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

OALJ 23-08

DEPARTMENT OF VETERANS AFFAIRS VA NORTHERN CALIFORNIA HEALTH CARE SYSTEM MATHER, CALIFORNIA RESPONDENT AND MARCUS WALKER, AN INDIVIDUAL CHARGING PARTY	Case No. SF-CA-22-0241

Cara Krueger
For the General Counsel

Jeffrey Stacey
Mickel-Ange Eveillard
For the Respondent

Marcus Walker
For the Charging Party

Before: LEISHA A. SELF
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

In this case, the Respondent has failed to file a timely answer to the Complaint. As a result, the General Counsel filed a Motion for Summary Judgment alleging that the Respondent has admitted the allegations of the Complaint and therefore it is entitled to judgment as a matter of law. The Respondent filed a Response to the Motion for Summary Judgment, arguing that this case is not properly before the Authority as the Union sought to withdraw the Charge that preceded the Complaint. The Response alternatively argues that it had good cause for not answering because it made its best efforts to answer but unintentionally erred by emailing a position statement to a charge to the General Counsel rather than filing and serving an answer to the Complaint.

As to the first point, any intent by the Union to withdraw the Charge could not so operate as the Union is not the Charging Party and did not have the right to withdraw the Charge. As to the second point, the Authority has made clear that unintentional errors do not satisfy the good cause requirement for failing to comply with filing requirements. Further, the Respondent's email to the General Counsel of a position statement to a charge does not satisfy the requirements of filing an answer. Therefore, the Respondent has not filed an answer and has not established good cause for that failure. As a result, the Respondent is deemed to have admitted the allegations of the Complaint. As such, the General Counsel is entitled to summary judgment and the hearing in this case is cancelled.

I. Statement of the Case

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101 – 7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On February 25, 2022, Marcus Walker, an Individual (Charging Party) filed the ULP Charge in this case (Charge) against the Department of Veterans Affairs, VA Northern California Health Care System, Mather, California (the Respondent or Agency). Complaint, ¶ 1. Thereafter, on May 4, 2023, the Regional Director of the Authority of the San Francisco Region issued a Complaint and Notice of Hearing (Complaint) on behalf of the Acting General Counsel (GC). The Complaint alleged that the Respondent violated § 7116(a)(1) and (5) of the Statute when it removed the Charging Party from the Respiratory Therapy on-call roster without notice to the Union and an opportunity to negotiate over the procedures and appropriate arrangements for this substantial change in unit employees' conditions of employment. Complaint, ¶¶ 4-7. The Respondent did not file an answer to the Complaint.

On June 16, 2023, the GC filed a Motion for Summary Judgment (Motion), based on the fact that the Respondent had failed to file an answer to the Complaint. In its Motion, the GC argues that because the Respondent had not answered the Complaint it admitted all of the allegations of the Complaint. The GC asserts that, since there are no factual or legal issues in dispute, the case is ripe for summary judgment in its favor. Motion at 3.

On July 3, 2023, the Respondent timely filed the Agency's Response to the General Counsel's Motion for Summary Judgment (Agency Response), but did not file an answer. In the Agency Response, the Respondent argues that the case is not properly before the Authority because the Union sought to withdraw it. Alternatively, the Respondent argues that it had good cause for not answering because it intended to answer but unintentionally erred when it sent an email to the GC that attached a position statement to a charge, rather than filing an answer to the Complaint. *Id.*

II. Discussion of Motion for Summary Judgment and Agency Response

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

moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A. The Union is not the Charging Party and could not withdraw the Charge.

Before turning to the question of whether the Respondent had good cause for not answering the Complaint, it is first necessary to address whether this case is properly before the Authority, based on the Respondent's argument that it should have been withdrawn. Agency Response at 1-2. The basis for this came from a November 2, 2022, email sent by Jon Gallegos, Executive Vice President for AFGE, Local 1206, to the GC requesting that charges be dropped in several cases, including one with a similar case number to the instant case (SF-CA-22-0421), and which included an attachment that had the same case number as the instant case. *Id.*, Ex. 1. Because of the similar, but different, case numbers, after receiving the Motion, the Respondent emailed Mr. Gallegos to determine whether, in his November 2, 2022 email, he had meant to request that charges be dropped in the instant case, rather than SF-CA-22-0421. Mr. Gallegos responded that, "if there is not an active case for 0421, I meant to type 0241." *Id.*, Ex. 3.

According to the Authority's regulations, only the Charging Party may withdraw a charge. 5 C.F.R. § 2423.11. The Charging Party is the "individual, labor organization, activity, or agency filing an unfair labor practice charge with a Regional Director." 5 C.F.R. § 2423.3. In this case, Mr. Walker, an Individual, filed the Charge with the Regional Director and is therefore the Charging Party. Complaint, ¶ 1. The Union is not the Charging Party, and therefore did not have authority to withdraw the Charge. 5 C.F.R. §2423.11. As there is no indication that the Charging Party, Mr. Walker, withdrew or intended to withdraw the Charge, and the case proceeded to the issuance of the Complaint, this case is properly before the Authority. 5 C.F.R. § 2423.20.

B. The Respondent has failed to answer the Complaint or provide good cause for that failure and therefore has admitted the allegations therein.

The GC argues that, because the Respondent failed timely to answer the Complaint, it is deemed to have admitted the allegations therein. The GC argues therefore that, as there are no material facts in dispute, it is entitled to summary judgment as a matter of law. Motion at 3.

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

> (b) Answer. Within 20 days after the date of service of the complaint . . . the Respondent shall file and serve, in accordance with part 2429 of this subchapter, 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 Authority's 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.*, 5 C.F.R. §§ 2429.21 through 2429.23. Furthermore, in the body of the Complaint, the Regional Director provided the Respondent with detailed instructions concerning the requirements for filing an answer, including the date on which the answer was due, May 30, 2023, and where and how to file the answer, along with references to the applicable regulations. As well, the Complaint advised

the Respondent that, absent a showing of good cause, the failure to answer any allegation of the Complaint would constitute an admission. Complaint at 2. The Complaint was served by certified mail and was also sent by courtesy email to the Respondent's representative, Jordan Gildersleeve. Complaint, Certificate of Service.

The Respondent did not timely file an answer to the Complaint on May 30, 2023. Thereafter, the Counsel for the General Counsel, Cara Krueger, sent an email to Jordan Gildersleeve to inquire about who was assigned to the case. Agency Response, Exhibit (Ex.) 2. Email correspondence from Respondent's Supervisory ER/LR Specialist, Crystal Sensabaugh, indicates that she assigned Joshua Baker, ER/LR, to the case. *Id.* On June 1, 2023, after the due date for the answer, Mr. Baker emailed Ms. Krueger to ask "what [she] need[ed] from [him]." *Id.* Ms. Krueger responded that the Respondent needed to answer the Complaint. *Id.* On June 9, well after the answer was due, Mr. Baker sent an email to Ms. Krueger (but did not file the document with the Office of Administrative Law Judges (OALJ)), indicating that he was attaching the Agency response. *Id.* The response provided "the Agency's position regarding an unfair labor practice (ULP) charge, stating the following:

> Charge 1: On September 13, Respondent, by Diaz, removed the Charging Party from the Respiratory Therapy on-call roster.
>
> Agency Position: Mr. Diaz became a 100% Union Steward on or about January 3, 2022. In a Memorandum of Understanding dated April 14, 2022, signed by Jordan Gildersleeve (the Agency) and Luz Fuller (the Union) it states, "Respiratory Therapists (RT) who have completed all required training may volunteer for on-call. In addition to being proficient in all therapies provided at Mather, the RT's will be employees without restrictions." Mr. Diaz signed up for a shift 9-12 months after being away from bedside without his credentials being completed and was asked by his supervisor, Melinda Marshall, to re-orientate due to changes in equipment and time away from clinical care. When Mr. Diaz signed up for on-call, he no longer had access to CPRS nor had he completed required training such as Operating Room annual requirements, RQI, CPR/ALS and RT TMS Modules.

Agency Response, Ex. 1.

In follow-up, on June 12, 2023, Ms. Krueger emailed the Complaint to Mr. Baker, notified him that he needed to provide an answer to the Complaint, and directed him to the applicable regulation regarding answering a complaint. *Id.*, Ex. 2. Six days after the GC filed the Motion due to the Respondent's failure to answer the Complaint, Ms. Sensabaugh sent emails to the OALJ, indicating that she had not been included in the mailing of documents from the Authority in this case, and that therefore there had not been an opportunity to answer. She requested an "extension and/or the opportunity to answer/respond to the attached," with the attached being the Motion. The undersigned provided Ms. Sensabaugh guidance on answering and responding consistent with the regulations, including direction on requesting a waiver of the expired time limit for answering the Complaint, and the deadline for filing a response to the Motion. Email Correspondence with OALJ.

To date, the Respondent has not filed an answer or requested a waiver of the expired time limit. It asserts however that it had good cause for not answering because it believed it had

submitted an answer, made best efforts to answer, and had unintended confusion as to what constituted an answer when it emailed to the GC the position statement to a charge on June 9, 2023. Agency Response at 2.

Such a misunderstanding does not constitute good cause. The Authority has held, in a variety of factual and legal contexts, that parties are responsible for being aware of the statutory and regulatory requirements in proceedings under the Statute. *U.S. EPA, Envtl. Research Lab., Narragansett, R.I.*, 49 FLRA 33, 34-36 (1994) (answer to a complaint and an ALJ's order); *U.S. Dep't of VA Med. Ctr., Waco, Tex.*, 43 FLRA 1149, 1150 (1992) (exceptions to an arbitrator's award). Because the parties are charged with understanding the Authority's filing requirements, it is well established that a misunderstanding of the Authority's requirements does not constitute good cause for mistakes in filing. *U.S. Dep't of Transp., FAA, Hous., Tex.*, 63 FLRA 34, 36 n.2 (2008); *see also U.S. EPA, Envtl. Research Lab., Narragansett, R.I.*, 49 FLRA 33, 35 (1994).

In this case, even though the Respondent is charged with being aware of the statutory and regulatory requirements in proceedings under the Statute, it was further on notice that it was required to file an answer through the explanation in the Complaint that gave the date, the method and means for filing, an explanation that the answer must admit, deny or explain each allegation of the Complaint, the consequences for failing to file an answer, and also referenced the Authority's regulations. The Respondent was further on notice from the email correspondence with the GC which provided a specific reference to the Authority's regulation for filing an answer, among other things. Finally, the Respondent was provided additional information from the OALJ as explained above.

Moreover, the Respondent's emailed position statement to a charge does not even come close to satisfying the requirements for filing an answer. As noted above, an answer "shall admit, deny, or explain each allegation of the complaint." 5 C.F.R. § 2423.20(b). The emailed position statement did not do that, but rather simply stated the Agency's response to a charge. It is also noted that the position statement did not even regard the substance of the Complaint, which alleged that the Charging Party, Mr. Walker (not Mr. Diaz), was removed from the on-call roster without the Union being afforded notice and an opportunity to bargain over the procedures and appropriate arrangements regarding the substantial change. Complaint, ¶¶ 4-7. The position statement indicates that Mr. Diaz was removed from the on-call roster. As well, the position statement alternatively indicated it was responding to ULP Case No. SF-CA-22-0241 and Case No. DE-CA-22-0241.

Not only did the position statement fail to satisfy the requirements for an answer, but it also was not filed in accordance with the Authority's regulations, which require either mail filing to the OALJ address or filing by way of the eFiling system. 5 C.F.R. §§2429.24(d), 2429.25(a), and 2429.24(f). Despite the explanation in the Complaint that the Respondent must file the answer by sending it to the Office of Administrative Law Judges at the address provided, or by eFile, as explained in the Complaint, Complaint at 2, the Respondent simply sent the position statement by email to the GC. This does not constitute proper filing and the misunderstanding about that does not provide good cause for the same. *See U.S. EPA, Envtl. Research Lab., Narragansett, R.I.*, 49 FLRA at 35.

Simply put, the Respondent has not filed an answer and has not provided good cause for its failure to do so. As such, pursuant to 5 C.F.R. § 2423.20(b), the Respondent's failure to file an answer and failure to establish good cause for not doing so establish that the Respondent is deemed to have admitted the allegations of the Complaint. Accordingly, there are no disputed factual issues in this case, and summary judgment against the Respondent is justified. Therefore, the GC's Motion for Summary Judgment is granted.

Based on the existing record, I make the following findings of fact, conclusions of law, and recommendations:

III. Findings of Fact

1. The Charging Party filed the charge in this proceeding on February 25, 2022, and a copy was served on the Respondent.

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

3. At all times material, the following individuals held the position opposite their names and have been supervisors or management officials of Respondent within the meaning of Section 7103(a)(1) and (11) of the Statute and agents of Respondent acting upon its behalf: Steven Diaz, Acting Respiratory Therapy Supervisor.

4. On September 13, Respondent, by Diaz, removed the Charging Party from the Respiratory Therapy on-call roster.

5. The impact of the change described in paragraph 4 is substantial.

6. Respondent implemented the change in unit employees' conditions of employment described in paragraph 4 without providing the Union with notice and an opportunity to negotiate over the procedures and appropriate arrangements of the change.

7. By the conduct described in paragraphs 4 and 6, Respondent has been refusing to negotiate in good faith with the Union in violation of Section 7116(a)(1) and (5) of the Statute.

IV. Conclusions of Law

By virtue of its failure to answer the Complaint, the Respondent has admitted that it implemented a change in the conditions of unit employees that was substantial by removing the Charging Party from the on-call roster. Before implementing such a change, an agency is required to bargain over those aspects of the change that are within the duty to bargain. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999). The Respondent further admits that it violated this obligation when it implemented the change without negotiating with the Union.

Accordingly, the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute.

In order to remedy the Respondent's unfair labor practice, the GC seeks an order requiring the Respondent to cease and desist from implementing changes to on-call rosters without first notifying and bargaining with the Union, and from interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute. Further, the GC requests that the Respondent be required to post a notice, physically and electronically, signed by the Medical Center Director. Finally, the GC requests that the Respondent be ordered to make affected employees whole for harm they suffered as a result of the change in their conditions of employment. Motion at 4. In the Agency Response, the Respondent did not oppose the remedies the GC requested.

As to the first three requested remedies, they are traditional remedies which are provided in virtually all cases where a violation has been found. *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Ocean Serv., Coast & Geodetic Survey, Aero. Charting Div., Wash., D.C.*, 54 FLRA 987, 1021-22 (1998); *F.E. Warren AFB, Cheyenne, Wyo*, 52 FLRA 149, 160-61 (1996); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 222-26 (2014) (electronic notice posting is a traditional remedy). With regard to the official responsible for signing the notice, it is appropriate for the highest level official of the activity responsible for the violation to sign the notice. *U.S. Dep't of* Commerce, 54 FLRA at 1021-22. In this case that official is the Medical Center Director, the individual whom the GC requested to sign the notice. Therefore, the remedies of a cease-and-desist order and notice signed by the Medical Center Director are ordered.

With respect to the requested remedy that the Respondent make affected employees whole for harm they suffered as a result of the change in their conditions of employment, to the extent that remedy involves a request for backpay under the Back Pay Act, 5 U.S.C. § 5596, certain findings are required. That is, it must be determined that: (1) an aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials. *Soc. Sec. Admin.*, 64 FLRA 199, 205 (2009).

With regard to the first requirement, an aggrieved employee affected by an unfair labor practice is affected by an unjustified or unwarranted personnel action. *U. S. Sec. & Exch. Comm'n*, 62 FLRA 432, 438 (2008). Here, it is established that an employee, the Charging Party, was affected by an unfair labor practice and thus was affected by an unjustified or unwarranted personnel action. Thus, the first requirement is met.

With regard to the second requirement, that the personnel action resulted in the withdrawal or reduction of pay, allowances or differentials, the Authority has found that backpay is appropriate where it has been established that employees would have worked more (and been paid more) had management not implemented a unilateral change. *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) (*IRS*); *Air Force Accounting and Fin. Ctr.*, 42 FLRA 1196, 1208 (1991) (Authority found backpay remedy appropriate where the agency failed to bargain over the impact and implementation of decision to change the duty roster). There is no requirement however to calculate the precise amounts involved. *Id.*; *U.S. Dep't of Transp., FAA*, 63 FLRA 646, 648 (2009). Rather, that determination may be resolved in compliance proceedings. *IRS*, 67 FLRA at 106; *U.S.*

Customs Serv., Sw. Region, El Paso, Tex., 44 FLRA 1128, 1141 (1992). Here, the Respondent's implementation of the unilateral change to the on-call roster resulted in the Charging Party not being called for work pursuant to the roster, resulting in loss of work and a resultant loss in pay. Therefore, the second requirement for an award of backpay is satisfied. As such, the request for a make whole remedy, including backpay, is ordered.

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

V. Order

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Veterans Affairs, VA Northern California Health Care System, Mather, California, shall:

1. Cease and desist from:

   (a) Implementing changes to on-call rosters without first notifying and bargaining with the Union.

   (b) In any like or related manner, interfering with, restraining, or coercing its 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) Make affected employees whole for harm they suffered as a result of the change in their conditions of employment.

   (b) Post at the VA Northern California Health Care System, Mather, California copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center 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, if the Respondent customarily communicates with employees by such means.

   (d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C.
July 13, 2023

LEISHA SELF

Digitally signed by LEISHA SELF
Date: 2023.07.13 10:36:30 -04'00'

LEISHA A. SELF
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, VA Northern California Health Care System, Mather, California 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 and/or fail to bargain with the American Federation of Government Employees, Local 1206, AFL-CIO (Union), the exclusive representative of a unit of our employees, over changes to the on-call roster.

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 Statute.

WE WILL make affected employees whole for harm they suffered as a result of the change in their conditions of employment.

_____

(Agency/Activity)

Dated: _____ By: _____

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, San Francisco Regional Office, Federal Labor Relations Authority, whose address is Federal Labor Relations Authority, San Francisco Region, 1301 Clay St., 1180N, Oakland, CA 94612 and whose telephone number is (510) 982-5440.