Counsel

Patrick D. McGlone
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On October 2, 2009, the Regional Director of the Chicago Region issued a Complaint and Notice of Hearing in the above case. The complaint set forth a hearing date of November 16, 2009, and stated the Answer to the Complaint was due no later than October 27, 2009. The complaint was served on Jamie Olson, Esq., Labor and Employee Relations, FAA Great Lakes Region, 2300 East Devon Avenue, Des Plaines, Illinois.

On October 16, 2009, Joyce Peppers, a Human Resources Specialist from the FAA Great Lakes Region filed a Motion to Postpone the Hearing due to the unavailability of a witness. This motion was denied by the Chief Administrative Law Judge

because of failure to comply with the filing requirements of §2423.21 of the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA).

On October 23, 2009, the Respondent filed another Motion to Postpone the Hearing due to the unavailability of a witness. This motion was granted on October 27, 2009, with the prehearing conference call rescheduled for November 17, 2009 and the hearing rescheduled for November 24, 2009.

On November 4, 2009, 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. The GC asserted that there were no factual or legal issues in dispute and the case was ripe for summary judgment in the GC's favor.

On November 6, 2009, the Respondent filed an Opposition to Motion for Summary Judgment. The Respondent first asserted that it did not file its answer due to an administrative error on the part of the Chicago Region of the Authority. Specifically, the Respondent noted that the complaint was served on Jamie Olson of the Great Lakes Regional Office of the FAA. However, the Agency representative on this case was Joyce Peppers and not Jamie Olson and the Chicago Region had been communicating with Ms. Peppers during the course of the investigation. The Respondent further argued that this case involves a significant legal dispute that needs to be determined by the Authority at hearing. The Respondent finally argued that, if the Motion for Summary Judgment was granted, there would be no resolution to the underlying legal issue and the requested remedy would allow union representatives to engage in otherwise illegal behavior.

On November 6, 2009, the Respondent also filed its Response to Complaint and Notice of Hearing, in which it both admitted and denied certain allegations of the complaint.

On November 9, 2009, the GC filed a Motion to Strike, requesting that the Respondent's answer filed on November 6, 2009 be struck as untimely. The GC asserted that the Respondent was well aware of the complaint since it filed two motions to reschedule the hearing. The GC also pointed out that the Respondent does not claim that it was prevented from timely filing its answer at any time prior to the October 27 due date. The GC asserted that the Respondent has failed to establish the required extraordinary circumstances permitting

the untimely filing.

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.

It is undisputed that the Respondent's answer was not timely filed. Therefore, the issue is whether the Respondent has shown "good cause" for its late submission. As noted above, in its Opposition to the Motion for Summary Judgment, the Respondent argued that the Chicago Regional Office of the FLRA served the complaint on the incorrect representative, specifically, Jaime Olson rather than Joyce Peppers, both located in the FAA Great Lakes Region Office in Des Plaines, Illinois. The Respondent does not assert that the complaint was served on the wrong address. Further, the Respondent does not deny that it was in possession of the complaint when it filed motions requesting that the hearing be postponed. As noted above, the first motion was filed on October 16, 2009, and the second was filed on October 23, 2009. Both of these dates were prior to the date that the answer was due, October 27, 2009.

The standard for determining whether to waive an expired time limit is set forth in 5 C.F.R. §2429.23(b), which permits waiver "in extraordinary circumstances." See *United States Dep't of Transportation, Federal Aviation Administration, Houston, Tx*, 63 FLRA 34, 35 (2008); *United States Dep't of Hous. & Urban Dev., Ky. State Office, Louisville, KY*, 58 FLRA 73, 73 n.2 (2002).

In the text of the complaint and notice of hearing, 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. The plain language of the notice leaves no doubt that Respondent was required to file an answer to the complaint.

Moreover, the Authority has held, in a variety of factual and legal contexts, that parties are responsible for being aware of the statutory and regulatory requirements in proceedings under the Statute. *U.S. Environmental Protection Agency, Environmental Research Laboratory, Narragansett, Rhodes Island*, 49 FLRA 33, 34-36 (1994) (answer to a complaint and an ALJ's order); *U.S. Department of Veterans Affairs Medical Center, Waco, Texas and American Federation of Government Employees, Local 1822*, 43 FLRA 1149, 1150 (1992) (exceptions to an arbitrator's award); *U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida*, 37 FLRA 603, 610 (1990) (failure to file an answer due to a clerical error is not good cause sufficient to prevent a summary judgment).

In this case the Respondent has not filed an answer as required by the Regulations. Nor has the Respondent presented any "good cause" for its failure to do so. The assertion that the complaint was not issued to the correct representative in the Respondent's Great Lakes Region does not support a finding of good cause or relieve the Respondent of its responsibilities for being aware of statutory and regulatory requirements. The Respondent does not deny that it was in possession of the complaint, with the information on the required due date for the answer, prior to that due date. In accordance with section 2423.20(b) of the Authority's Rules and Regulations, failure to file an answer to the complaint 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). Accordingly, there are no disputed factual or legal issues in this matter.

FINDINGS OF FACTS

The uncontested facts establish the following:

1. The Respondent is an agency as defined by 5 U.S.C. §7103(a) (3).
2. The National Air Traffic Controllers Association, AFL-CIO, is a labor organization as defined by

5 U.S.C. §7103(a)4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

3. During the time period covered by the complaint, the following individuals occupied the positions set opposite their names and have been agents of the Respondent acting upon its behalf:

Barry Cooper	Regional Administrator
Joyce B. Scott	Deputy Regional Administrator
George Bloomingbird	Staff Manager
Jeffrey Klang	Regional Counsel

4. During the time period covered by the complaint, the individuals named in paragraph 3 have been supervisors or management officials within the meaning of 5 U.S.C. §7103(a)(10) and/or (11).
5. On or about October 16, 2007, the Respondent, by Cooper and Klang, informed employees that employees were prohibited from soliciting signatures for a Union petition or distributing Union flyers at any time while upon the Respondent's premises.
6. On or about October 16, 2007, the Respondent, by Klang, threatened employees with discipline if they solicited signatures for a Union petition or distributed Union flyers at any time while upon the Respondent's premises.
7. On or about October 18, 2007, the Respondent, by Klang, informed Local Union President Troy Swanberg that he was prohibited from discussing with employees the Union's views and positions on legislative issues and asking employees to support the Union's views and positions on legislative issues at any time while upon Respondent's premises.
8. By the conduct described in paragraphs 5, 6, and 7 above, the Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in section 7102 of the Statute in violation of 5 U.S.C. §7116(a)(1).

In conclusion, the Respondent has admitted that it has violated section 7116(a)(1) of the Statute by informing

employees that employees were prohibited from soliciting signatures for a Union petition or distributing Union flyers at any time while upon the Respondent's premises, by threatening employees with discipline if they solicited signatures for a Union petition or distributed Union flyers at any time while upon the Respondent's premises, and by informing the Local Union President that he was prohibited from discussing with employees the Union's views and positions on legislative issues and asking employees to support the Union's views and positions on legislative issues at any time while upon the Respondent's premises.

The Respondent has not shown good cause for its failure to file a timely answer to the complaint. The General Counsel's motion to strike the Respondent's late filed answer is granted and it has not been considered. I find that the Respondent violated section 7116(a)(1) of the Statute, as alleged, and the General Counsel's Motion for Summary Judgment is granted.

REMEDY

Counsel for the General Counsel proposed a recommended remedy requiring the Respondent to recognize its obligations under the Statute, to cease and desist from certain activities and to take affirmative action in order to effectuate the purposes and policies of the Statute. Further, the Respondent would be required to post a Notice To All Employees at the FAA Great Lakes Regional Office, signed by the Regional Administrator and the Regional Counsel, for 60 consecutive days. The GC notes that its recommended remedy is consistent with the remedy ordered by the Authority in similar cases. See *Dep't of Commerce, Bureau of the Census*, 26 FLRA 719 (1987); *Dep't of Commerce, Bureau of the Census*, 26 FLRA 311 (1987); *Social Security Administration*, 13 FLRA 409 (1983); *General Services Administration*, 9 FLRA 213 (1982); *Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts*, 7 FLRA 596 (1982) and *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma*, 6 FLRA 159 (1981).

Since I have found that the Respondent has violated the Statute as alleged in the Complaint, I find the General Counsel's recommended remedy to be appropriate.

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 (the Statute), it is hereby ordered that the U.S. Department of Transportation, Federal Aviation Administration, Great Lakes Region, Des Plaines, Illinois, shall:

1. Cease and desist from:

(a) Prohibiting employees from engaging in union solicitation during nonworking time and from engaging in union solicitation or distribution in nonworking areas during nonworking time.

(b) Threatening employees with discipline for engaging in union solicitation during nonworking time and for engaging in union solicitation or distribution in nonworking areas during nonworking time.

(c) Telling the local NATCA President that he was prohibited from discussing with employees the Union's views and positions on legislative issues during nonworking time.

(d) 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 Statute:

(a) Permit employees to engage in union solicitation during nonworking time and to engage in union solicitation or distribution in nonworking areas during nonworking time.

(b) Permit the local NATCA President, and any other Union representative, to discuss with employees the Union's views and positions on legislative issues and ask employees to support the Union's views and positions on legislative issues during nonworking time.

(c) Post at the FAA Great Lakes Regional Office, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed

by the Regional Counsel, 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.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago 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.

Issued, Washington, DC, November 13, 2009.

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 U.S. Department of Transportation, Federal Aviation Administration, Great Lakes Region, Des Plaines, Illinois, 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 prohibit employees from engaging in union solicitation during nonworking times and from engaging in union solicitation or distribution in nonworking areas during nonworking time.

WE WILL NOT threaten employees with discipline for engaging in union solicitation during nonworking time and for engaging in union solicitation or distribution in nonworking areas during nonworking time.

WE WILL NOT prohibit Local NATCA President Troy Swanberg, or any other Union representative, from discussing with employees the Union's views and positions on legislative issues and asking employees to support the Union's views and positions on legislative issues during nonworking time.

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

WE WILL permit employees to engage in union solicitation during nonworking time and to engage in union solicitation or distribution in nonworking areas during nonworking time.

WE WILL permit the local NATCA President, and any other Union representative, to discuss with employees the Union's views and positions on legislative issues and ask employees to support the Union's views and positions on legislative issues during nonworking time.

(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, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe Street, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-886-3465

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. CH-CA-08-0266, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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REGULAR MAIL:

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Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: November 13, 2009

Washington, DC