

70 FLRA No. 165

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
DENVER REGIONAL OFFICE
DENVER, COLORADO
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1557, AFL-CIO
(Charging Party)

DE-CA-17-0309
DE-CA-17-0310
DE-CA-17-0311

DECISION AND ORDER

September 24, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

Let this case serve as a reminder that late is late, and if a party believes it has good cause, it should say so. Here, the Agency missed both of these points.

The Regional Director of the Denver Region of the Federal Labor Relations Authority issued three unfair-labor-practice (ULP) complaints alleging that the Respondent violated §§ 7102 and 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute)¹ by investigating a Union steward's use of official time, conducting an investigation into the steward's meeting with an employee, and suspending the steward for two days.

The Respondent filed its answers to the respective complaints after the filing deadline. The Federal Labor Relations Authority Chief Administrative Law Judge David L. Welch (the Judge) found that the Respondent filed untimely answers and failed to show good cause for its untimeliness. Because the answers

were filed late, the Judge determined that, under § 2423.20(b) of the Authority's Regulations,² the Respondent admitted to all of the allegations enumerated in the complaints. Accordingly, the Judge granted the General Counsel's motion for summary judgment.³

After summary judgment was entered, the Respondent filed exceptions with the Authority. We deny all of the exceptions because the Judge's finding that the answers were late was not challenged.

The Respondent excepts to the Judge's decision and argues that the allegations are untrue and that the order violates its management's rights to discipline and assign work.⁴ Oddly, however, the Respondent does not challenge the Judge's conclusion that its answers were late.⁵ Thus, the Respondent does not demonstrate that the Judge's application of § 2423.20(b), is incorrect. Therefore, there is nothing left for us to review.

Accordingly, we deny the Respondent's exceptions.⁶

II. Order

Pursuant to § 2423.41(c) of the Authority's Regulations⁷ and § 7118 of the Statute,⁸ the Department of Veterans Affairs, Denver Regional Office, Denver, Colorado, shall:

1. Cease and desist from:

(a) Requiring any employee who is a representative of the American Federation of Government

² Under 5 C.F.R. § 2423.20(b), the respondent in a ULP proceeding must file an answer to the complaint "[w]ithin [twenty] days after the date of service of the complaint, . . . [a]bsent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission."

³ The Judge found that the Agency's excuse, as expressed in its answers, that it failed to file timely answers to the complaints because of a "scarcity" of attorneys and an abundance of work, did not demonstrate extraordinary circumstances that may constitute good cause for its untimeliness. Judge's Decision at 2-3; cf. *AFGE, Local 1102*, 63 FLRA 343, 344 (2009) (citing *IRS, Indianapolis Dist.*, 32 FLRA 1235, 1236 (1988)); see also *U.S. DHS, ICE, L.A., Cal.*, 68 FLRA 302, 303-04 (2015).

⁴ On April 13, 2018, the General Counsel of the Federal Labor Relations Authority filed an opposition which we have considered. See 5 C.F.R. § 2429.26.

⁵ Judge's Decision at 3; see also *Exceptions Br.* at 5.

⁶ See *U.S. Dep't of VA, VA Med. Ctr., Martinsburg, W. Va.*, 66 FLRA 776, 779 (2012) (respondent cannot challenge administrative law judge's factual findings after admitting complaint's factual allegations by failing to file a timely answer or showing good cause).

⁷ 5 C.F.R. § 2423.41(c).

⁸ 5 U.S.C. § 7118.

¹ 5 U.S.C. §§ 7102, 7116(a)(1), (2).

Employees, Local 1557, AFL-CIO (Union) to disclose, under threat of discipline, the names of bargaining-unit employees they meet with while engaging in protected activity.

(b) Requiring any bargaining-unit employee of the Respondent to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity.

(c) Disciplining any representative of the Union for engaging in protected conduct while performing their representational duties.

(d) In any like or related manner, interfering with, restraining, or coercing bargaining-unit 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 the two-day suspension given to Konstane Shuey, expunge from Respondent's files all records of and references to this suspension, and make Konstane Shuey whole by reimbursing her for the losses she incurred as a result of the two-day suspension, including back-pay with interest and any other benefits lost due to the suspension, including overtime.

(b) Post at its facilities where bargaining-unit employees are located copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Agency Director, Renaye Murphy, 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 bargaining-unit 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) Disseminate a copy of the signed Notice to all bargaining-unit employees by email. The message of the email transmitted with the Notice will state: "We are distributing the attached Notices to you pursuant to a finding by an Administrative Law Judge of the Federal Labor Relations Authority that we violated the Statute in Case Nos. DE-CA-17-0309, DE-CA-17-0310, and DE-CA-17-0311."

(d) Pursuant to § 2423.41(e) of the Authority's Regulations,⁹ provide the Regional Director, Denver Regional Office, in writing, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

⁹ 5 C.F.R. § 2423.41(e).

**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 Regional Office, Denver, Colorado, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT require American Federation of Government Employees, Local 1557, AFL-CIO (Union) representatives to disclose, under threat of discipline, the names of bargaining-unit employees they meet with while engaging in protected activity.

WE WILL NOT require bargaining-unit employees to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity.

WE WILL NOT interfere with, restrain, or coerce employees by disciplining Konstanse Shuey or any other representative of the Union, for engaging in protected conduct while performing representational duties.

WE WILL rescind the two-day suspension given to Konstanse Shuey, expunge from our files all records of and references to this suspension, and make Konstanse Shuey whole by reimbursing her for the losses she incurred as a result of the two-day suspension, including back-pay with interest, and any other benefits lost due to the suspension, including overtime.

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, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.

(Respondent/Agency)

Dated: _____

By: _____
(Signature) (Title)

Member DuBester, concurring:

I agree with the determination to deny the Respondent's exceptions.

Office of Administrative Law Judges

DEPARTMENT OF
VETERANS AFFAIRS
DENVER REGIONAL OFFICE
DENVER, COLORADO
RESPONDENT

AND

AMERICAN FEDERATION
OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1557
CHARGING PARTY

Katie A. Smith
Sue T. Kilgore
For the General Counsel

Melissa Lolotai
John Zodrow
For the Respondent

Lance Stewart
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

On November 14, 2017, the Regional Director of the Denver Region of the Federal Labor Relations Authority (FLRA/Authority) issued a Complaint and Notice of Hearing in Case No. DE-CA-17-0311. On November 15, 2017, the Regional Director of the Authority issued Complaints and Notices of Hearing in Case Nos. DE-CA-17-0309 and DE-CA-17-0310. The Complaint in Case No. DE-CA-17-0309 alleges in substance that the Department of Veterans Affairs, Denver Regional Office, (Respondent) failed and refused to comply with §§ 7102 and 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) by conducting an investigation into Union Steward Konstanse Shuey's meeting with a bargaining unit employee. The Complaint in Case No. DE-CA-17-0310 alleges in substance that Respondent failed and refused to comply with §§ 7102 and 7116(a)(1) by requiring bargaining unit employees at the Veterans Service Center (VSC) to disclose, under threat of discipline, whether they met with Shuey. The Complaint in Case No. DE-CA-17-0311 alleges in substance that the Respondent subsequently failed and refused to comply

with § 7116(a)(1) and (2) of the Statute by issuing a two-day suspension to Shuey.

Each Complaint in Case Nos. DE-CA-17-0309, DE-CA-17-0310, and DE-CA-17-0311 indicated that a hearing on the all of the allegations would be held on February 7 and 8, 2018, and advised Respondent that an Answer to each Complaint was due no later than December 11, 2017. The Complaints further advised that "[a]bsent a showing of good cause, failure to file an answer or respond to any allegation will constitute an admission." Each Complaint was served by first class mail on Respondent's agent, John Zodrow, Human Resources Liaison, Department of Veteran Affairs Regional Office, 155 Van Gordon Street, Lakewood, CO 80228.

On January 2, 2018, Counsel for the General Counsel (GC) filed a Motion for Summary Judgment based upon the Respondent's failure to file an Answer to the Complaints, contending that by application of 5 C.F.R. § 2423.20(b), the Respondent admitted all of the allegations set forth in the Complaints. 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. Respondent filed an Answer to the Complaints on January 3, 2018, citing scarcity of attorneys and an abundance of work as its reason for failing to file a timely answer. Respondent filed a Memorandum in Support of its Response to the GC's Motion for Summary Judgment on January 11, 2018. The GC filed a Motion Opposing Respondent's Untimely Answer and Respondent's Response to the GC's Motion for Summary Judgment on January 12, 2018. Respondent filed a Cross-Motion for Summary Judgment on January 17, 2018. Respondent's Cross Motion for Summary Judgment as to Case Nos. DE-CA-17-0309, DE-CA-17-0310, and DE-CA-17-0311 is denied. As I have determined that summary judgment in Case Nos. DE-CA-17-0309, DE-CA-17-0310, and DE-CA-17-0311 is appropriate, the hearing is hereby cancelled.

DISCUSSION OF THE MOTIONS FOR SUMMARY JUDGMENT

5 C.F.R. § 2423.20(b) 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.*, §§ 2429.21 through 2429.23.

In the text of each 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 Complaints.

Moreover, the Authority has held in a variety of factual and legal contexts the 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 did not file a timely Answer to the GC's Complaint, nor did it demonstrate any "good cause" for its failure to do so. In *Broad. Bd. of Governors, Office of Cuba Broad., Miami, Fla.*, No. AT-CA-15-0097, 2015 WL 454985, at *2, *3 (June 29, 2015), the Authority held that the agency's conflicting work assignments and shortage of attorneys may have demonstrated "good cause" if the agency had requested an extension of time to file its answer, but did not demonstrate "extraordinary circumstances" that might constitute "good cause" for the late filing. Given the Respondent's failure to file a timely answer to the complaints and the absence of good cause for such a failure, application of the admission provision of 5 C.F.R. § 2423.20(b) is appropriate. Thus, Respondent has admitted all of the allegations set forth in each Complaint. Accordingly, there are no disputed factual issues and summary judgment in favor of the GC is granted.

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

FINDINGS OF FACT

1. The Union filed the charges in Case Nos. DE-CA-17-0309, DE-CA-17-0310, and DE-CA-0311 on August 2, 2017. A copy

of each charge was served on the Respondent.

2. The Union filed the first amended charges for Case Nos. DE-CA-17-0309, DE-CA-17-0310, and DE-CA-17-0311 on October 19, 2017. A copy of each amended charge was served on the Respondent.
3. The Respondent, Department of Veterans Affairs (VA), Denver Regional Office, Denver, Colorado, is an agency within the meaning of § 7103(a)(3) of the Statute.
4. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of nationwide consolidated units of VA employees, which includes employees of the Respondent (the unit).
5. Local 1557 is an agent of AFGE for the purpose of representing the bargaining unit employees employed by the Respondent.
6. The Respondent's Veterans Service Center (VSC) in Cheyenne, Wyoming includes employees who are in the bargaining unit described in paragraph 4.
7. At all material times Support Services Supervisor Jason Rasmussen has been a supervisor or management official of Respondent within the meaning of § 7103(a)(10) and (11) of the Statute.
8. At all material times Acting Assistant Director Andrew Post has been a supervisor or management official of Respondent within the meaning of § 7103(a)(10) and (11) of the Statute.
9. Konstanse Shuey is an employee under § 7103(a)(2) of the Statute and is in the bargaining unit described in paragraph 4.
10. In Case No. DE-CA-17-0309, beginning in December 2016 Shuey engaged in protected activity under § 7102 of the Statute by, among other things, serving as a Union steward and meeting with a bargaining unit employee on

April 11, 2017, to discuss concerns about working conditions.

11. In Case No. DE-CA-17-0309, on April 25, 2017, Respondent, by Rasmussen, conducted an official investigation into Shuey's meeting with a bargaining unit employee referenced in paragraph 10.
12. By the conduct described in paragraph 11, Respondent has been interfering with, restraining, or coercing employees in the exercise of rights guaranteed in § 7102 of the Statute in violation of § 7116(a)(1).
13. In Case No. DE-CA-17-0310, on April 25, 2017, Respondent, by Rasmussen, conducted an investigation into Konstanse Shuey's use of official time, and required the VSC employees described in paragraph 6 to disclose, under threat of discipline, whether they met with Shuey on April 11, 2017.
14. By the conduct described in paragraph 13, Respondent has been interfering with, restraining, or coercing employees in the exercise of rights guaranteed in § 7102 of the Statute in violation of § 7116(a)(1).
15. In Case No. DE-CA-17-0311, on June 28, 2017, Respondent, by Post, issued Shuey a two-day suspension.
16. Respondent engaged in the conduct described in paragraph 15 because Shuey engaged in the conduct described in paragraph 10, and to discourage employees from engaging in these protected activities.
17. By the conduct described in paragraphs 15 and 16, Respondent has been discriminating in connection with hiring, tenure, promotion, or other conditions of employment of its bargaining unit employees, thereby discouraging membership in a labor organization in violation of § 7116(a)(1) and (2) of the Statute.

CONCLUSIONS OF LAW

By the conduct set forth in Case No. DE-CA-17-0309, which contains allegations to which the Respondent has failed to file an Answer or otherwise demonstrate good cause for such failure, the Respondent

admits that it investigated Shuey's meeting with a bargaining unit employee. Therefore, the Respondent failed to comply with § 7102 of the Statute and thereby violated § 7116(a)(1) of the Statute.

By the conduct set forth in Case No. DE-CA-17-0310, which contains allegations to which the Respondent has failed to file an Answer or otherwise demonstrate good cause for such failure, the Respondent admits that it investigated Shuey's use of official time. Therefore, the Respondent failed to comply with § 7102 of the Statute and thereby violated § 7116(a)(1).

By the conduct set forth in Case No. DE-CA-17-0311, which contains allegations to which the Respondent has failed to file an Answer or otherwise demonstrate good cause for such failure, the Respondent admits that it suspended Shuey because of her service as a Union steward and because of her meeting with a bargaining unit employee. Therefore, the Respondent thereby violated § 7116(a)(1) and (2) of the Statute.

REMEDY

As a remedy to the conduct alleged in Case No. DE-CA-17-0309, the Respondent is ordered to cease and desist from requiring any employee who is a representative of the Union to disclose, under threat of discipline, the names of bargaining unit employees with whom they met while engaging in protected activity and to cease and desist from interfering with, restraining or coercing bargaining unit employees in the exercise of their rights assured by the Statute in any like or related manner.

As a remedy to the conduct alleged in Case No. DE-CA-17-0310, the Respondent is ordered to cease and desist from requiring bargaining unit employees to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity and to cease and desist from interfering with, restraining or coercing bargaining unit employees in the exercise of their rights assured by the Statute in any like or related manner.

As a remedy to the conduct alleged in Case No. DE-CA-17-0311, the Respondent is ordered to cease and desist from interfering with, restraining, or coercing employees by disciplining Konstanse Shuey, or any representative of the Union, from engaging in protected conduct while performing their Union representational duties and to cease and desist from interfering with, restraining or coercing bargaining unit employees in the exercise of rights assured to them by the Statute in any like or related manner. The Respondent is also ordered to rescind the two-day suspension given to Konstanse Shuey, expunge from its files all records and references

to this suspension, and make Shuey whole by reimbursing her for the losses she incurred as a result of the two-day suspension, including back pay with interest, and any other benefits lost due to the suspension, including overtime.

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, Denver Regional Office, Denver, Colorado, shall:

1. Cease and desist from:

(a) Requiring any employee who is a representative of the American Federation of Government Employees, Local 1557, AFL-CIO (Union) to disclose, under threat of discipline, the names of bargaining unit employees they met with while engaging in protected activity.

(b) Requiring any bargaining unit employee of the Respondent to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity.

(c) Disciplining any representative of the Union for engaging in protected conduct while performing their representational duties.

(d) In any like or related manner, interfering with, restraining, or coercing bargaining unit 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 the two-day suspension given to Konstanse Shuey, expunge from Respondent's files all records of and references to this suspension, and make Shuey whole by reimbursing her for the losses she incurred as a result of the two-day suspension, including back pay with interest and any other benefits lost due to the suspension, including overtime.

(b) Post at its facilities where bargaining unit employees are located copies of the

attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Agency Director, Renaye Murphy, 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 bargaining unit 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) Disseminate a copy of the signed Notice to all bargaining unit employees by email. The message of the email transmitted with the Notice will state: "We are distributing the attached Notices to you pursuant to a finding by an Administrative Law Judge of the Federal Labor Relations Authority that we violated the Statute in Case Nos. DE-CA-17-0309, DE-CA-17-0310, and DE-CA-17-0311."

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, provide the Regional Director, Denver Region, in writing, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., February 28, 2018

DAVID L. WELCH
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 Regional Office, Denver, Colorado, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT require American Federation of Government Employees, Local 1557, AFL-CIO (Union) representatives to disclose, under threat of discipline, the names of bargaining unit employees they met with while engaging in protected activity.

WE WILL NOT require bargaining unit employees to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity.

WE WILL NOT interfere with, restrain, or coerce employees by disciplining Konstanse Shuey, or any representative of the Union, for engaging in protected conduct while performing representational duties.

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 2-day suspension given to Konstanse Shuey, expunge from our files all records of and references to this suspension, and make Shuey whole by reimbursing her for the losses she incurred as a result of the 2-day suspension, including back pay with interest, and any other benefits lost due to the suspension, including overtime.

 (Respondent/Agency)

Dated: _____

By: _____
 (Signature) (Title)