

U.S. DEPARTMENT OF VETERANS AFFAIRS  
Respondent

Case No. CH-CA-90798

and

KENTUCKY NURSES ASSOCIATION

Charging Party

Mary D. Garcia For the Respondent

Irwin H. Cutler, Jr. For the Charging Party

Susan L. Kane For the General Counsel

Before: ELI NASH, JR. Administrative Law Judge

### **DECISION ON MOTION FOR SUMMARY JUDGMENT**

On January 5, 2000, the Regional Director for the Chicago Region of the Federal Labor Relations Authority (FLRA), issued a Complaint and Notice of Hearing which was duly served by certified mail upon the named Respondent. The complaint alleged that Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (8), by its failure and refusal to proceed to arbitration on a unit employee's grievance as requested by the President of the Kentucky Nurses Association (the Union) under the parties' negotiated agreement.

The complaint specifically advised the Respondent that an answer must be filed "no later than January 31, 2000," and that a "failure to file an answer or respond to any allegation of this complaint will constitute an admission. See 5 C.F.R. § 2423.20(b)." Respondent did not file an answer, either in person or by mail, within the required period or at any time thereafter.

On February 9, 2000, Counsel for the General Counsel filed a Motion for Summary Judgment because of Respondent's failure to file an answer to the allegations of the complaint, thereby resulting in the admission of all such allegations and the absence of any material issue of fact requiring a hearing. Thereafter, on February 11, 2000, the Chief Administrative Law Judge issued an Order to Show Cause, on or before February 28, 2000, why the hearing set for March 2, 2000, should not be canceled and Counsel for the General Counsel's Motion for Summary Judgment not be granted.<sup>(1)</sup>

Timely responses were received from the Union in support of the motion, for the reasons stated by Counsel for the General Counsel, and from the Respondent in opposition thereto for the following reasons. First, the Respondent stated that while there was no excuse for its acknowledged failure to file an answer, the reason for such failure was the inexperience of its designated representative. Second, while admitting the factual allegations of the complaint, the Respondent stated that its communications with the Union explained why it would not agree to arbitrate the grievance, i.e., the failure of the Union to request a list of arbitrators within

seven days of its timely invocation of arbitration as required by the terms of the parties' agreement. In any event, Respondent asserts it did not patently breach the contract and thus did not commit an unfair labor practice.

Since Respondent failed to answer the instant complaint, it is recommended that the General Counsel's Motion for Summary Judgment be granted.

### **Findings of Fact**

The uncontested facts establish the following:

The Union and Respondent are parties to a collective bargaining agreement covering an appropriate unit of employees at Respondent's Cincinnati, Ohio Medical Center. Jackie Scheid is a bargaining unit employee who filed a grievance under the four-step procedure in that agreement.<sup>(2)</sup> On March 1, 1999, the Respondent issued a fourth-step response to the Scheid grievance. Thereafter, on March 12, 1999, the Union's President invoked arbitration concerning the grievance.<sup>(3)</sup> By letter dated April 23, 1999, Respondent informed the Union that it would not proceed to arbitration on employee Scheid's grievance, and thereafter in a letter dated May 7, 1999, Respondent advised the Union that it would not participate in the selection of an arbitrator for that grievance from a list of arbitrators supplied by the Federal Mediation and Conciliation Service. The Union contacted the Respondent by letter dated May 11, 1999, and asked Respondent to participate in the selection of an arbitrator; Respondent refused to do so by letter dated June 4, 1999, declaring that it considered the matter closed. Since on or about April 23, 1999, and at all times continuing to date, the Respondent has failed and refused to proceed to arbitration on Scheid's grievance.

### **Conclusions**

Section 2423.20(b) of the Authority's Rules and 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 . . . . Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission.

In this case, Respondent admittedly failed to file an answer to the complaint by January 31, 2000, as required by section 2423.20(b) of the Authority's Rules and Regulations, even though it was specifically notified of such requirement in the complaint. Respondent admits that it has no excuse for the failure to file an answer. Although the inexperience of Respondent's designated representative is the reason ascribed for the failure to answer the complaint, such ground does not constitute good cause under the Authority's Rules and Regulations, since all parties before the Authority are responsible for being aware of the statutory and regulatory filing requirements. *See U.S. Environmental Protection Agency, Environmental Research Laboratory, Narragansett, Rhode Island*, 49 FLRA 33, 35-36 (1994); *U.S. Department of Veterans Affairs Medical Center, Waco, Texas and American Federation of Government Employees, Local 1822*, 43 FLRA

1149, 1150 (1992); *U.S. Department of Housing and Urban Development, Washington, DC*, 34 FLRA 307, 309 (1990). This is particularly true when the inexperienced representative is told specifically in writing what needs to be filed, by when, and the consequences of failing to do so.

Respondent's contention in its response to the Chief Administrative Law Judge's Order to Show Cause, that the facts alleged in the complaint are true but do not reflect additional facts which excuse the refusal to proceed to arbitration as requested by the Union, i.e., that the Union did not request a list of arbitrators within the time limits specified in the parties' agreement. To the extent it may constitute a defense to the alleged violation herein, it should have been included in a timely-filed answer to the complaint.<sup>(4)</sup> Permitting the Respondent to rely upon factual assertions in a response to an order to show cause why summary judgment should not be granted in favor of the General Counsel would render the requirement to file a timely answer meaningless, particularly where the allegations of the complaint taken as admitted, present a *prima facie* statutory violation. *Department of the Air Force, Langley Air Force Base, Hampton, Virginia*, 39 FLRA 966, 969 (1991).

Accordingly, it is recommended that the Authority grant the General Counsel's Motion for Summary Judgment, and issue the following Order:

### ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Veterans Affairs, shall:

1. Cease and desist from:

(a) Failing and refusing to proceed to arbitration concerning the grievance filed by employee Jackie Scheid on November 9, 1998, as requested by the employee's exclusive representative, the Kentucky Nurses Association, by letter dated March 12, 1999.

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

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

(a) Upon the Union's request, proceed to arbitration concerning the grievance filed by employee Jackie Scheid on November 9, 1998, as requested by the employee's exclusive representative, the Kentucky Nurses Association, on March 12, 1999.

(b) Post at the Department of Veterans Affairs Medical Center, Cincinnati, Ohio, 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, Department of Veterans Affairs Medical Center, Cincinnati, 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Regional Office, 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, DC, April 4, 2000.

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ELI NASH, JR.

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, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY BARGAINING UNIT EMPLOYEES THAT:**

**WE WILL NOT** fail and refuse to proceed to arbitration concerning the grievance filed by employee Jackie Scheid on November 9, 1998, as requested by the employee's exclusive representative, the Kentucky Nurses Association, by letter dated March 12, 1999.

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 Federal Service Labor-Management Relations Statute.

WE WILL, upon the Union's request, proceed to arbitration concerning the grievance filed by employee Jackie Scheid on November 9, 1998, as requested by the employee's exclusive representative, the Kentucky Nurses Association, on March 12, 1999.

\_\_\_\_\_

(Activity/Respondent)

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, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe Street, Suite 1150, Chicago, Illinois 60603, and whose telephone number is: (312)886-3465.

1. Counsel for the General Counsel's unopposed motion dated February 14, 2000, to postpone the scheduled pre-hearing disclosure, pre-hearing conference, and hearing in this case, was granted by Order of the Chief Administrative Law Judge on February 16, 2000.
2. It appears that the grievance was filed on November 9, 1998 even though the complaint inadvertently refers to 1999.
3. Respondent concedes that the Union was timely under the agreement in providing notice that arbitration was being invoked.
4. It is noted, however, that a defense of untimeliness under the terms of the parties' agreement raises an issue of procedural arbitrability which the Respondent should have raised before an arbitrator as a threshold matter.

See section 7121(a)(1) of the Statute.