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

MEMORANDUM DATE: November 29, 2006

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERAN AFFAIRS
SAN DIEGO HEALTHCARE SYSTEM
SAN DIEGO, CALIFORNIA

Respondent

and Case No. SF-CA-06-0520

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES/SEIU, LOCAL R12-228

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
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERAN AFFAIRS SAN DIEGO HEALTHCARE SYSTEM SAN DIEGO, CALIFORNIA Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES/SEIU, LOCAL R12-228 Charging Party	Case No. SF-CA-06-0520

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 her 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 26, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: November 29, 2006
Washington, DC

OALJ 07-05

Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS SAN DIEGO HEALTHCARE SYSTEM SAN DIEGO, CALIFORNIA Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES/SEIU, LOCAL R12-228 Charging Party	Case No. SF-CA-06-0520

John R. Pannozzo, Jr., Esquire
For the General Counsel

Eric LaZare, Esquire
For the Respondent

Sharon Shubert
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On October 12, 2006, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing, alleging that the Department of Veterans Affairs, San Diego Healthcare System, San Diego, California (the Respondent) violated section 7116 (a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by failing and refusing to implement an agreement. The complaint was served on Respondent by certified mail. The complaint specified that, in accordance with the Authority's Rules and Regulations, the Respondent must file an Answer to the complaint no later than November 6, 2006, and that a failure to file an answer shall constitute an admission of the allegations of the complaint. A hearing was initially scheduled for November 28, 2006 in San Diego, California. On November 15, 2006, the Chief Administrative Law Judge issued an Order rescheduling the prehearing conference call to December 5, 2006 and the hearing to December 12, 2006.

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

On November 20, 2006, Counsel for the General Counsel (CGC) filed a Motion For Summary Judgment and a Brief in Support of its Motion for Summary Judgment, based on the Respondent's failure to timely file an answer to the complaint. The CGC notes that, pursuant to section 2423.20 (b) of the Authority's Rules and Regulations, the Respondent was required to answer the complaint by November 6, 2006. On November 14, 2006, the CGC informed the Respondent that it would file a motion for summary judgment if an answer was not received by November 15, 2006. (Ex. 4) The CGC notes that section 2423.20(b) of the Authority's Rules and Regulations provides that "[a]bsent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission." The CGC therefore asserts that by its failure to answer the complaint, the Respondent has admitted all of the allegations therein. Since there are no factual or legal issues in dispute, the CGC submits that the scheduled hearing is not necessary and the record demonstrates that the Respondent violated section 7116(a)(1) and (5) of the Statute.

On November 21, 2006, the Respondent filed an Agency Response To Motion For Summary Judgment. The Respondent asserts that during the prior week the parties had engaged in numerous settlement discussions regarding this matter. On Friday, November 17, the Respondent's counsel spoke with the counsel for the CGC a number of times about various settlement options. During these conversations, the CGC informed him that an answer to the complaint was overdue and instructed him to "put anything down on paper and send it to him". Soon after this telephone conversation, the Respondent's counsel experienced a death in his family and had to leave the office immediately to attend to family issues and did not have the opportunity to submit the answer. The Respondent's counsel asserts that he has been away from the office and it was not his intent to ignore his responsibilities.

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 has failed to file an answer in this matter, although its counsel has expressed an intention to do so. The issue before me is whether the Respondent has shown "good cause" for its failure to file an answer.

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, Rhode Island*, 49 FLRA 33, 35-36 (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, 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. Further, it appears that the Respondent was placed on notice by the CGC on November 14 that its answer was already late. The CGC indicated that it intended to file a motion for summary judgment if the answer was not received by November 15. During further settlement discussions, the CGC again indicated that it would accept an answer by November 17. Although the Respondent's counsel had a family emergency on November 17, he provided no

explanation for the failure to file an answer prior to November 17. Under these circumstances, the Respondent's explanation does not support a finding of good cause or relieve the Respondent of its responsibilities for being aware of statutory and regulatory requirements. 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 case.

The uncontested facts establish the following:

Findings of Fact

1. The Respondent is an agency as defined by 5 U.S.C. §7103(a)(3).

2. Service Employees International Union (SEIU) is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the Department of Veterans Affairs.

3. The National Association of Government Employees/ SEIU, Local R12-228 (Charging Party or Union) is an agent of SEIU for the purpose of representing employees at the Respondent within the unit described in paragraph 3 of the complaint.

4. During the time period covered by the complaint, Gary Rossio occupied the position of Director and Tracy Schulberg occupied the position of Agency Representative. Both were supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11), and were acting on behalf of the Respondent.

5. On April 27, 2006, Respondent, by Schulberg, and the Charging Party, reached agreement to remove the screen saver locking devices from the Charging Party's three office computers.

6. Since April 27, 2006, the Respondent has failed to implement the agreement reached on April 27, 2006.

In conclusion, the Respondent has admitted that it has failed and refused to implement the agreement reached on April 27, 2006, in violation of section 7116(a)(1) and (5) of the Statute. Following the legal framework set forth by

the Authority in *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia,* 40 FLRA 1211, 1218-19(1991(*Warner Robins*) and reaffirmed in *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois,* 51 FLRA 858, 861(1996)(*Scott AFB*), the CGC has established that the Respondent and the Charging Party entered into an oral agreement to remove the screen saver locking devices from the three office computers. Further the Respondent provided notice to the Charging Party that it did not intend to be bound by the April 27 agreement.

In *Warner Robins,* the Authority stated that where "the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms, we will find that an unfair labor practice has occurred in violation of the Statute." Consistent with *Warner Robins*, in *Scott AFB* at 862, the Authority further held that two elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e. was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the agreement?). In this matter, the parties' agreement was clear and not subject to any other interpretation. Further, the removal of the screen saver devices from the three office computers went to the heart of the parties' agreement.

Consequently, it can only be found that the Respondent has admitted that it has violated section 7116(a)(1) and (5) of the Statute by failing and refusing to implement the April 27, 2006 agreement. Respondent has not shown good cause for its failure to file a timely answer to the Complaint. Since this failure to file an answer constitutes an admission of each of the allegations of the complaint, I find that the Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged, and the General Counsel's Motion for Summary Judgment is, hereby, granted.

Remedy

Counsel for the General Counsel proposed a recommended remedy requiring the Respondent to remove the screen saver locking devices from the Charging Party's three office computers and to post an appropriate Notice To All Employees signed by the Respondent's Director. *U.S. Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Connecticut*, 55 FLRA 201, 205-07(1999). Since I have found that the Respondent has violated the Statute as alleged in the complaint, I find the CGC's recommended remedy to be appropriate.

Accordingly, I recommend that the Authority grant the CGC's Motion for Summary Judgment and issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Veterans Affairs, San Diego Healthcare System, San Diego, California, shall:

1. Cease and desist from:

(a) Failing and refusing to honor an agreement to remove screen saver locking devices from the three union office computers.

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

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

(a) Remove the screen saver locking devices from the three union office computers.

(b) Post at its facilities 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 Director, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC November 29, 2006.

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Susan E. Jelen
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, San Diego Healthcare System, San Diego, California, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by the Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to honor the April 27, 2006 agreement that we negotiated with the National Association of Government Employees/SEIU, Local R12-228, our employees' exclusive representative, to remove the screen saver locking devices from the three Union office computers.

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

WE WILL abide by our April 27, 2006 oral agreement to remove the screen saver locking devices from the three Union office computers and WE WILL remove such devices.

_____
Department of Veterans Affairs
San Diego Healthcare System
San Diego, California

Dated:_____ By:_____

Gary Rossio, Director

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, San Francisco Regional Office, Federal Labor Relations Authority, whose address is 901 Market Street, Suite 220, San Francisco, CA 94103, and whose phone number is 415-356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-06-0520, were sent to the following parties:

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CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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San Diego, California 92161

DATED: November 29, 2006
Washington, DC