

UNITED STATES OF AMERICA  
**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C. 20424-0001

DEFENSE COMMISSARY AGENCY MIDWEST REGION SAN ANTONIO, TEXAS  Respondent	
and  NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R14-23  Charging Party	Case No. DA-CA-04-0239

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 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 Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 13, 2004**, and addressed to:

Office of Case Control  
Federal Labor Relations Authority  
1400 K Street, NW, 2<sup>nd</sup> Floor  
Washington, DC 20005

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SUSAN E. JELEN  
Administrative Law Judge

Dated: August 13, 2004  
Washington, DC

UNITED STATES OF AMERICA  
**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: August 13, 2004

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN  
Administrative Law Judge

SUBJECT: DEFENSE COMMISSARY AGENCY  
MIDWEST REGION  
SAN ANTONIO, TEXAS

Respondent

and

Case No. DA-CA-04-0239

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R 14-23

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), I am hereby transferring 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 is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges OALJ 04-39  
WASHINGTON, D.C.

DEFENSE COMMISSARY AGENCY MIDWEST REGION	
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SAN ANTONIO, TEXAS Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R14-23 Charging Party	Case No. DA-CA-04-0239

Anne McFearin, Esq.  
For the General Counsel

Keith Jones  
For the Charging Party

Before: SUSAN E. JELEN  
Administrative Law Judge

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

On June 3, 2004, the Regional Director of the Dallas Region of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing, alleging that the Defense Commissary Agency, Midwest Region, San Antonio, Texas (the Respondent) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by refusing to process five completed Requests for Payroll Deductions for Labor Organization Dues (SF-1187) submitted by the National Association of Government Employees, Local R14-23 (the Charging Party) on behalf of bargaining unit employees. The complaint also alleged that by this conduct, the Respondent refused to comply with section 7115(a) of the Statute. The complaint was served on Respondent by certified mail and the certified mail receipt, demonstrating service upon the Respondent, was returned to the Dallas Region. The complaint specified that, in accordance with the Authority's Rules and Regulations, the Respondent must file an Answer to the complaint no later than June 28, 2004, and that a failure to file an answer shall constitute an admission of the allegations of the complaint. A hearing was scheduled for October 19, 2004.

The Respondent did not file an answer, either in person or by mail, within the required period or at any time thereafter.

On July 19, 2004, Counsel for the General Counsel filed a Motion for Summary Judgment, asserting that by its failure to answer the complaint, the Respondent has admitted all of the allegations therein. Since no facts are in dispute, the General Counsel submits that the record demonstrates that the Respondent violated section 7116(a)(1) and (8) of the Statute.

The Respondent has failed to file any response to the General Counsel's Motion for Summary Judgment within the time period provided by Regulations. See 5 C.F.R. § 2423.27 (b). The Charging Party filed a Motion for Separate Judgment dated July 30, 2004, in which it requested a different remedy than the General Counsel.

#### **Discussion of Motion for Summary Judgment**

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

(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 Rules and 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 this case the Respondent has not filed an answer as required by the Regulations. In accordance with section 2423.20(b) of the Rules and Regulations, this failure constitutes an admission of each of the allegations of the Complaint. *Department of Veterans Affairs Medical Center, Asheville, North Carolina*, 51 FLRA 1572, 1594 (1996) (VA Asheville). Furthermore, the Respondent has not filed any response to the Motion for Summary Judgment. Accordingly, there are no disputed factual or legal issues in this case and it is appropriate to resolve this case 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 as defined by 5 U.S.C. § 7103(a)(3).

2. The National Association of Government Employees (NAGE) is a labor organization as defined by 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent.

3. The Charging Party is an agent of NAGE for the purpose of representing employees of the Respondent within the unit described in paragraph 2 above.

4. On or about August 13, 2003, the Charging Party submitted completed SF-1187s to the Respondent for bargaining unit employees Karen McGinty, Cheryl Harper and Patricia Cruz. On or about September 10, 2003, the Charging Party submitted a completed SF-1187 to the Respondent for bargaining unit employee Irma Roth. On or about October 3, 2003, the Charging Party submitted a completed SF-1187 to the Respondent for bargaining unit employee Kathleen Dawoud.

5. From August 13, 2003 through February 2004, Respondent refused to process the SF-1187s for bargaining unit employees McGinty, Harper and Cruz. From September 10, 2003 through February 2004, the Respondent refused to process the SF-1187 for bargaining unit employee Roth. From October 3, 2003 through February 2004, the Respondent refused to process the SF-1187 for bargaining unit employee Dawoud.

6. By the conduct described in paragraph 5 above, the Respondent refused to comply with 5 U.S.C. § 7115(a) and therefore violated 5 U.S.C. § 7116(a)(1) and (8).

## **Discussion and Conclusions**

Section 7116(a)(8) of the Statute provides that it shall be an unfair labor practice for an agency to otherwise fail or refuse to comply with any provision of this chapter. Section 7115(a) of the Statute provides that if an agency receives from an employee in an appropriate unit a written assignment authorizing a deduction of dues, the agency shall honor the assignment and make an appropriate allotment to the exclusive representative. The Authority has interpreted this provision of the Statute as an "absolute duty on agencies to honor the current assignments of unit employees by remitting regular and periodic dues deducted from their

accrued salaries to their exclusive representatives." *Lowry Air Force Base, Denver, Colorado*, 31 FLRA 793, 797 (1988). An agency's obligation under section 7115 is mandatory and nondiscretionary. *American Federation of Government Employees, Council 214 v. FLRA*, 835 F.2d 1458 (D.C. Cir. 1987).

Respondent has admitted by its failure to file an answer that it violated section 7115(a) of the Statute by failing to process the dues withholding authorizations from five bargaining unit employees, thereby violating section 7116(a) (1) and (8) of the Statute.

### **Remedy**

Counsel for the General Counsel proposed a recommended remedy requiring that the Respondent cease and desist from engaging in conduct which violates the Statute, accompanied by an appropriate Notice To All Employees signed by the Respondent's Director. The General Counsel is not seeking reimbursement for the Charging Party by Respondent for the dues which Respondent failed to deduct from employees' paychecks.<sup>1</sup> As noted above, the Charging Party filed its own Motion, in which it supported the General Counsel's Motion for Summary Judgment, but requested a different remedy. Specifically, the Charging Party is requesting reimbursement for the dues which the Respondent failed to deduct from employees' paychecks. Citing *VA Asheville, supra*, the Charging Party argues that it has been negatively impacted on a financial basis by the Respondent's actions. The Charging Party therefore requests reimbursement by Respondent for dues which Respondent failed to deduct from employees' paychecks with interest. The Charging Party further moves that this reimbursement be done without impacting the pay of the affected employees.

The Authority has long held that the remedy for failure to comply with section 7115(a) properly includes a requirement that the Respondent reimburse a union for the dues it would have received but did not as a result of the unlawful conduct. *U.S. Department of the Treasury, U.S. Mint*, 35 FLRA 1095, 1097 (1990). Therefore, in agreement with the Charging Party, the remedy should include an order requiring that such reimbursement be made to the extent it has not already been done. *Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island*, 16 FLRA

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Counsel for the General Counsel did not submit a brief in support of its Motion for Summary Judgment and did not offer any explanation for its requested remedy or cite any case law regarding the violation or the requested remedy.

1124, 1127 (1984). With regard to the Charging Party's request that the reimbursement be done without impacting the pay of the affected employees, the standards governing the waiver of claims for the erroneous payment of pay and allowances to or on behalf of an employee, other than travel, transportation, or relocation payments, are set forth in 5 U.S.C. § 5584 and 4 C.F.R. Part 91. Under those standards, waiver may be granted if: (1) collection action would be against equity and good conscience and not in the best interests of the United States; (2) there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver. Moreover, only the Comptroller General, not the head of an agency, can waive claims for an erroneous payment exceeding \$500. 4 C.F.R. §91.4. Determinations as to the waiver of claims must be made on a case-by-case basis. 4 C.F.R. §91.5(c). See *National Federation of Federal Employees, Local 284 and Department of the Navy, Naval Air Technical Training Center, Lakehurst, New Jersey*, 29 FLRA 958, 962 (1987) and *National Federation of Federal Employees, Local 1380 and U.S. Department of the Navy, Naval Coastal Systems Center, Panama City, Florida*, 36 FLRA 725 (1990). Assuming the affected employees make a claim for waiver, I find no evidence that the standards are not met in this matter. I have no evidence before me indicating whether the amount of payment would or would not exceed \$500; a matter the parties should determine and pursue.

Accordingly, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment and issue the following Order:

#### **ORDER**

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Defense Commissary Agency, Midwest Region, San Antonio, Texas, shall:

1. Cease and desist from:

(a) Refusing to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by refusing to accept and honor valid written dues assignments from bargaining unit employees Karen McGinty, Cheryl Harper, Patricia Cruz, Irma Roth and Kathleen Dawoud, for the payment of regular and periodic dues to the National Association of Government Employees,

Local R14-23, the exclusive representative of the unit employees.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reimburse the exclusive representative, National Association of Government Employees, Local R14-23, in an amount equal to the regular and periodic dues it would have received from the pay of bargaining unit employees Karen McGinty, Cheryl Harper, Patricia Cruz, Irma Roth and Kathleen Dawoud, but did not receive as a result of the unlawful refusal to honor the employees' valid written dues assignments for such purpose.

(b) Commencing with the first pay period after the date of this Order, deduct regular and periodic dues from bargaining unit employees Karen McGinty, Cheryl Harper, Patricia Cruz, Irma Roth, Kathleen Dawoud and from any bargaining unit employee who completes a valid written dues assignment for such purpose and make an appropriate allotment of such dues to the exclusive representative, National Association of Government Employees, Local R14-23.

(c) Post at all facilities of the Defense Commissary Agency, Midwest Region, where bargaining unit employees represented by the National Association of Government Employees, Local R14-23 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, and shall be posted and maintained for 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) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas 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, DC, August 13, 2004.

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SUSAN E. JELEN  
Administrative Law Judge

Dated: August 13, 2004  
Washington, DC

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Defense Commissary Agency, Midwest Region, San Antonio, Texas, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** refuse to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by refusing to accept and honor valid written dues assignments from bargaining unit employees Karen McGinty, Cheryl Harper, Patricia Cruz, Irma Roth and Kathleen Dawoud, for the payment of regular and periodic dues to the National Association of Government Employees, Local R14-23, the exclusive representative of the unit employees.

**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 Federal Service Labor-Management Relations Statute.

**WE WILL** reimburse the exclusive representative, National Association of Government Employees, Local R14-23, in an amount equal to the regular and periodic dues it would have received from the pay of bargaining unit employees Karen McGinty, Cheryl Harper, Patricia Cruz, Irma Roth and Kathleen Dawoud, but did not receive as a result of the unlawful refusal to honor the employees' valid written dues assignments for such purpose.

**WE WILL,** commencing with the first pay period after the date of this Order, deduct regular and periodic dues from the pay of bargaining unit employees Karen McGinty, Cheryl Harper, Patricia Cruz, Irma Roth, Kathleen Dawoud and from any bargaining unit employee who completes a valid written dues assignment for such purpose and make an appropriate

allotment of such dues to the exclusive representative, National Association of Government Employees, Local R14-23.

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(Activity)

Date:

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.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, LB 107, Dallas, TX 75202-5093, and whose telephone number is: 214-767-0156.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION ON MOTION FOR SUMMARY JUDGMENT**, issued by Susan Jelen, Administrative Law Judge, in Case No. DA-CA-04-0239 were sent to the following parties:

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**CERTIFIED MAIL AND RETURN RECEIPT**

**CERTIFIED NOS:**

Anne McFearin

7000 1670 0000 1175

**4243**

Counsel for the General Counsel  
Dallas Regional Office  
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Keith Jones

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**4267**

President, NAGE, Local R14-23  
1263-F Wicker Avenue  
Alamogordo, NM 88310

Dated: August 13, 2004  
Washington, DC