FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 17-07

FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL COMPLEX COLEMAN, FLORIDA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 506 CHARGING PARTY	Case No. AT-CA-16-0281

Vicky Gillen
For the General Counsel

Jenifer G. Hollett
For the Respondent

Kenneth Pike
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Respondent sought permission to file an untimely Answer to the Complaint in this case, and to avoid the harsh penalty of summary judgment for its failure to file its Answer in a timely manner, by asserting that it had good cause for that failure. On initial consideration, I granted the Respondent's Motion to Answer Out of Time and denied the General Counsel's Motion for Summary Judgment, on the ground that the Respondent's error was "inadvertent and excusable." The General Counsel then filed a Motion for Reconsideration of my prior order, and after reviewing the facts of this case and the law governing those facts, it is clear that my denial of the Motion for Summary Judgment was erroneous. While the Respondent's failure to file a timely answer may have been inadvertent,

the reasons for its late Answer do not constitute "extraordinary circumstances," as defined by the Authority. Therefore, the Respondent has not demonstrated good cause to excuse its late answer; as a result it is deemed to have admitted the allegations of the Complaint, and 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 October 24, 2016,[1] the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing on behalf of the General Counsel (GC), alleging that the Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (the Respondent or Agency), violated § 7116(a)(1) and (5) of the Statute by implementing a change to the procedures regarding the wearing of puncture-resistant gloves without completing negotiations with the American Federation of Government Employees, AFL-CIO, Local 506 (the Charging Party or Union). The Complaint advised the Respondent that an answer was due no later than November 21, and it further advised the Respondent 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 November 10, the Respondent filed a Designation of Agency Representative, identifying Jenifer G. Hollett as its representative in this matter.

The date for filing the Respondent's Answer passed without a filing. On November 30, both the GC and the Respondent filed motions: the GC filed a Motion for Summary Judgment, based on the Respondent's failure to file an answer; the Respondent filed a Motion to Answer Out of Time, along with its Answer. The Respondent's motion asserted that its counsel had drafted the Answer on Friday, November 18, and then left on leave, not returning to her office until November 29. Upon her return, she learned that her office staff had failed to file the Answer as she had instructed, so she acted promptly and filed the Answer and accompanying motion the next day. Respondent's counsel asserted that the late filing was "due to administrative error," and that "[i]t would be unfair to penalize the Agency . . . due to the simple mailing error that occurred in connection with vacation around the [Thanksgiving] holidays." Mot. to Ans. Out of Time at 2. Respondent requested that the Answer be considered as timely filed. The GC's Motion for Summary Judgment asserted simply that because the Respondent failed to file an answer by the November 21 deadline, it had admitted all of the allegations of the Complaint, and that summary judgment was therefore appropriate. The GC opposed any extension of the time limit for filing the Respondent's Answer.

[1] Unless otherwise noted, all dates are in 2016.

On December 12, an Order Denying Motion for Summary Judgment was issued, under the stamped signature of the Chief Administrative Law Judge. In fact, the Order was drafted and approved by me, and it should have been issued under my signature. The Order stated that the Respondent's late Answer was an "inadvertent and excusable" error and granted the Respondent's Motion to Answer Out of Time. On December 14, the GC filed a Motion for Reconsideration of Order Denying Motion for Summary Judgment, arguing that the reasons given by the Respondent for its untimely Answer do not constitute extraordinary circumstances or good cause for extending the time limit for filing an Answer.

DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

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 . . . .
>
> (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. . . .

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. It is clear that Respondent and its counsel were aware of the due date, as they noted it in their Motion to Answer Out of Time. It is undisputed that the Answer, filed on November 30, was untimely. Respondent's counsel asserts that she prepared the Answer prior to the filing deadline and "left the packet to be mailed in her absence the following week. Unfortunately, the packet did not get mailed in a timely manner." Mot. to Ans. Out of Time at 1. The issue is whether these were "extraordinary circumstances" that constitute "good cause" under the Regulations to waive the time limit.

In *U.S. Dep't of Hous. & Urban Dev.*, 32 FLRA 1261 (1988), the Authority waived an expired time limit for filing a motion for reconsideration, as the representative of record was out of town on a family medical emergency for nearly a month, encompassing the period from before the Authority's original decision was served until several days after the motion for reconsideration was due. The representative filed the motion ten days after returning to the office and learning of the Authority's decision. The Authority considered these to be "extraordinary circumstances" justifying the late filing, within the meaning of § 2429.23(b). It also compared these circumstances to the facts in *Internal Revenue Serv., Indianapolis Dist.*, 32 FLRA 1235 (1988), where the attorney responsible for the case was out of town in training, but was informed thirteen days before the due date of a motion for reconsideration that his office had received the Authority's decision. Although the agency argued that its attorney had been "unable to review the Decision until returning" to his office, the Authority noted that the agency had notice of the decision and could have filed a timely motion. *Id.* at 1236. Thus, it held that extraordinary circumstances did not exist to justify waiving the time limit. *See also U.S. Dep't of Hous. & Urban Dev., Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 n.2 (2002); *U.S. Dep't of Veterans Affairs Med. Ctr., Kans. City, Mo.*, 52 FLRA 282, 283-84 (1996).

In the present case, the Respondent does not assert that counsel was unable to file a timely answer because of illness or absence, but rather because of an unexplained error or failure of the office staff, who had been given the document but failed to mail it. This is similar to the facts of *U.S. Dep't of Transp., FAA, Hous., Tex.*, 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. Dep't of Veterans Affairs Med. Ctr., Waco, Tex.*, 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 Respondent and its counsel, and my sympathy entered into my original decision to extend the filing deadline, the regulation and the case law are clear that the Respondent's administrative error, however inadvertent, does not constitute "extraordinary circumstances" justifying the late filing. The Answer could have been filed in a timely manner, if ordinary diligence had been followed by Respondent's staff. 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. The General Counsel has established that its Motion for Reconsideration should be granted and the Respondent's untimely Answer should not be accepted.

In accordance with § 2423.20(b), failure to file an answer to a complaint constitutes an admission of 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 Respondent is an agency within the meaning of § 7103(a)(3) of the Statute.

2. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and Local 506 is the certified exclusive representative of nationwide consolidated units of Prison Locals, which includes employees of the Respondent (the unit).

3. The Union is an agent of AFGE for the purposes of representing the unit employees employed at the Respondent.

4. On January 7, 2016, the Respondent notified the Union that it intended to implement the mandatory compliance order issued by the U.S. Department of Labor, Occupational Safety and Health Administration to require all staff to wear puncture-resistant gloves while performing cell searches, pat searches, and packing inmate personal property.

5. On January 7, 2016, the Union requested to negotiate over the change described in paragraph 4, requested further information, and submitted proposals.

6. On January 27, 2016, the Respondent implemented the change described in paragraph 4.

7. The Respondent implemented the change in unit employees' conditions of employment described in paragraphs 4 and 6 without completing negotiations with the Union over the impact and implementation of the change.

8. By the conduct described in paragraphs 6 and 7, the Respondent has been refusing to negotiate in good faith with the Union in violation of § 7116(a)(1) and (5) of the Statute.

CONCLUSIONS OF LAW

By virtue of its failure to timely answer the Complaint, the Respondent has admitted that it implemented a change in the conditions of employment of unit employees by requiring them to wear puncture-resistant gloves while performing cell searches, pat searches, and packing inmate personal property. Before implementing such a change, an agency is required to bargain over those aspects of the change that are within the duty to bargain. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999). When an agency, as here, exercises a reserved management right, and the substance of the decision itself is not subject to negotiation, the agency nonetheless has the obligation to give notice and to bargain over procedures to implement that decision and appropriate arrangements for unit employees

adversely affected by the decision. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003). The Respondent admits that it violated this obligation when it implemented the requirement concerning puncture-resistant gloves. Accordingly, the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute.

In order to remedy the Respondent's unfair labor practice, the General Counsel does not seek a status quo ante remedy; rather, the GC asks that the Respondent be ordered to bargain prospectively with the Union over the impact and implementation of the Respondent's decision to require all staff to wear puncture-resistant gloves while performing certain duties, that Respondent post the attached Notice to Employees at its facilities where unit employees represented by the Union are located, and that Respondent disseminate a copy of the Notice to Employees through its email system to those same employees. In light of the admitted violation of the Statute, these are appropriate remedies.

The General Counsel's Motion for Reconsideration is hereby granted, and Respondent's Motion to Answer Out of Time is denied.

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(a)(7) of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment of bargaining unit employees by implementing a requirement that all staff wear puncture-resistant gloves while performing certain job duties, without fulfilling its obligation to bargain with the American Federation of Government Employees, AFL-CIO, Local 506 (the Union) concerning the impact and implementation of such changes.

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

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

(a) Bargain with the Union over the impact and implementation of its decision to require all staff to wear puncture-resistant gloves while performing certain job duties.

(b) Post at its facilities 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 Warden 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.

(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, 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., January 9, 2017

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 Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, 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 unilaterally change conditions of employment of bargaining unit employees by implementing a requirement that all staff wear puncture-resistant gloves while performing certain job duties, without fulfilling our obligation to bargain with the American Federation of Government Employees, AFL-CIO, Local 506 (the Union) concerning the impact and implementation of such changes.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL bargain with the Union over the impact and implementation of our decision to require all staff to wear puncture-resistant gloves while performing certain job duties.

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature) (Title)

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 any of 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.