



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

OALJ 24-03

DEPARTMENT OF VETERANS AFFAIRS  
HARRY S. TRUMAN MEMORIAL  
VETERANS HOSPITAL  
COLUMBIA, MISSOURI

RESPONDENT

Case No. CH-CA-22-0354

AND

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES  
LOCAL 3399, AFL-CIO

CHARGING PARTY

Julia Napier  
For the General Counsel

David P. Doler  
For the Respondent

Lindsay Browning  
For the Charging Party

Before: LEISHA A. SELF  
Administrative Law Judge

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

The Respondent in this case has failed timely to answer the Complaint. As a result, the General Counsel moved for summary judgment because that failure means that the Respondent is deemed to have admitted all of the allegations of the Complaint. With all of the allegations deemed admitted, there are no genuine issues of material fact and the General Counsel is entitled to summary judgment as a matter of law.

## I. Factual and Procedural Background

On July 18, 2023, the Regional Director of the Chicago Regional Office of the Federal Labor Relations Authority (the Authority) issued a Complaint and Notice of Hearing in this case. The Complaint alleged that the Department of Veterans Affairs, Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri (the Respondent or the Agency) violated § 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to allow the American Federation of Government Employees, Local 3399, AFL-CIO (the Charging Party or the Union) to provide representation to a bargaining unit employee during the written part of an investigatory examination the Respondent conducted, as is required by § 7114(a)(2)(B) of the Statute. Complaint ¶¶ 2-17. The Complaint advised the Respondent that an Answer to the Complaint was due no later than August 14, 2023. Complaint, “Answer Requirement.” The Respondent did not timely file an Answer to the Complaint.

On September 29, 2023, Counsel for the General Counsel (GC) filed a Motion for Summary Judgment, based on the fact that the Respondent had failed to file an Answer to the Complaint, and arguing that the Respondent therefore had 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. GC MSJ at 1. The Respondent did not file a Response to the Motion for Summary Judgment.

## II. 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, VA 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 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 . . . 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.*, 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 its Answer, including the date on which the Answer was due, persons to whom it was to have been sent, and references to the applicable regulations; he also advised the Respondent that, absent a showing of good cause, the failure to answer any allegation of the Complaint would constitute an admission.

Moreover, 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); *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 37 FLRA 603, 610 (1990) (failure to file an answer due to a clerical error is not good cause sufficient to prevent a summary judgment).

In this case, the Respondent has not filed an Answer; nor has it demonstrated any good cause for its failure to do so. *See, e.g., U.S. Dep't of Transp., FAA, Hous., Tex.*, 63 FLRA 34, 36 (2008); *U.S. Dep't of VA Med. Ctr., Kan. City, Mo.*, 52 FLRA 282, 284 (1996), and the cases cited therein. In these circumstances, § 2423.20(b) clearly requires that the Respondent's failure to file an Answer be treated as an admission of each of 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 Union filed the charge in this proceeding on May 27, 2022 and a copy was served on the Respondent.
2. The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute.
3. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of nationwide consolidated units of VA employees, which include employees of the Respondent (the units).
4. The Union is an agent of AFGE for the purpose of representing the unit employees employed at the Respondent.
5. At all times material, the following individuals held the positions 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:
 

Connie Drake	VISN 15 Deputy Capital Asset Manager
Gregory Massey	Senior Electrical Engineer
6. On March 24, 2022, the Union, by President Lindsay Browning, represented Oscar Ignacio, Electrician, in an examination (a fact-finding interview about an electrical outage).

7. Ignacio is an employee under § 7103(a)(2) of the Statute and is in the bargaining unit described in paragraph 3.
8. On March 30, 2022, the Respondent, by Drake, sent Ignacio notes from the fact-finding interview described in paragraph 6 without copying his designated Union representative. The Respondent asked Ignacio to concur if the Respondent had accurately captured the intent of his responses and to sign the PDF document and to return it. The Respondent asked that if Ignacio did not feel that Respondent captured an answer accurately to edit the word version, typing in a different color, so that the Respondent can easily see what is changed, and to then save it as a PDF, and return it by close of business Friday.
9. The examination described in paragraphs 6 and 8 was in connection with an investigation.
10. Ignacio reasonably believed that the examination described in paragraphs 6 and 8 could result in disciplinary action.
11. Ignacio requested representation at the examination described in paragraphs 6 and 8.
12. The Respondent effectively denied Ignacio's request for representation at the portion of the examination described in paragraph 8.
13. By the conduct described in paragraphs 8 and 12, the Respondent has been failing and refusing to comply with § 7114(a)(2)(B) of the Statute.
14. By the conduct described in paragraphs 8, 12 and 13, the Respondent has been violating § 7116(a)(1) and (8) of the Statute.
15. By the conduct described in paragraph 8, the Respondent bypassed the Union and dealt directly with unit employees on matters affecting conditions of employment.
16. By the conduct described in paragraph 8, the Respondent has been refusing to negotiate in good faith with the Union and violating § 7116(a)(1) and (5) of the Statute.
17. By the conduct described in paragraph 8, the Respondent has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed in § 7102 of the Statute and violating § 7116(a)(1) of the Statute.

#### IV. Conclusions of Law

The GC argues that the Respondent failed to comply with § 7114(a)(2)(B) of the Statute and therefore violated § 7116(a)(1) and (8) of the Statute. GC MSJ at 4. Section 7114(a)(2)(B) entitles bargaining unit employees to representation by their union under certain conditions. Specifically, (1) there must be an examination of an employee by a representative of the agency; (2) the examination must be in connection with an investigation; (3) the employee must reasonably believe that the examination may result in disciplinary action against the employee; and (4) the employee must request representation. *Dep't of Def., Def. Criminal Investigative Serv.*, 28 FLRA 1145, 1145 (1987) (*Def. Criminal Investigative Serv.*). A request for a written statement may constitute an examination. *U.S. Immigration & Naturalization Serv., U.S. Border Patrol, Del Rio, Tex.*, 46 FLRA 363, 363-64 (1992). An Agency's failure to comply with § 7114(a)(2)(B) of the Statute is an unfair labor practice under § 7116(a)(1) and (8) of the Statute. *Def. Criminal Investigative Serv.*, 28 FLRA at 1145.

In this case, by virtue of the Respondent's failure to answer the Complaint, it has admitted that it conducted an examination of a bargaining unit employee in connection with an investigation. It further admitted that the employee reasonably believed the examination could result in disciplinary action. Finally, it admitted that it effectively denied the employee's request for representation during the written portion of the examination. As all of the elements are established to trigger the § 7114(a)(2)(B) right to representation by the Union, and those rights were denied, the Agency failed to comply with § 7114(a)(2)(B) of the Statute. As a result, the Respondent is found to have violated § 7116(a)(1) and (8) of the Statute.

The GC also argues that the Respondent bypassed the Union and dealt directly with a unit employee on matters affecting conditions of employment by virtue of seeking the bargaining unit employee's written statement without representation after he had engaged in the Union. GC MSJ at 4. Authority precedent establishes that agencies "unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters related to the collective bargaining relationship." *Dep't of HHS, SSA, Balt., Md.*, 39 FLRA 298, 311 (1991). By its failure to answer, the Respondent is deemed to have admitted that it bypassed the Union and dealt directly with a unit employee on matters affecting conditions of employment and, as a result, violated § 7116(a)(1) and (5) of the Statute.

#### V. Remedy

The only remaining question is that of remedy. The Authority has held that the purpose of a remedy is "to restore, as far as possible, the *status quo* that would have obtained but for the wrongful act and to deter future misconduct." *Fed. BOP, Wash., D.C., Fed. BOP, South Central Region, Dallas, Tex., and Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 55 FLRA 1250, 1258 (2000). To remedy similar violations, the Authority has ordered respondents to cease and desist and post a notice signed by the highest-level official of the activity responsible for the violation. *U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 395-96 (1999); *U.S. Dep't of HUD, Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73-75 (2002). The Authority has also required electronic distribution of the notice. *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla.*

*City, Okla.*, 67 FLRA 221, 221-26 (2014). The GC requests these remedies.\* GC MSJ at 5. As they are the traditional remedies, they are found appropriate here.

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

## VI. Order

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri shall:

1. Cease and desist from:
  - (a) Requiring any bargaining unit employee to take part in any examination (whether written, oral or otherwise) in connection with an investigation, without Union representation, when the employee has requested representation and reasonably believes that the examination may result in disciplinary action.
  - (b) Bypassing the American Federation of Government Employees, Local 3399, AFL-CIO (the Union), the exclusive representative of a bargaining unit of its employees, by dealing directly with bargaining unit employees concerning conditions of employment.
  - (c) 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 action in order to effectuate the purposes and policies of the Statute:
  - (a) Provide the Union with the opportunity to provide representation when a bargaining unit employee's investigatory examination (whether written, oral or otherwise), at which the employee originally requested representation and reasonably believes that the examination may result in disciplinary action, continues to a later point, whether the continued examination is written, oral or otherwise.
  - (b) Post at its facilities where bargaining unit employees of 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 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.

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\* The GC correctly notes that the Authority has also ordered agencies to conduct a new investigatory examination of the bargaining unit employee involved. GC MSJ at 5, n. 1; see *U.S. DOJ, Fed. Bur. of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 395-96 (1999). However, the GC does not request this remedy in this case because the bargaining unit employee involved has retired from the Agency. GC MSJ at 5, n. 1.

(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 Authority's 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, D.C.  
October 17, 2023

**LEISHA  
SELF** Digitally signed  
by LEISHA SELF  
Date: 2023.10.17  
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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 Department of Veterans Affairs, Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this notice.

We hereby notify bargaining unit employees that:

WE WILL, in any examination in connection with an investigation of a bargaining unit employee where the employee reasonably believes that the examination may result in disciplinary action, permit the employee, upon his or her request, to have a representative of the American Federation of Government Employees, Local 3399, AFL-CIO (the Union), represent the employee.

WE WILL NOT require any bargaining unit employee to take part in any examination in connection with an investigation without Union representation, if the employee requests representation and reasonably believes that the examination may result in disciplinary action.

WE WILL NOT bypass the Union, the exclusive representative of a bargaining unit of our employees, by dealing directly with bargaining unit employees concerning conditions of employment.

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

\_\_\_\_\_  
(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.

Questions about this notice or compliance with its terms may be directed to the Regional Director, Chicago Regional Office, Federal Labor Relations Authority by mail: 224 S. Michigan Ave., Suite 445, Chicago, IL 60604 or phone: (872) 627-0020.