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

OALJ 24-15

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO CHARGING PARTY	Case No. WA-CA-22-0450

Elizabeth Wiseman
For the General Counsel

Kimberly Stratton
Karey Hart
For the Respondent

James P. Flynn
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

After the Respondent notified the Union in this case of its intent to replace its existing customer relationship management software with a new software platform, the parties engaged in negotiations over the impact and implementation of this plan, called the FHA Resource Center Modernization Project, Phase 1, or RCMP. Eventually negotiations stalled, and the Respondent implemented its final proposals on the subject, causing the Union to file an unfair labor practice charge. After investigating the charge, the FLRA's Office of General Counsel (GC) issued a complaint against the Respondent, alleging that it violated its duty to bargain in good faith by negotiating without the intent to reach an agreement. The Respondent failed to file an answer to the complaint, and the GC now seeks summary judgment against the Respondent.

In response to the motion, the Respondent concedes that it failed to answer the complaint and that summary judgment is appropriate. However, it argues that portions of the remedy proposed by the GC are not warranted, as these terms go beyond restoring the status quo and are contrary to law. I agree in part with the Respondent that portions of the proposed remedy are not supported by the record in this case, and I will order a modified remedy for the Respondent's admitted unfair labor practice.

Factual and Procedural Background

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. parts 2423 and 2429.

On July 28, 2023, the Regional Director of the Washington Region of the Federal Labor Relations Authority (the Authority) issued a Complaint and Notice of Hearing against the U.S. Department of Housing and Urban Development (the Agency or Respondent). The Complaint alleged that the Respondent violated its duty under § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), to bargain in good faith with the American Federation of Government Employees, Council 222, AFL-CIO (the Charging Party or Union). Specifically it alleged that the Respondent bargained without the intent to reach an agreement on a proposed new customer relationship management software platform. Complaint, ¶¶ 7, 8. The Complaint indicated that a hearing on the allegations would be held on December 19, 2023, and advised the Respondent that an Answer to the Complaint was due no later than August 22, 2023. The Respondent did not file an Answer.

On December 5, 2023, Counsel for the GC filed a Motion for Summary Judgment (MSJ), arguing that because the Respondent had failed to file an answer to the Complaint, it was deemed to have admitted all the allegations of the Complaint. The GC asserts that there are, accordingly, no factual or legal issues in dispute, and that summary judgment against the Respondent is thus warranted. To remedy the Agency's unlawful conduct, the GC proposes (among other things) that it be ordered to cease and desist from refusing to bargain with the Union, that it post a notice to employees regarding its unlawful conduct, and that it further be ordered to bargain with the Union over a series of six specific proposals that the Union had submitted on February 11, 2022. MSJ at 10, 11.

On December 12, 2023, the Respondent filed a response to the MSJ (Resp. MSJ). It admits that it did not file an answer and that summary judgment is therefore appropriate. Resp. MSJ at 1. It also agrees it should post a notice to employees and engage in post-implementation bargaining with the Union over the RCMP. *Id*. But it asserts that some of the specific bargaining proposals cited in the GC's proposed remedial order (such as cash awards, remote work, and the FHA Catalyst project) relate to subjects that were not part of the parties' negotiations over RCMP. *Id*. at 4. In the Agency's view, these subjects are non-negotiable and potentially unlawful; thus the proposed order goes beyond the legitimate purposes of an FLRA remedy. *Id*. at 4-9.

Discussion of Motions 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.*, 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 must be sent, and references to the applicable regulations. The Regional Director also advised Respondent that absent a showing of good cause, the failure to answer any allegation of the Complaint would constitute an admission.

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:

FINDINGS OF FACT

1. The Union filed the charge in this proceeding on June 7, 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 Section 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide consolidated unit of employees, which includes employees of Respondent (the unit).

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

5. At all material times, the following individual held the position opposite her name and has been a supervisor or management official of the Respondent within the meaning of Section 7103(a)(10) and (11) of the Statute and an agent of Respondent acting on its behalf:

Sheila Sayles Employee and Labor Relations Specialist

6. At various times from about August 3, 2021, to April 22, 2022, Respondent and the Union met for the purpose of negotiating a collective bargaining agreement regarding the implementation of a new customer service platform.

7. During the period described in paragraph 6, Respondent, through Sayles, engaged in the following conduct: bargaining without intent to reach agreement.

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

CONCLUSIONS OF LAW

Section 7114(a)(4) of the Statute requires agencies and unions to negotiate in good faith for the purposes of arriving at a collective bargaining agreement. Section 7114(b) defines the duty to negotiate in good faith as, among other things, "the obligation to approach the negotiations with a sincere resolve to reach a collective bargaining agreement." 5 U.S.C. § 7114(b)(1). Section 7116(a)(5) provides that it is an unfair labor practice for an agency to refuse to negotiate in good faith with its exclusive representative.

The Complaint in this case does not offer much in the way of detail as to how exactly the Agency bargained in bad faith; it simply alleges that the Agency negotiated "without intent to reach agreement." And by its failure to file an answer, the Respondent has admitted that it negotiated without intent to reach agreement. In this regard, the Respondent has admitted that it committed an unfair labor practice and violated § 7116(a)(5). However, neither the GC's allegations nor the Respondent's admissions shed much light on what actions the Respondent committed that demonstrated its lack of intent to reach agreement, and because of this it is difficult to craft a remedy that addresses the unlawful conduct. Crucially, the Complaint makes no allegations regarding the Union proposals, over which the GC now seeks to require the Agency to bargain.

The GC attempted to cure this problem in its MSJ, which provides a detailed description of the course of bargaining between the Agency and the Union between June of 2021 and April of 2022, supported by an affidavit from James Flynn, the Union's chief negotiator, and by other documentary exhibits. These documents include a February 2, 2022 email from Agency representative Sheila Sayles to Mr. Flynn, in which she agreed to allow the Union additional time, until February 11, to submit "new proposals" relating to the RCMP negotiations. MSJ Ex. 11. The Union submitted further proposals on February 11 (MSJ Ex. 12), and the Agency responded on April 22 by asserting that the Union proposals were submitted too late, and also argued that they were not negotiable (MSJ Ex. 14). The GC concludes this history of the negotiations by asserting, "By refusing to negotiate over proposals it offered to accept, Respondent has failed to negotiate in good faith with the Charging Party, in violation of Section 7116(a)(1) and (5) of the Statute." MSJ at 8.

Based on this evidence, and the Respondent's admissions, I agree with the GC that the Agency's refusal to return to the bargaining table after February 11, 2022, demonstrated deceptive conduct by the Agency, and its unilateral implementation of its last-best offer further constituted bad faith and a lack of intent to reach agreement, in violation of § 7116(a)(1) and (5). *U.S. DOJ, Exec. Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 465 (2006); *see also VA Wash., D.C., & VA Med. Ctr., Leavenworth, Kan.*, 32 FLRA 855 (1988).

This evidence, however, does not support an order – such as the one proposed by the GC – that explicitly requires the Agency to negotiate over the six new proposals submitted by the Union on February 11, 2022. The GC has shown, and the Respondent has admitted, that the Respondent's overall course of conduct in the negotiation period between August of 2021 and April of 2022 demonstrated a lack of intent to reach an agreement. But that does not mean that each of the Union's February 11 proposals was negotiable, and that the Agency should be ordered to negotiate over them. The Agency agreed to allow the Union to submit additional proposals by February 11, 2022, and it can reasonably be inferred that the Agency agreed to at least consider them at the bargaining table, but it certainly was not saying that those proposals (which it had not yet seen) were negotiable. In its Complaint, the GC did not allege that any Union proposals were negotiable. Yet that is the import of the GC's proposed order.

The implications of the proposed order come into better focus upon looking at some of the specifics of that order. Paragraph 2(b)(2) of the proposed order requires that savings from the implementation of RCMP (both Phase 1 and future programs) be utilized for special cash awards and within-grade pay increases for bargaining unit employees. The Respondent correctly notes that it is entirely speculative whether there will be any such savings, and further argues that its Congressional appropriations do not permit it to allocate savings from RCMP to cash awards or pay increases. Resp. MSJ at 7-9. The Respondent objects to Paragraph 2(b)(4) of the proposed order, as it requires the Respondent to bargain over technical aspects of the FHA Catalyst project, which has been explicitly excluded from the scope of the parties' bargaining, and other unspecified "advanced technologies." *Id*. at 6. Respondent objects to other Union proposals, which are included in the GC's proposed order, that it considers overly vague or undefinable, which it says will simply lead to future compliance disputes. *Id*. at 6-7.

The record in this case does not provide me a basis for evaluating the negotiability of the proposals which the Union submitted on February 11, 2022, and on which the GC seeks to require the Respondent to bargain. *See AFGE Local 3283*, 61 FLRA 426, 427-28 (2005) (evidence that union inadequately advised employees did not justify a backpay order). The GC did not allege in the Complaint that the proposals were negotiable, and thus the Respondent has not admitted they were. The record reflects that the Respondent agreed on February 2, 2022, to consider any proposals submitted by February 11, and the Respondent's underlying bad faith conduct was its refusal to follow through on that promise. It is appropriate that Respondent be ordered to remedy its unlawful conduct by returning to the status quo that existed on February 11, 2022: by returning to the bargaining table to resume negotiations over the RCMP. *See, e.g.*, *U.S. DOJ, Fed. Bureau of Prisons, Fed. Transfer Ctr., Oklahoma City, Okla*., 67 FLRA 221, 223, 226 (2014). Such a remedy should not presume that specific proposals offered by the Union were negotiable, and the Respondent should be permitted to raise negotiability objections to any of those proposals.

Although the Respondent objects to being ordered to bargain over issues that may likely lead to future ULP charges, that is an unavoidable consequence of almost any type of bargaining order. Returning to the bargaining table carries the risk – borne equally by the Union and the Agency – that their proposals will not be persuasive or that those proposals may be viewed as non-negotiable. When the parties here return to the bargaining table, the Agency must consider and discuss the Union's February 11, 2022 proposals; if it views any of them as non-negotiable, there are statutory avenues for the parties to pursue to resolve those disputes.

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 Housing and Urban Development, shall:

1. Cease and desist from:

(a) Refusing to negotiate in good faith with the American Federation of Government Employees, Council 222, AFL-CIO (the Union), regarding the FHA Resource Center Modernization Project, Phase 1 (RCMP-P1).

(b) Negotiating with the Union without an intent to reach agreement.

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

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

(a) Upon the request of the Union, negotiate in good faith regarding the RCMP-P1.

(b) Post at the U.S. Department of Housing and Urban Development in the Atlanta, Georgia; Denver, Colorado; Philadelphia, Pennsylvania; and Santa Ana, California Homeownership Centers; the National Servicing Center and Headquarters Single Family Housing Offices and the FHA Resource Centers in Indianapolis, Indiana, and Albuquerque, New Mexico, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by Julie Shaffer, Associate Deputy Assistant Secretary, 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 the 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. The message of the email transmitted with the Notice shall state, "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number WA-CA-22-0450."

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Washington 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., June 25, 2024

Richard A. Pearson

Digitally signed by Richard A. Pearson
Date: 2024.06.25 13:18:02 -04'00'

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 Housing and Urban Development 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 refuse to negotiate in good faith with the American Federation of Government Employees, Council 222, AFL-CO (the Union), regarding the FHA Resource Center Modernization Project, Phase 1 (RCMP-P1).

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

WE WILL, upon the request of the Union, negotiate in good faith regarding the RCMP-P1.

_____
(Agency/Activity)

Date: _____ 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 its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street, N.W., 3rd Flr., Washington, D.C. 20424, and whose telephone number is: (771) 444-5780.