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

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL TRANSFER CENTER OKLAHOMA CITY, OKLAHOMA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS #33, LOCAL 171 CHARGING PARTY	Case No. DA-CA-10-0583

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 her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 29, 2013**, electronically at **www.flra.gov**, by selecting **eFile** under the **Filing a Case** tab and follow the instructions or by U.S. Mail to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge

Dated: March 28, 2013
Washington, D.C.

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

OALJ 13-11

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL TRANSFER CENTER OKLAHOMA CITY, OKLAHOMA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS #33, LOCAL 171 CHARGING PARTY	Case No. DA-CA-10-0583

Charlotte A. Dye
For the General Counsel

Sonya Cole
For the Respondent

Bryan Houck
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et. seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. part 2423.

On September 17, 2010, the American Federation of Government Employees, Council of Prison Locals #33, Local 171 (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma (Respondent/Agency), with the Dallas Regional Office. The charge was later transferred to the Boston Region on March 21, 2011. The Regional Director of the Boston Region issued a Complaint and Notice of Hearing on

November 30, 2011, claiming that the Respondent violated § 7116(a)(1), (5) and (6) of the Statute by refusing to sign a renegotiated memorandum of understanding (MOU) unless the Charging Party consented to withdraw a pending grievance regarding overtime. On March 21, 2011, the Regional Director issued an order transferring the charge to the Dallas Region.

The Respondent filed its Answer to the complaint on December 27, 2011, in which it admitted certain facts but denied the substantive allegations of the complaint.

On February 2, 2012, the General Counsel (GC) filed a Motion to Amend the Complaint and changed the wording of paragraphs 11 through 15. The Respondent filed an Opposition to the GC's motion on February 2, 2012. By order issued on February 2, 2012, the GC's motion to amend the complaint was granted.

The Respondent filed an Amended Answer to the amended complaint on February 3, 2012, in which it again admitted certain facts, but denied the substantive allegations of the complaint.

A hearing in this matter was held on February 15, 2012, in Oklahoma City, Oklahoma. At the opening of the hearing the General Counsel withdrew its allegation that the Respondent violated § 7116(a)(6) of the Statute. All parties were represented and afforded a full opportunity to be heard, to produce relevant evidence, and to examine and cross-examine witnesses. Both the General Counsel and Respondent filed timely post-hearing briefs that have been duly considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency as defined by 5 U.S.C. § 7103(a)(3). The Respondent's mission is not only to house prisoners, but also to process inmates in transit: (1) to the prisons where they will serve their sentences; (2) from one prison to another prison; and (3) between the prisons where they are incarcerated and federal court. During all times material to this matter, Paul Kastner was the Warden, and Samuel Henderson, Jr., was the Captain for the Respondent. (G.C. Ex. 1(d), 1(g); Tr. 21, 22, 51). Kenneth Hortman served as the Associate Warden and the Labor-Management Relations Chair (LMR Chair). Additionally, Mark Wedding occupied the position of Administrative Lieutenant but retired from the Agency prior to the hearing.

The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Agency. At all times material to this matter, Tom Townley was the Vice-President, Bryan Houck was the Chief Steward, and Bobby Hutchinson served as a Steward of the Union. (G.C. Ex. 1(d), 1(g)).

The Respondent and the Union are parties to a collective bargaining agreement (CBA), which became effective on March 9, 1998. Article 18, Section p of the CBA provides that local unions have the right to negotiate over "[s]pecific procedures regarding overtime assignments . . . ." (G.C. Ex. 2 at 48).

Also, the Respondent and the Union are parties to a Memoranda of Understanding (MOU), which became effective on November 8, 2005 (2005 MOU). (G.C. Ex. 3). The parties entered into the 2005 MOU which covered the Respondent's Custody Department after the Agency implemented a computer program that changed the way in which it recorded and assigned employees overtime. Further, the 2005 MOU established procedures that the Respondent was required to follow when hiring employees to work either voluntary or mandatory overtime, including: (1) how to contact employees regarding overtime opportunities; and (2) the order that employees should be offered or required to work overtime.

After the parties negotiated the 2005 MOU, some problems arose concerning the manner in which the Agency hired employees to work voluntary overtime. For instance, Agency officials improperly hired employees who were not on the voluntary overtime list (list-exempt employees) to work overtime and failed to manually rotate such employees to the bottom of that list. In some instances, the Union had to file grievances to remedy these problems. The Agency often agreed to settle those cases and to pay overtime compensation to employees who should have been hired to work overtime. (Tr. 44, 45, 70-75, 103-07).

On June 11, 2010, Agency and Union officials requested that Thomas Smith, Assistant Administrator, for the Correctional Programs Division, create "an updated version of the overtime program that the parties had" used since 2005. (Resp. Ex. 6 at 1, Tr. 60, 83-84, 108, 136, 185). In response, the Agency upgraded to a new computer program which contained various changes from its original program. (Tr. 60, 63, 136-37, 139, 185). As a result of various grievances the Union filed alleging that the Agency violated the 2005 MOU, and the creation of the new computer program, the Union sought to renegotiate that MOU. The Union tasked Hutchinson with renegotiating the 2005 MOU because he had studied the manuals for both the old and new computer programs and thus, was a "subject matter expert" on the programs. (G.C. Ex. 5; Tr. 83, 105, 107, 108).

Hutchinson sent an email to Hortman on July 11, 2010, requesting to negotiate both procedures and appropriate arrangements concerning the Agency's implementation of the updated computer program. Hortman never responded to Hutchinson's email. (G.C. Ex. 5; Tr. 107). According to Hortman, he found it unnecessary to respond to the email because the Union already had negotiated over the new computer program when it agreed to implement that program. (Tr. 196-97). Hutchinson sent no additional emails to Hortman concerning the renegotiation of the 2005 MOU.

Hutchinson testified that on either July 19, 2010 or July 20, 2010, he went to Hortman's office to discuss renegotiating the 2005 MOU because Hortman did not reply to his email, and that he met with Hortman for six hours. (Tr. 108). Hutchinson claimed that during the meeting he presented Hortman with the Union's initial proposal, a draft of the new MOU which contained articles identical in substance to those in the 2005 MOU, and

addressed new issues such as the requirement that Agency officials manually rotate list-exempt employees to the bottom of the voluntary overtime list when they work at least two hours of overtime. According to Hutchinson, Hortman then called Wedding into the meeting. Hutchinson asserted that he edited the initial proposal with both Hortman and Wedding, and he made note of the edits. Hutchinson maintained that by editing the initial proposal, Hortman agreed to renegotiate the 2005 MOU. Also, Hutchinson testified and Houck confirmed, that Hutchinson placed a copy of the initial proposal in the Union's office and subsequently received an email from Houck requesting that changes be made to the proposal. (Tr. 110-11). Moreover, Hutchinson claimed that he revised the initial proposal to incorporate all of the edits. (Tr. 113-15).

While Hortman admitted that he met with the Union to resolve various grievances concerning overtime, he denied that the meeting on or about July 19, 2010, took place. According to Hortman, he did not receive a draft of the new MOU in July, and he would never have agreed to renegotiate the 2005 MOU without the assistance of Wedding who had technical knowledge of the Agency's overtime computer programs. Hortman also asserted that if he had agreed to renegotiate the 2005 MOU, then he would have been required to notify Kastner. (Tr. 198-201). Further, Kastner testified that he expected Hortman to keep him apprised of labor-management relations, that Hortman never notified him of the Union's intention to renegotiate the 2005 MOU, and that he first learned of the Union's allegation that Hortman agreed to renegotiate that MOU when the ULP charge was filed.

On August 26, 2010, Hutchinson sent Henderson an email, requesting eight hours of official time for September 1, 2010, to finalize the new MOU that he had been working on with Hortman. Henderson granted Hutchinson four hours of official time to meet with Hortman concerning the new MOU after confirming with Hortman that he agreed to meet with Hutchinson, and learning that "all of this business should not take more than [four] hours" at the most. (G.C. Ex. 8 at 1; Tr. 111-12).

While witnesses testified that a meeting took place in September 2010 concerning the new MOU, their testimony differed with respect to the specific details of the meeting. In this regard, both Hutchinson and Houck asserted that they met with Hortman on September 2, 2010, to finalize the new MOU. (Tr. 113-14). Both Houck and Hutchinson maintained that while they gave the Union's final proposal, a revised version of the new MOU, to Hortman during the meeting, they were not opposed to making additional changes if Hortman requested such changes. (Tr. 31, 116). They also testified that after they gave Hortman the final proposal he pulled a document containing a list of pending grievances out of his desk, pointed at the document, and questioned whether a particular grievance involving overtime would be withdrawn if he signed the new MOU. Both Hutchinson and Houck asserted that they told Hortman they lacked the authority to withdraw the grievance and, as a result, would not agree to withdraw it. (Resp. Ex. 11; Tr. 31-32, 116). They claimed that in response Hortman stated that he had "no incentive to bargain" over the new MOU and they left Hortman's office. (Tr. 32, 116). Moreover, according to Houck, he had never met with Hortman concerning the new MOU prior to this meeting; he had relied previously on Hutchinson to provide him with information concerning the renegotiation of the 2005 MOU; and he was already on official time at the time of the meeting. (Tr. 43).

Hortman testified that he had a brief meeting with Hutchinson on September 1, 2010, and that Houck was not present at the meeting. Hortman maintained that Hutchinson gave him a copy of the new MOU during the meeting. Also, Hortman asserted that he quickly looked over the new MOU and said that he would need time to review it before discussing it with Hutchinson. Hortman claimed that after the meeting ended, he reviewed the new MOU and made various notations, including the date of receipt on his copy of the MOU. Further, according to Hortman, he never stated that he would only agree to renegotiate the 2005 MOU if the Union withdrew a grievance involving overtime. (Tr. 198, 203, 221, 247).

Finally, on September 3, 2010, Hortman sent Hutchinson an email, in which Hortman stated that, after the September 2, 2010 meeting, he reviewed the new MOU and that the Union put forth "no viable reason []or incentive . . . to justify" renegotiating the 2005 MOU. (G.C. Ex. 10 at 1). The parties have not met since September 2010 to renegotiate the 2005 MOU.

DISCUSSIONS

Positions of the Parties

General Counsel

The General Counsel (GC) contends that the Respondent bargained in bad faith in violation of § 7116(a)(1) and (5) of the Statute by conditioning further negotiations regarding the new MOU on the withdrawal of a grievance filed by the Union. In support of its contention, the GC asserts, among other things, that Authority precedent establishes that a party violates § 7116(a)(1) and (5) of the Statute by conditioning bargaining on a permissive subject matter. The GC also claims that the withdrawal of a ULP or a grievance "is a permissive subject[] matter and negotiable only" at the election of the filing party. (G.C. Br. at 14). Further, the GC maintains that here the Union's representatives did not agree to withdraw the grievance and as a result, the Respondent refused to continue bargaining over the new MOU.

Also, the GC argues that Hortman's testimony should be discredited based on his demeanor and the fact that his testimony was inconsistent with the evidence and other testimony presented at the hearing. In this respect, the GC contends that while Hortman testified that the draft of the new MOU that he received on September 2, 2010, was a completely different document from the 2005 MOU, he refused, during cross-examination to identify any significant changes made in the new MOU and only noted insignificant changes.[1] The GC asserts that Hortman improperly downplayed his responsibility as the

[1] In Attachment A to its brief, the General Counsel has included a table, comparing the language of the 2005 MOU, the Union's initial proposal, and the Union's final proposal. While the Respondent did not file a motion to strike this attachment, I will not consider the attachment because the General Counsel did not introduce it at the hearing and did not authenticate it. *See Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 n.5 (2003) (finding that it was in the judge's discretion to determine the matters to be admitted into evidence and that the judge did not err in refusing to admit certain documents when the respondent failed to introduce those documents prior to filing its post-hearing brief); *Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 43 FLRA 1378, 1383 n.3 (1992) (granting the general counsel's motion to strike a document because the respondent failed to

LMR Chair by insisting that he would not have agreed to renegotiate the 2005 MOU without the assistance of Wedding and notifying Kastner.

The GC maintains that while the Respondent relied on the absence of emails between Hutchinson and Hortman from July 12, 2010 to September 2, 2010, as evidence that no negotiations took place, Hutchinson had no reason to send Hortman additional emails after Hortman failed to respond to the email Hutchinson sent him on July 11, 2010. Moreover, although the Respondent implied that Hutchinson was a mere steward, and could not have been involved with the renegotiation of the 2005 MOU, both Townley and Houck credibly testified that the Union tasked Hutchinson with renegotiating the MOU because he was the Union's subject matter expert on the Agency's overtime computer programs.

Further, the GC contends that the testimony of its witnesses, namely Hutchinson and Houck, should be credited because their testimony was corroborated by evidence presented at the hearing. In this regard, the GC claims that Hutchinson's contention that he met with Hortman in July 2010 was corroborated by an email exchange between himself and Henderson. According to the GC, in an email to Henderson, Hutchinson stated that he needed eight hours of official time to finalize the MOU that he had been working on with Hortman and, in response, Henderson granted him four hours of official time after learning from Hortman that their business would take no more than four hours. The GC also asserts that Hutchinson's and Houck's testimony concerning their meeting with Hortman is supported by an email sent by Hortman to Hutchinson on September 3, 2010, in which Hortman indicated that the meeting occurred on September 2, 2010, and that the Union presented him with no incentive to justify renegotiating the 2005 MOU. Finally, the GC argues that Hutchinson's contention that Hortman agreed to renegotiate the 2005 MOU is credible, because the renegotiation was in the Respondent's best interest based on the fact that various problems arose with the Agency's implementation of the 2005 MOU, and that the new MOU addressed those problems.

As a remedy, the GC requests that the Respondent be ordered to cease and desist and to return to the bargaining table to finalize renegotiating the 2005 MOU. The GC also asks that the Respondent be ordered to post a notice in conspicuous places, including all bulletin boards and other locations where notices to employees are customarily posted. The GC requests that the Respondent be ordered to electronically transmit the notice to all of its bargaining unit employees due to the fact that the Respondent admitted, it "regularly and routinely communicates with bargaining unit employees by email[.]" (G.C. Br. at 24).

Respondent

The Respondent asserts that the General Counsel failed by a preponderance of the evidence to establish that the Respondent committed a ULP in violation of § 7116(a)(1) and (5) of the Statute. In support of its assertion the Respondent claims that the GC failed to show that the Respondent agreed to renegotiate the 2005 MOU. According to the Respondent, testimony demonstrates that Hortman never responded to Hutchinson's email

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demonstrate why it could not have offered that document as evidence at the hearing and why that document should have been accepted as evidence after the close of the hearing).

dated July 11, 2010. Further, the Respondent argues that Hutchinson's testimony concerning the alleged meeting that occurred in July is not credible because: (1) it is unlikely that it would take six hours for Hutchinson to discuss the Union's initial proposal with Hortman; (2) it is improbable that Hortman would spend six hours with Hutchinson in an unannounced meeting; and (3) it is unlikely that Hortman would have agreed to renegotiate the 2005 MOU without notifying Kastner.

According to the Respondent, the GC also failed to demonstrate that it engaged in negotiations with the Union between July 19, 2010 and September 1, 2010. In this regard, the Respondent contends that while the GC's witnesses testified that the Agency's primary way of communicating with employees was through email, the GC presented no emails establishing that the Union submitted draft proposals to the Agency or that the Agency engaged in negotiations with the Union.

The Respondent claims that the GC has failed to show that Hutchinson presented Hortman with a final draft of the new MOU on or about September 2, 2010, because Hutchinson's testimony was uncorroborated by other testimony presented at the hearing. According to the Respondent, Houck admitted that between June 2010 and September 2010, he was only kept somewhat informed of Hutchinson's progress in renegotiating the 2005 MOU. The Respondent maintains that Hortman credibly testified among other things, that he never received a draft of the new MOU in July 2010 and that when he received such a draft on September 1, 2010, he took extensive notes on it.

Finally, the Respondent asserts that no adverse inference should be drawn with regard to Wedding's failure to appear as a witness. Among other things, the Respondent claims that it could not have compelled Wedding's attendance as a witness at the hearing because he had already retired from the Agency. Moreover, the Respondent argues that the GC did not request that the Respondent produce Wedding as a witness and that the GC could have issued a subpoena to compel Wedding to testify.

ANALYSIS

The Respondent Violated § 7116(a)(1) and (5) of the Statute By Conditioning Further Bargaining Concerning the New MOU on the Withdrawal of a Grievance Filed By the Union

The Statute specifies the collective bargaining obligations of both agencies and unions. *U.S. Food & Drug Admin., Ne. & Mid-Atl. Regions*, 53 FLRA 1269, 1273 (1998) (*FDA*). Under § 7103(a)(12) of the Statute, the term "collective bargaining" is defined as "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet . . . and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . ." 5 U.S.C. § 7103(a)(12). Besides the obligation to bargain over employees' conditions of employment, an agency and a union may also

negotiate over a wide range of permissive subjects of bargaining. *E.g.*, *FDA*, 53 FLRA at 1273. Permissive subjects include proposals that would require a party to limit a right granted to it by the Statute, such as a proposal which would compel the union to withdraw a grievance. *See id.* at 1274; *Fed. Deposit Ins. Corp., Headquarters*, 18 FLRA 768, 771, 774 (1985). The Authority has held that, while parties may negotiate over permissive subjects, they are not required to do so. *E.g.*, *FDA*, 53 FLRA at 1274. Further, Authority precedent clearly establishes that a party violates § 7116(a)(1) and (5) of the Statute by insisting to impasse on a permissive subject of bargaining. *E.g.*, *AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 21 (2009).

I find that Hutchinson apprised Hortman of the Union's intention to renegotiate the 2005 MOU on July 11, 2010. Both Hutchinson's undisputed testimony and evidence presented at the hearing demonstrate that he sent Hortman an email on July 11, 2010, requesting to negotiate both procedures and appropriate arrangements concerning the Agency's implementation of the new computer program. Such testimony shows that while Hortman received Hutchinson's email, he never replied to the email.

With regard to the alleged meeting in July 2010, the GC argues that Hutchinson met with Hortman on or about July 19, 2010, for six hours to discuss renegotiating the 2005 MOU, but the Respondent denies that the meeting took place. I find that regardless of the length of the meeting, both Hutchinson and Hortman met on or about July 19, 2010, and during the meeting Hortman agreed to renegotiate the 2005 MOU. Hutchinson's testimony concerning the July 2010 meeting is credible because it is supported by other testimony and evidence presented at the hearing. Hutchinson testified that during the July 2010 meeting Hortman received the Union's initial proposal, a draft of the new MOU, which contained articles identical in substance to those in the 2005 MOU, and addressed new issues. According to Hutchinson, Hortman then called Wedding who Hortman admitted was the Agency's subject matter expert on its overtime computer programs, into the meeting. Hutchinson also testified that he edited the initial proposal with both Hortman and Wedding and that he made note of the edits. Further, Hutchinson maintained that by editing the initial proposal with him, Hortman agreed to renegotiate the 2005 MOU.

Hutchinson's contention that he drafted an initial proposal for the Union is supported by Houck's testimony. Houck testified that he sent Hutchinson an email requesting that changes be made to the initial proposal after Hutchinson placed a copy of the proposal in the Union's office. Moreover, Hutchinson's testimony is corroborated by an email exchange between himself and Henderson. In an email to Henderson dated August 26, 2010, Hutchinson requested eight hours of official time to finalize the MOU that he had been working on with Hortman. In reply, Henderson granted Hutchinson four hours of official time after learning from Hortman that he had agreed to meet with Hutchinson and that their "business should not take more than [four] hours" at the most. (G.C. Ex. 8 at 1).

Although the Respondent contends that Kastner's testimony supports Hortman's assertion that he never agreed to renegotiate the 2005 MOU in July 2010 because the alleged meeting in July never took place, the Respondent's contention is without merit. In this regard, Kastner testified that he was never notified of the Union's intention to renegotiate the 2005 MOU. However, both Hutchinson's undisputed testimony and evidence presented at

the hearing demonstrate that he initially informed Hortman that the Union intended to enter into negotiations on July 11, 2010. Since Hortman never notified Kastner of the Union's intention to renegotiate the 2005 MOU, it is reasonable to assume that Hortman did not tell Kastner that he had agreed to negotiate with the Union. Also, while the Respondent relies on the absence of emails, establishing that the Union submitted draft proposals to the Agency or that the Agency engaged in negotiations with the Union, in arguing that no negotiations took place in July 2010, Hutchinson had no reason to send Hortman additional emails after Hortman failed to respond to the email Hutchinson sent him on July 11, 2010. Additionally, the Respondent implicitly claims that Hortman's contention that he never received the initial proposal in July 2010 is credible because a copy of the proposal, containing his edits, was not entered into evidence. However, Hortman did not need to keep track of the edits because Hutchinson testified that he edited the initial proposal during the meeting, and the GC entered into evidence a copy of the proposal which contained his edits.[2]

Further, I find that regardless of the date of the meeting, Hutchinson met with both Houck and Hortman to finalize renegotiating the 2005 MOU in September 2010 and that, during the meeting, Hortman conditioned further negotiations on the withdrawal of a grievance filed by the Union. Hutchinson's and Houck's testimony concerning the September 2010 meeting is credible because their testimony is consistent and is supported by evidence presented at the hearing. In this regard, both Hutchinson and Houck testified that they met with Hortman in September 2010 to continue renegotiating the 2005 MOU and during the meeting, they gave Hortman the Union's final proposal, a revised version of the new MOU. While Hortman claimed that he never received a copy of the new MOU prior to this meeting, I previously have found Hutchinson's contention that Hortman was given a draft of the new MOU during a meeting in July 2010 to be credible.

Also, both Houck and Hutchinson consistently testified that after they gave Hortman the final proposal he pulled a document containing a list of pending grievances out of his desk, pointed at the document, and questioned whether a particular grievance involving overtime would be withdrawn if he signed the new MOU. According to Hutchinson and Houck, they then told Hortman that they lacked the authority to withdraw the grievance and as a result, they would not agree to withdraw it. They further claimed that in response Hortman stated that he had "no incentive to bargain" over the new MOU. (Tr. 32, 116). Therefore, they never finalized renegotiation of the 2005 MOU. While Hortman did not deny that he possessed a document, containing a list of pending grievances, he claimed that he never stated he would only agree to renegotiate the 2005 MOU if the Union withdrew a grievance involving overtime. However, Houck's and Hutchinson's testimony is corroborated by an email that Hortman sent to Hutchinson on September 3, 2010, in which Hortman stated that the Union put forth "no viable reason []or incentive . . . to justify"

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[2] Based on my above findings concerning the July 2010 meeting, I find it unnecessary to draw an adverse inference with regard to Wedding's failure to appear as a witness. *See DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Seattle, Wash.*, 61 FLRA 272, 285 n.13 (2005) (concluding that, in light of prior findings, it was unnecessary to determine whether an adverse inference was warranted); *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 113 n.2 (2001) (holding that it was unnecessary, in light of a prior finding, to decide whether the judge wrongfully failed to draw an adverse inference based on the respondent's failure to provide subpoenaed information).

renegotiating the 2005 MOU. (G.C. Ex. 10 at 1). Finally, Hutchinson's contention that he requested official time to meet with Hortman concerning the new MOU is supported by an email that he sent to Henderson on August 26, 2010. Houck's assertion that he was on official time at the time the meeting occurred is uncontested by the Respondent.

Consequently, I find that because the Respondent conditioned further negotiations concerning the new MOU on the withdrawal of a grievance, the Respondent insisted to impasse on a permissive subject of bargaining. *See FDA*, 53 FLRA at 1277-78 (finding that an impasse on a permissive subject of bargaining occurred when a party insisted on its position on a permissive subject as a condition of bargaining). As a result, the Respondent engaged in bad faith bargaining in violation of § 7116(a)(1) and (5) of the Statute. *See Gen. Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 855 (1973) (upholding the National Labor Relations Board's determination that the employer did not bargain in good faith, in part, because it conditioned further bargaining on the union's withdrawal of a pending ULP charge); *B.C. Studios Inc. & Sign & Pictorial Painters, Local No. 820*, 217 NLRB 307, 312-13 (1975) (finding that the employer engaged in bad faith bargaining, in part, because it conditioned further bargaining on the withdrawal of a grievance that the union had filed).

REMEDY

The GC proposed a recommended remedy requesting that the Respondent be ordered to return to the bargaining table to finalize renegotiating the 2005 MOU. Also, the GC asks that the Respondent be ordered to cease and desist and to post a notice to employees. Under current Authority precedent, an order requiring a party to cease and desist and to post a notice to employees on bulletin boards is considered a traditional remedy that is ordered in virtually all cases where a violation is found. *See F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*F.E. Warren*). The Authority also has held that an order requiring a party to bargain in good faith is a traditional remedy. *See Pension Benefit Guar. Corp.*, 59 FLRA 48, 53 (2003); *see also GSA, Nat'l Capital Region, FPS Div., Wash., D.C.*, 52 FLRA 563, 568 (1996). Since I have found that the Respondent violated the Statute as alleged in the complaint, I find this portion of the GC's recommended remedy appropriate in this case.

However, the GC also requests that the Respondent electronically transmit the notice to all of its employees. Requiring that the notice be distributed electronically is a nontraditional remedy. *See U.S. Dep't of Justice, Fed. BOP, FCI, Florence, Colo.*, 59 FLRA 165, 173-74 (2003) (*FCI Florence*). The standard that the Authority applies in determining whether to order a nontraditional remedy is as follows:

> [A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.

(*Id.* at 174) (quoting *F.E. Warren*, 52 FLRA at 161) (internal quotation marks omitted).

In *U.S. DHS, U.S. Customs & Border Protection, El Paso, Tex.*, 67 FLRA 46, 50 n.4 (2012), the Authority found that electronic dissemination of a notice was appropriate because the respondent's primary way of communicating with employees was through its computer system, and the alleged ULP concerned the respondent's failure to bargain over computer access. Here, even if the Respondent regularly and routinely uses email to communicate with bargaining-unit employees, the ULP involved in this case does not concern the Respondent's failure to bargain over employees' access to email. Moreover, nothing in the record establishes that requiring the Respondent to distribute the notice electronically "is reasonably necessary and would be effective to recreate conditions and relationships with which the violation interfered or to effectuate the purposes and policies of the Statute." *FCI Florence*, 59 FLRA at 174. Thus, I find that ordering electronic transmission of the notice is not appropriate in this case.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the American Federation of Government Employees, Council of Prison Locals #33, Local 171 (the Union), the exclusive representative of bargaining unit employees, on overtime procedures.

(b) Conditioning bargaining on overtime procedures on the Union's withdrawal of a grievance concerning overtime procedures.

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

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

(a) Bargain in good faith with Union by returning to the bargaining table and resuming negotiations on overtime procedures.

(b) Post at is facility 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, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma, and shall be posted and maintained for sixty (60) consecutive days thereafter in 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) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas 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., March 28, 2013

SUSAN E. JELEN
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 Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma, 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 fail and refuse to bargain in good faith with the American Federation of Government Employees, Council of Prison Locals #33, Local 171 (the Union), the exclusive representative of bargaining unit employees, on overtime procedures.

WE WILL NOT condition bargaining on overtime procedures on the Union's withdrawal of a grievance concerning overtime procedures.

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

WE WILL bargain in good faith with the Union by returning to the bargaining table and resuming negotiations on overtime procedures.

_____
(Agency/Activity)

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 any of its provisions, they may communicate directly with the Regional Director, Dallas Region, Federal Labor Relations Authority, and whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: 214-767-6266.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-10-0583, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT — **CERTIFIED NOS:**

Charlotte A. Dye
Counsel for the General Counsel, DRO
Federal Labor Relations Authority
525 S. Griffin Street, Suite 926, LB 107
Dallas, TX 75202

7009-2820-0000-5708-5463

George Cho
Assistant General Counsel
Sonya Cole
Assistant General Counsel
Federal Bureau of Prisons
S. Central Regional Office, EL&EB
4211 Cedar Springs Road
Dallas, TX 75219

7009-2820-0000-5708-5470

Bryan Houck
Chief Steward, AFGE, Local 171
P.O. Box 898802
Oklahoma City, OK 73189

7009-2820-0000-5708-5487

REGULAR MAIL:

Office of the General Counsel
AFGE, AFL-CIO
80 F Street, N.W.
Washington, DC 20001

Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: March 28, 2013
Washington, DC