



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

OALJ 22-08

U.S. DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL LAREDO SECTOR
LAREDO, TEXAS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, LOCAL 2455, AFL-CIO

CHARGING PARTY

Case No. DA-CA-17-0361

Alicia E. Weber
Daniel A. Kornberg
For the General Counsel

Jacquelyn O. Trevino
For the Respondent

Hector Garza
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On November 30, 2021, the Acting Regional Director of the Chicago Region of the Federal Labor Relations Authority (the Authority) issued a Complaint and Notice of Hearing in this matter, alleging that the U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol Laredo Sector, Laredo, Texas (the Respondent) violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by holding a formal meeting with a bargaining unit employee concerning a grievance without providing the American Federation of Government Employees, National Border Patrol Council, Local 2455, AFL-CIO (the Union) an opportunity to be represented at the meeting as required by § 7114(a)(2)(A) of the Statute. The Complaint indicated that a hearing on the allegations would be held on March 29, 2022, and advised the Respondent that an Answer to the Complaint was due no later than December 27, 2021. The Complaint was sent by first class mail to the

Respondent's designated representative, Jacquelyn O. Trevino, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, 5810 San Bernardo Avenue, Suite 490, Laredo, Texas 78041, and a courtesy copy was delivered by email.

The date for filing Respondent's Answer passed without a filing.

On January 18, 2022, Counsel for the 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 arguing therefore that the Respondent had admitted all the allegations of the Complaint. The GC asserts that there are no factual or legal issues in dispute, and the case is ripe for summary judgment in its favor.

On February 7, 2022, the Respondent filed a Motion for Leave and Answer to Complaint, acknowledging the Answer was untimely but asking that it be accepted as timely. Counsel for the Respondent stated in this regard that she was "out of the office on and off through the end of December 2021 and January 2022 with her immediate family contracting COVID-19" and that "[u]pon return" to the office Respondent's counsel engaged in settlement negotiations with opposing counsel and "did not realize the filing deadline for Respondent's answer had passed." Resp. Mot. at 1. The Respondent did not include a statement of position of the other parties on the motion as required under § 2429.23 of the Authority's Regulations.

On February 14, 2022, the GC filed a Response and Opposition to Respondent's Motion for Leave, arguing that the Respondent had not established extraordinary circumstances for waiving the expired time limit to answer the complaint.

DISCUSSION ON MOTION FOR SUMMARY JUDGMENT

Section 2423.20(b) of the Authority's Regulations, 5 C.F.R. § 2423.20(b), 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 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 [and] shall state the position of the other parties on the request for extension

(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. Request for a waiver of time limit shall state the position of the other parties

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 the Respondent was required to file an Answer to the Complaint.

As noted above, the Respondent acknowledges that the Answer, filed February 7, 2022, was untimely. The issue is whether the Respondent has demonstrated that “extraordinary circumstances” existed in this case so as to excuse the late Answer. For the reasons that follow, extraordinary circumstances have not been established.

The Respondent raises two arguments to support its request. First, the Respondent argues that it failed to file a timely answer because Respondent’s counsel “did not realize the filing deadline . . . had passed.” But the time for filing an Answer was clearly stated in the Complaint, and ignorance of or absentmindedness regarding a filing deadline does not constitute extraordinary circumstances. *See U.S. EPA, Envtl. Research Lab., Narragansett, R.I.*, 49 FLRA 33, 35 (1994) (“Parties filing actions with the Authority are responsible for being knowledgeable of the statutory and regulatory filing requirements.”); *U.S. Dep’t of Transp., FAA, Hous., Tex.*, 63 FLRA 34, 35-36 (2008) (agency unsuccessfully argued it had good cause for its late answer, based on office having “misfiled” the complaint). Accordingly, the Respondent’s argument is unavailing.

The Respondent next contends that its failure ought to be excused because Respondent’s counsel was in and out of the office in December 2021 and January 2022 due to her family’s illness. The undersigned is most certainly sympathetic to the difficulties faced by Respondent’s counsel and her family. But by stating vaguely that she was out of the office only some of the time, on an “on and off” basis, Respondent’s counsel has failed to demonstrate that she, or another member of her team, was in fact prevented from filing a timely answer or extension request. *Compare U.S. Dep’t of HUD*, 32 FLRA 1261 (1988) (expired time limit for filing motion for reconsideration waived where representative was out of town on family medical emergency for nearly a month, encompassing period from Authority’s original decision was served until days after motion for reconsideration was due) *with IRS, Indianapolis Dist.*, 32 FLRA 1235 (1988) (time limit not waived where attorney responsible for 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 Authority’s decision); *see also U.S. Dep’t of HUD, Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 n.2 (2002); *U.S. Dep’t of VA, Med. Ctr., Kansas City, Mo.*, 52 FLRA 282, 283-84 (1996). Although not directly pertinent in the case at bar, much of the Federal workforce has been in and out of their offices during this extraordinary period of the pandemic for extended periods of time. Accordingly, the Respondent’s second argument fails.

Based on the foregoing, the undersigned concludes 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.

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, the undersigned makes the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The American Federation of Government Employees, National Border Patrol Council, Local 2455, AFL-CIO (the Union) filed the charge in this proceeding on September 6, 2017, and a copy was served on the U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol Laredo Sector, Laredo, Texas (the Respondent).
2. The Union filed the first amended charge in this proceeding on January 3, 2018, and a copy was served on the Respondent.
3. The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute.
4. The American Federation of Government Employees, National Border Patrol Council, AFL-CIO (AFGE NBPC) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide unit of U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol employees, which includes the employees of the Respondent (the unit).
5. The Union is an agent of AFGE NBPC for the purpose of representing the unit employees employed at the Respondent.
6. At all times material, the following individuals held the positions opposite their names and were supervisors or management officials of the Respondent within the meaning of § 7103(a)(10) and (11) of the Statute and agents of the Respondent acting upon its behalf:

Jason Owens	Acting Chief Patrol Agent
Manuel Martinez	Assistant Chief Patrol Agent
Jesus Ybarra	Agency Attorney
7. On June 7, 2017, the Respondent, by Owens, Martinez, and Ybarra, held a meeting with bargaining unit employee Albert Esparza.

8. The subject of the meeting described in paragraph 7 was a grievance: an EEO complaint Esparza filed with the Respondent's Privacy and Diversity Office.
9. The meeting described in paragraph 7 was formal in nature, including because it (a) included the two highest level management officials at the Laredo Sector; (b) lasted approximately 45 minutes; (c) was planned and scheduled over two weeks in advance; and (d) was conducted formally, with each party presenting its side and agreeing to follow set ground rules.
10. The Respondent did not afford the Union an opportunity to be represented at the meeting described in paragraph 7.
11. By the conduct described in paragraphs 7 through 10, the Respondent has been failing and refusing to comply with § 7114(a)(2)(A) of the Statute.
12. By the conduct described in paragraphs 7 through 11, the Respondent has violated § 7116(a)(1) and (8) of the Statute.

CONCLUSIONS OF LAW

By the conduct described in the facts set forth in the Complaint containing allegations to which the Respondent has failed to file an Answer or otherwise demonstrate good cause for such failure, the Respondent admits that it held a formal meeting with a bargaining unit employee concerning a grievance without providing the Union an opportunity to be represented at the meeting. Therefore, the Respondent failed to comply with § 7114(a)(2)(A) of the Statute and violated § 7116(a)(1) and (8) of the Statute.

As a remedy, the Respondent is ordered to cease and desist from failing to provide the Union advance notice and opportunity to be represented at formal discussions in violation of the Statute, and the Respondent is ordered to provide the Union advance notice and opportunity to be represented at formal discussions as required by the Statute. In addition, the Respondent is ordered to post, at the Respondent where bargaining unit employees represented by the Union are located, copies of a notice signed by the Chief Patrol Agent on bulletin boards and other places at the Respondent where notices to employees are customarily posted, and to distribute the notice electronically if the Respondent customarily communicates with employees by such means.

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 U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol Laredo Sector, Laredo, Texas, shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, National Border Patrol Council, Local 2455, AFL-CIO (the Union) advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including discussions to mediate settlement of EEO complaints filed by bargaining unit employees.

(b) 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) Provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including discussions to mediate settlement of EEO complaints filed by bargaining unit employees.

(b) Post at the U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol Laredo Sector, Laredo, Texas 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 Patrol Agent 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.

(c) 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.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago 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., March 3, 2022

David L. Welch, Digitally signed by David L. Welch, Chief Judge
Chief Judge Date: 2022.03.03 15:00:24 -05'00'

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 U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol Laredo Sector, Laredo, 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 fail or refuse to provide the American Federation of Government Employees, National Border Patrol Council, Local 2455, AFL-CIO (the Union) with notice and an opportunity to attend formal discussions with bargaining unit employees concerning grievances, including formal meetings to mediate EEO complaints.

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

WE WILL provide the Union with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning the mediation of EEO complaints.

(Respondent/Agency)

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.

Questions about this notice or compliance with its terms may be directed to the Regional Director, Chicago Region, Federal Labor Relations Authority, by mail: 224 S. Michigan Ave., Suite 445, Chicago, IL 60604 or telephone: (312) 886-3465.