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

OALJ 14-05

DEPARTMENT OF DEFENSE, UNITED STATES ARMY, ARMY CAPABILITIES INTEGRATION CENTER, ARCHITECTURE INTEGRATION AND MANAGEMENT DIVISION

RESPONDENT

AND

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-12, SEIU, AFL-CIO

CHARGING PARTY

Case No. WA-CA-13-0706

Christopher A. Bowers
For the General Counsel

Anthony Andrew Cochet, Sr.
For the Respondent

Robert J. Novak
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On February 24, 2014, the Regional Director of the Washington Region of the Federal Labor Relations Authority (the Authority/FLRA), issued a Complaint and Notice of Hearing, alleging that the Department of Defense, United States Army, Army Capabilities Integration Center, Architecture Integration and Management Division (the Respondent), violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute). The Complaint alleged that the Respondent threatened and coerced an employee in the exercise of his protected rights, and that the Respondent discriminated against that employee by issuing him a lower performance rating because he had engaged in activity protected by the Statute. The Complaint indicated that a hearing on the allegations would be held on April 23, 2014, and advised the Respondent that an Answer to the Complaint was due no

later than March 24, 2014. The Complaint was served by certified mail on Anthony Andrew Cochet, Sr., TRADOC Command Labor Attorney, TRADOC Staff Judge Advocate, 950 Jefferson Avenue, Fort Eustis, VA 23604-5707. The Respondent did not file an Answer to the Complaint.

On April 1, 2014, the FLRA 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. The Respondent has not filed any response to the Motion for Summary Judgment.

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.

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. 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. Envtl. Prot. Agency, Envtl. Research Lab., Narragansett, R.I.*, 49 FLRA 33, 34-36 (1994) (answer to a complaint and an ALJ's order); *U.S. Dep't of Veterans Affairs Med. Ctr., Waco, Tex.*, 43 FLRA 1149, 1150 (1992) (exceptions to an arbitrator's award); *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 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, nor has it demonstrated any "good cause" for its failure to do so. In *U.S. Dep't of Transp., Fed. Aviation Admin., Houston, Tex.*, 63 FLRA 34, 36 (2008), the Authority held that the agency's misfiling of the

complaint, resulting in its filing an answer two weeks after the deadline, did not demonstrate "extraordinary circumstances" that might constitute "good cause" for the late filing. *See also U.S. Dep't of Veterans Affairs Med. Ctr., Kansas City, Mo.*, 52 FLRA 282, 284 (1996) and the cases cited therein. Moreover, after the General Counsel filed its motion for summary judgment, the Respondent did not file a response or otherwise offer any explanation for its failure to answer the Complaint. In these circumstances, section 2423.20(b) clearly requires that the Respondent's failure to file an answer constitutes an admission of each of the allegations of the Complaint. Accordingly, there are no disputed factual issues in this case, and summary judgment in favor of the General Counsel is justified. 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 National Association of Government Employees, Local R4-12, SEIU, AFL-CIO (the Charging Party or the Union) 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, Robert J. Cook was an employee as defined by 5 U.S.C. § 7103(a)(2) and was in the bargaining unit described in paragraph 2.

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

5. At all material times, Ronald W. Vandiver served as the Respondent's Chief of the Architecture Integration and Management Division and was a supervisor or management official within the meaning of 5 U.S.C. § 7103(a)(10) and (11).

6. On or about June 13, 2013, Vandiver sent Cook an email invitation to a meeting in Vandiver's office. Cook asked Denise Watson, the Union's Vice President, to accompany him to the meeting. Cook informed Paul Copeland, Vandiver's deputy, that he had requested union representation.

7. Vandiver, Copeland, and another manager attended the meeting. During the meeting, which occurred in Vandiver's office, Vandiver refused to let Cook or Watson sit down. Vandiver read a letter of counseling to Cook in a loud and intimidating manner. After reading the letter, Vandiver refused to let Cook or Watson ask questions and ordered them to leave the room.

8. On or about June 24, 2013, the Union filed a grievance on Cook's behalf over the letter of counseling.

9. On or about July 1, 2013, Vandiver, Cook's senior rater, issued Cook a performance rating that was lower than what Cook had received on all four of his previous evaluations, in which he had received the highest possible rating.

10. The Respondent, through Vandiver, took the action in paragraph 9 because Cook engaged in the protected activity described in paragraphs 6 and 8, thereby violating 5 U.S.C. § 7116(a)(1) and (2).

11. By Vandiver's conduct as described in paragraph 7, the Respondent threatened and coerced Cook in the exercise of his right under the Statute to seek assistance from the Union, in violation of 5 U.S.C. § 7116(a)(1).

CONCLUSIONS OF LAW

Section 7102 of the Statute gives employees the right to form, join, or assist any labor organization, including the right to engage in collective bargaining with respect to conditions of employment. Section 7116(a)(1) prohibits an agency from interfering with, restraining, or coercing any employee in the exercise of any right protected by the Statute. Collective bargaining agreements, such as the one between the Respondent and the Union, provide for grievance procedures for the resolution of grievances. By seeking the assistance of Union Vice President Watson at his June 13, 2013, meeting with Vandiver, Cook was exercising his statutory right, and he further engaged in protected activity when the Union filed a grievance on his behalf regarding the letter of counseling he received on June 13. At the June 13 meeting, Vandiver spoke to Cook in a loud and intimidating manner, refused to allow Cook or Watson to be seated, and ordered them to leave the room as soon as he had read the letter of counseling. The test for whether a statement or conduct violates section 7116(a)(1) is whether, under the circumstances, it tends to coerce or intimidate an employee, or whether an employee could reasonably have drawn a coercive inference from it. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199, 200 (2007). Since the Respondent has admitted the allegations of the Complaint, it has admitted that Vandiver's words and conduct at the June 13 meeting were coercive, and I therefore conclude that Vandiver and the Respondent violated section 7116(a)(1) of the Statute.

Section 7116(a)(2) of the Statute prohibits an agency from encouraging or discouraging membership in a labor organization by discriminating in connection with hiring, tenure, promotion, or other conditions of employment. Giving an employee a lower performance evaluation in retaliation for the employee's filing of a grievance or other protected activity would certainly constitute the type of discrimination barred by section 7116(a)(2). The analytical framework for such discrimination allegations was set forth in *Letterkenny Army Depot*, 35 FLRA 113, 117-18 (1990), but I need not spell it out in detail, since the Respondent has admitted that Cook's rating on July 1, 2013, was lowered because Cook had brought a Union representative to the June 13 meeting and because he had filed a grievance over his letter of counseling. It is clear, therefore, that the Respondent unlawfully discriminated against Cook, in violation of section 7116(a)(2), in issuing Cook's performance evaluation of July 1, 2013.

As a remedy, the Respondent will be ordered to rescind the discriminatory performance evaluation and to reappraise Cook for the relevant period without taking into consideration Cook's protected activity. This is the type of remedy that the Authority traditionally orders for this type of discrimination, as noted by the General Counsel. *22nd Combat Support Group (SAC), March AFB, Cal.*, 27 FLRA 279, 286 (1987). The Respondent will also be ordered to cease and desist its unlawful conduct and to post and distribute a notice to 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 Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Defense, United States Army, Army Capabilities Integration Center, Architecture Integration and Management Division, shall:

1. Cease and desist from:

(a) Threatening or coercing bargaining unit employees who file a grievance or seek the assistance of the National Association of Government Employees, Local R4-12, SEIU, AFL-CIO (the Union), regarding conditions of employment.

(b) Discriminating against bargaining unit employees for engaging in protected activities, including requesting assistance from the Union or filing a grievance.

(c) In any like or related manner, interfering with, restraining, or coercing 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 Architect Analyst Robert Cook's performance evaluation for the period covering July 1, 2012 to June 30, 2013, and furnish Cook with a new and fair performance evaluation for that period, without taking into account Cook's exercise of protected rights.

(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 Chief, Architecture Integration and Management Division, 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. The Respondent will also email a copy of the Notice to all bargaining unit employees represented by the Union.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and 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., April 16, 2014.

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 Defense, United States Army, Army Capabilities Integration Center, Architecture Integration and Management Division, 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 threaten or coerce bargaining unit employees who file a grievance or seek the assistance of the National Association of Government Employees, Local R4-12, SEIU, AFL-CIO (the Union), regarding conditions of employment.

WE WILL NOT discriminate against bargaining unit employees for engaging in protected activities, including requesting assistance from the Union or filing a grievance.

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

WE WILL rescind Architect Analyst Robert Cook's performance evaluation for the period covering July 1, 2012 to June 30, 2013, and furnish Cook with a new and fair performance evaluation for that period, without taking into account Cook's exercise of protected rights.

_____
(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, Ext. 6019.