

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: March 15, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3283

Respondent

and

Case No. CH-CO-04-0601

LENDA D. SPIVEY, AN INDIVIDUAL

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3283 Respondent	
and LENDA D. SPIVEY, AN INDIVIDUAL Charging Party	Case No. CH-CO-04-0601

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 18, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20005

RICHARD A. PEARSON
Administrative Law Judge

Dated: March 15, 2005
Washington, DC

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3283 Respondent	
and LEND A D. SPIVEY, AN INDIVIDUAL Charging Party	Case No. CH-CO-04-0601

Gary W. Stokes, Esq.
Greg A. Weddle, Esq.
For the General Counsel

Vic-tor Davis, President
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

On December 7, 2004, the Acting Regional Director of the Chicago Region of the Federal Labor Relations Authority 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(b) (1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to advise a group of grievants of the objective criteria used by the Respondent to determine which grievants would obtain a monetary award as part of the settlement of their grievances, thereby violating the Respondent's duty of fair representation. The Complaint also specified that, in accordance with the Authority's Rules and Regulations, the Respondent was required to file an answer to the Complaint no later than January 3, 2005, and that a failure to file an answer would constitute an admission of the allegations of the Complaint. Nonetheless, the Respondent did not file an answer to the Complaint.

On February 9, 2005, Counsel for the General Counsel filed a Motion for Summary Judgment, based on the Respondent's failure to file a timely answer. The Motion for Summary Judgment was served on the Respondent by facsimile transmission and by certified mail on February 9, 2005. In accordance with sections 2423.27(b) and 2429.21(a) of the Authority's Rules and Regulations, a response by the Respondent to the Motion for Summary Judgment was required within five days of service, or by February 16, 2005. On February 18, 2005, the Respondent's President, Victor Davis (Davis), sent by facsimile transmission a letter to the Chief Administrative Law Judge, in which he stated that he had received "several different documents" in this case, that he did not intend to ignore any requirements to respond, and that he was prepared "to be in attendance for the actual trial date" scheduled for March 9, 2005. On February 28, 2005, the Chief Administrative Law Judge issued an order indefinitely postponing the hearing.

Discussion of Motion for Summary Judgment

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 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. Motions to extend the filing deadline shall be filed in accordance with § 2423.21.

The Rules and Regulations also explain how to calculate filing deadlines and how to request extensions of time for filing required documents. See, e.g., sections 2429.21 through 2429.23.

The February 18 letter sent to this office by the Respondent's president was neither a timely answer to the complaint nor a timely response to the Motion for Summary Judgment. Therefore, the issue is whether the Respondent has shown "good cause" for its late submission. As noted above, Davis stated that he did not intend to ignore any requirements to respond, although that is precisely what he had done. He asserted that the Union was prepared to attend the hearing, and that "[t]here were some minor corrects that needed to be addressed that was in the charging party's

documents that are not true facts." However, the letter offered no explanation or excuse for the Respondent's failure to answer the complaint. In short, nothing in the Respondent's letter demonstrates "good cause" for excusing the late submission, within the meaning of section 2423.20 (b). See, *U.S. Department of Veterans Affairs Medical Center, Kansas City, Missouri*, 52 FLRA 282 (1996).

It is likely that Mr. Davis is inexperienced in unfair labor practice procedures, and his letter suggests that he might have believed he could simply appear at the hearing to present his case. But the Authority has made it clear that neither inexperience nor ignorance of its regulations is a valid excuse for failure to comply with those requirements. *U.S. Environmental Protection Agency, Environmental Research Laboratory, Narragansett, Rhode Island*, 49 FLRA 33, 35-36 (1994) (answer to a complaint and an ALJ's order); *U.S. Department of Veterans Affairs, Medical Center, Waco, Texas and American Federation of Government Employees, Local 1822*, 43 FLRA 1149, 1150 (1992) (exceptions to an arbitrator's award). The exclusive bargaining representative of a unit of employees is responsible for complying with the law and regulations, and when its officials are not familiar with the law they must consult lawyers or other advisors who will help them comply.

The Respondent's failure to respond timely is not attributable simply to inexperience, however. In the text of the Complaint and Notice of Hearing, the Acting 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. The plain language of the notice leaves no doubt that Respondent could not simply wait until the hearing to present its side of the case. An inexperienced official, exercising normal diligence, should have consulted with legal counsel or with more experienced union officials, if he had any questions as to what was required.

In light of these factors, the Respondent has not shown good cause for its failure to file a timely answer to the Complaint. In accordance with section 2423.20(b) of the Rules and Regulations, this failure constitutes an admission of each of the allegations of the Complaint. There is, therefore, no genuine issue of material fact, and it is appropriate to resolve this case by summary judgment. Based on the allegations and admissions, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

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 unit of employees appropriate for collective bargaining at the Defense Finance and Accounting Service (DFAS). AFGE Local 3283 (the Respondent) is an agent of AFGE for the purpose of representing employees in the unit described above at the DFAS Cleveland, Ohio facility.

During all times pertinent to this complaint, Lenda D. Spivey (Spivey or the Charging Party) was an employee under 5 U.S.C. § 7103(a) (2) and was in the bargaining unit described above at the DFAS Cleveland facility.

Between May 1, 2000, and April 30, 2001, a number of bargaining unit employees at the DFAS Cleveland facility filed grievances under the negotiated grievance procedure concerning their performance appraisals. The Respondent represented the employees in these grievances, and in August 2003 the Respondent grouped 19 of these grievances together for purposes of arbitration.

On January 9, 2004, the Respondent and DFAS entered into a settlement agreement resolving all 19 grievances. Davis signed the agreement on behalf of the Respondent. Pursuant to the settlement, as evidenced by a copy of the agreement and documents attached to it, the Respondent agreed to withdraw its arbitration request, and DFAS agreed to change the performance appraisals for seven of the 19 grievants, with those seven grievants receiving additional awards totalling \$4,178. Pursuant to an alternative settlement proposal, which the Union dropped, all 19 of the grievants would have had their performance appraisals changed, resulting in additional awards to the 19 grievants totalling \$9,478. Thus, by virtue of the settlement agreement executed by the Respondent and DFAS, 12 of the 19 grievants represented by the Respondent received no adjustment in their appraisals and no adjustment in their awards.

The Respondent failed to properly advise the grievants as to the objective criteria it used to determine which employees would obtain a monetary award as part of the settlement and which employees would not obtain a monetary award.

Conclusions

Section 7114(a) (1) of the Statute vests exclusive representatives with the responsibility to represent "all

employees in the unit it represents without discrimination and without regard to labor organization membership." This incorporates in Federal labor relations the duty of fair representation recognized for unions in the private sector. *American Federation of Government Employees, Local 3354, AFL-CIO*, 58 FLRA 184, 187 (2002) (*Local 3354*). In cases, such as this one, where union membership is not alleged to be a factor in the union's illegal action, the General Counsel must show that the union has "deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit." *National Federation of Federal Employees, Local 1453*, 23 FLRA 686, 691 (1986). Even without hostile intent, a union can violate its duty of fair representation if it acts arbitrarily. See, e.g., *U.S. Air Force, Loring Air Force Base, Limestone, Maine*, 43 FLRA 1087, 1098-99 (1992), and cases cited therein, where a violation was found because the union divided money from a grievance settlement based on arbitrary and unexplained changes.

In this case, it has been established that the Respondent, acting as the exclusive representative of unit employees, agreed to a grievance settlement that was favorable for seven employees and unfavorable for 12 employees. In doing so, the Respondent had a wide range of discretion, but it could not act arbitrarily or without explanation. The complaint alleged that the Respondent acted "in an irrational, arbitrary and unreasonable manner by not properly and fairly advising the 19 grievants . . . of the objective criteria the Respondent intended to and did use to determine which employees would obtain a monetary award as part of the Respondent's settlement with the Agency." As I have already explained, the Respondent is deemed to have admitted this crucial allegation by its failure to answer the complaint. Thus Respondent has admitted that it gave no explanation to the grievants of its reasons for treating some of them favorably and some of them unfavorably. This failure to explain constituted arbitrary conduct and violated the duty of fair representation.

I therefore conclude, based on the admitted allegations of the complaint and the documentation attached to the Motion for Summary Judgment, that the Respondent violated section 7114(a)(1) of the Statute and committed an unfair labor practice in violation of section 7116(b)(1) and (8).

However, neither the complaint itself nor the evidence submitted in support of the Motion for Summary Judgment supports the backpay remedy sought by the General Counsel. The Authority has held that a union may be held liable for losses suffered by employees due to the union's violation of

its duty of fair representation, but the General Counsel must show that the union's conduct caused the loss. *Local 3354, supra*, 58 FLRA 184, 191. Here, the General Counsel has not shown the necessary causal connection.

The complaint merely alleges that the Respondent improperly failed to explain to the employees the criteria it used in its settlement of their grievances. From the evidence in the record, it is quite possible that the Respondent had legitimate reasons for settling the case unfavorably to 12 of the 19 grievants. By failing to explain its reasons to the employees, Respondent acted arbitrarily and violated its duty of fair representation, but it did not necessarily cause any monetary loss to the 12 "losing" grievants. There simply is no evidence that those 12 grievants would have received awards if the Union had explained to them the reasons for the settlement.

Accordingly, I recommend that the Authority grant the General Counsel's motion for summary judgment and issue the following:

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 American Federation of Government Employees, Local 3283 (Respondent), shall:

1. Cease and desist from:

(a) Failing to perform its duty of fairly representing bargaining unit employees by processing and resolving grievances in an irrational, arbitrary or unreasonable manner.

(b) Failing to explain to grievants the objective criteria used by Respondent in processing and resolving grievances.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Represent the interests of all bargaining unit employees without acting in an irrational, arbitrary or unreasonable manner.

(b) Explain to grievants the objective criteria used by Respondent in processing and resolving grievances.

(c) Post at its business offices, and in all places where notices to employees represented by the Respondent are customarily posted, 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 President of the Respondent, 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) Submit appropriate signed copies of the Notice to the Defense Finance and Accounting Service, Cleveland Office, for posting in conspicuous places where unit employees represented by the Respondent are located. Copies

of the Notice should be maintained for a period of 60 days from the date of the posting.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago 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 15, 2005.

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RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO OUR MEMBERS AND OTHER EMPLOYEES
AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY
AND TO EFFECTUATE THE POLICIES OF THE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

The Federal Labor Relations Authority has found that the American Federation of Government Employees, Local 3283, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE WILL NOT fail to perform our duty of fairly representing bargaining unit employees by processing and resolving grievances in an irrational, arbitrary or unreasonable manner.

WE WILL NOT fail to explain to grievants the objective criteria we use in processing and resolving grievances.

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 represent the interests of all bargaining unit employees without acting in an irrational, arbitrary or unreasonable manner.

WE WILL explain to grievants the objective criteria we use in processing and resolving grievances.

Government

(American Federation of
Employees, Local 3283)

Date:

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, Chicago Regional
Office, Federal Labor Relations Authority, whose address is:
55 W. Monroe Street, Suite 1150, Chicago, IL 60603-9729, and
whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. CH-CO-04-0601, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Gary W. Stokes, Esq. and **7000 1670 0000 1175 5257**
Greg A. Weddle, Esq.
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Vic-tor Davis, President **7000 1670 0000 1175 5264**
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REGULAR MAIL:

Lenda Spivey
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President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: March 15, 2005
Washington, DC