67 FLRA No. 109

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
MARTINSBURG, WEST VIRGINIA
(Respondent)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL LODGE 1798
IAMAW, AFL-CIO
(Charging Party)

WA-CA-12-0593

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DECISION AND ORDER

May 19, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In the attached decision, the Federal Labor Relations Authority's (FLRA's) Chief Administrative Law Judge (Judge) found that the Respondent committed unfair labor practices (ULPs) under § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by denying an employee's request to telework five days per week while on 100% official time, after the employee had injured her ankle. However, the Judge denied the General Counsel's (GC's) request for a make-whole remedy and an electronic-notice posting. This case presents us with three substantive questions.

The first question is whether the Judge lacked jurisdiction to issue a decision. Because none of the authorities that the Respondent cites presents a jurisdictional bar, the answer is no.

The second question is whether the Judge erred in rejecting the GC's request, as a make-whole remedy, that he restore any leave that the employee used. Because Authority and National Labor Relations Board (NLRB) precedent supports granting such a remedy and permitting the details to be worked out in compliance proceedings, the answer is yes.

The third question is whether, contrary to the Judge, the Authority should order an electronic-notice-posting remedy. For the reasons discussed in *U.S. DOJ, Federal BOP, Federal Transfer Center, Oklahoma City, Oklahoma* (*BOP Oklahoma*),[1] the answer is yes.

II. Background and Judge's Decision

The GC issued a complaint alleging that the Respondent violated § 7116(a)(1) and (2) of the Statute by interfering with a bargaining-unit employee's right to act as a Union official and by discriminating against the employee for engaging in protected activity. Specifically, the complaint alleges that: (1) the employee is a Union official on 100% official time; (2) the employee broke her ankle and was "unable to bear weight on her right ankle or drive a car";[2] and (3) the Respondent subsequently refused the employee's request to telework five days per week, claiming that the use of official time while on telework is "illegal."[3]

When the Respondent failed to submit a timely answer to the complaint, the GC filed a motion for summary judgment. In its motion, the GC, citing Authority precedent, requested an order that would direct the Respondent to: (1) "[m]ake [the employee] whole by restoring any annual and sick leave that [the employee] was forced to use due to the [Respondent's] denial of her request to telework five days per week" (make-whole remedy); and (2) "[d]istribute [a] [n]otice [regarding the Respondent's ULP] electronically to all bargaining[-]unit employees employed at the [Respondent's facility]" (electronic-notice-posting remedy).[4]

Under § 2423.20(b) of the Authority's Regulations, which states that "failure to file an answer . . . shall constitute an admission,"[5] the Judge found that the Respondent's failure to file a timely answer admitted the complaint's allegations. Finding "no genuine issue of material fact in dispute,"[6] the Judge granted the GC's motion for summary judgment and concluded that the Respondent violated § 7116(a)(1) and (2) of the Statute as alleged.

But the Judge rejected the GC's proposed make-whole remedy. The Judge found that the complaint contained no allegation, and the remaining "record" lacked evidence, regarding any use of annual or sick

[1] 67 FLRA 221 (2014).
[2] Judge's Decision at 5.
[3] *Id.*
[4] Mot. for Summary Judgment at 4.
[5] 5 C.F.R. § 2423.20(b).
[6] Judge's Decision at 3.

leave.[7] Thus, the Judge determined that the Respondent had not admitted that the employee had used such leave. According to the Judge, that the employee could not bear weight on one ankle or drive a car did not support a conclusion that the Respondent "forced" the employee to use sick or annual leave.[8] The Judge found that injured federal employees come to work every day and that the employee could have used other "methodologies" to report for duty, such as "ride sharing, public transportation, carpool, a friend, or a spouse, or use crutches, a cane and walking cast, a wheelchair, or a knee cart."[9] The Judge also found that it was not unreasonable for the Respondent to expect the Union president on 100% official time to come to the office during the work week (for meetings and negotiations). And the Judge also "note[d]" that the "pleadings indicate[d]" that the Respondent was obligated only to negotiate regarding telework for union officials, not to allow union officials to telework five days per week or to grant telework any time it was requested.[10]

The Judge also rejected the GC's proposed notice-posting remedy. The Judge found that, under the Authority precedent existing at the time he made his decision, an electronic-notice posting was a "nontraditional remedy."[11] Although he credited evidence that the Respondent frequently uses email to communicate with employees, the Judge concluded that the Respondent's email use "does not establish that the use of electronic mail for posting a notice is reasonably necessary and effective to recreat[e] the conditions and relationships with which the [ULPs] interfered."[12] Instead, as a recommended remedy, the Judge directed the Respondent to post physical notices of its ULP violations in places where "notices to employees are customarily posted," such as on "bulletin boards."[13]

The GC filed exceptions to the Judge's recommended decision and order, and the Respondent filed a cross-exception and opposition to the GC's exceptions. The GC filed an opposition to the Respondent's cross-exception.

III. Analysis and Conclusions

A. The Judge did not lack jurisdiction.

In its cross-exception, the Respondent argues that the Judge lacked jurisdiction to consider the ULP violations in the complaint. Specifically, the Respondent claims that there is no statutory provision that allows union officials to telework while on official time, citing, as set forth below, Public Law 106-346 § 359 (§ 359), Agency Handbook 5011/5, Part 2, Chapter 3 (Agency Handbook), and § 7131(d) of the Statute. The Respondent claims that allegations contained in the complaint may be resolved only through the parties' negotiated grievance procedure. The Respondent also argues that the Judge lacked jurisdiction to consider the complaint because the parties' agreement "covers the matter at issue and the related bargaining obligation[,] which divests the FLRA of jurisdiction over this matter."[14]

As to the Respondent's first argument, the Authority has held that § 359 addresses the statutory basis for an agency to establish a telecommuting program for employees to perform "officially assigned duties at home or [an]other work site."[15] Moreover, the Agency Handbook states that "[e]mployees who meet the criteria for telework may participate in telework arrangements in accordance with applicable laws[] and collective[-]bargaining arrangements."[16] And § 7131(d) of the Statute states, in relevant part, that union representatives "shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest."[17]

Contrary to the Respondent's argument, nothing in the wording of § 359, the Agency Handbook, or § 7131(d) restricts the Judge's jurisdiction. Moreover, the Respondent's claim that no statutory provision exists addressing whether union officials may telework does not establish that the Judge lacked jurisdiction to consider the ULP complaint.

As for the Respondent's reliance on the "covered-by" doctrine, that doctrine applies as a defense to an alleged failure to satisfy a statutory bargaining obligation;[18] it does not support the Respondent's claim

[7] *Id.* at 8.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 7 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Florence, Colo.*, 59 FLRA 165 (2003)).
[12] *Id.* (citing *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149 (1996)).
[13] *Id.* at 9.
[14] Cross Exception at 3.
[15] *AFGE, Nat'l Council of HUD Locals 222, AFL-CIO*, 60 FLRA 311, 313. (2004) (quoting H.R. Conf. Rep. No. 106-940, § 359, at 151 (2000), *reprinted in* 2000 U.S.C.C.A.N. 1063, 1143).
[16] Cross Exception at 3.
[17] 5 U.S.C. § 7131(d).
[18] *See SSA, Balt., Md.*, 66 FLRA 569, 573 n.6 (2012) (*SSA, Balt.*); *SSA Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001).

that the Judge lacked jurisdiction over the ULP complaint at issue here. Moreover, to the extent that the Respondent now raises the "covered-by" doctrine as an affirmative defense, because there is no dispute that the Respondent failed to file a timely answer to the complaint or to demonstrate "good cause" for its failure to file such an answer,[19] the Respondent cannot raise an affirmative defense to the complaint in its cross-exception.[20]

Accordingly, we deny the Respondent's cross-exception.

B. The Judge erred in denying the "make-whole" remedy.

The GC argues that the Judge's recommended order is deficient because it fails to award the employee a make-whole remedy of restoring any leave that the employee used as result of the Respondent's ULPs.[21] Specifically, the GC contends that a make-whole remedy is a "traditional remedy" for discrimination cases and that, by failing to answer the complaint, the Respondent admitted that a make-whole remedy is appropriate.[22] Thus, according to the GC, the "only remaining issue" is the amount of leave that the employee used, and this issue should be resolved in compliance proceedings.[23]

The Authority has stated that "when an issue is properly raised as [a ULP] under [§] 7116 [of the Statute], nothing therein would prevent the Authority from remedying any violation found."[24] Moreover, the Authority has held that remedies for ULPs should, "like those under the [National Labor Relations Act], be 'designed to recreate the conditions and relationships that would have been had there been no [ULP].'"[25] The Authority has also stated that the purpose of ULP remedies is to restore, "as far as possible, the status quo that would have obtained" if the violation had not been committed.[26] Among other "traditional remedies," the Authority has recognized a "make-whole" remedy where there is "discrimination in connection with conditions of employment based on unlawful consideration of protected union activity."[27] Further, both the Authority[28] and the NLRB[29] have held that determining whether employees actually suffered a loss as a result of a ULP is a matter that may be resolved in compliance proceedings.

In this case, the Judge concluded that the Respondent violated § 7116(a)(1) and (2) of the Statute as alleged.[30] Despite this finding, the Judge rejected the GC's proposed make-whole remedy.[31] As stated previously, according to the Judge, because the complaint and the remaining "record" lacked an allegation or evidence regarding any use of annual or sick leave, the Respondent did not admit that any leave was used.[32] The Judge also found that the employee's injury did not support a conclusion that the Respondent "forced" the employee to use leave, because the employee could have used other "methodologies" to report for duty.[33] Further, the Judge determined that it was not unreasonable to expect the Union president on 100% official time to come to the office during the work week.[34] Finally, the Judge found that the "pleadings indicate" that the Respondent was obligated only to negotiate over telework for union officials, not to permit union officials to telework five days a week or to grant every telework request.[35]

However, as the Judge found that the Respondent committed a ULP, a make-whole remedy is appropriate under the circumstances of this case.[36] And any questions regarding whether the employee actually suffered a loss as a result of the violation can be resolved in compliance proceedings.[37]

Adopting the Judge's conclusion would wholly deny the employee potential make-whole relief. To the extent that the Judge concluded that the complaint and the remaining "record" lacked an allegation or evidence regarding any use of annual or sick leave,[38] or that the employee's injury should not have resulted in her using leave, such factual determinations as to the employee's

[19] 5 C.F.R. § 2423.20(b).
[20] *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 timely answer or without showing good cause for this failure).
[21] GC's Exceptions at 3-4.
[22] *Id.* at 4.
[23] *Id.* at 4-5.
[24] *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 355, 361 (2009) (*Davis-Monthan*).
[25] *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1021(1998) (*NOAA*) (quoting *U.S. DOJ, BOP, Safford, Ariz.*, 35 FLRA 431, 444-45 (1990)).
[26] *U.S. DOJ, Fed. BOP, FCI Danbury, Danbury, Conn.*, 55 FLRA 201, 205 (1999) (citations omitted).
[27] *NOAA*, 54 FLRA at 1021 (quoting *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 13 (1995)).
[28] *Davis-Monthan*, 64 FLRA at 361; *NOAA*, 54 FLRA at 1023; *DOD, Dependents Sch.*, 54 FLRA 259, 270 (1998) (*DOD*).
[29] *Enterprise Leasing Co.*, 359 NLRB No. 149, slip op. at 5 (2013) (*Enterprise*).
[30] Judge's Decision at 2.
[31] *Id.* at 8.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *See Davis-Monthan*, 64 FLRA at 361.
[37] *Id.*; *NOAA*, 54 FLRA at 1023; *DOD*, 54 FLRA at 270; *see Enterprise*, 359 NLRB No. 149, slip op. at 5 (2013).
[38] Judge's Decision at 8.

use of *any* leave are left for the compliance stage. And the Judge's conclusions that it was not unreasonable to expect the Union president on official time to come to the office during the work week, and that the "pleadings indicate[d]" that the Respondent was obligated only to *negotiate* regarding telework for union officials,[39] are inconsistent with his finding that the denial of telework violated the Statute. The finding of the violation necessarily implies that the Respondent could not require the employee to come in to the office or refuse to grant the employee's request to telework five days a week in the circumstances of this case. Accordingly, we leave for compliance proceedings the determination of any specified losses and other appropriate relief for the employee.

We note that in *AFGE, Local 3283*, the Authority rejected an administrative law judge's decision to deny a make-whole remedy for monetary loss.[40] In that decision, the Authority found that because the nature of the violation was solely that the respondent violated the Statute by failing to "advis[e]" the grievants, the respondent's violation "*could not have resulted in a loss of pay, allowances[,] or differentials*."[41] By contrast, here, the nature of the violation was that the Respondent discriminated against the employee by refusing her request to telework five days per week because she could not bear weight on one ankle or drive a car. This violation *could have resulted* in the employee using annual or sick leave. And whether she did so (and if so, how much) is an issue properly resolved through compliance proceedings.

Accordingly, we find that the Judge's denial of a make-whole remedy is deficient, and grant a make whole remedy, the details of which can be resolved through compliance proceedings.[42]

C. We direct an electronic-notice posting.

The GC next argues that the Judge erred in denying its request for an electronic-notice posting.[43] For the reasons set forth in detail in *BOP Oklahoma*, we hold that an electronic-notice posting is a traditional remedy, and order that remedy here.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Interfering with Janice Perry's right to act as an official of the Charging Party.

(b) Discriminating against Janice Perry because of her protected activity, namely, serving as an officer of the Charging Party.

(c) 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 action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities where bargaining-unit employees represented by the Charging Party are located, copies of the attached Notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Medical Center Director, U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Martinsburg, West Virginia, and shall be posted and maintained for sixty consecutive days in 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(b) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Washington Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

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[39] *Id.*
[40] 61 FLRA 426, 427-28 (2005).
[41] *Id.* at 428 (emphasis added).
[42] *See Davis-Monthan*, 64 FLRA at 361; *see also NOAA*, 54 FLRA at 1023; *DOD*, 54 FLRA at 270.
[43] GC's Exceptions at 6.

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 Veterans Affairs, Veterans Affairs Medical Center, Martinsburg, West Virginia, 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 interfere with the National Federation of Federal Employees, Local Lodge 1798's (the Union's) President's, Janice Perry's, right to act as a Union official by denying or imposing conditions upon her use of official time while teleworking.

WE WILL NOT discriminate against Janice Perry due to her status as a Union official by refusing to permit her to telework because she is a Union official.

WE WILL permit employees to use official time while teleworking.

WE WILL permit Union officials to telework, subject to negotiation.

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

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature) (Title)

This notice must remain posted for 60 consecutive days from the date of this 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, Washington Regional Office, Federal Labor Relations Authority, and whose address is: 1400 K Street, NW, Second Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.

Member Pizzella, dissenting:

After agreeing with my fellow Members in the disposition of eighty-three consecutive cases since becoming a Member of the Authority on November 12, 2013, I am disagreeing with my colleagues for the first time. I do not agree that the Chief Administrative Law Judge (Chief Judge) erred when he denied the General Counsel's request to award a make-whole remedy or that such a remedy is "appropriate"[1] under the embarrassing circumstances presented by this case.

After the Union president (who spends 100% of her work time performing Union duties on "official time") broke her ankle, she requested that she be permitted to work at home, performing all Union duties, on telework *five days every week*.[2] In response to her request, the Agency offered the Union president several alternatives.[3] As a final alternative, the Agency offered her the option to perform Union duties on telework from home *three days each week*[4] and to report to her duty location on the *other two days* in order to fulfill her Union obligations that could be performed only at the duty station,[5] such as attending "meetings and negotiations with management."[6]

The complaint alleges that the Respondent discriminated against the Union president for engaging in protected activity when it denied her request to telework all five days, every week.[7] In other words, the central issue in this case is whether the Agency acted reasonably when it denied the Union president's all-or-nothing requests and expected her to report to work *two days each week* to attend "meetings and negotiations with management located at the duty station."[8] But the Judge never had the opportunity to make that determination. Instead, the Agency "*fail[ed] to file a timely answer* to the complaint,"[9] and the Judge had no option but to find that the Agency "admit[ted]" that it violated the Federal Service Labor-Management Relations Statute (the Statute).[10] Put another way, a violation was established because the Agency "failed to file an answer . . . [in] blatant disregard . . . [of] its legal responsibilities."[11]

Now, the General Counsel argues that the Chief Judge erred when he failed to award a make-whole

[1] Majority at 6.
[2] Judge's Decision at 5
[3] *Id.*
[4] *Id.* at 5, 8.
[5] *Id.* at 8.
[6] *Id.*
[7] *Id.* at 5.
[8] *Id.* at 8.
[9] *Id.* at 7.
[10] *Id.*
[11] *Id.* at 6.

remedy (restoration of annual or sick leave that the Union president was "forced" to use).[12] Oddly, however, the Charging Party never "alleg[ed]," and the General Counsel presented absolutely "no evidence," that the Union president was "forced" to use any annual or sick leave as a result of the Agency's denial of the all-or-nothing requests.[13] As the Judge sensically noted, "[e]mployees who cannot drive or cannot bear weight on a single extremity report to work every day in the [f]ederal government," and the Union president "could have performed official time on telework three out of every five days, any decision by her to avoid the inconvenience of going to her duty station on the other two days was a matter of personal choice."[14] Under these awkward circumstances, it is inexplicable to me that the General Counsel would even request a make-whole remedy.

The majority concludes, however, that because the Judge "*found* that the Respondent committed [an unfair labor practice (ULP)], a make-whole remedy *is appropriate*."[15]

I do not agree with my colleagues in two respects.

First, the Judge never found that the Agency committed a ULP; he simply noted that "[b]y failing to file a timely answer" the Agency "admit[ted]" that it violated the Statute.[16] I fail to see how awarding the Union president restitution of leave (that was never alleged or proved to have been used), where the Agency's actions were seemingly reasonable and lawful, contributes to the effective conduct of public business.[17]

Second, I do not agree that our precedent establishes that a make-whole remedy is "appropriate," in all circumstances, whenever a violation is admitted or found. In *U.S. Department of the Air Force, Aerospace Maintenance & Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona*, my colleagues held (in a two-to-one ruling from which Member Beck dissented) only that the Judge "*was not barred* by § 7116 of the Statute *from considering* [individual relief] for [e]mployees [who had also filed Merit Systems Protection Board appeals]."[18] And, unlike the Union in this case, in both *U.S. Department of Commerce National Oceanic & Atmospheric Administration, National Ocean Service, Coast & Geodetic Survey Aeronautical Charting Division, Washington, D.C.*[19] and *DOD, Dependents Schools*,[20] the unions specifically asserted, and proved, actual losses in order to be awarded make-whole remedies.

Therefore, I do not agree that the Chief Judge erred by not awarding a make-whole remedy.

Thank you.

[12] Exceptions at 5-6; *see also* Judge's Decision at 8.
[13] Judge's Decision at 8.
[14] *Id*.
[15] Majority at 6 (emphases added).
[16] Judge's Decision at 7.
[17] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella) ("the filing of what could be considered frivolous grievances unwisely consumes federal resources, including: time, money, and human capital; serves to undermine 'the effective conduct of [government] business;' and completely fails to take into account the resulting costs to the taxpayers who fund agency operations and pay for the significant costs of union official time") (internal citations omitted).
[18] 64 FLRA 355, 361 (2009) (Member Beck dissenting) (emphases added).
[19] 54 FLRA 987, 1023 (1998) (union asserted that annual "leave was used").
[20] 54 FLRA 259, 261 (1998) (union asserted that employees "would have received hardship pay" but for agency's violation).

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
MARTINSBURG VETERANS AFFAIRS MEDICAL CENTER, MARTINSBURG, WEST VIRGINIA
Respondent

AND

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL LODGE 1798
IAMAW, AFL-CIO
Charging Party

Case No. WA-CA-12-0593

Ryan H. White
For the General Counsel

Arthur W. Hicks
For the Respondent

Janice V. Perry
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The General Counsel issued a complaint and notice of hearing is this case on December 18, 2012. After the Respondent failed to file and properly serve a timely answer to the complaint, the General Counsel filed and properly served a motion for summary judgment (MSJ) on January 31, 2013. Apparently, the General Counsel gave the Respondent notice of the summary judgment motion on January 29, 2013, and on January 30, 2013, the Respondent prepared a brief in opposition to the motion and telefaxed it, along with related documents to the Office of Administrative Law Judges (OALJ), on January 31, 2013. The Respondent's documents did not include a certificate of service. On February 1, 2013, the Respondent telefaxed to OALJ an additional brief in opposition to the motion dated February 2, 2013, which incorporated an email transmission previously sent to counsel for the General Counsel which included a "response to WA-CA-12-0593", dated January 29, 2013. Like the first brief, neither the "response" nor the second brief were served in accordance with 5 C.F.R. § 2429.27.

Because the Respondent presented no extraordinary circumstances in its response or briefs in opposition to the General Counsel's motion for summary judgment that justify waiving the time limit and averting the admissions made as a result of failing to file a timely answer, I find that the Respondent has not demonstrated good cause, and thus, the General Counsel is entitled to summary judgment pursuant to 5 C.F.R. §§ 2423.20(b) and 2423.27.

PROCEDURAL STANDARDS

Parties appearing before the Federal Labor Relations Authority (Authority), are charged with knowledge of all pertinent statutory and regulatory filing requirements. *U.S. Envtl. Prot. Agency, Envtl. Research Lab., Narragansett, R.I.*, 49 FLRA 33, 37 (1994). Section 2423.20(b) of the Authority's rules and regulations requires a respondent to file and serve its answer to the complaint within 20 days of the date of service of the complaint, but, in any event, prior to the start of the hearing. Should a respondent fail to file an answer within the required time, absent a showing of good cause, the failure to file an answer constitutes an admission of the allegations in the complaint.

STANDARDS FOR SUMMARY JUDGMENT

In considering motions for summary judgment submitted pursuant to § 2423.27 of the Authority's regulations, the standards to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of Veterans Affairs, VAMC, Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Upon review of the General Counsel's motion and the Respondent's oppositions, I have determined that summary judgment is appropriate in this case.

On December 18, 2012, the Regional Director of the Washington Region of the Authority issued a complaint and notice of hearing alleging that the Department of Veterans Affairs (Respondent), violated § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute), by interfering with Janice Perry's right to act as a union official and by discriminating against Perry for her protected activity.

The complaint, which was served on the Respondent by certified mail, specified that an answer was to be filed by January 14, 2013. The complaint also explained that absent a demonstration of good cause, a failure to file an answer would constitute an admission of the allegations in the complaint. The due date established by the complaint reflected the twenty days a respondent is afforded to file an answer along with five days added for service by mail as allowed by regulation and since the twenty-fifth day fell on a weekend, the following workday of January 14, 2013, was the appropriate due date under the Authority's regulations. Thus, a total of twenty-six days was provided by the date set forth in the

complaint. See 5 C.F.R. §§ 2423.20(b), 2429.21 and 2429.22.

A hearing was scheduled for March 7, 2013, and while the Respondent filed no answer or other pleading with the OALJ prior to the required date of January 14, 2013, it emailed a "response" to counsel for General Counsel on January 29, 2013, and it telefaxed two briefs to the OALJ in opposition to the General Counsel's motion for summary judgment on January 31, 2013, and February 1, 2013. None of the Respondent's pleadings were properly served with a certificate of service as required by 5 C.F.R. §2429.27.

However, the Respondent's failures to file a timely answer and to properly serve its pleadings are but two indications of its inability to comply with Authority regulations. 5 C.F.R. § 2429.23(a) mandates that an extension of time must be in writing and received not later than five days before the established time limit for filing. The Respondent made no such request prior to January 14, 2013. The Respondent was fifteen days past the established time for filing an answer when it submitted a "response" to the General Counsel on January 29, 2013, and even if the Respondent intended for this "response" to be its answer, the response was not filed with the OALJ; was not served upon all parties; and did not admit, deny, or explain each allegation of the complaint as required by 5 C.F.R. § 2423.20(b). Furthermore, the Respondent did not request a waiver under 5 C.F.R. § 2429.23(b), nor did it present any evidence of extraordinary circumstances that would justify a waiver of the time limit for filing an answer that had already passed.

On January 31, 2013, the General Counsel filed a motion for summary judgment, asserting that by virtue of failing to answer the complaint and notice of hearing by the required date, the Respondent admitted all of the allegations set forth therein, and thus, violated the Statute as alleged. On February 1, 2013, the Respondent telefaxed an opposition to the motion for summary judgment to OALJ in which it asserted that factual and legal disputes remained to be decided. It does not appear that this opposition was served upon the other parties as no certificate of service as required by Authority regulations was attached. While the opposition asserted that the "electronic responses" provided on January 29, 2013, and January 31, 2013, demonstrated a factual dispute over the General Counsel's allegation that no answer was filed, it offered no explanation for how responses submitted on January 29 and 31, satisfied the requirement that an answer be filed on January 14, 2013, nor did it demonstrate extraordinary circumstances that warranted a finding of good cause for waiving the time limit. Upon that issue, the pleading was silent.

As the Respondent failed to answer the allegations of the complaint on or before January 14, 2013, and has not shown good cause for its failure to file an answer within the time allotted by the Authority's regulations, the Respondent admits the allegations of the complaint pursuant to 5 C.F.R. § 2423.20(b). Accordingly, there is no genuine issue of material fact in dispute, and it is appropriate to resolve this case by summary judgment. Although the Respondent's opposition presented no justification for the failure to file a timely answer, it presented argument that genuine issues of material fact remained in dispute in the form of the "covered by" doctrine and the Authority's lack of jurisdiction over the matter. However, consideration of those issues is not appropriate absent a demonstration of good cause that negates the admissions imposed by operation of 5 C.F.R. § 2423.20(b). As the Respondent did not offer any explanation for its failure to provide a timely answer, based upon the existing record, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The unfair labor practice complaint and notice of hearing was issued under 5 U.S.C. §§ 7101-7135 (the Statute) and 5 C.F.R. Chapter XIV.

2. The Department of Veterans Affairs (Respondent), is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

3. The National Federation of Federal Employees, IAMAW, AFL-CIO (NFFE), is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining.

4. NFFE, Local Lodge 1798 (Charging Party), is an agent of NFFE for the purpose of representing employees of the Respondent at the Martinsburg Veterans Affairs Medical Center.

5. The Charging Party filed the charge with the Washington Regional Director on June 18, 2012.

6. A copy of the charge was served on the Respondent.

7. During the time period covered by the complaint, the persons listed below occupied the position opposite their name:

Anne Brown	Medical Center Director
Arthur Hicks	Chief of Labor Management Relations
Betty Veney	Human Resources Specialist

8. During the time period covered by the complaint, the persons named in paragraph 7 were supervisors and/or management officials under 5 U.S.C. § 7103(a)(10) and (11) at the Respondent.

9. During the time period covered by the complaint, the persons named in paragraph 7 were acting on behalf of the Respondent.

10. At all material times, Janice Perry was the President of the Charging Party.

11. At all material times, Perry was on 100% official time.

12. At all material times, the Respondent and the NFFE have been parties to a master labor agreement that covers employees in the bargaining unit described in paragraph 3.

13. On or about April 28, 2012, Perry broke her ankle.

14. As a result of the injury described in paragraph 13, Perry has been unable to bear weight on her right ankle or drive a car.

15. On or about May 4, 2012, Perry emailed Veney to request permission to telework five days per week while she recovered.

16. On or about May 4, 2012, Hicks replied to the email described in paragraph 15, stating that "Telework is for 'work' performed on behalf of the government."

17. On or about May 10, 2012, Brown told Perry, by telephone, that permitting a union official to telework while on official time was illegal per FLRA case law.

18. During the telephone conversation described in paragraph 17, Brown offered to permit Perry to telework three days per week, but only if she would perform the duties of her position of record rather than use official time while teleworking.

19. On or about June 7, 2012, Brown sent Perry a Memorandum of Understanding that would permit Perry to telework three days a week while on official time.

20. At all points thereafter, Respondent refused to permit Perry to telework five days per week while on official time.

21. By the conduct described in paragraphs 10-20, Respondent violated 5 U.S.C. § 7116(a)(1) by interfering with Perry's right to act as a union official.

22. By the conduct described in paragraphs 10-20, Respondent violated 5 U.S.C. § 7116(a)(1) and (2) by discriminating against Perry for her protected activity, to wit, acting as a union official.

DISCUSSION

In devoting its oppositions to the General Counsel's motion for summary judgment to arguing the existence of legal and factual disputes while ignoring the need to demonstrate good cause for its failure to file an answer within the required time, the Respondent placed the cart before the horse. Simply put, unless the Respondent can demonstrate good cause for not filing a timely answer, the admission provision of 5 C.F.R. § 2423.20(b), precludes it from disputing the allegations set forth in the complaint, including the assertions of paragraphs 21 and 22, which allege that it committed unfair labor practices in violation of 5 U.S.C. § 7116(a)(1) and (2).

Section 2423.20(b) of the Authority's regulations, 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. . . .

When an answer is not timely filed, there are no genuine issues of material fact remaining because the respondent has admitted that all of the allegations within the complaint are true. Thus, the allegations that the respondent violated the Statute are admitted and cannot be contested even if the respondent had reasonable arguments to the contrary. That is the consequence of failing to file an answer that denies the allegations. A respondent who fails to comply with the procedural requirements does not get to have that failure excused by simply arguing that there is a legitimate dispute over the substance of the allegations. *U.S. Dep't of Transp., FAA, Great Lakes Region, Des Plaines, Ill.*, 64 FLRA 1184 (2010) (*FAA Great Lakes*); *U.S. Dep't of Transp., FAA, Houston, Tex.*, 63 FLRA 34 (2008) (*FAA Houston*).

Under the Authority's regulations, failure to file a timely answer can only be excused by extraordinary circumstances and having a legitimate factual argument or potential valid defense is hardly extraordinary. A respondent without such a position typically resolves the unfair labor practice charge prior to a complaint being filed, so those with one or more substantive arguments about why they did not violate the Statute are more the norm than the extraordinary. Thus, the Respondent's arguments regarding the "covered by" doctrine and jurisdiction do not present the extraordinary circumstances necessary to establish good cause for not applying the admissions imposed by operation of 5 C.F.R. § 2423.20(b) even when they have more merit than the case at bar.

In this case, the Respondent failed to file an answer and then failed to offer any justification for the failure, merely suggesting that the "response" sent to the General Counsel on January 29, 2013, should suffice for the answer that was due on January 14, 2013. To appreciate the blatant disregard this shows for its legal responsibilities under the Statute, one must understand and appreciate that a typical answer to an unfair labor practice complaint is a two or three page document containing little more than fifteen to twenty-five one word declarations of admit or deny. An answer is not a legal treatise, memorandum or brief, and while it can offer explanation when appropriate, none is required. A respondent does not have to make legal arguments or explain legal theories within an answer, one merely has to indicate if the allegation is admitted or denied. 5 C.F.R. § 2423.20(b). Thus, it is difficult to comprehend how a Respondent could find such a task so onerous that it simply could not be done within the timeframe prescribed when this particular complaint consisted of twenty-two allegations set forth on two typewritten pages.

Extraordinary circumstance constitutes an exacting standard that others failed to meet with excuses far superior to the nonexistent justification present in this case. While the unavailability of a representative for the entire period during which the pleading was due as a result of family medical issues was found to be sufficient to establish good cause, *U.S. Dep't of Housing & Urban Dev.*, 32 FLRA 1261 (1988), extended absence from the workplace for only a portion of such a period has been rejected in multiple cases. *U.S. Dep't of Veterans Affairs Med. Ctr., Kansas City, Mo.*, 52 FLRA 282 (1996); *AFSCME, Local 3870*, 50 FLRA 445 (1995); *Internal Revenue Serv., Indianapolis Dist.*, 32 FLRA 1235 (1988). Likewise, service upon a different representative for the agency did not provide good cause, nor did misplacing a properly served complaint within the office after receipt. *FAA Great Lakes*, 64 FLRA at 1184; *FAA Houston*, 63 FLRA at 34. In short, good cause is difficult to establish but it certainly cannot be established without making an effort to do so, and nothing was presented in this case to merit a waiver under 5 C.F.R. § 2429.23(b).

By failing to file a timely answer to the complaint and not showing good cause for the failure, the Respondent admits that it interfered with Janice Perry's right to act as a union official and discriminated against her for her protected activity and in doing so, violated § 7114 (a)(1) and (2) of the Statute.

As a remedy for the Respondent's violation, the General Counsel submitted a proposed order that requires the Respondent to electronically distribute the Notice of the violation to all bargaining unit employees at the Martinsburg Veterans Affairs Medical Center and make Janice Perry whole by restoring any annual and sick leave that Janice Perry was forced to use due to the Agency's denial of her request to telework five days per week. For the reasons outlined below, those proposals have been rejected and do not appear in the Order that is part of this recommended decision.

The Authority has determined that the posting of a notice on an electronic bulletin board is a nontraditional remedy. *U.S. Dep't of Justice, FBOP, FCI, Florence, Colo.*, 59 FLRA 165 (2003). If there are no legal or public policy objections to a proposed nontraditional remedy, it must be reasonably necessary and effective to recreating the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violations. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*Warren AFB*). In this case, the complaint offered no allegations about the legality, necessity or efficacy of electronic distribution of the notice of violation, thus, the Respondent made no admissions upon such matters. Although the General Counsel presented an affidavit from Janice Perry (G.C. Ex. 3), attesting to the fact that the Respondent frequently uses electronic mail to communicate with employees, that does not establish that the use of electronic mail for posting a notice is reasonably necessary and effective to recreating the conditions and relationships with which the unfair labor practice interfered in accordance with *Warren AFB.* Thus, ordering an electronic distribution of the Notice is not appropriate under current Authority guidance. *NAATS, Macon AFSS, Macon, Ga.*, 59 FLRA 261, 262 (2003).

The General Counsel also proposed that the order require the Respondent to restore any annual and sick leave that Janice Perry was "forced" to use due to the Agency's denial of her request to telework five days per week. However, there are multiple reasons for why this remedy is not appropriate given the facts and the General Counsel's election to seek resolution via a motion for summary judgment pursuant to 5 C.F.R. §§ 2423.20(b)

and 2423.27. First, the complaint contains no allegations about the use of annual leave or sick leave, thus, the Respondent has made no admissions upon such matters. The record contains no evidence that any annual or sick leave was used, and even if it was, there is certainly no evidence that its use was a function of "force" imposed by the Respondent, nor is there any admission made by the application of 5 C.F.R. § 2423.20(b) to such an allegation. At best, paragraph 14 of the complaint asserts that Perry was unable to bear weight on her right ankle or drive a car, and while the Respondent admitted those facts by virtue of its failure to file an answer, those facts do no give rise to the conclusion that the Respondent "forced" Perry to use annual or sick leave.

Employees who cannot drive or cannot bear weight on a single extremity report to work every day in the Federal government. Whether they get there using ride sharing, public transportation, carpool, a friend, or a spouse, or use crutches, a cane and walking cast, a wheelchair, or a knee cart, they still report for duty. Thus, an employee who elects to use annual or sick leave to avoid the inconvenience of such methodologies is making a choice and they are not "forced" into using leave by virtue of not having the ability to telework. That is a choice they make to avoid the inconvenience of reporting for work at their regular duty station. In this regard, I note that the pleadings indicate that the only obligation the Respondent had with respect to telework for union officials was to engage in local negotiation upon the matter, and they were not obligated to allow union officials to telework five days a week or to permit telework anytime it was requested. As paragraph 19 of the complaint indicates that Perry could have performed official time on telework three out of every five days, any decision by her to avoid the inconvenience of going to her duty station on the other two days was a matter of personal choice and not force. It was not unreasonable for the Respondent to expect a Union president, whose use of 100% official time includes meetings and negotiations with management located at the duty station to report there for some portion of each workweek in order to accomplish those activities.

Finally, the General Counsel proposed that the order require the Respondent to provide a notice of compliance at fifteen and sixty days after receipt. However, 5 C.F.R § 2423.41(e) reads as follows:

> After the Authority issues an order, the Respondent shall, within the time specified in the order, provide to the appropriate Regional Director ***a report*** regarding what compliance actions have been taken. (Emphasis added).

As the regulation in question calls for "***a report*** ", which is singular, the General Counsel's request for an order requiring two reports is rejected and a single report will be required thirty days from the date of the order.

CONCLUSION

For the reasons set forth in this decision, 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(a)(7) of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, Martinsburg Veterans Affairs Medical Center, Martinsburg, West Virginia, shall:

1. Cease and desist from:

(a) Interfering with Janice Perry's right to act as a Union official of the National Federation of Federal Employees, Local Lodge 1798 (NFFE).

(b) Discriminating against Janice Perry because of her protected activity, namely, serving as an officer of the NFFE, Local Lodge 1798.

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

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

(a) Post at the Department of Veterans Affairs, Martinsburg Veterans Affairs Medical Center, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. The Notices shall be signed by the Medical Center 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.

(b) Pursuant to § 2423.41(e) of the Authority's regulations, notify the Regional Director, Washington Regional Office, 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., February 20, 2013

CHARLES R. CENTER
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, Martinsburg Veterans Affairs Medical Center, Martinsburg, West Virginia, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with the National Federation of Federal Employees, Local Lodge 1798, President Janice Perry's right to act as a union official by denying or imposing conditions upon her use of official time while teleworking.

WE WILL NOT discriminate against Janice Perry due to her status as a union official by refusing to permit her to telework because she is a union official.

WE WILL permit employees to use official time while teleworking.

WE WILL permit union officials to telework, subject to negotiation.

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 Federal Service Labor-Management Relations Statute.

_____
(Agency/Activity)

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.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, and whose address is: 1400 K Street, N.W., 2nd Floor, Washington, D.C. 20424, and whose telephone number is: 202-357-6029 ext. 6018.