69 FLRA No. 93

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
WILLIAM JENNINGS BRYAN DORN
VETERANS AFFAIRS MEDICAL CENTER
COLUMBIA, SOUTH CAROLINA
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1915
(Charging Party/Union)

AT-CA-15-0461

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DECISION AND ORDER

September 29, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Federal Labor Relations Authority's (FLRA's) General Counsel (GC) issued a complaint alleging that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] because the Agency did not respond to the Union's request to bargain over the impact and implementation of a proposed change to the Agency's on-call policy, and instead, unilaterally implemented the change. The change shortened substantially the time hospital technicians had to report to the hospital after receiving a call. The Agency failed to file an answer to the complaint. The GC then filed a motion for summary judgment, requesting – among other relief – a status-quo-ante (SQA) remedy. Again, the Agency did not respond.

In the attached decision, FLRA Chief Administrative Law Judge Charles R. Center (the Judge) granted the GC's summary-judgment motion. As remedies, the Judge ordered the Agency to cease and desist from failing to respond to the Union's request to bargain over the change in employees' on-call-reporting time, and to post and electronically distribute a notice of the violation to bargaining-unit employees. He denied the GC's request for an SQA remedy.

The question before us is whether the record supports granting an SQA remedy under the Authority's balancing test set forth in *Federal Correctional Institute* (*FCI*).[2] Regarding the *FCI* factors, because (1) the Agency gave the Union notice of the proposed change; (2) the Union requested to bargain over the impact and implementation of the proposed change; (3) the Agency willfully failed to discharge its bargaining obligation under the Statute; (4) the unilateral change to the on-call policy adversely affected employees in a way that is more than de minimis; and (5) there is no record evidence to suggest that an SQA remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations, the answer is yes.

II. Background and Judge's Decision

A. Background

The Agency is a veterans hospital. The Agency notified the Union that it intended to implement a change to the on-call policy for certain hospital technicians (the employees) who work an on-call schedule. Under the existing policy, employees had forty-five minutes to report to the hospital after receiving a call. The new policy reduced the reporting time to thirty minutes. The Union requested to bargain with the Agency over the impact and implementation of the proposed change, but the Agency did not respond to the Union's request. Subsequently, the Agency unilaterally implemented the change to the on-call policy.

The Union filed a ULP charge, and, after an investigation, the GC issued a complaint alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by not responding to the Union's request to bargain, and by unilaterally implementing the change. The Agency did not file an answer to the complaint. The GC then filed a motion for summary judgment. As remedies, the GC requested that the Agency: (1) cease and desist from failing to respond to the Union's request to bargain; (2) restore the SQA; and (3) post and electronically distribute to bargaining-unit members a notice of the violation. The Agency did not file a response to the GC's motion for summary judgment.

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] 8 FLRA 604 (1982).

B. Judge's Decision

The Judge granted the GC's unopposed motion for summary judgment, finding that the Agency committed a ULP under § 7116(a)(1) and (5) of the Statute. The Judge then analyzed the appropriateness of an SQA remedy under the balancing test set forth in *FCI*. The Judge found that the first three *FCI* factors were satisfied. Specifically, the Judge found that: (1) "the [Agency] gave [the Union] notice of [the] change"; (2) "the Union demanded to bargain"; and (3) the Agency's "failure to discharge its bargaining obligation was willful."[3] However, the Judge found that "there is nothing in the record about factors [four] and [five]."[4] The Judge concluded that, "based upon the current record, it cannot be determined if [SQA] relief is appropriate," and he denied the GC's request for an SQA remedy.[5]

Accordingly, as remedies, the Judge ordered the Agency to cease and desist from refusing to respond to the Union's request to negotiate over the change in the on-call policy, and to post physical and electronic notices of the ULP violation.

The GC filed exceptions to the Judge's decision. The Agency did not file an opposition to the GC's exceptions.

III. Analysis and Conclusions

A. An SQA remedy is appropriate in this case.

The GC argues that the Judge erred by denying its request for an SQA remedy.[6] "The Authority has broad discretion under the Statute to fashion appropriate remedies for [ULP]s."[7] "The purpose of a[n SQA] remedy is to place . . . employees[] in the position[] they would have been in had there been no unlawful conduct."[8] Thus, an SQA remedy deters parties "from failing to satisfy their duty to bargain, and reduce[s] any incentive that may exist to unilaterally implement changes in conditions of employment and then refuse to negotiate over all pertinent aspects of the impact and implementation of the changes."[9]

Where an agency takes a unilateral action without fulfilling its obligation to bargain over the impact and implementation of a decision, "the Authority applies [the] criteria set forth in *FCI* to determine whether a[n SQA] remedy is appropriate."[10] In *FCI*, the Authority held that it will determine the appropriateness of an SQA remedy "on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy."[11] In cases involving a violation of the duty to bargain over impact and implementation, the Authority considers:

> (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a[n SQA] remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.[12]

Contrary to the Judge, we find that the record supports the GC's request for an SQA remedy. The Judge found, and the Agency does not dispute, that the GC met the first three *FCI* factors. Specifically, the Judge found that: (1) "the [Agency] gave [the Union] notice of [the] change"; (2) "the Union demanded to bargain"; and (3) the Agency's "failure to discharge its bargaining obligation was willful."[13] We adopt the Judge's findings concerning the first three *FCI* factors.

Regarding the fourth *FCI* factor, the GC argues that the Judge erred by finding "that there was nothing in the record addressing" the adverse impact of the policy change on affected employees.[14] In considering the

[3] Judge's Decision at 5.
[4] *Id.*
[5] *Id.*
[6] Exceptions at 3.
[7] *U.S. DOJ, INS, Wash., D.C.*, 56 FLRA 351, 358 (2000) (*INS*) (Member Cabaniss dissenting, in part) (citing *NTEU v. FLRA*, 910 F.2d 964, 967 (D.C. Cir. 1990) (en banc)).
[8] *Id.* (citing *Dep't of VA Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1580 (1996)).
[9] *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 857 (1999).
[10] *INS*, 56 FLRA at 358 (citation omitted).
[11] 8 FLRA at 606.
[12] *Id.*
[13] Judge's Decision at 5.
[14] Exceptions at 5.

entire record in this case, we agree with the GC that the record supports finding that the fourth *FCI* factor is satisfied.

The Agency failed to present any evidence to contradict the GC's contention that the change in the on-call policy had an adverse impact on employees. The Agency did not file an answer to the complaint or respond to the GC's summary-judgment motion – including the GC's request for an SQA remedy. This failure to respond constitutes an admission of the GC's version of the facts.[15]

Considering the facts, the unilateral change to the on-call policy, on its face, adversely affects employees in a way that is more than de minimis because the change reduced the time within which employees are required to report to work, from forty-five minutes to thirty minutes. In this regard, the Authority has held that changes in work schedules that are more than de minimis support an SQA remedy under the fourth *FCI* factor.[16] Here, a 33.3% reduction in the employees' allotted time to report to work after being called in has more than a de minimis adverse effect on the employees. Further, as the GC asserted, and as the Agency effectively admits, "[i]t is reasonably foreseeable . . . that not all employees will be able to reach the hospital in [thirty] minutes and will either be disciplined or will no longer be eligible for on-call assignments."[17] In support, the GC submitted a sworn affidavit from a Union official who affirmed that bargaining-unit members were experiencing "problems" with the new on-call policy.[18]

Accordingly, we find that the record supports finding that an SQA remedy is appropriate under the fourth *FCI* factor, and we grant the GC's exception on this issue.

Regarding the fifth *FCI* factor, the GC argues that the Judge erred by placing the burden on the GC to establish whether an SQA remedy would be disruptive to the Agency's operations.[19] Specifically, the GC contends that the Judge erred by denying its request for an SQA remedy based, in part, on his finding that there was no evidence in the record concerning the fifth *FCI* factor.[20] The Authority has held that "a conclusion that a[n SQA] remedy would be disruptive to the operations of an agency [must] be 'based on *record evidence*,'" and that "[i]n the absence of record evidence establishing that a[n SQA] remedy is not appropriate, the Authority should restore the status quo."[21] Here, the Agency did not respond to the GC's summary-judgment motion, and did not provide any record evidence that an SQA remedy would "disrupt or impair the efficiency and effectiveness of [its] operations."[22] Accordingly, we find that the Judge erred to the extent that he considered the absence of evidence concerning the fifth *FCI* factor as weighing against the appropriateness of an SQA remedy. We, therefore, grant the GC's exception on this issue.

In sum, balancing the nature and circumstances of the Agency's failure to meet its obligation to bargain under the Statute, and the lack of evidence of any disruption to government operations that an SQA remedy would cause, we find that an SQA remedy is appropriate in this case.

Further, we disagree with the dissent's assertion that Authority should review administrative law judges' (ALJs') factual determinations on a "deferential 'substantial[-]evidence' standard," and should uphold the determination of the ALJ in this case that an SQA remedy is not appropriate.[23] The Authority has previously explained in detail the reasons for applying the well-established preponderance-of-the-evidence standard for reviewing ALJs' factual findings.[24] There is no need to repeat that discussion here. However, the dissent's additional assertion – that the Authority should grant an ALJ's factual findings "the same deference that it does to an arbitrator['s]" factual findings[25] – warrants comment.

The deferential standard that the Authority applies to review arbitrators' factual findings is based on considerations unique to the arbitration process, and has no implications for the standard that the Authority applies in reviewing ALJs' factual determinations in ULP cases. Congress was very explicit in the Statute about the grounds for reviewing arbitrators' awards. Specifically, § 7122(a) expressly provides, among other things, that the Authority review arbitrators' awards "on . . . grounds

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[15] 5 C.F.R. § 2423.20(b). *Cf., e.g.*, *Beard v. Banks*, 548 U.S. 521, 527 (2006) (citing Fed. R. Civ. P. 56(e)) (when a party fails to respond to a factual assertion supporting a motion for summary judgment, this failure constitutes an admission of the movant's version of the facts).

[16] *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 406, 408 (2009) (citing *VA Med. Ctr., Prescott, Ariz.*, 46 FLRA 471, 476 (1992)).

[17] GC's Mot. for Summ. J., Br. at 2-3.

[18] *Id.*, Attach., Aff. at 2.

[19] Exceptions at 6.

[20] *Id.*

[21] *INS*, 56 FLRA at 359 (emphasis added).

[22] *FCI*, 8 FLRA at 606.

[23] Dissent at 11.

[24] *See U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 171-172 (2009) (*Air Force*); *see also* 5 U.S.C. § 557(b) (when an administrative agency, such as the FLRA, reviews an ALJ's findings of fact and recommended order, "the agency has all the powers which it would have in making the initial decision").

[25] Dissent at 10.

similar to those applied by [f]ederal courts in private[-]sector labor-management relations."[26] Regarding factual issues, courts review arbitrators' awards applying the highly deferential nonfact standard.[27] Congress made this determination to ensure uniformity between the treatment of arbitrators' awards in private-sector labor-management relations, and their treatment by the Authority in federal-sector labor-management relations.[28]

The comparable analogy regarding ULP cases would be to the standard applied in private-sector labor-management relations by the National Labor Relations Board (NLRB). And as the Authority previously explained, "[t]he NLRB has determined to review factual findings made by its ALJs in [ULP] cases based on the preponderance[-]of[-]the[-]evidence standard."[29] In short, the analogy that the dissent seeks to draw between the standard for reviewing arbitrators' factual findings and the standard for reviewing ALJs' factual findings is contrary to Congress's determination in the Statute, and we reject it.

Moreover, we reject the dissent's "pretty good day" remedial policy of denying a party a remedy (here, an SQA remedy) because the party, having "a pretty good day," had already received two other remedies (an order for the Agency to cease and desist from failing to respond to the Union's request to negotiate, and a posting).[30] As discussed above, under longstanding precedent, the Authority will impose an SQA remedy for a statutory violation when certain criteria – derived from the Authority's *FCI* decision – are met.[31] An SQA remedy, therefore, has unique character and purpose that are not supplanted by other remedies that a party may have received, even if that party has otherwise had "a pretty good day."[32] The dissent's approach would deny a party remedies to which the party is legally entitled. Such an approach lacks a legal foundation.

Accordingly, we grant the GC's exceptions, and we order the parties to return to the status quo ante and bargain, upon request, over the impact and implementation of any proposed change to the on-call policy, as required by the Statute.

B. It is unnecessary to decide whether a prospective bargaining order is appropriate in this case.

The GC claims that, absent an SQA remedy, the Judge erred by not ordering a prospective bargaining order.[33] We have ordered the parties to return to the status quo ante and the Agency to meet its obligation under the Statute to bargain, upon request, over the impact and implementation of any proposed change to the on-call policy. Thus, it is unnecessary to determine whether a prospective bargaining order is appropriate in this case because the issue is moot.

IV. Order

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

1. Cease and desist from:

(a) Refusing to respond to the Union's request to negotiate over a change in the on-call policy.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of the 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 April 2015 change to the on-call policy.

(b) Upon request, bargain with the Union concerning any future proposed change to the on-call policy, as required by the Statute.

(c) 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 FLRA. Upon receipt of such forms, they shall be signed by the Director of the Agency, and shall be posted and maintained for sixty 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

[26] 5 U.S.C. § 7122(a)(2).
[27] *See Metro Hato Rey, Inc. v. Unión Internacional de Trabajadores de la Industria de Automoviles, Aeroespacial e Implementos Agricolas, UAW Local 2312*, 59 F. Supp. 3d 326, 332–33 (D.P.R. 2014).
[28] *See* H.R. Rep. No. 95-1717, at 153 (1978) (Conf. Rep.), *reprinted in* Subcomm. on Postal Pers. & Modernization of the Comm. on Post Office & Civil Serv., 96th Cong., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 821 (Comm. Print 1979) ("The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector.").
[29] *Air Force*, 64 FLRA at 172.
[30] Dissent at 12.
[31] *FCI*, 8 FLRA at 606.
[32] Dissent at 12.
[33] Exceptions at 7.

ensure that such Notices are not altered, defaced, or covered by any other material.

(d) In addition to physical posting of paper notices, Notices shall be distributed electronically, on the same day as physical posting, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(e) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Atlanta Regional Office, FLRA, in writing, within thirty 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 (FLRA) has found that the U.S. Department of Veterans Affairs, William Jennings Bryan Dorn Veterans Affairs Medical Center, Columbia, South Carolina, 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 rescind the April 2015 change to the on-call policy.

WE WILL, upon request, bargain with the American Federation of Government Employees, Local 1915 (the Union) in good faith over the impact and implementation of any future proposed change to the on-call policy.

WE WILL NOT fail or refuse to respond to the Union's request to bargain over a change in the on-call policy, as required by the Statute.

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

_____
(Agency)

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

This Notice must remain posted for sixty 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, Atlanta Regional Office, FLRA, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA, 30303, and whose telephone number is: (404) 331-5300.

Member Pizzella, dissenting:

Vince Lombardi, the legendary head coach of the Green Bay Packers, wisely noted that "[t]he measure of who we are is what we do with what we have."[1]

So it is with Authority decisions. How the Authority conducts its appellate review (i.e., how it measures any given case) may well determine the outcome of the case. Put another way, "you get what you measure."[2]

Unfortunately, the current majority of the Authority is not consistent to whose, or what, determinations it will defer. For example, many arbitrators have no specialized experience in the Federal Service Labor-Management Relations Statute (Statute)[3] or knowledge of the missions carried out by federal agencies. But, in its review of arbitral decisions, the majority often goes out of its way to defer to those arbitrators' erroneous factual findings, procedural-arbitrability determinations, or findings of contractual violations of provisions that were never grieved.[4] I do not agree with the majority on how far they believe Congress's mandate in 5 U.S.C. § 7122(a) requires us to go to defer to an arbitrator's erroneous award.

But that has *nothing* whatsoever to do with whether the same deference should be given to the administrative law judges of the Federal Labor Relations Authority. The Authority's judges are recognized experts in applying the various provisions of the Statute and unfair labor practices. It is counterintuitive, then, that when the majority reviews the reasoned determinations of its own administrative law judges, the majority does not accord the same deference that it does to an arbitrator who may have no expertise in the Statute or the subject matter of the grievance.

In their decision today, my colleagues repeat the many reasons why they will not give the same deference to an experienced administrative law judge as they will to an arbitrator. But those reasons are no more convincing today than when they came up with that rationale in 2009. And, contrary to the majority's assertion, the Authority has not always given such short shrift to its own judges. To the extent they do so just because that is what the National Labor Relations Board has chosen to do, both the Authority and Board run against the standard used by most other federal administrative agencies who are called upon to pass judgment on the decisions of their administrative law judges.[5]

Therefore, I agree entirely with the perspective that Member Beck set forth (and it would therefore be superfluous for me to repeat it here) in his concurring opinions in *U.S. Department of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Texas* (*Randolph AFB*)[6] and in *U.S. Department of the Air Force, Air Force Materiel Command, Space & Missile Systems Center, Detachment 12, Kirtland Air Force Base, New Mexico* (*Air Force*)[7] and his dissenting opinion in *Social Security Administration* (*SSA*).[8] As a federal quasi-judicial administrative review agency, the Authority should review decisions of our administrative law judges with the deferential "substantial evidence" standard.[9]

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[1] http://www.brainyquote.com/quotes/quotes/v/vincelomba382625.html?src=t_measure.

[2] https://www.isixsigma.com/community/blogs/what-you-measure-what-you-get/.

[3] 5 U.S.C. §§ 7101-35.

[4] *E.g., U.S. Dep't of VA, James N. Quillen VA Med. Ctr., Mountain Home, Tenn.*, 69 FLRA 144, 147 (2015) (Dissenting Opinion of Member Pizzella) (majority defers to arbitrator's erroneous finding that "the grievant was *senior* to the selectee" when in fact "the grievant was *junior* to the selectee"); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1037 (2015) (Dissenting Opinion of Member Pizzella) (majority "defer[s] to . . . arbitrator's erroneous procedural-arbitrability determination"); *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 196 (2015) (Dissenting Opinion of Member Pizzella) (majority accepts arbitrator's "faulty reliance" on provisions that were "never mentioned . . . in its grievance, at the hearing, or in its closing brief" to find contractual violation); *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 176 (2015) (Dissenting Opinion of Member Pizzella) (majority defers to arbitrator's erroneous factual finding that agency changed the manner it tracked productivity although there was not "one iota of evidence that the agency ever measured . . . productivity" in that manner).

[5] *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256, 263 (2009) (Separate Opinion of Member Beck).

[6] *Id.*

[7] 64 FLRA 166, 179-80 (2009) (Concurring Opinion of Member Beck).

[8] 64 FLRA 199, 207 (2009) (Dissenting Opinion of Member Beck).

[9] *Randolph AFB*, 63 FLRA at 263.

In fact, until September 2009 (as Member Beck exhaustively explained the historic and legislative underpinnings in *Randolph AFB*, *Air Force*, and *SSA*), the Authority (with but three exceptions) applied the deferential "substantial evidence" standard whenever it was called upon to review exceptions that were filed from a decision rendered by one of the Authority's administrative law judges.[10] But in *Air Force*, the current majority changed course and decided that it would instead review every decision issued by its administrative law judges under the more-demanding "preponderance of the evidence standard," effectively conducting an independent, full de novo review[11] of the record in each case (or more aptly, as Coach Lombardi might see it, Monday-morning quarterbacking).

Unlike the majority, I am unable to conclude that Judge Center erred when he found that "there [was] *nothing in the record* about factors 4 [adverse impact of the policy change on affected employees] and 5 [whether and to what degree a status-quo-ante remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations], the two most important factors."[12] The majority's contrary conclusion is not based on anything that is contained *in the record* but is based entirely on its own perception that the "policy, on its face"[13] adversely impacted bargaining-unit employees and that the Agency (rather than the General Counsel) should have proved that the status-quo-ante remedy would disrupt (rather than not disrupt) its operations.

When Judge Center found that "there [was] *nothing in the record* about factors 4 and 5,"[14] he was making factual determinations to which the Authority should defer. I would go so far as to say, his conclusions on those points are entitled to deference even under the less-deferential preponderance-of-the-evidence standard. If there is *no evidence* to support a conclusion, then that conclusion cannot be based on preponderant evidence. Conversely, if the policy, as the majority concludes, "*on its face*"[15] adversely affects employees, then it seems equally plausible that the status-quo-ante remedy (which would undo a policy that has been in place already for nearly eighteen months)[16] *on its face* would similarly disrupt or impair the efficiency of the Agency's operations.

Quite simply, nothing more substantial than the majority's own predilection to impose a status-quo-ante remedy supports its imposition.

I would be remiss if I did not discuss one other telling aspect of this case. Judge Center *granted* the General Counsel's motion for summary judgement, and as requested by the General Counsel, *found* that the Agency violated the Statute when it did not respond to the Union's request to negotiate and when it did not negotiate over the impact and implementation of the policy change, and ordered the Agency to cease and desist from failing to respond to the Union's request to negotiate, and to post a notice (on all bulletin boards and electronic mail) which would notify all bargaining-unit employees of the violation. Judge Center denied *only* the request for a status-quo-ante remedy because the General Counsel put "nothing in the record" that supported factors 4 and 5.

I do not dispute that the General Counsel and Union have the legal *right* to file this appeal and to request a status-quo-ante remedy. But, under these circumstances, it is inexplicable that they would. All in all, *allegorically* speaking, the General Counsel and the Union had a pretty good day. The filing of a full-throttled appeal just to pursue yet *one more remedy*, and thereby generate even more Union official time and consume General Counsel and Authority resources does not "facilitate[] and encourage[] the amicable settlement[] of disputes"[17] or "contribute[] to the effective conduct of public business."[18]

Thank you.

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[10] *Air Force*, 64 FLRA at 179-80 (quoting *U.S. DOJ Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 61 FLRA 515, 517 (2006) ("[W]hen reviewing a judge's factual findings, the Authority reviews the record to determine whether those factual findings are supported by ***substantial evidence*** in the record as a whole." (emphasis added) (citing *U.S. Dep't of Transp.*, 48 FLRA 1211, 1215 (1993))); *U.S. DHS, Border & Transp. Directorate, Bureau of CBP*, 59 FLRA 910, 913 (2004) (same); *U.S. DOJ, Exec. Office for Immigration Review, N.Y.C., N.Y.*, 61 FLRA 460, 465 (2006) ("[W]e find that ***substantial evidence*** in the record supports the [j]udge's finding.") (emphasis added)).

[11] *Air Force*, 64 FLRA at 179-80; *see also Randolph AFB*, 63 FLRA at 263.

[12] Judge's Decision at 5 (emphasis added).

[13] Majority at 4.

[14] Judge's Decision at 5 (emphasis added).

[15] Majority at 4 (emphasis added).

[16] *See* Judge's Decision at 3 (on-call policy implemented "effective April 25, 2015").

[17] 5 U.S.C. § 7101(a)(1)(C).

[18] *Id.* § 7101(a)(1)(B).

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
WILLIAM JENNINGS BRYAN DORN
VETERANS AFFAIRS MEDICAL CENTER
COLUMBIA, SOUTH CAROLINA
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1915
CHARGING PARTY

Case No. AT-CA-15-0461

Ayo A. Glanton
For the General Counsel

Tamara Nichols
Asha Burrell
For the Respondent

Johnny Allen
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On October 14, 2015, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (FLRA/Authority), issued a Complaint and Notice of Hearing, alleging that the Department of Veterans Affairs, William Jennings Bryan Dorn Veterans Affairs Medical Center, Columbia, South Carolina (Respondent), violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute). The Complaint alleged that the Respondent implemented a change to the CT policy without negotiating with the American Federation of Government Employees, Local 1915 (Union) over the impact and implementation of the planned change and did not respond to the Union's request to negotiate over the change to the CT policy.

The Complaint indicated that a hearing on the allegations would be held on December 8, 2015, and advised the Respondent that an Answer to the Complaint was due no later than November 9, 2015. The Complaint was served by first class mail on Respondent's agents, Tamara Nichols, Chief, Human Resources Management Service and Asha Burrell, Employee/Labor Relations Specialist, Department of Veterans Affairs, Veterans Affairs Medical Center, 6439 Garners Ferry Road, Columbia, SC 29209, and the Respondent failed to file an Answer to the Complaint.

On November 24, 2015, Counsel for the General Counsel (GC) filed a Motion for Summary Judgment (MSJ) based upon the Respondent's failure to file an Answer to the Complaint, contending that by application of 5 C.F.R. § 2423.20(b), the Respondent admitted all of the allegations set forth in the Complaint. Accordingly, the GC contends that there are no factual or legal issues in dispute and summary judgment pursuant to 5 C.F.R. § 2423.27(a) is proper. The Respondent failed to file a response to the motion for summary judgment. As I have determined that summary judgment in this matter is appropriate, the hearing scheduled for December 8, 2015, in Columbia, South Carolina is cancelled.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

> The relevant portion of the Authority's Rules and Regulations 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. 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.

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 VA 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 the failure to do so. In *U.S. Dep't of Transp., FAA, Hous., Tex.*, 63 FLRA 34, 36 (2008), the Authority held that the agency's misfiling of a 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 VA Med. Ctr., Kan. City, Mo.*, 52 FLRA 282, 284 (1996) and the cases cited therein. Moreover, after the General Counsel filed its MSJ, the Respondent did not file a response or otherwise offer any explanation for its failure to answer the Complaint. Given the Respondent's failure to respond to the Complaint or the MSJ, and the absence of good cause for such failures, application of the admission provision of 5 C.F.R. § 2423.20(b) is appropriate. Thus, Respondent has admitted each of the allegations set forth in the Complaint. Accordingly, there are no disputed factual issues and summary judgment in favor of the General Counsel is granted.

Based on the existing record, I make the following findings of fact, conclusions of law, and recommendations:

FINDINGS OF FACT

1. The Department of Veterans Affairs, William Jennings Bryan Dorn Veterans Affairs Medical Center, Columbia, South Carolina, is an agency under § 7103(a)(3) of the Statute.

2. The American Federation of Government Employees (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

3. AFGE Local 1915 is an agent of AFGE for the purpose of representing employees within the unit described in paragraph 2.

4. The Union filed the charge in Case No. AT-CA-15-0461 with the Atlanta Regional Director on April 29, 2015.

5. A copy of the charge was served on the Respondent.

6. At all times material, Jennings Pressly occupied the position of Chief, Radiology and Nuclear Medicine and was a supervisor or management official of the Respondent within the meaning of § 7103(a)(10) and (11) of the Statute, and was an agent of the Respondent acting upon its behalf.

7. On or about April 10, 2015, the Respondent, by Pressly, notified the Union that it intended to implement, effective April 25, 2015, a change in the CT policy.

8. On April 13, 2015, the Union, by Executive Vice President Johnny Allen, requested to negotiate over the change described in paragraph 7.

9. The Respondent did not respond to the Union's request as described in paragraph 8.

10. Respondent implemented the change described in paragraph 7 without negotiating with the Union over the impact and implementation of the change.

11. By the conduct described in paragraphs 9 and 10, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).

CONCLUSIONS OF LAW

By the conduct described in the facts set forth above as drawn from the Complaint containing allegations to which the Respondent failed to file an Answer or otherwise demonstrate good cause for such failure, the Respondent admits that it did not respond to the Union's request to negotiate and did not negotiate over the impact and implementation of the change to the CT policy. Therefore, the Respondent violated § 7116(a)(1) and (5) of the Statute.

REMEDY

As a remedy, the GC requested that the Respondent be ordered to cease and desist from failing to respond to the Union's request to negotiate and to post a notice signed by the Medical Center Director using bulletin boards and electronic email to all bargaining unit employees. I have determined that these are appropriate remedies in this matter and will order such.

However, the GC also requested that status quo ante relief be ordered and that request is denied based upon Authority precedent. *Fed. Corr. Inst.*, 8 FLRA 604 (1982) (*FCI*). Where an agency has changed a condition of employment without fulfilling its obligation to bargain over the impact and implementation of that decision, the Authority applies the criteria set forth in *FCI* to determine whether status quo ante remedy is appropriate. *FCI*, 8 FLRA at 606. The purpose of a status quo ante remedy is to place parties, including employees, in the positions they would have been in had there been no unlawful conduct. *Dep't of VA Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1580 (1996). Other "traditional" remedies, including retroactive bargaining orders and cease and desist orders accompanied by the posting of a notice to employees, are also available. *See F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 161 (1996).

As the Authority explained in *FCI*, determining the appropriateness of status quo ante relief requires, "on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." *FCI*, 8 FLRA at 606. In determining whether a status quo ante remedy would be appropriate in a case involving a violation of the duty to bargain over impact and implementation, the Authority considers: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. *Id.*

In accordance with the admission provision of 5 C.F.R. § 2423.20(b), the only facts to which the Respondent has admitted are those set forth in the Complaint. The Complaint establishes that the Respondent gave notice of a change and that the Union demanded to bargain. While it is something of an assumption, it can be deduced that the Respondent's failure to discharge its bargaining obligation was willful given its failure to offer any other explanation. However, there is nothing in the record about factors 4 and 5, the two most important factors established by *FCI*. Thus, based upon the current record, it cannot be determined if status quo ante relief is appropriate after balancing the nature and circumstances of this particular violation against the degree of disruption in government operations that would be caused by such a remedy. Therefore, the GC's request for status quo ante relief is not supported by the record. As the GC requested relief and did not limit its motion to a decision on the violation with the appropriate remedy remaining an issue for hearing, this is a final recommended decision.

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, William Jennings Bryan Dorn Veterans Affairs Medical Center, Columbia, South Carolina, shall:

1. Cease and desist from

(a) Refusing to respond to the American Federation of Government Employees, Local 1915 (Union), request to negotiate over a change in the CT policy.

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

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

(a) 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 Director, William Jennings Bryan Dorn Veterans Affairs Medical Center, Columbia, South Carolina, and shall be posted and maintained for sixty (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.

(b) In addition to physical posting of paper notices, Notices shall be distributed electronically, on the same day as physical posting, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

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

Issued, Washington, D.C., December 2, 2015

_____

CHARLES R. CENTER
Chief 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, William Jennings Bryan Dorn Veterans Affairs Medical Center, Columbia, South Carolina, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to respond to the American Federation of Government Employees, Local 1915 (Union), request to bargain over a change in the CT policy as required by the Statute.

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

_____
(Agency/Respondent)

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

This Notice must remain posted for sixty (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, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.