FEDERAL LABOR RELATIONS AUTHORITY OALJ 12-17
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. GENERAL SERVICES ADMINISTRATION
WASHINGTON, D.C.
RESPONDENT

AND

NATIONAL FEDERATION OF FEDERAL EMPLOYEES
CHARGING PARTY

Case No. WA-CA-11-0051

June M. Marshall
For the General Counsel

Tae L. Kim
For the Respondent

Sherry Grayson
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Respondent failed to file a timely answer to the complaint and belatedly filed and improperly served a motion miss-styled as a motion for extension of time. While that belated motion was pending, the General Counsel filed a motion for summary judgment to which the Respondent filed a timely opposition. Because the Respondent presented no extraordinary circumstances in either its motion or opposition to the General Counsel's motion for summary judgment that permits a waiver of the expired time limit for filing an 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. § 2423.27.

PROCEDURAL STANDARDS

Parties appearing before the Federal Labor Relations Authority (the 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). Rule 56(c) provides, in pertinent part, that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Upon review of the General Counsel's motion and the Respondent's opposition, I have determined that summary judgment is appropriate in this case.

On April 27, 2012, the acting Regional Director of the Washington Region of the Authority issued a complaint and notice of hearing alleging that the U.S. General Services Administration (Respondent) violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute), by implementing an office relocation that impacted approximately twenty-three (23) bargaining unit employees of the National Federation of Federal Employees (Charging Party/Union) without completing its bargaining obligation over this change to the extent required by the Statute.

The complaint, which was served on the Respondent by certified mail, specified that an answer was to be filed by May 22, 2012. The complaint also explained that a failure to file an answer would constitute an admission of the allegations in the complaint absent a demonstration of good cause. The due date established by the complaint reflected the twenty (20) days a respondent is afforded to file an answer along with five (5) days added for service by mail as allowed by regulations. Thus, a total of twenty-five (25) 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 July 10, 2012, and while the Respondent filed no answer or other pleading prior to the required date of May 22, 2012, a belated motion to extend the time for an answer was filed by the Respondent on May 30, 2012, requesting that it have until June 5, 2012, to file an answer to the complaint. Although that motion was served upon the Charging Party, it was not properly served upon the counsel of record for the General Counsel, as required by 5 C.F.R. § 2423.20(b) and § 2429.27. Furthermore, 5 C.F.R. § 2429.23(a) mandates that an extension of time must be in writing and received not later than five (5) days before the established time limit for filing. As the Respondent was already eight (8) days past the established time for filing an answer, the motion styled as a motion for extension of time was actually a request for a waiver under 5 C.F.R. § 2429.23(b), which can be granted only when extraordinary circumstances are presented. In support of the request, Respondent articulated as its reason for needing additional time a single sentence indicating that an answer was not filed by the required date "due to the press of business." Upon that sparse explanation, the Respondent rested its request that it be given more time to file an answer.

On June 1, 2012, the General Counsel filed a motion for summary judgment, asserting that by its failure to answer the complaint by the required date, the Respondent admitted all of the allegations set forth therein, and thus, the Respondent violated the Statute as alleged. On June 6, 2012, the Respondent filed and properly served upon all representatives an opposition to the motion for summary judgment which asserted that genuine issues of material fact remained to be decided and contended that good cause existed for the failure to file a timely answer. The Respondent devoted almost the entirety of the opposition to establishing the existence of genuine issues of material fact. With respect to supporting the claim of good cause, the Respondent supplied but two sentences, indicating that the press of business was a function of reduced staff and a sudden increase in workload that started in March 2012, which caused an unexpected delay in filing an answer.

As the Respondent failed to answer the allegations of the complaint 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 application of 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 scant justification for the failure to file a timely answer, it presented a substantial amount of argument that genuine issues of material fact remained in dispute in the form of the "covered by" doctrine and *de minimis* defense. 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 provided nothing more than a bare assertion about limited staff and increased workload, based on 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 and 5 C.F.R. Chapter XIV.

2. The U.S. General Services Administration, Washington, D.C. (Respondent), is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

3. The National Federation of Federal Employees (Charging Party) 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. The Charging Party filed the charge with the Washington Regional Director on November 15, 2010.

5. The Charging Party served a copy of the charge on the Respondent.

6. At all times material herein, the following individuals held the positions set forth opposite their names at the Respondent, and have been agents of the Respondent acting on its behalf:

Michael Brooks ("Brooks")	Deputy, COO, Federal Acquisition Service
Paul York ("York")	Labor Relations Specialist

7. At all times material herein, Brooks and York were supervisors and/or management officials within the meaning of 5 U.S.C. § 7103(a)(10) and (11) at the Respondent.

8. The Respondent and the Union are parties to a collective bargaining agreement covering employees in the bargaining unit described in paragraph 3.

9. On or about September 7, 2010, the Respondent notified the Charging Party that it intended to relocate approximately 23 employees from their current location at 2200 Crystal Drive, Suite 600 to 2011 Crystal Drive, Suite 1102.

10. On September 10, 2010, the Charging Party requested to negotiate over the employees' relocation.

11. On September 22, 2010, the Charging Party submitted ground rules and proposals for bargaining over the relocation.

12. On October 10, 2010, the Respondent responded stating that it was applying the provisions of the May 26, 2006, Memorandum of Understanding (MOU) relating to a different location.

13. The Charging Party rejected the Respondent's assertion that it would apply the 2006 MOU.

14. On October 26, 2010, the Respondent submitted proposals in the form of an MOU.

15. On October 30, 2010, the Respondent implemented the relocation.

16. The Respondent unilaterally implemented the relocation without completing its bargaining obligations with the Union.

17. By its conduct described in paragraphs 16 and 17, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).

DISCUSSION

In devoting considerable time and effort within its opposition to the General Counsel's motion for summary judgment to arguing the existence of genuine issues of material fact while virtually 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 assertion of paragraph 17 that it committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).*

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 allegation that the respondent violated the Statute is admitted and cannot be contested even if the respondent had a reasonable argument 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

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* Although the complaint contains consecutive paragraphs identified as 17, it is also missing a paragraph numbered as 11, thus, the second paragraph enumerated as 17 that contains the language establishing a violation of the Statute is properly numbered as 17.

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 without 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 *de minimis* defense do not present the extraordinary circumstances necessary to establish good cause for not applying the admissions requirement imposed by operation of 5 C.F.R. 2423.20(b).

Turning to the Respondent's stated basis for why good cause should be found, the entirety of the argument from its opposition reads as follows:

> The Respondent had good cause in its failure to file an answer. The press of business, especially caused by reduced staff and a sudden increase in workload beginning in March 2012, caused an unexpected delay in responding to the Authority's Complaint and Notice of Hearing.

This reflects a virtual doubling of effort over the justification offered in the earlier filed motion for extension of time which stated:

> The Respondent's counsel in this matter was unable to file an answer to the Complaint and Notice of Hearing due to the press of business.

To appreciate that this is the legal equivalent of a grade school student claiming the dog ate my homework, one must understand that a typical answer to an unfair labor practice complaint is a two or three page document containing little more than fifteen (15) to twenty (20) 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 any attorney's workload could be so demanding that twenty (20) days does not afford sufficient time to prepare an answer to a complaint containing seventeen (17) allegations set forth on two pages, most of which no more than two lines long.

While it is dubious that reduced staffing and workload increases could ever constitute extraordinary circumstances within a federal sector where such events are more typical than not, proving such a claim requires more than a bare assertion set forth in a motion. *Nat'l Ass'n of Air Traffic Specialists, Macon AFSS, Macon, Ga.*, 59 FLRA 261 (2003)(*NAATS*). At the very least, an affidavit from a management or supervisory official containing relevant

and detailed information about staff reductions and workload changes, along with an explanation for why other work demanded higher priority would be required. While merely citing "the press of business" may work in other venues, it is not enough to persuade or prevail in a formal legal proceeding.

Extraordinary circumstance constitutes an exacting standard that others failed to meet with excuses far superior to that presented in the case at bar. 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, the good cause presented in this case is not nearly good enough to merit a waiver under 5 C.F.R. § 2429.23(b).

By failing to file a timely answer to the complaint and showing no good cause for the failure, the Respondent admits that it unilaterally relocated bargaining unit employees without first providing the Union with an opportunity to negotiate over the change and in doing so, violated §7114 (a)(1) and (5) of the Statute.

As a remedy for the Respondent's violation, the General Counsel submitted a proposed order that would require the Respondent to post a Notice of the violation on the Respondent's Intranet and to give notice of compliance at fifteen (15) and sixty (60) days from the date of the order. 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*, 52 FLRA 149, 161 (1996)(*Warren AFB*). In this case, the complaint offered no allegations about the legality, necessity or efficacy of posting a Notice on the Respondent's Intranet, thus, the Respondent made no admissions upon such matters. As the General Counsel presented no document, affidavit, applicable precedent, or other appropriate materials in support of the request for a nontraditional remedy, the findings mandated in the *Warren AFB* case cannot be made and ordering a nontraditional remedy is not appropriate. *NAATS,* 59 FLRA 261, 262.

The General Counsel also proposed that the order require the Respondent to provide a notice of compliance at fifteen (15) and sixty (60) 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 (30) 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 U.S. General Services Administration, Washington, D.C., shall:

1. Cease and desist from:

(a) Unilaterally relocating bargaining unit employees without first providing the National Federation of Federal Employees (Union), with advance notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Provide the Union with advance notice concerning any intended changes in working conditions, including any intent to relocate employees and, upon request, bargain with NFEE regarding procedures that management will observe in taking these actions and appropriate arrangements for employees adversely affected by these actions to the extent required by the Statute.

(b) Post at the GSA Center for IT Schedule Program, 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 Division Director of the Center for IT Schedule Program, 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.

(c) Pursuant to § 2423.41(e) of the Authority's rules and regulations, notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., June 25, 2012

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 U.S. General Services Administration, Washington, D.C., 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 unilaterally relocate bargaining unit employees without first providing the National Federation of Federal Employees (Union), the representative of bargaining unit employees at the Center for IT Schedule Program, with advance notice, and upon request, bargaining with the Union regarding procedures that management will observe in taking these actions and appropriate arrangements for employees adversely affected by these actions, to the extent required by Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured them by the 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, NW., 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029 ext. 6018.