



FEDERAL LABOR RELATIONS AUTHORITY OALJ 18-01
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
VETERANS AFFAIRS REGIONAL OFFICE
ST. PETERSBURG, FLORIDA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1594

CHARGING PARTY

Case Nos. AT-CA-17-0137
AT-CA-17-0211

Carrie L. McCready
For the General Counsel

Kristin Langwell
For the Respondent

Valorie Reilly
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

A Motion for Summary Judgment filed under § 2423.27 of the Authority's Rules and Regulations is governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA 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. Fed. R. Civ. P. 56. In the case at bar, the General Counsel filed a Motion for Summary Judgment asserting that there are no genuine issues of material fact in dispute. The Respondent believes that there "could" be a genuine issue of fact. After reviewing the motion and other pleadings, the undersigned finds that summary judgment is appropriate as the only issues to be decided are questions of law.

STATEMENT OF THE CASE

This proceeding was filed pursuant to the Federal Service Labor-Management Relations Statute (Statute) and Section 2423.20(a) of the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA).

On December 2, 2016, the American Federation of Government Employees, Local 1594 (Union) filed a charge against the Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida (Agency/Respondent/VA) alleging that the Agency's failure to respond to the Union's request for information concerning Rating Veterans Service Representative (RSVR) resulting in a violation of Section 7116(a)(2) and (8) of the Statute. The Union filed a second charge on January 5, 2017, alleging another violation of the Statute. Both allegations entailed information requests regarding two selection panels. Following an investigation of the charges, a Consolidated Complaint and Notice of Hearing was issued by the Atlanta Regional Director on April 25, 2017, alleging that the Agency violated Sections 7114(b)(4) and 7116(a)(1), (5) and (8) of the Statute. The Agency filed its Answer to the Complaint on May 22, 2017, in which it admitted some of the allegations, but denied violating the Statute.

The General Counsel (GC) filed a Motion for Summary Judgment on August 18, 2017. The Agency filed a Response to the General Counsel's MSJ on September 5, 2017, the day of the telephonic Pre-hearing Conference Call. Subsequently, I issued an Order Indefinitely Postponing Hearing on the same date, to allow me to address the GC's motion for summary judgement.

Based upon the entire record, the undersigned finds that the Agency violated Sections 7114(b)(4) and 7116(a)(1), (5) and (8) of the Statute when it failed to respond to the Union's information requests of September 12, 2016, October 21, 2016, and November 29, 2016, with respect to the Rating Veterans Service Representative Vacancy Announcement 317-16-085-LP-R41633418-BU and respectively, the Rating Quality Review Specialist Vacancy Announcement 317-16-283-LP-RU-1704415-BU. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. It is undisputed the parties are subject to the terms of Article 23, Section 16 of the parties' Master Agreement (MA) which sets forth the procedure for local union audits of competitive actions. (GC Ex.7; Agency Response to MSJ, para. 1);
2. The Union filed a charge against the Agency on December 2, 2016. (GC Ex. 1(a); Agency Response);
3. The Union filed a second charge against the Agency on January 5, 2017. (GC Ex. 1(b); Agency's Response);

4. The General Counsel issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on April 25, 2017. (GC Ex. 1(c));
5. The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees at the Agency. (GC Ex. 1(d); Answer at ¶4);
6. The Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida, is a Respondent and an Agency under 5 U.S.C. § 7103(a)(3). (GC Ex. 1(d), Answer at ¶3);
7. The Union made an Information Request on September 12, 2016. (GC Ex. 2);
8. The Union made an Information Request on October 14, 2016. (GC Ex. 2);
9. The Union made an Information Request on October 21, 2016. (GC Ex. 4);
10. It is undisputed that the Union made two requests for information regarding the audit promotion packets referenced in Findings 2 and 3 above. (Agency Response);
11. The parties' MA states that upon submitting a timely request to audit a promotion packet, the Regional Office is required to ". . . make the pertinent records from the package available to the local union auditor within seven working days of the receipt of the audit request. An auditor shall treat information confidentially and review it in [Human Resources Management Services] in the presence of a Department official." (Agency Ex. 1, Article 23, Section 16(D), p. 114);
12. The parties engaged in a series of email exchanges faithfully and diligently seeking to determine a mutually convenient time and place to comply with Article 23, Section (16D) of the parties' MA. (GC's Ex. 5; Agency Ex. 2);
13. As of September 5, 2017, the audits requested by the Union of the Agency had not taken place. (GC's Ex. 7, Affidavit of Valorie Reilly); and
14. As of September 5, 2017, the Agency had not specifically responded to the Union's requests for information. (Agency's Response, para. 5; GC Ex. 7, Affidavit of Valorie Reilly).

POSITIONS OF THE PARTIES

Agency

The Veterans Administration, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida, artfully argues the belief that requiring the Veterans Administration Regional Office to provide copies of information requested by the Union moots the negotiated process of an in-person inspection audit. Further, it is argued that this procedure of providing copies of information requested essentially allows the Union to arbitrarily re-negotiate certain terms of the parties' Master Agreement without the consent of or the consideration of the Department of Veterans Affairs. (R. Response to GC MSJ, ¶6). Essentially the Agency argues that entering into timely communications, within seven working days of the receipt of an audit request, to find a mutually agreeable date, time and location, in the presence of a Veterans Administration official, complies with the terms of the parties' Master Agreement. The Agency does not refute that the audits requested by the Union have not yet taken place. (*Id.* at ¶5). The Agency also argues that "the Agency has engaged in good faith discussions with the Union on the substance of the requests." (*Id.*). The Agency does not refute that "to date, the Agency has not responded to the RFI's specifically . . ." (*Id.*). (i.e., the Union's requests for information, but that "The records made available to the Union encompassed the documents requested in their RFI's such as panel rankings, applications, etc." (*Id.* at ¶4)). The Respondent does not cite law in support of their good faith arguments.

General Counsel

The General Counsel, on behalf of the Union, asserts that, pursuant to 5 U.S.C. § 7114(b)(4), an agency shall, upon request, furnish the exclusive representative, data which is normally maintained in the regular course of business. Provision of data must not be prohibited by law and reasonably available and necessary for a full and proper discussion, understanding, and negotiation of the subject matter within the scope of collective bargaining. Furthermore, such information cannot constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining. Further, they argue that the Authority has found that, at a minimum, an agency has a duty to respond to a union's information request even if the union is not entitled to the data (citing *Soc. Sec. Admin., Balt., Md.*, 60 FLRA 674, 679 (2005) (*SSA, Balt.*)), *Dep't of HHS, SSA, N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1149-50 (1997) (*SSA, New York*), *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 978 (2010). It is also asserted that the failure to respond to an information request in a timely manner is an independent violation of § 7116(a)(1), (5) and (8) of the Statute (citing *SSA, Balt.*, 60 FLRA at 679). They denote the difference between failing to respond to the information request and a failure to provide the requested information (citing *SSA, New York*, 52 FLRA at 1148-50), and the duty to respond being independent of the union's right to information, per the Authority's decision in *SSA, Balt.*, 60 FLRA at 679.

The General Counsel, in arguing the applicable facts herein, refutes the claim in the Answer to the Complaint that the Agency's response to the Union's contractual request to audit the vacancy announcements was sufficient to constitute a response under § 7114 of the Statute, particularly noting that the Agency has never responded to the Union's requests for information. In support thereof, they cite the Authority's decision in *U.S. DOL, Emp't Standards Admin., Wage & Hour Div.*, 21 FLRA 484, 494 (1986) with a finding that a union did not waive its right to bargain impact and implementation by abandoning such a proposal at the table, noting "[t]his distinction between statutory rights and contractual rights has long been recognized in the field of labor relations" In addition, arguing that a union's waiver of a statutory right must be clear and unmistakable (citing *U.S. Dep't of the Navy, U.S. Marine Corps (MPL), Wash., D.C.*, 38 FLRA 632, 636 (1990)).

The General Counsel references Article 23, Section 16 of the parties' Master Agreement regarding the procedure agreed upon between the parties for local union audits of competitive actions and the distinction between the contractual procedure and Section 7114(b)(4) of the Statute denying any clear and unmistakable evidence of the union waiving its right to request information about competitive actions. Claiming the Union's right to exercise both the contractual right to audit and its statutory right to request information, the General Counsel argues the Agency failed in its duty to respond to either type of request, resulting in a violation of Section 7116(a)(1), (5) and (8) of the Statute.

CONCLUSIONS OF LAW

1. The American Federation of Government Employees (AFGE) is a labor union organization within the meaning of Section 7103(a)(4) of the Statute;
2. The Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida is an agency within the meaning of Section 7103(a)(3) of the Statute;
3. The Agency's failure to provide information and to conduct an audit of a Rating Veterans Service Representative vacancy, as requested by the Union on September 12, 2016 and October 14, 2016 is a violation of Section 7114(b)(4) of the Statute;
4. The Agency's failure to provide information and to conduct an audit of a Rating quality Review Specialist vacancy, as requested by the Union on October 21, 2016 and November 29, 2016 is a violation of Section 7114(b)(4) of the Statute;
5. The Agency's timely response, in attempting to arrange a mutually convenient time and location to conduct the audits, and provide requested information was an initial good faith effort to comply with its' statutory and contractual obligation to respond to the Union's audit requests; however, its' failure to meet its' legal responsibilities for such requests in over one year are indefensible;

6. The Agency's argument that the records, that would have been available had the parties ever met, would suffice to meet its' contractual and statutory obligation to provide information requested lacks merit;
7. It is the Agency that possesses the records and information lawfully requested by the Union; further, it is the Agency, not the Union, that has a legal obligation to respond upon request; the Union cannot unilaterally arrange a mutually convenient date and time to meet; the parties failure to meet in over one year, regarding information and records within the exclusive control of the Agency, is not a clear and unmistakable waiver of the Union's earlier requests; in fact, the Union's filing a complaint against the Agency for the alleged failures ought to be recognized by the Agency of its continuing obligation to seek to meet its statutory and contractual obligation to meet and provide information; hence, the Agency's failure to seek opportunities to meet its legal obligations refutes any good faith defense;
8. The Agency's failure to respond to the Union's requests for information dated September 12, 2016, October 14, 2016, October 21, 2016 and November 29, 2016 are violations of Section 7116(a)(1), (5) and (8) of the Statute.
9. The Agency's continuing failure to communicate with the Union to seek mutually convenient opportunities to arrange a date and location to comply with the Union's lawful requests for information defeat the Agency's claim of a good faith defense.

CONCLUSION

Based upon the record, the undersigned finds that the Agency has engaged in unfair labor practices in violation of Sections 7114(b)(4) and 7116(a)(1), (5) and (8) of the Statute.

REMEDY

To remedy the Respondent's violation of the Statute, the Agency must cease and desist from:

1. failing and refusing to respond to the Union's requests for information submitted on September 12, 2016 and October 14, 2016 with respect to Rating Veterans Service Representative Vacancy Announcement 317-16-085-LP-R41633418-BU;
2. failing and refusing to respond to the Union's requests for information submitted on October 21, 2016 and November 29, 2016 with respect to Rating Quality Review Specialist Vacancy Announcement 317-16-283-LP-RU-1704415-BU; and

3. in any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute;

In addition, the following affirmative actions shall be taken to effectuate the purposes and policies of the Statutes:

1. Respond to the information requests referenced herein;
2. Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, 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;
3. Disseminate a copy of the Notice signed by the Director through the Agency's email system to all bargaining unit employees; and
4. Pursuant to Section 2423.41(e) of the Rules and Regulations of the Authority, provide the Regional Director, Atlanta Region, in writing, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Accordingly, 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 Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida, shall:

1. Cease and desist from:
 - a. failing and refusing to respond to the American Federation of Government Employees, Local 1594 (Union) requests for information submitted on September 12, 2016 and October 14, 2016 with respect to Rating Veterans Service Representative Vacancy Announcement 317-16-085-LP-R41633418-BU;

- b. failing and refusing to respond to the Union's requests for information submitted on October 21, 2016 and November 29, 2016 with respect to Rating Quality Review Specialist Vacancy Announcement 317-16-283-LP-RU-1704415-BU; and
 - 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 actions in order to effectuate the purposes and policies of the Statute:
- a. Respond to the information requests referenced herein;
 - b. Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, 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. Disseminate a copy of the Notice signed by the Director through the Agency's email system to all bargaining unit employees.
 - d. Pursuant to Section 2423.41(e) of the Rules and Regulations of the Authority, provide the Regional Director, Atlanta Region, in writing, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., October 4, 2017



DAVID L. WELCH
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to respond to information requests concerning position vacancies submitted pursuant to section 7114 of the Statute by the American Federation of Government Employees, Local 1594.

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

(Respondent/Agency)

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

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 any of its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.