UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

MEMORANDUM DATE: July 30, 2024

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON RAP
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, D.C.

RESPONDENT

AND Case No. DE-CA-22-0174

AFGE NATIONAL VA COUNCIL, AFL-CIO

CHARGING PARTY

Pursuant to § 2423.34(b) of the Rules and Regulations, I hereby transfer the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the exhibits, briefs, and other pleadings filed by the parties.

Enclosures

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DEPARTMENT OF VETERANS AFFAIRS, WASHINGTON, D.C. RESPONDENT AND AFGE NATIONAL VA COUNCIL, AFL-CIO CHARGING PARTY	Case No. DE-CA-22-0174

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Federal Labor Relations Authority (Authority), the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date, and this case is hereby transferred to the Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions is governed by 5 C.F.R. Part 2423, Subpart D.

Any such exceptions must be filed on or before **SEPTEMBER 3, 2024**, electronically at **www.flra.gov**. by selecting **eFile** under the **Filing a Case** tab and following the instructions, or by U.S. Mail to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, N.W., 3rd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: July 30, 2024
Washington, D.C.

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

OALJ 24-18

DEPARTMENT OF VETERANS AFFAIRS, WASHINGTON, D.C. RESPONDENT AND AFGE NATIONAL VA COUNCIL, AFL-CIO CHARGING PARTY	Case No. DE-CA-22-0174

Michael A. Quintanilla
For the General Counsel

Alfred E. Steinmetz
For the Respondent

Thomas Dargon
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

In 2008, the Veterans Administration and the American Federation of Government Employees Union negotiated a Memorandum of Agreement, in conjunction with a new VA directive titled "Smoke-Free Policy for VA Health Care Facilities." The MOU provided that the Agency would provide employees with "reasonably accessible designated smoking areas" and that employees would be permitted to smoke only in those designated areas or in outdoor locations away from building entrances. In 2017, the Agency sought to replace the 2008 directive and MOU with an absolute no-smoking policy, but the Union refused to renegotiate the MOU at that time. Instead, the Agency unilaterally rescinded the directive in 2017 and declared the MOU void in 2019, simultaneously removing all smoking areas on VA property.

The VA's closure of all smoking areas prompted the Union to file a grievance, and in 2020 an arbitrator ruled in favor of the Union: she held that the MOU was still in effect; that the Agency could not require the Union to renegotiate it; and that the implementation of the Agency's new total smoking ban constituted a repudiation of the MOU, an unfair labor practice, and a violation of the parties' collective bargaining agreement. The Agency filed exceptions to this award with the Federal Labor Relations Authority, but in December of 2021 the Authority dismissed one of the exceptions and denied the others. At that point, the Authority's decision was final, and the award it upheld was binding on the parties. Nevertheless, the Agency has refused to comply with the award, arguing that the award conflicts with the Agency's core mission of protecting the public health and that it essentially orders the Agency to inflict harm on its employees, patients, and visitors.

The Agency's health-related justifications for its actions are understandable, but they are misdirected. It made an agreement in 2008 that struck a compromise on the issue of smoking – at a time when the dangers of smoking and second-hand smoke were well known -- and both the arbitrator and the Authority have held that the Agency cannot unilaterally change that agreement. Now that the Authority's decision has become final, the Agency's continued refusal to comply with the award constitutes an unfair labor practice.

STATEMENT OF THE CASE

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

On June 7, 2023, the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing against the Department of Veterans Affairs, Washington, D.C. (the Agency or Respondent). The Complaint alleged that the Respondent violated § 7116(a)(1) and (8) of the Statute by refusing to comply with a final and binding arbitration award. Complaint at ¶¶ 9-11. On June 27, 2023, the Respondent filed its Answer to the Complaint; in it, Respondent denied refusing to comply with the award, arguing instead that it was unable to comply, because compliance was inconsistent with the Agency's public health and safety obligations. Answer at ¶¶ 9-11.

On August 3, 2023, the FLRA's General Counsel (GC) filed a Motion for Summary Judgment (MSJ), arguing that because the Respondent's Answer admitted all of the material factual allegations of the Complaint, there was no need for a hearing, and that summary judgment in favor of the GC was warranted. MSJ at 2. The Respondent filed its response to this motion, submitting that factual issues remain in dispute and that summary judgment should be denied. MSJ Resp. at 1, 3. On August 4, 2023, the judge then assigned to the case ordered that the hearing be indefinitely postponed in order to fully consider the GC's motion. Order Indefinitely Postponing Hearing, Prehearing Conference and Due Date for Prehearing Disclosures. And on August 16, 2023, the judge issued an Order of Recusal, after finding that she might have a conflict of interest. The case was then assigned to me.

On September 29, 2023, Respondent filed a Motion to Stay the proceedings in this case, because legislation had been introduced in both the U.S. Senate and House of Representatives to prohibit all smoking on the premises of all VA facilities. Since the filing of the motion, neither House of Congress has enacted that legislation, and I hereby deny the Motion to Stay.

DISCUSSION OF MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Therefore, the first issue to resolve is whether there are any material facts in dispute in this case. If any material facts remain in dispute, as Respondent claims, then I must deny the motion and conduct a hearing; if there are none, then I must determine whether the record establishes that either party is entitled to judgment in its favor.

The material allegations of the GC's Complaint, in my view, are: that pursuant to a grievance filed under the Agency and Union's collective bargaining agreement (CBA), an arbitrator issued an award finding that the Agency had violated the agreement; the arbitrator further ordered the Agency to rescind VHA Directive 1085.01 and to fully comply with the parties' 2008 MOU; that the award became final and binding when the Authority denied or dismissed all of the Agency's exceptions to the award on December 10, 2021; and that the Agency has refused to comply with that award.

In its Answer, the Respondent admits all but the last of these allegations. Furthermore, Respondent's denial of the last allegation is not really a denial at all: Respondent doesn't deny the factual allegation that it has refused to comply with the award, but rather it submits explanations and justifications for its refusal to comply.[1] In other words, Respondent does not dispute the fact that it has refused to comply, but is making a legal justification for its conduct. The same characterization is true of Respondent's answers to Paragraphs 10 and 11 of the Complaint.

[1] For instance, after denying that it refused to comply with the award, Respondent asserts: "Respondent is unable to maintain smoking shelters at its health care . . . facilities because they are inconsistent with public health and safety interests." Answer at ¶ 9. To be clear, Respondent is not claiming that it cannot maintain smoking shelters; such a claim might require a hearing to ascertain what circumstances prevent the Agency from maintaining shelters. Rather, Respondent is arguing that its legal obligation to protect the public health conflicts with its obligation to comply with the award. This argument does not require a hearing to resolve.

In its opposition to the MSJ, the Respondent further notes its disagreement with the GC's assertion (MSJ Brief at 10-11) that Respondent is raising new issues in defense of its conduct that it did not raise before the arbitrator or the Authority. MSJ Resp. at 1, 3. Respondent insists that it did assert these issues in the proceedings below, and therefore material factual disputes remain.

I agree with the Respondent that at least some of the justifications it has asserted in its Answer and in its response to the MSJ are similar, if not precisely identical, to issues that it litigated before the Arbitrator. Since 2019 it has consistently argued that because smoking – in any form and in any location – is harmful to patients, employees, and visitors, it has a legal obligation to prohibit it in all locations at all VA facilities. It has also argued that the dangers of smoking on VA premises relate to the Agency's internal security practices and thus are a management right under § 7106)(a)(1) of the Statute.[2] I will consider these arguments raised by the Respondent in defense of its conduct, but they do not assert any material facts that are in dispute; they are simply legal arguments that can be resolved through summary judgment.

At the outset of its response to the MSJ, Respondent makes the following assertion: "If the General Counsel does indeed agree with the Respondent's position on the seriousness of the harm caused from smoke, then the remaining legal question would be how much harm can Respondent be ordered to inflict upon its employees and Veteran patients." MSJ Resp. at 1. While Respondent poses this issue in a deliberately provocative manner (and more provocatively than it did to the arbitrator or the Authority), I am willing to accept the underlying premise of its statement. The GC indeed has not disputed any of the assertions in the Respondent's Answer concerning the health dangers of smoking to employees, patients, and visitors to VA facilities, and I will consider them to be undisputed facts. In the proceedings below, the Respondent argued that the health of its employees and patients obligated it to repudiate the 2008 MOU, and it argues now that those same concerns prevent it from complying with the award and the Authority's decision. The issue before me, therefore, is not factual but legal, and it does not require an evidentiary hearing to resolve.

Accordingly, I find that there are no material factual issues in dispute in this case, and that it can be resolved on summary judgment. Based on the existing record, I will set forth my findings of facts and make the following conclusions of law and recommendations:

FINDINGS OF FACT

1. The AFGE National VA Council, AFL-CIO (the Union or Charging Party) filed the unfair labor practice charge in this proceeding on January 28, 2022, and a copy was served on the Respondent.

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

[2] On the other hand, the Respondent's assertion (Answer at ¶ 9) that it was required under Article 29 of the CBA to eliminate smoking everywhere on VA premises was not discussed in either the arbitrator's award or the Authority's decision affirming the award. I will therefore not consider this argument.

3. The American 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 a nationwide consolidated unit of employees of the Department of Veterans Affairs.

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

5. The Union and the Respondent are parties to a collective bargaining agreement covering employees in the bargaining unit described in Paragraph 3.

6. At all times material to this case, the following individuals held the positions opposite their names and have been supervisors or management officials of the Respondent within the meaning of § 7103(a)(10) and (11) of the Statute and agents of Respondent acting on its behalf:

Alfred "Bron" Steinmetz	Staff Attorney
Lindsay Gower	Staff Attorney

7. On November 10, 2020, Arbitrator Mary P. Bass issued a decision and award in FMCS Case No. 201003-00095, finding that Respondent violated the parties' collective bargaining agreement.

8. Arbitrator Bass directed in the award that Respondent timely: (1) rescind VHA Directive 1085.01 as applied to AFGE bargaining unit employees; (2) take any and all steps to fully comply with the provisions of the AFGE/VA MOU re Smoke-Free Policy for VA Health Care Facilities, dated July 30, 2008; and (3) distribute a remedial notice to all AFGE bargaining unit employees by email, signed by the current Deputy Under Secretary for Health for Operations and Management, setting forth the terms of this Award.

9. The Respondent filed exceptions to the award described in Paragraphs 7 and 8. The Authority denied or dismissed all of these exceptions in a decision dated December 10, 2021, at which time the Authority's decision became final and binding.

10. Since December 10, 2021, Respondent has been failing and refusing to perform the actions ordered by Arbitrator Bass, described in Paragraph 8.

11. In January of 2022, Union attorney Thomas Dargon spoke to and emailed Agency representatives Steinmetz and Gower about the Agency's plans to comply with Arbitrator Bass's award. MSJ, GC Ex. 5 at 3. In their final conversation, the Agency representatives told Dargon that "the VA Secretary had directed them not to comply with the Authority's decision,"

because "it wasn't appropriate to put people in close conditions, given the risk of exposure to second-hand smoke and Covid-19." *Id.* The Respondent admits that since that time, it has taken no steps to comply with the award.

CONCLUSIONS OF LAW

An agency violates § 7122(b) of the Statute, and thereby violates § 7116(a)(1) and (8) as well, when it fails to comply with all or part of an arbitrator's award. *U.S. Dep't of the Air Force, Carswell AFB, Tex.*, 38 FLRA 99, 105 (1990) (*Carswell*). If the award is ambiguous, however, an agency does not violate the Statute if its actions are consistent with a reasonable construction of the award. *DOJ, Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, 59 FLRA 3, 4 (2003). The Authority has repeatedly stated that a party cannot use an unfair labor practice proceeding to collaterally attack the merits of the award. *U.S. Dep't of Def. Educ. Activity*, 72 FLRA 382, 384-85 (2021) (*DoDEA*); *Dep't of Transp., FAA, Nw Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*FAA*). To allow a party to litigate matters that go to the merits of award "would circumvent Congressional intent with respect to statutory review procedures and the finality of arbitration awards." *FAA*, 55 FLRA at 296. Quoting the Second Circuit Court of Appeals, the Authority has stated that it was the intent of Congress that "the awards of arbitrators, when they become final, are not subject to further review by any other authority or administrative body." *Id.* (quoting *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 29 (2d Cir. 1986)).

Under § 7122(b) of the Statute, a party must take the action required by the arbitrator's award when that award becomes "final and binding;" it becomes final and binding when there are no timely exceptions filed to the award under § 7122(a) of the Statute, or when timely exceptions are denied by the Authority. *Carswell*, 38 FLRA at 105. It is undisputed that the Authority rejected the Respondent's exceptions to the award on December 10, 2021, and that no action to pursue judicial review of the Authority's decision was filed. Accordingly, the award was final on December 10, 2021. The only remaining issue for me is whether the Respondent has complied with the award. *See DoDEA*, 70 FLRA at 667; *FAA*, 55 FLRA at 296.

As noted earlier, the Respondent denies that it has failed to comply with the award, but offers no evidence that it has taken any actions to comply with the award; rather, it simply asserts that it is "unable" to comply with the award. Answer at ¶ 9. Its asserted inability to comply is not based on any factual circumstances that prevent it from complying,[3] but rather on its unwillingness to continue to allow employees to smoke and to endanger their health. It insists that permitting employees to smoke on VA premises would violate the VA's overriding statutory duty to protect the health of people on its premises.

The Respondent's argument in this regard, however, is simply an attempt to relitigate one of the arguments it made to the arbitrator. It argued then that it was not obligated to bargain with the Union over its decision to prohibit smoking because this was encompassed in its

[3] That was one of the defenses asserted (albeit unsuccessfully) by the agency in *FAA*. There, it argued it could no longer provide parking spaces for employees, as ordered by the arbitrator, because the City of Denver would not allow it to do so. 55 FLRA at 297.

statutory right to determine its internal security practices. Award at 14, GC Ex. 1 of MSJ. In support of that argument, Respondent quoted findings of the Centers for Disease Control and Prevention and of the Surgeon General of the United States, to the effect that smoking is "the leading cause of preventable death in the United States." *Id.* The arbitrator rejected this argument on a variety of grounds, among them that the dangers of smoking were already well-known to all parties in 2008, when they negotiated their MOU that allows smoking in restricted areas, and that the MOU remained binding on the parties. *Id.* at 15. I cannot and will not review the reasoning of the arbitrator, which has already been reviewed and affirmed by the Authority.

I therefore conclude that the Respondent has made no effort to comply with the award. Indeed, representatives of the Respondent advised the Union, shortly after the award became final, that the VA Secretary had ordered them not to comply. The Respondent's principled disagreement with the award does not mean that it is unable to comply with it. Rather, it is quite apparent that the Respondent has consciously refused to comply with a final and binding arbitration award, and that it has committed an unfair labor practice, in violation of § 7116(a)(1) and (8) of the Statute.

In order to remedy its unfair labor practice, the Respondent must comply with Arbitrator Bass's award of November 10, 2020. In particular, it must rescind VHA Directive 1085.01, insofar as it applies to AFGE bargaining unit employees, and it must take all steps necessary to comply with the AFGE/VA MOU re Smoke-Free Policy for VA Health Care Facilities, dated July 30, 2008. My recommended order omits the portion of Arbitrator Bass's order regarding a notice to employees, as that notice is superseded by mine. Additionally, I am ordering that the Notice to Employees be signed by the Secretary of Veterans Affairs, because the record reflects that the Respondent's refusal to comply with the award came at the direction of the Secretary.

I therefore 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 Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Veterans Affairs, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the final and binding award of Arbitrator Mary P. Bass dated November 10, 2020.

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

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

(a) Comply with the final and binding award of Arbitrator Mary P. Bass dated November 10, 2020, ordering the Respondent to:

i. Cease and desist from further implementation of VHA Directive 1085.01 as applied to AFGE bargaining unit employees.
ii. Rescind VHA Directive 1085.01 as applied to AFGE bargaining unit employees.
iii. Take any and all steps necessary to fully comply with the provisions of AFGE/VA MOU re Smoke-Free Policy for VA Health Care Facilities, dated July 30, 2008.

(b) Post at all facilities of the Respondent where AFGE bargaining unit employees work, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary of Veterans Affairs, 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 the physical posting of paper notices, disseminate a copy of the Notice electronically, on the same day as the physical posting, through the Respondent's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees. The message of the email transmitted with the Notice shall state, "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number DE-CA-22-0174."

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver 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., July 30, 2024

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Washington, D.C., 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 comply with the final and binding award of Arbitrator Mary P. Bass dated November 10, 2020.

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

WE WILL cease and desist from further implementation of VHA Directive 1085.01 as applied to AFGE bargaining unit employees.

WE WILL rescind VHA Directive 1085.01 as applied to AFGE bargaining unit employees.

WE WILL take any and all steps necessary to fully comply with the provisions of AFGE/VA MOU re Smoke-Free Policy for VA Health Care Facilities dated July 30, 2008.

_____

(Agency/Activity)

Date: _____ By: _____

(Signature) (Secretary of Veterans Affairs)

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 80424, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION ON MOTION FOR SUMMARY JUDGMENT**, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-22-0174 were served on the following parties as indicated below:

CERTIFIED MAIL & RETURN RECEIPT — **CERTIFIED NOS:**

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Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: July 30, 2024
Washington, D.C.