FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 17-09

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONSFEDERAL
CORRECTIONAL INSTITUTION
BASTROP, TEXAS
RESPONDENT

AND

AMERICAN FEDERATON OF GOVERNMENT
EMPLOYEES, LOCAL 3828, AFL-CIO
CHARGING PARTY

Case No. DA-CA-16-0248

Zachary T. Wooley
For the General Counsel

K. Tyson Shaw
Lee R. Jones
For the Respondent

Clifton Simon
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Respondent seeks permission to file an untimely answer to the Complaint in this case, and to avoid the harsh penalty of summary judgment for its late answer, by asserting that it was due to "an administrative oversight" and that it was only slightly late. The General Counsel objects to the Respondent's Motion to Accept Answer, and it has filed a Motion for Summary Judgment. While Respondent's failure to file a timely answer may indeed have been inadvertent, the reasons it offers for its untimely answer do not constitute "extraordinary

circumstances," as defined by the Authority. Therefore, the Respondent has not demonstrated good cause to excuse its late answer, and it is deemed to have admitted the allegations of the Complaint. As such the General Counsel is entitled to Summary Judgment in its favor.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101- 7135 (the Statute), and the Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. parts 2423 and 2429.

On December 8, 2016,[1] the Regional Director of the FLRA's Chicago Region issued a Complaint and Notice of Hearing on behalf of the FLRA's General Counsel (GC), alleging that the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas (the Respondent or Agency), violated § 7116(a)(1) and (5) of the Statute by changing the conditions of employment of bargaining unit employees without negotiating with the American Federation of Government Employees, Local 3828, AFL-CIO (the Union). The Complaint advised the Respondent that an answer was due no later than January 2, 2017, and it further advised the Respondent that a failure to file an answer or respond to any allegation would constitute an admission of those allegations, absent a showing of good cause. On December 27, the Respondent filed a Designation of Agency Representative, identifying K. Tyson Shaw and Lee R. Jones as its representatives in this matter.

The date for filing Respondent's Answer passed without a filing. On January 4, 2017, the Respondent filed both its Answer and a Motion to Accept Answer, conceding that the Answer was untimely but asking that it be accepted as timely. Counsel for the Respondent asserted that the late filing was "a result of an administrative oversight and Agency legal staff leave usage over the holiday season . . . ." Respondent stated that once it discovered its error, it acted promptly to file its Answer as quickly as possible. Respondent asserted that its Answer was only one day late (when in fact, it appears to be two days late) and that no party had been prejudiced by the delay. Nonetheless, the GC opposed the Motion to Accept Answer and filed a Motion for Summary Judgment. Since the Respondent's Answer was not timely, the GC argued that the Respondent had admitted all the allegations of the Complaint, and that summary judgment was therefore appropriate. Respondent then filed a pleading in opposition to the Motion for Summary Judgment.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

Section 2423.20(b) of the Authority's Regulations, 5 C.F.R. § 2423.20(b) provides, in pertinent part:

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[1] Unless otherwise noted, all dates are in 2016.

> (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 answers and other required documents. *See, e.g.*, §§ 2429.21 through 2429.23. Section 2429.23 provides, in pertinent part:

> (a) [T]he Authority or General Counsel, or their designated representatives, as appropriate, may extend any time limit provided in this subchapter for good cause shown . . . . Requests for extensions of time shall be in writing and received by the appropriate official not later than five (5) days before the established time limit for filing . . . .
>
> (b) [T]he Authority or General Counsel, or their designated representatives, as appropriate, may waive any expired time limit in this subchapter in extraordinary circumstances. . . .

In the text of the Complaint in this case, the Regional Director provided the Respondent with detailed instructions concerning the requirements for its Answer, including the date on which the Answer was due, the persons to whom it must be sent, and references to the applicable regulations. It is clear that Respondent and its counsel were aware of the due date, as they noted it in their Motion to Accept Answer. It is therefore undisputed that the Answer, filed on January 4, 2017, was untimely. The issue is whether the Respondent has demonstrated that "extraordinary circumstances" existed in this case so as to excuse the late Answer.

In *U.S. Dep't of Hous. & Urban Dev.*, 32 FLRA 1261 (1988), the Authority waived an expired time limit for filing a motion for reconsideration, as the representative of record was out of town on a family medical emergency for nearly a month, encompassing the period from before the Authority's original decision was served until several days after the motion for reconsideration was due. The representative filed the motion ten days after returning to the office and learning of the Authority's decision. The Authority considered these to be "extraordinary circumstances" justifying the late filing, within the meaning of § 2429.23(b). It also compared these circumstances to the facts in *Internal Revenue Serv., Indianapolis Dist.*, 32 FLRA 1235 (1988), where the attorney responsible for the case was out of town in training, but was informed thirteen days before the due date of a motion for reconsideration that his office had received the Authority's decision. Although the agency argued that its attorney had been "unable to review the Decision until returning" to his office, the Authority noted that the agency had notice of the decision and could have filed a timely motion. *Id.* at 1236. Thus, extraordinary circumstances did not exist to justify waiving the expired

time limit. *See also U.S. Dep't of Hous. & Urban Dev., Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 n.2 (2002); *U.S. Dep't of Veterans Affairs Med. Ctr., Kansas City, Mo.*, 52 FLRA 282, 283-84 (1996).

In the present case, the Respondent does not assert that counsel was unable to file a timely answer because of illness or absence, but rather because of an "administrative oversight" and because lawyers were on leave for the holidays. This is similar to the facts of *U.S. Dep't of Transp., FAA, Hous., Tex.*, 63 FLRA 34, 35-36 (2008), where the agency unsuccessfully argued that it had good cause for its late answer, based on the office having "misfiled" the complaint; and to *U.S. Dep't of Veterans Affairs Med. Ctr., Waco, Tex.*, 43 FLRA 1149, 1150 (1992), where the agency mailed its exceptions to an arbitration award to the wrong location. While I sympathize with the plight of Respondent and its legal staff, and I recognize that many agencies are short-staffed between mid-December and early January every year, these are entirely foreseeable situations, and Respondent should have been able to file its Answer in a timely manner. It is worth noting here that the Respondent did file a Designation of Agency Representative on December 27, several days before the Answer was due; it could just as easily have filed its Answer at that time, or a request for an extension of time to file its Answer, as required by § 2429.23(a) of the Regulations. The case law is clear that a party's administrative error, however inadvertent, does not constitute "extraordinary circumstances" justifying the late filing. The Answer could have been filed in a timely manner, if ordinary diligence had been followed by Respondent's staff. It does not really matter, under our regulation and case law, that the Answer was "only" one or two days late. As my drill sergeant used to say, close only counts with horseshoes and hand grenades. Accordingly, I conclude that there are no extraordinary circumstances warranting a waiver of the time limit for filing the Respondent's Answer, and the Respondent has not demonstrated good cause for failing to file its answer in a timely manner. The General Counsel has established that the Respondent's untimely Answer should not be accepted.

In accordance with § 2423.20(b) of the Regulations, the failure to file an answer to a complaint constitutes an admission of each of the allegations of the complaint. Accordingly, there are no disputed factual issues in this matter, and the case can be resolved by summary judgment. Based on the existing record, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute.

2. The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive collective bargaining representative of a nationwide unit of Federal Bureau of Prisons employees, which includes employees of the Respondent (the unit).

3. The Union is an agent of AFGE for the purposes of representing the unit employees employed at the Respondent.

4. On or about January 15, 2016, the Respondent notified unit employees that it intended to change the hours when work, including overtime work, could be performed at local hospitals outside the institution.

5. On or about January 24, 2016, the Respondent implemented the change in work hours described in paragraph 4.

6. The Respondent implemented the change in unit employees' conditions of employment described in paragraphs 4 and 5 without negotiating with the Union over the change as required by the Statute.

7. By the conduct described in paragraphs 4, 5, and 6, the Respondent has violated § 7116(a)(1) and (5) of the Statute.

CONCLUSIONS OF LAW

By virtue of its failure to answer the complaint, the Respondent has admitted that it implemented a change in the conditions of employment of unit employees by changing the hours when they can perform work at outside hospitals. Before implementing such a change, an agency is required to bargain over those aspects of the change that are within the duty to bargain. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999). The Respondent further admits that it violated this obligation when it implemented the change without negotiating with the Union. Accordingly, Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute.

In order to remedy the Respondent's unfair labor practice, the General Counsel seeks a status quo ante remedy, pursuant to which the Respondent will rescind the January 14, 2016 memo entitled "Change of Hospital Hours," and I find that this remedy is appropriate. Further, if the Respondent seeks to change work hours for hospital work in the future, it must notify the Union of the proposed change and negotiate to the extent required by the Statute. Respondent shall also post the attached Notice to Employees at its facilities where unit employees represented by the Union are located and disseminate a copy of the Notice through its email system to those same employees.

The Respondent's Motion to Accept Answer is denied, and I recommend that the Authority grant the General Counsel's Motion for Summary Judgment and issue the following order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment of bargaining unit employees by implementing changes to employee work hours, including overtime work, without fulfilling its obligation to bargain with the American Federation of Government Employees, Local 3828, AFL-CIO (the Union) over the impact and implementation of such changes.

(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 January 14, 2016 memo entitled "Change of Hospital Hours" and reestablish the outside local hospital working hours that existed prior to January 24, 2016.

(b) Upon request, bargain with the Union over any future proposed changes to work hours, 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 Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden 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.

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

(e) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas 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., February 9, 2017

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 United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 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 NOT unilaterally change conditions of employment of bargaining unit employees by implementing changes to employee work hours, including overtime work, without fulfilling our obligation to bargain with the American Federation of Government Employees, Local 3828, AFL-CIO (the Union) over the impact and implementation of such changes.

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.

WE WILL rescind the January 14, 2016 memo entitled "Change of Hospital Hours" and reestablish the outside local hospital working hours that existed prior to January 24, 2016.

WE WILL, upon request, bargain with the Union over any future proposed changes to work hours, as required by the Statute.

_____
(Agency/Activity)

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, Dallas Region, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-6266.