FEDERAL LABOR RELATIONS AUTHORITY OALJ 21-02
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF THE AIR FORCE 82ND TRAINING WING SHEPPARD AIR FORCE BASE, TEXAS RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 779, AFL-CIO CHARGING PARTY	Case No. DE-CA-20-0441

Katie A. Smith
For the General Counsel

Lawrence E. Lynch
For the Respondent

Stephanie Medley-Arens
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, and to avoid the harsh penalty of summary judgment for failing to file its Answer in a timely manner, by asserting that the failure occurred because office members were teleworking in response to the COVID-19 pandemic, and because the Respondent's representative accidentally deleted an email containing a courtesy copy of the Complaint. As I discuss below, the reasons for the Respondent's failure to timely file an Answer do not constitute "extraordinary circumstances," as defined by the Authority. Therefore, the Respondent has not demonstrated good cause to excuse its failure to file a timely 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 May 21, 2021, the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing on behalf of the FLRA's Acting General Counsel (GC), alleging that the Department of the Air Force, 82nd Training Wing, Sheppard Air Force Base, Texas (the Respondent or Agency), violated § 7116(a)(1) of the Statute by conduct and statements it made concerning an employee's protected activity, and violated § 7116(a)(1) and (2) of the Statute by issuing the employee an admonishment because of her protected activity.

The Complaint indicated that a hearing on the allegations would be held on July 30, 2021, and advised the Respondent that an Answer to the Complaint was due no later than June 15, 2021. The Complaint also advised 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.

On June 22, 2021, the GC filed a Motion for Summary Judgment, based on the fact that the Respondent had failed to file an Answer to the Complaint, and therefore the Respondent had admitted all the allegations of the Complaint. Motion for Summary Judgment at 1. The GC asserted that it mailed a copy of the Complaint to the Respondent on May 21, 2021, and emailed a courtesy copy to the Respondent on May 24, 2021. Memorandum in Support of the GC's Motion for Summary Judgment (GC Memorandum) at 2. The GC added that the parties had communicated about the case via email both before and after the Complaint was emailed to the Respondent. *Id.* Accordingly, the GC asserted that there were no factual or legal issues in dispute, and the case was ripe for summary judgment in its favor.

On June 28, 2021, the Respondent filed a pleading in opposition to the Motion for Summary Judgment, arguing that the Respondent's failure to timely file an answer was due to "accident and circumstance." Agency Reply [to] Motion for Summary Judgment (Agency Reply) at 1. In its pleading, the Respondent's representative asserts that: (1) every member of the representative's office is teleworking full-time due to the COVID-19 pandemic, and "[o]ur mail is not being checked"; (2) he "unintentionally deleted" the courtesy copy of the Complaint that was emailed on May 24, 2021 (the representative notes that he received an emailed courtesy copy of a complaint in a different case that day, and that he filed a timely answer in that case); and (3) the hard copy of the Complaint that was sent by mail "was not received by any member of our office" until the day after the representative received the GC's Motion for Summary Judgment by email, when the representative "went to our office and discovered [the Complaint] in our mailbox." *Id.* at 1-2. The representative adds that between his "unthinking deletion of the email" and the Agency's mail not being checked, the Agency was "unaware it had received the Complaint." *Id.* at 2.

The Respondent contends that it would be "inappropriate under the circumstances" and "unduly harsh" to grant the Motion for Summary Judgment. The Respondent asks for additional time to file an Answer, though it has not stated the positions of the other parties regarding that request. *Id.* at 1-2.

On July 12, 2021, I issued an Order cancelling the hearing in this case, pending my decision on the Motion for Summary Judgment.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

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).

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 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. The Respondent does not dispute that the Answer was due on June 15, 2021, or that it failed to timely file an Answer. In its pleading, the Respondent requests additional time to file an Answer. Because the Respondent's pleading was filed thirteen days after the due date for the Answer, I will treat the pleading 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). Accordingly, the issue is whether extraordinary circumstances exist to justify a waiver of the expired time limit and to permit the Respondent to file an untimely Answer.

The Authority considered a similar request in *AFGE, Local 2338*, 72 FLRA 176 (2021) (*Local 2338*). There, the Authority served its decision on the parties by certified mail on December 11, 2020. The union had until December 28, 2020, to file a motion for reconsideration, but it did not file its motion for reconsideration until December 30, 2020. *Id.* at 176. Upon receiving the motion, the Authority ordered the union to show cause why the motion should not be dismissed as untimely filed. *Id.* The union's attorney responded that "illness and mandatory absence, quarantine" from his office prevented him from filing the motion on an earlier date. The attorney stated that he and his administrative assistant were diagnosed with COVID-19 on December 21, 2020, after first exhibiting symptoms on December 18, 2020, and that the attorney therefore had no one in his office to collect mail from December 18 until December 29, 2020. The attorney added that while another tenant in his building signed for the Authority's decision in his absence, the attorney did not actually receive the Authority's decision until he returned to the office on December 29, 2020. The attorney filed the motion for reconsideration the next day. *Id.*

The Authority found that the union did not demonstrate extraordinary circumstances for waiving the expired time limit. *Id.* As an initial matter, the Authority noted that the union failed to state the agency's position on the union's waiver request, as required by § 2429.23(b). *Id.* at 177. In addition, the Authority stated that while the union's attorney asserted he had no one in his office to collect his mail, the union did not explain why it did not make arrangements for monitoring the union's mail in the attorney's absence. *Id.* The Authority emphasized that although the quarantining of the attorney and his assistant from December 18 to December 29, 2020, "could potentially support a showing of extraordinary circumstances," the Authority emphasized that the union "[did] not provide[] any further details regarding this particular circumstance, including whether it precluded the [u]nion's counsel from making arrangements for receiving official correspondence during this time period." *Id.* at 177 n.17. The Authority "acknowledge[d] the serious nature of the COVID-19 pandemic[] and recognize[d] the burdens it has placed on all of our parties in conducting business before our agency," but the Authority was constrained by its precedent to conclude that the union had not demonstrated extraordinary circumstances warranting the waiver of the filing deadline for the union's motion for reconsideration. *Id.* at 177.

Based on the Authority's reasoning in *Local 2338*, I conclude that the Respondent has failed to establish extraordinary circumstances to justify a waiver of the expired time limit for filing an Answer.

First, the Respondent failed to state the position of the other parties regarding its request. That alone can be fatal to the Respondent's motion, as the Authority has "denied waiver requests that did not state the positions of other parties." *Id.*

Second, while the Respondent's representative asserts that mail "is not being checked," Agency Reply at 1, the Respondent has not indicated that it was precluded from making arrangements for monitoring and receiving mail while members of the representative's office were teleworking. For example, there is no indication that the Respondent was unable to have mail forwarded to the home address of a paralegal or other office member. Moreover, it is apparent that the Respondent was capable of monitoring and receiving mail delivered to the office, in spite of the burdens brought about by the pandemic. Indeed, the Respondent's representative communicated with the GC about this case by email and was able to go into the office to retrieve mail when needed. *Id.* at 2; *see also* GC Memorandum at 2. Of course, the burdens of the COVID-19 pandemic are serious, but those burdens do not automatically establish extraordinary circumstances. *See Local 2338*, 72 FLRA at 177. While the COVID-19 pandemic itself is certainly an "extraordinary circumstance," that is not the case for every administrative disruption caused by the pandemic. And while it might not have been easy to monitor and receive mail during the pandemic, the need to do so was entirely foreseeable. By the time the events in this case occurred, more than a year into the pandemic, the Agency should have been able to make arrangements to ensure that it receives important mail and to avoid a reliance on "courtesy" copies of such documents. For these reasons, the COVID-19-related burdens faced by the Respondent do not constitute extraordinary circumstances warranting waiver. *See id.*

Finally, the Respondent suggests that its failure to timely file an Answer should be excused because it resulted from an office mistake, namely, the representative's accidental deletion of an email containing a courtesy copy of the Complaint. This is similar to the facts of *U.S. Department of Transportation, FAA, Houston, Texas*, 63 FLRA 34, 35-36 (2008), where the agency unsuccessfully argued that it had good cause for its late answer, based on the office having "misfiled" the complaint, and to *U.S. Department of VA Medical Center, Waco, Texas*, 43 FLRA 1149, 1150 (1992), where the agency mailed its exceptions to an arbitration award to the wrong location. While I sympathize with the plight of the Respondent and its representative, the case law is clear that a party's administrative error, however inadvertent, does not constitute "extraordinary circumstances" to justify a late filing.

Accordingly, I conclude that there are no extraordinary circumstances warranting a waiver of the time limit for filing the Respondent's Answer, and the Respondent has not demonstrated good cause for failing to file a timely Answer.

In accordance with § 2423.20(b), the Respondent has admitted 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 American Federation of Government Employees, Local 779, AFL-CIO (the Union) filed the charge in this proceeding on August 20, 2020, and a copy was served on the Respondent.

2. The Union filed the first amended charge in this proceeding on December 21, 2020, and a copy was served on the Respondent.

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

4. The Union is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

5. At all times material, the following individuals held the position opposite their names and have been supervisors or management officials of the Respondent within the meaning of § 7103(a)(10) and (11) of the Statute and agents of the Respondent acting upon its behalf:

Michelle Ramos	Executive Housekeeper
Andy Flores	General Manager

6. Gloria Davis (Davis) is an employee under § 7103(a)(2) of the Statute and is in the unit described in paragraph 4.

7. On February 25, 2020, the Respondent, by Ramos and Flores, questioned Davis concerning her conversation with other employees, and made statements to the effect of Davis not being a good Union representative if she talked with employees behind closed doors, and that there was no benefit being in the Union because it did not accomplish anything. In mid-March 2020, the Respondent, by Ramos and Flores, called Davis into a breakroom and made statements to the effect of Davis not being a good Union representative because she was spreading gossip concerning COVID-19.

8. By the conduct described in paragraph 7, the Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in § 7102 of the Statute and violated § 7116(a)(1) of the Statute.

9. On February 25, 2020, mid-March 2020, and periodically thereafter, Davis engaged in protected activity under § 7102 of the Statute by, among other things, communicating with bargaining unit employees about conditions of employment in the workplace.

10. On or about July 30, 2020, the Respondent, by Ramos, issued an Admonishment to Davis.

11. The Respondent engaged in the conduct described in paragraph 10, because Davis engaged in the protected activity described in paragraph 9, and to discourage employees from engaging in protected activities.

12. By the conduct described in paragraphs 10 and 11, the Respondent discriminated in connection with hiring, tenure, promotion, or other conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of § 7116(a)(1) and (2) of the Statute.

CONCLUSIONS OF LAW

Section 7102 of the Statute gives employees the right to form, join, or assist any labor organization. Section 7116(a)(1) of the Statute prohibits an agency from interfering with, restraining, or coercing any employee in the exercise of their rights under the Statute. Here, the Respondent questioned Davis concerning her conversation with other employees; made statements to the effect of Davis not being a good Union representative if she talked with employees behind closed doors, and that there was no benefit to being in the Union because it did not accomplish anything; and called Davis into a breakroom and made statements to the effect of Davis not being a good Union representative because she was spreading gossip concerning COVID-19. The test for whether a statement or conduct violates § 7116(a)(1) is whether, under the circumstances, the agency's action would tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute, or whether the employee could reasonably have drawn a coercive inference from the agency's action. *Mich. Army Nat'l Guard*, 69 FLRA 393, 394 (2016), *enf'd as modified*, *FLRA v. Mich. Army Nat'l Guard*, 878 F.3d 171 (6th Cir. 2017); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199, 200 (2007). Since the Respondent has admitted the allegations of the Complaint, it has admitted that its statements interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by § 7102 of the Statute. I therefore conclude that the Respondent violated § 7116(a)(1) of the Statute.

Section 7116(a)(2) of the Statute prohibits an agency from encouraging or discouraging membership in a labor organization by discriminating in connection with hiring, tenure, promotion, or other conditions of employment. Issuing an employee an admonishment in retaliation for the employee engaging in protected activity, including the employee's communicating with bargaining unit employees about conditions of employment in the workplace, would certainly constitute the type of discrimination barred by § 7116(a)(2). The analytical framework for such discrimination allegations was set forth in *Letterkenny Army Depot*, 35 FLRA 113, 117-18 (1990), but I need not spell it out in detail, since the Respondent has admitted that it issued the admonishment to Davis because Davis engaged in protected activity and to discourage employees from engaging in protected activities. The Respondent has thus admitted that it discriminated in connection with hiring, tenure, promotion, or other conditions of employment of its employees, thereby discouraging membership in a labor organization. Accordingly, I conclude that the Respondent violated § 7116(a)(1) and (2) of the Statute.

As a remedy, the Respondent will be ordered to rescind the admonishment and expunge it from all personnel files pertaining to Davis. This is the type of remedy that the Authority traditionally orders for this type of discrimination. *See U.S. Dep't of VA, Golden Gate Nat'l Cemetery, San Bruno, Cal.*, 59 FLRA 956, 961 (2004). The Respondent will also be ordered to cease and desist its unlawful conduct and to post and distribute a notice to employees regarding its conduct.

I therefore 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 (the Statute), the U.S. Department of the Air Force, 82nd Training Wing, Sheppard Air Force Base, Texas, shall:

1. Cease and desist from:

(a) Discriminating against Gloria Davis, or any other employee, because they exercised rights protected by § 7102 of the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights under the Statute, including questioning union representatives concerning their conversations with employees, making statements to union representatives that they are not good representatives for talking with employees about conditions of employment, and making statements to union representatives and bargaining unit employees that there is no benefit to being in the union because it does not accomplish anything.

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

(a) Rescind the admonishment issued to Gloria Davis on or about July 30, 2020, and expunge that document from all personnel files pertaining to Davis.

(b) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 779, AFL-CIO 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 Base Commander and shall be posted and maintained for sixty (60) 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 other material.

(c) In addition to physical posting of paper notices, disseminate a copy of the Notice electronically, on the same day as the physical posting, through the Agency's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver 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., August 3, 2021.

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 the Air Force, 82nd Training Wing, Sheppard Air Force Base, Texas, 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 discriminate against Gloria Davis or any other employee, because they exercised rights protected by § 7102 of the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights under the Statute, including questioning union representatives concerning their conversations with employees, making statements to union representatives that they are not good representatives for talking with employees about conditions of employment, and making statements to union representatives and bargaining unit employees that there is no benefit to being in the union because it does not accomplish anything.

WE WILL rescind the admonishment issued to Gloria Davis on or about July 30, 2020, and expunge it from all personnel files pertaining to Ms. Davis.

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature) (Director)

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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Blvd., Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.