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

OALJ 17-17

U.S. DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS REGIONAL OFFICE
CHICAGO, ILLINOIS
RESPONDENT

AND

AMERICAN FEDERATON OF GOVERNMENT EMPLOYEES, LOCAL 1765, AFL-CIO
CHARGING PARTY

Case No. CH-CA-17-0015

Alicia E. Weber
For the General Counsel

Timothy B. Morgan
For the Respondent

Sandra J. Davis
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Respondent seeks permission to file an untimely answer to the Complaint in this case, despite its failure to offer anything more than a perfunctory explanation for its tardiness and despite its misrepresentation of the nature of its request. The General Counsel objects to any extension of the time to file an answer and has filed a Motion for Summary Judgment. The statement by Respondent's counsel that he has other pending cases does not constitute "extraordinary circumstances," as defined by the Authority. Therefore, the Respondent has not demonstrated good cause to excuse its late answer, and it is deemed to have admitted the allegations of the Complaint. As such, the General Counsel is entitled to Summary Judgment in its favor.

STATEMENT OF THE CASE

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

On March 20, 2017,[1] the Regional Director of the FLRA's Chicago Region issued a Complaint and Notice of Hearing on behalf of the General Counsel (GC), alleging that the U.S. Department of Veterans Affairs, Veterans Affairs Regional Office, Chicago, Illinois (the Respondent or Agency), violated § 7116(a)(1) and (5) of the Statute by refusing to negotiate with the American Federation of Government Employees, Local 1765, AFL-CIO (the Charging Party or Union) over the procedure for marking bargaining unit employees absent without leave (AWOL). The Complaint advised the Agency that an answer was due no later than April 17, and that a failure to file an answer or respond to any allegation would constitute an admission of those allegations, absent a showing of good cause.

The date for filing Respondent's Answer passed without a filing. On April 20, the Respondent filed a document titled "Agreed Motion to Extend Response Time" and asserted that the parties had agreed to extend the deadline for filing an answer to May 12, 2017. Respondent asserted that the parties were negotiating to settle the case, that Respondent's counsel had three other cases pending, and that "the parties" jointly requested the extension of time. On April 21, the General Counsel filed its opposition to the Respondent's motion, citing several violations of the Regulations and arguing that the Respondent had not demonstrated good cause to extend the time for filing an answer. The GC noted that, contrary to the Regulations, the motion was filed after the April 17 deadline; it misrepresented the position of both the GC and the Union; and Respondent failed to serve the motion on the GC's Chicago Region. The GC filed a Motion for Summary Judgment on April 24, arguing that the Respondent's failure to file a timely answer meant that the allegations in the Complaint were deemed to be admitted; therefore, summary judgment was appropriate. Respondent filed its Answer on April 27, denying that it had refused to bargain with the Union. It has not filed a pleading responding to or opposing the Motion for Summary Judgment.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

Section 2423.20(b) of the Authority's 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

[1] Unless otherwise noted, all dates are in 2017.

> allegation of the complaint. . . . Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission. . . .

The Regulations also explain how to calculate filing deadlines and how to request extensions of time for filing answers and other required documents. *See, e.g.*, §§ 2429.21 through 2429.23. Section 2429.23 provides, in pertinent part:

> (a) [T]he Authority or General Counsel, or their designated representatives, as appropriate, may extend any time limit provided in this subchapter for good cause shown . . . . Requests for extensions of time shall be in writing and received by the appropriate official not later than five (5) days before the established time limit for filing, shall state the position of the other parties on the request for extension, and shall be served on the other parties.
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> (b) [T]he Authority or General Counsel, or their designated representatives, as appropriate, may waive any expired time limit in this subchapter in extraordinary circumstances. Request for a waiver of time limits shall state the position of the other parties and shall be served on the other parties.

In the text of the Complaint in this case, the Regional Director provided the Respondent with detailed instructions concerning the requirements for its Answer, including the date on which the Answer was due, the persons to whom it must be sent, and references to the applicable regulations. Respondent does not dispute that its Answer was due on April 17 and that it was filed on April 27.[2] Thus the record clearly establishes that the Answer was untimely. The issue is whether extraordinary circumstances exist to justify a waiver of the expired time limit, to accept the untimely Answer, and to allow Respondent to contest the alleged unfair labor practice.

As the GC has noted, the Agreed Motion to Extend Response Time is faulty in many respects. Since the motion was filed three days after the due date for the Answer, it should have been labelled as a motion to waive the expired time limit under 5 C.F.R. § 2429.23(b), rather than as a motion to extend the time limit under § 2429.23(a). Extensions are granted "for good cause," while waivers are granted only "in extraordinary circumstances." It was already too late to grant an extension when Respondent filed its motion, and Respondent compounded its problem by failing to serve the GC's counsel at the Chicago Region and by inaccurately asserting that the GC and Union had agreed to an extension. The GC attached an affidavit from the Union's president, asserting that while Respondent's counsel notified her that he would be requesting an extension of time, the Union did not agree to that extension. The Respondent has not rebutted that assertion. Moreover, it is clear that Counsel

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[2] The date on page 2 of the Answer (May 27) conflicts with the date on the Certificate of Service (April 27). The date on page 2 is clearly a typographical error, as the Answer was received in this office on May 2. The correct date on which the Answer was filed is April 27.

for the GC was never even contacted regarding a request for extending the time to file an answer. Thus the Respondent's assertion that "the parties" had agreed to the extension is simply false. Agreed Motion to Extend Response Time at 1, 2. In light of these facts, I will treat the pleading as a motion to waive the expired time limit for filing an answer.

Even if the Respondent had met the procedural requirements for such a motion, it fails on the merits. It has not even begun to demonstrate that there were extraordinary circumstances justifying a waiver of the time limit. Instead, it asserts that the parties have been negotiating a settlement of the case and that Counsel has three other cases pending. Both the Union and the GC deny that there have been settlement negotiations, but such discussions would not constitute "extraordinary circumstances" in any case. Such discussions are routine, and should be expected in every case; they do not warrant a delay in the submission of an answer. As for Counsel's work load, there is no evidence that three pending cases pose an extraordinary burden, and no evidence that Counsel, along with other lawyers for the Respondent, could not have filed a timely answer. Respondent has not met its burden of showing extraordinary circumstances, and its untimely Answer should not be accepted. *See, e.g., U.S. Dep't of VA, VA Med. Ctr., Martinsburg, W.Va.*, 66 FLRA 776 (2012); *IRS, Indianapolis Dist.*, 32 FLRA 1235 (1988).

In accordance with § 2423.20(b) of the Regulations, the failure to file an answer to a complaint constitutes an admission of each of the allegations of the complaint. Accordingly, there are no disputed factual issues in this matter, and the case can be resolved by summary judgment. Based on the existing record, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The Union filed the charge in this proceeding on October 13, 2016, and a copy was served on the Respondent.

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

3. The American Federation 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 collective bargaining representative of a nationwide unit of employees of the U.S. Department of Veterans Affairs, Veterans Affairs Regional Office, Chicago, Illinois, which includes employees of the Respondent (the unit).

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

5. On or about August 11, 2016, the Union requested that the Respondent negotiate with the Union over the procedure for marking bargaining unit employees absent without leave.

6. The subject described in paragraph 5 is a mandatory subject of bargaining under the Statute.

7. Since on or about September 21, 2016, the Respondent has refused to negotiate with the Union over the subject described in paragraph 5.

8. By the conduct described in paragraph 7, the Respondent has violated § 7116(a)(1) and (5) of the Statute.

CONCLUSIONS OF LAW

By virtue of its failure to answer the Complaint, the Respondent has admitted that it refused to bargain over a mandatory subject (the procedure for marking bargaining unit employees absent without leave), and that in doing so it violated its duty to bargain with the Union pursuant to § 7116(a)(1) and (5) of the Statute. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999).

In order to remedy the Respondent's unfair labor practice, the General Counsel seeks to require the Agency to bargain with the Union over the procedure for marking bargaining employees AWOL. Further, if the Respondent seeks to change this procedure in the future, the GC insists that Respondent be required to notify the Union of the proposed change and negotiate to the extent required by the Statute. I agree. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Det. Ctr., Brooklyn, N.Y.*, 69 FLRA 44, 46 (2015); *U.S. Dep't of Labor, Office of the Assistant Sec'y for Admin. & Mgmt., Dallas, Tex.*, 65 FLRA 677, 681 (2011). Respondent shall also post the attached Notice to Employees at its facilities where unit employees represented by the Union are located and disseminate a copy of the Notice through its email system to those same employees.

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 Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Veterans Affairs, Veterans Affairs Regional Office, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing to bargain with the American Federation of Government Employees, Local 1765, AFL-CIO (the Union) regarding the procedure for marking bargaining unit employees AWOL.

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

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

(a) Bargain in good faith with the Union regarding the procedure for marking bargaining unit employees AWOL.

(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) In addition to physical posting of paper notices, the Notice shall be distributed electronically, on the same day, as the physical posting, such as by email, posting on an intranet or internet site, or other electronic means.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago 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., May 25, 2017

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 U.S. Department of Veterans Affairs, Veterans Affairs Regional Office, Chicago, Illinois 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 refuse to bargain with the American Federation of Government Employees, Local 1765, AFL-CIO (the Union), the exclusive representative of a unit of our employees, over the procedures for marking employees AWOL.

WE WILL NOT in any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL, upon request, bargain with the Union over the procedures for marking employees AWOL.

_____
(Agency/Activity)

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 its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, Illinois 60604, and whose telephone number is: (312) 886-3465.