



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

OALJ 12-10

U.S. DEPARTMENT OF VETERANS AFFAIRS
PORTLAND VA MEDICAL CENTER
PORTLAND, OREGON

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2157, AFL-CIO

CHARGING PARTY

Case No. SF-CA-11-0467

Vanessa Lim
For the General Counsel

Dennis Saub
For the Respondent

Leonard Fearn
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Respondent failed to file an answer to the complaint and has not replied to the General Counsel's motion for summary judgment. Because the Respondent has presented no extraordinary circumstances to justify its failure to timely file 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 Authority are charged with knowledge of all pertinent statutory and regulatory filing requirements, *U.S. Env'tl. Prot. Agency, Env'tl. Research Lab., Narragansett, R.I.*, 49 FLRA 33, 37 (1994). Section 2423.20(b) of the Federal Labor Relations Authority's (FLRA/Authority) rules and regulations requires that the Respondent 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. Section 2423.27(b) requires responses to motions for summary judgment to be filed within five (5) days after the date of service of the motion.*

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, Veterans Affairs Med. Ctr., 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 I have determined that the summary judgment process is appropriate in this case.

On November 22, 2011, the Regional Director of the San Francisco Region of the Authority issued a Complaint and Notice of Hearing alleging that the U.S. Department of Veterans Affairs, Portland VA Medical Center, Portland, Oregon (Agency/Respondent), violated §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by implementing a Physical Medicine and Rehabilitation Service Holiday Coverage Policy without first providing the American Federation of Government Employees, Local 2157 (Charging Party/Union), with notice and an opportunity to negotiate over this change to the extent required by the Federal Service Labor-Management Relations Statute (the Statute).

* In accordance with §2429.21 of the rules and regulations, when the period of time allowed for the filing of papers is seven (7) days or less, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation.

The complaint, which was served on the Respondent by certified mail, specified that Respondent's answer was to be filed by December 19, 2011, and that a failure to file an answer would constitute an admission of the allegations of the complaint. See 5 C.F.R. § 2423.20(b). A hearing was scheduled for January 26, 2012. The Respondent did not file an Answer or other response to the Complaint.

On January 4, 2012, the General Counsel filed a Motion for Summary Judgment, asserting that by its failure to answer the complaint, the Respondent admitted all of the allegations therein. Since no facts are in dispute, the General Counsel submits that the record demonstrates that the Respondent violated the Statute as alleged. The Respondent did not file an opposition to the motion for summary judgment.

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. . . .

The Respondent failed to answer the allegations of the complaint and did not show good cause for its failure. Nor did the Respondent oppose the motion for summary judgment or the remedies requested therein. By its inaction, the Respondent admits the allegations of the complaint pursuant to §2423.20(b) and the motion is unopposed. Accordingly, there are no factual issues in dispute, and it is appropriate to resolve this case by summary judgment. Based on the existing record, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. This unfair labor practice complaint and notice of hearing is issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.
2. The U.S. Department of Veterans Affairs, Portland VA Medical Center, Portland, Oregon is an agency under 5 U.S.C. § 7103(a)(3).
3. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4), and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the U.S. Department of Veterans Affairs, including employees of Respondent.
4. The American Federation of Government Employees, Local 2157, AFL-CIO (Charging Party) is an agent of the exclusive representative for the purpose of representing certain employees of the Respondent within the unit described in paragraph 3.

5. The charge and amended charge were filed by the Charging Party with the San Francisco Regional Director on July 8, 2011 and November 2, 2011, respectively.

6. Copies of the charges described in paragraph 5 were served on the Respondent.

7. At all times material herein, John E. Patrick occupied the position of Director, Portland VA Medical Center.

8. At all times material herein, Mr. Patrick was a supervisor and/or management official under 5 U.S.C. § 7103(a)(10) and (11) at Respondent.

9. At all times material herein, Mr. Patrick acted on behalf of Respondent.

10. On or about May 31, 2011, Respondent, by Mr. Patrick, and/or others implemented a Physical Medicine and Rehabilitation Service Holiday Coverage Policy without first providing the Charging Party with notice and an opportunity to negotiate over this change to the extent required by the Statute.

11. By the conduct described in paragraph 10, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).

DISCUSSION

In failing to file an Answer to the complaint, the Respondent admits that it implemented a change to its holiday coverage policy without first providing the Union with notice and an opportunity to negotiate over this change and in doing so, it violated §7114 (a)(1) and (5) of the Statute.

It is well settled that a change to holiday work scheduling constitutes a change in conditions of employment that requires notice and impact and implementation bargaining prior to implementation of the change when the change is more than *de minimis*. *Dep't of the Treasury, U.S. Customs Serv., Region IV Miami, Fla.*, 19 FLRA 304 (1985). Having failed to file an Answer or a response to the Motion for Summary Judgment, the Respondent has failed to establish that the change was *de minimis*.

As a remedy for the Respondent's violation, the General Counsel requests an order to return to the *status quo ante* along with a cease and desist order to bargain, and that the Respondent post a notice to employees throughout its facilities at the U.S. Department of Veterans Affairs, Portland VA Medical Center, Portland, Oregon, signed by the Director of that facility. While neither of the cases cited by the General Counsel included a *status quo ante* remedy, such a remedy can be appropriate in a summary judgment decision based upon the failure to file an answer or response to the motion. *U.S. Dep't of Def., Def. Distrib. Depot, Anniston, Ala.*, 61 FLRA 108 (2005).

When an agency has failed to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a *status quo ante* remedy using the following factors: (1) whether and when notice was given to the union by the agency concerning the change; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a *status quo ante* remedy would disrupt or impact the efficiency or effectiveness of the agency's operations. *Fed. Corr. Inst.*, 8 FLRA 604 (1982).

As the Respondent could have raised but did not raise any objection to the request for a *status quo ante* remedy, the granting of such a remedy in this case is appropriate, as the Respondent admits that it provided no notice or an opportunity to negotiate and has failed to establish that the change had no impact on bargaining unit employees or would cause any disruption or impact the efficiency or effectiveness of agency operations.

CONCLUSION

Therefore 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 (the Statute), the U.S. Department of Veterans Affairs, Portland VA Medical Center, Portland, Oregon, shall:

1. Cease and desist from:

(a) Implementing the Physical Medicine and Rehabilitation Service Holiday Coverage Policy without first providing the American Federation of Government Employees, Local 2157, AFL-CIO, 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 bargaining unit employees in the exercise of their rights assured by the Statute.

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

(a) Rescind the Physical Medicine and Rehabilitation Service Holiday Coverage Policy implemented on or about May 31, 2011.

(b) Restore the practices and procedures concerning holiday coverage as they existed prior to the implementation of the Physical Medicine and Rehabilitation Service Holiday Coverage Policy on or about May 31, 2011.

(c) Post at the Portland VA Medical Center, where bargaining unit employees 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 of the Portland VA Medical Center, 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.

(d) Pursuant to §2423.41(e) of the Authority's rules and regulations, notify the Regional Director, San Francisco 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, DC, March 8, 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. Department of Veterans Affairs, Portland VA Medical Center, Portland, Oregon, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement a Physical Medicine and Rehabilitation Service Holiday Coverage Policy without first providing the American Federation of Government Employees, Local 2157, AFL-CIO, with advance notice and an opportunity to bargain to the extent required by 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 assured by the Statute.

WE WILL rescind the Physical Medicine and Rehabilitation Service Holiday Coverage Policy implemented on or about May 31, 2011.

(Agency/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 its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.