67 FLRA No. 57

UNITED STATES
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)

DA-CA-10-0583

_____

DECISION AND ORDER

January 31, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (the Judge) found that the Respondent committed an unfair labor practice (ULP). As a recommended remedy, the Judge directed the Respondent to post notices of its ULP in places where "notices to employees are customarily posted,"[1] such as "on bulletin boards,"[2] but denied the FLRA General Counsel's (GC's) request that the Respondent email employees a copy of the notice. Citing *U.S. DOJ, Federal BOP, Federal Correctional Institution, Florence, Colorado* (*FCI Florence*),[3] the Judge stated that directing the Respondent to email the notice is a "nontraditional" remedy[4] that does not meet the Authority's test for such remedies.

The main question before us is whether we should overturn *FCI Florence* and find that distribution of notices by electronic means such as email (electronic-notice posting) is a "traditional" remedy for ULPs – in other words, a remedy that the Authority orders in virtually all cases where a ULP is found.[5] Because the conclusion in *FCI Florence* is largely unexplained, and there is more recent, persuasive National Labor Relations Board (the Board) precedent ordering electronic-notice posting as a traditional remedy, we overturn *FCI Florence* and find that electronic-notice posting is a traditional remedy that, in addition to physical posting, we order in this case and will order in future decisions where ULPs are found.

II. Background and Judge's Decision

As relevant here, the Judge found that one of the Respondent's managers refused to bargain over a new memorandum of understanding unless the Charging Party first withdrew a grievance. By doing this, the Judge found, the Respondent insisted on bargaining to impasse over a permissive subject of bargaining, in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).[6]

With regard to the remedy, the GC requested that the Judge order the Respondent to not only post physical notices of the Respondent's ULP, but also distribute notices by email. The Judge granted the GC's request for posting physical notices, but rejected the GC's request for email distribution. In this regard, the Judge stated that, under *FCI Florence*, electronic-notice posting is a "nontraditional" remedy,[7] and found that "nothing in the record establishe[d] that" the Authority's test for nontraditional remedies – set forth in *F.E. Warren Air Force Base, Cheyenne, Wyoming* (*F.E. Warren*)[8] – was met.[9]

The Judge also found that the Authority's decision in *U.S. DHS, U.S. CBP, El Paso, Texas* (*CBP*)[10] did not indicate that such posting was appropriate in the circumstances of the case. In this regard, the Judge stated that, in *CBP*, the Authority had ordered electronic-notice posting because the respondent's "primary way of communicating with employees was through its computer system," and because the "ULP concerned the respondent's failure to bargain over computer access."[11] The Judge stated that "even if the Respondent [in this case] regularly . . . 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."[12] Based on these considerations, the Judge determined that

[1] Judge's Decision at 11.
[2] *Id.* at 10.
[3] 59 FLRA 165 (2003).
[4] Judge's Decision at 10.
[5] *SSA*, 64 FLRA 293, 297 (2009).
[6] 5 U.S.C. § 7116(a)(1), (5).
[7] Judge's Decision at 10.
[8] 52 FLRA 149, 160 (1996).
[9] Judge's Decision at 11.
[10] 67 FLRA 46 (2012).
[11] Judge's Decision at 11.
[12] *Id.*

electronic-notice posting was not warranted under the *F.E. Warren* test, and she denied the GC's request for that remedy.

The GC filed exceptions to the Judge's decision, and the Respondent filed an opposition to the GC's exceptions.

III. Analysis and Conclusions

The GC argues that we should overturn *FCI Florence*'s holding that electronic-notice posting is a "nontraditional" remedy, and should order such posting as a "traditional" remedy.[13] For support, the GC cites the Board's decision in *J & R Flooring, Inc.* (*J. Picini Flooring*).[14]

In the Authority's 2003 decision in *FCI Florence*, the administrative law judge found that the respondent violated the Statute by, among other things, removing a union flyer from a bulletin board.[15] With regard to the remedy, the judge noted the GC's claim that the respondent used television monitors and email to "customarily communicate with . . . employees,"[16] and agreed with the GC's claim that posting notices on television monitors and by email was "necessary."[17] Accordingly, the judge directed such electronic postings.[18] The respondent filed an exception with the Authority alleging that the remedy was a nontraditional remedy that was "extraordinary and unwarranted."[19]

Resolving the respondent's exception, the Authority stated that the posting of a notice serves the two remedial goals of demonstrating to employees that: (1) the Authority will vigorously enforce rights guaranteed under the Statute; and (2) the respondent recognizes and intends to fulfill its obligations under the Statute.[20] The Authority determined that posting notices on television monitors and by email was not necessary to serve these two goals.[21] The Authority also "agree[d] with the [r]espondent that posting a notice on television monitors and through the [email] system would constitute a [nontraditional] remedy."[22] Accordingly, the Authority applied the Authority's *F.E. Warren* test for nontraditional remedies,[23] which is discussed in greater detail below. Although the GC claimed that the respondent communicated with employees through television monitors and email,[24] the Authority did not address that claim and, instead, found that the remedy was not warranted under the *F.E. Warren* test.[25]

Then, in 2010, the Board issued the decision in *J. Picini Flooring*.[26] For reasons discussed more fully below, the Board determined that it would effectuate the purposes of the National Labor Relations Act (the NLRA) to make electronic-notice posting a standard remedy for violations of the NLRA.[27] Accordingly, the Board modified its standard notice-posting language to require electronic-notice posting, in addition to physical posting, when respondents customarily communicate with their employees (or, in cases of union respondents, their members) by electronic means.[28]

The GC's exceptions present an issue of whether we should overturn *FCI Florence*'s holding that electronic-notice posting is a "nontraditional" remedy, and, instead, follow the Board's holding in *J. Picini Flooring* that electronic-notice posting is a traditional remedy.[29] Resolving that issue requires considering the Authority's remedial powers, the differences between traditional and nontraditional remedies, and the relative persuasiveness of the reasoning in *FCI Florence* and *J. Picini Flooring*.

It is well settled that the Authority has a "broad range of remedial powers."[30] Section 7105(g)(3) of the Statute[31] provides that, in addition to issuing cease-and-desist orders, the Authority "may require an agency or a labor organization . . . to take any remedial action [the Authority] considers appropriate to carry out the policies of this chapter."[32] Section 7118(a)(7) similarly provides that the Authority may order a ULP respondent to take "such other action as will carry out the purpose of [the Statute]."[33] And the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) has held that §§ 7105(g)(3) and 7118(a)(7) "exude indications of a broad congressional delegation of discretion to the [Authority] to fashion appropriate

[13] *See* Exceptions at 6, 8, 10.
[14] 356 NLRB No. 9 (Oct. 22, 2010).
[15] 59 FLRA at 184; *see also id.* at 189-91.
[16] *Id.* at 191.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 169.
[20] *Id.* at 173 (citing *Nat'l Guard Bureau*, 57 FLRA 240, 245 (2001) (*Nat'l Guard*)).
[21] *Id.*
[22] *Id.* at 174.
[23] *See* 52 FLRA at 160.
[24] *FCI Florence*, 59 FLRA at 170, 173-74.
[25] *Id.* at 174.
[26] 356 NLRB No. 9.
[27] *See id.*, slip op. at 1.
[28] *Id.* at 3.
[29] *See* Exceptions at 6, 8, 10.
[30] *F.E. Warren*, 52 FLRA at 160 (quoting *Dep't of the Army v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) (*Army*)) (internal quotation marks omitted).
[31] 5 U.S.C. § 7105(g)(3).
[32] *F.E. Warren*, 52 FLRA at 160 (quoting 5 U.S.C. § 7105(g)(3)) (internal quotation marks omitted).
[33] *Id.* (quoting 5 U.S.C. § 7118(a)(7)(D)) (internal quotation marks omitted).

remedies for [a ULP]."[34] At the same time, the broad range of remedial powers is not unlimited. For example, the Authority may not issue remedies that violate the principle of sovereign immunity[35] or direct a respondent to perform an illegal act.[36] And remedies for ULPs may not be punitive.[37]

With regard to the "broad objectives that [a ULP] remedy should serve," the Authority has stated that "remedies for [ULPs] under the Statute should, like those under the NLRA, be 'designed to recreate the conditions and relationships that would have been had there been no [ULP].'"[38] Further, the Authority stated that remedies must "effectuate the policies of the Statute."[39] In addition, although the deterrence of future violative conduct is not the principal objective of a remedial order, it is "certainly a desirable effect of a remedy."[40] And with particular regard to notice posting, as stated previously, the Authority has held that notices serve the goals of demonstrating to bargaining-unit employees that: (1) the Authority will vigorously enforce rights guaranteed by the Statute; and (2) the respondent recognizes and intends to fulfill its obligations under the Statute.[41]

In *F.E. Warren*, the Authority discussed the difference between "traditional" and "nontraditional" remedies.[42] The Authority stated that traditional remedies – including cease-and-desist orders along with notice postings[43] – are "provided in virtually all cases where a [ULP] is found,"[44] and added that "[o]ther remedies requiring some form of affirmative action by the respondent" have "also become established, including . . . a retroactive bargaining order, the grant of back[p]ay, and the release of improperly withheld information."[45]

The Authority contrasted these remedies with "nontraditional" remedies,[46] such as requiring a management leader to write supervisors a memorandum reminding them to notify the union before conducting formal discussions with employees.[47] The Authority stated that before a nontraditional remedy may be ordered, the following test must be met:

> [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 [ULP] interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.[48]

"These questions," the Authority stated, are "essentially factual."[49] Therefore, "they should be argued and resolved in essentially the same fashion as other factual questions . . . . As with other factual questions, the [GC] bears the burden of persuasion, and the [j]udge is responsible for initially determining whether the remedy is warranted."[50]

In *U.S. Department of Commerce, National Oceanic & Atmospheric Administration, National Ocean Service, Coast & Geodetic Survey, Aeronautical Charting Division, Washington, D.C.* (*NOAA*),[51] the Authority further clarified the distinction between traditional and nontraditional remedies. Specifically, the Authority stated that traditional remedies are presumed to "meet [the] criteria" for determining whether a remedy is appropriate.[52] However, the Authority does not presume that nontraditional remedies meet these criteria.[53] Instead, the Authority applies the test set forth in *F.E. Warren* before ordering such remedies.[54] And the Authority has emphasized that nontraditional remedies are not warranted merely because they would further a "salutary objective."[55] Rather, they are appropriate "*only*

[34] *Id.* (quoting *Army*, 56 F.3d at 277) (internal quotation marks omitted).
[35] *Id.* (citing *Army*, 56 F.3d at 277).
[36] *Id.* (citing *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1532 (1994)).
[37] *Id.* (citing *U.S. DOJ, BOP, Safford, Ariz.*, 35 FLRA 431, 445 (1990) (*Safford*)).
[38] *Id.* (quoting *Safford*, 35 FLRA at 444-45).
[39] *Id.* (quoting *Safford*, 35 FLRA at 445) (internal quotation marks omitted).
[40] *Id.* (quoting *Safford*, 35 FLRA at 445) (internal quotation marks omitted).
[41] *Nat'l Guard*, 57 FLRA at 245 (citing *U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394-95 (1999) (*OIA*)).
[42] 52 FLRA at 161-62.
[43] *Id.* at 161.
[44] *Id.*
[45] *Id.* (footnotes omitted).
[46] *Id.*
[47] *Id.* (citing *Safford*, 35 FLRA at 444-45).
[48] *Id.* (quoting *Safford*, 35 FLRA at 444-45).
[49] *Id.*
[50] *Id.*
[51] 54 FLRA 987 (1998) (Member Wasserman dissenting in part).
[52] *Id.* at 1021 (citing *F.E. Warren*, 52 FLRA at 161).
[53] *See id.*
[54] *See id.*
[55] *F.E. Warren*, 52 FLRA at 162.

where traditional remedies will not adequately redress the wrong incurred by the [ULP]."[56]

By holding that electronic-notice posting is a nontraditional remedy, *FCI Florence* effectively limited this remedy to situations where the GC specifically litigates the issue and meets its burden of persuasion under the *F.E. Warren* test. However, in *FCI Florence*, the Authority did not give a specific reason for finding electronic-notice posting to be a nontraditional remedy. Instead, the Authority merely "agree[d] with the [r]espondent" that "posting a notice on television monitors and through the [email] system would constitute a [nontraditional] remedy."[57]

By contrast, the Board's decision in *J. Picini Flooring* – issued seven years after the Authority's decision in *FCI Florence* – gives specific reasoning for treating electronic-notice posting as a traditional remedy. And it is appropriate to consider that decision in addressing the GC's exception. As the Authority has held, "[w]hen there are comparable provisions under the Statute and the NLRA, decisions of the [Board] and the courts interpreting the NLRA have a high degree of relevance to similar circumstances under the Statute."[58] The Authority has previously recognized, moreover, that "Congress intended the Authority to have remedial authority in [ULP] cases similar to that granted the [Board] under the [NLRA]."[59] Further, the D.C. Circuit has stated that the "general remedial authority of the [Authority] under § 7118(a)(7)," including "the power to order 'such . . . action as will carry out the purpose of this chapter,'" is similar to 29 U.S.C. § 160(c), which grants the Board "broad remedial discretion in effectuating the purposes of the [NLRA]."[60]

In *J. Picini Flooring*, the Board noted that a standard remedy for violations of the NLRA is an order to post notices "in conspicuous places including all places where notices to employees" or members "are customarily posted,"[61] such as on "bulletin boards."[62] However, the Board stated, the "ubiquity of paper notices and wall[-]mounted bulletin boards . . . has gone the way of the telephone[-]message pad and the interoffice envelope."[63] While bulletin boards remain in use, "email, postings on internal and external websites, and other electronic[-]communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members."[64] In this connection, the Board noted that electronic communications are "now the norm in many workplaces," and that "the Board and most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees."[65] Further, the Board stated, the growth of telework and decentralized workspaces "mean that an increasing number of employees will never see a paper notice posted at an employer's facility."[66]

The Board stated that the "increasing reliance on electronic communication" and the "attendant decrease in the prominence of paper notices and physical bulletin boards" mean that the "continuing efficacy of the Board's remedial notice is in jeopardy."[67] Such notices "may be inadequate to reach employees and members who are accustomed to receiving important information from their employer or union electronically and are not accustomed to looking for such information on a traditional bulletin board."[68] This is especially true, the Board noted, for employees who telework or work in decentralized workspaces.[69] And the Board found that if notices are not "adequately communicated" to employees and members, then the remedial goals of notices will not be achieved.[70]

The Board determined that "it follows," as a "matter of general policy," that "in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members."[71] Similarly, the Board stated, "notices should be distributed by email if the

[56] *U.S. DOJ, INS, W. Reg'l Office, Labor Mgmt. Relations, Laguna Niguel, Cal.*, 58 FLRA 656, 661 (2003) (Chairman Cabaniss concurring; Member Armendariz concurring in part and dissenting in part) (emphasis added) (citing *Fed. BOP, Wash., D.C.*, 55 FLRA 1250, 1259 (2000) (Member Cabaniss dissenting as to other matters)); *see also NOAA*, 54 FLRA at 1021; *F.E. Warren*, 52 FLRA at 162.

[57] *FCI Florence*, 59 FLRA at 174.

[58] *AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1279 (1998) (Member Wasserman dissenting) (alteration in original) (quoting *U.S. Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 FLRA 1006, 1015 (1997)) (internal quotation marks omitted); *see also Dep't of VA, Med. Ctr., Phx., Ariz.*, 52 FLRA 182, 185 n.5 (1996); *Safford*, 35 FLRA at 444-45.

[59] *Fed. BOP, Wash., D.C.*, 55 FLRA at 1258 (citing *AFGE v. FLRA*, 785 F.2d 333, 336 (D.C. Cir. 1986)).

[60] *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 584 (D.C. Cir. 1982) (quoting 5 U.S.C. § 7118(a)(7)(D)) (internal quotation marks omitted).

[61] *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 2 (internal quotation marks omitted).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 2-3.

[65] *Id.* at 3.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 2.

[71] *Id.* at 3.

respondent customarily uses email to communicate with its employees or members, and by any other electronic means of communication so used by the respondent."[72] Because electronic-notice posting would be ordered only where electronic means of communications were "customary," the Board stated, posting notices electronically would "not entail an unreasonable burden for . . . respondent[s]."[73] And the Board held that the question of whether the respondent customarily disseminates information to its employees or members by email and/or electronic posting – as well as any issues regarding "peculiarities" in a respondent's electronic-communication systems, or claims that electronic-notice posting would be "unduly burdensome" for a respondent – could be resolved at the compliance stage of ULP proceedings.[74] Finally, the Board clarified that it did not intend to broaden the scope of the standard notice-posting remedy.[75] Rather, the Board stated, "electronic notices will have the same scope as notices posted by traditional means; that is, distribution will be limited, to the extent practicable, to the location(s) where the [ULPs] occurred."[76]

The Board's reasoning in *J. Picini Flooring* is both persuasive and relevant to the question of whether the Authority should make electronic-notice posting a standard remedy for ULPs. There is no dispute that in the federal sector, as in the private sector, there has been, and will continue to be, an increase in employee reliance on electronic communications. Thus, limiting notice postings to bulletin boards creates a risk that employees will be less likely to see those postings; making electronic-notice postings a standard remedy will help ensure that employees will be able to view the notices of ULP violations. As a result, supplementing physical-notice posting with electronic-notice posting can be presumed to provide a greater deterrent effect and more effectively help "recreate the conditions and relationships that would have been had there been no [ULP], as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct."[77] Moreover, the Authority can presume that distributing notices electronically will enhance the benefits provided by paper notices – distributing electronic notices by email, intranet, or internet will provide another way to inform employees that the Authority will vigorously enforce their rights under the Statute, and that the respondent recognizes and intends to fulfill its obligations under the Statute.[78]

In addition, by the Authority holding that electronic-notice posting is a "traditional" remedy, parties will not have to spend resources litigating whether a request for electronic-notice posting meets the test set forth in *F.E. Warren*.[79] Moreover, because electronic-notice posting is required in instances only where electronic communications are the norm, requiring electronic-notice posting will impose little to no burden on a respondent.[80] And consistent with the Board's approach, disputes as to whether the respondent customarily uses electronic means to communicate with employees – as well as other issues regarding a remedy's implementation – can be addressed at the compliance stage of ULP proceedings.[81]

The Respondent does not cite any harms that would result from making electronic-notice posting a traditional remedy.[82] Although the Respondent argues that it uses email for communication only "when there is a need for a quick dissemination and for convenience," that it "does not have a preset email distribution list that separates" unit from non-unit employees,[83] and that there was "limited evidence presented at hearing" to indicate that it has "chosen electronic means as its preferred mode of communication with its employees,"[84] any potential problems with electronic-notice posting in this case can be worked out in the compliance stage. In addition, the Respondent states that the "limited evidence presented at hearing regarding only" the Respondent does not warrant overturning *FCI Florence*.[85] To the extent that the Respondent is arguing that the Authority should not rely on the limited evidence in this case to conclude that electronic-notice posting is warranted in all cases, we find that any necessary adjustments can be made in future cases' compliance proceedings.

[72] *Id.*
[73] *Id.*
[74] *Id.* at 4.
[75] *Id.*
[76] *Id.* at 4-5.
[77] *Nat'l Park Serv.*, 54 FLRA 940, 945 (1998) (quoting *F.E. Warren*, 52 FLRA at 160) (internal quotation marks omitted).

[78] *See Nat'l Guard*, 57 FLRA at 245; *cf. J. Picini Flooring*, 356 NLRB No. 9, slip op. at 2 (notices "inform employees of steps to be taken by the respondent to remedy its violations of the [NLRA] and provide assurances that future violations will not occur").
[79] *See, e.g., SSA, Office of Hearings & Appeals, Region II, Buffalo Office of Hearings & Appeals, Buffalo, N.Y.*, 58 FLRA 722, 728 (2003) (Chairman Cabaniss dissenting in part); *Health Care Fin. Admin.*, 56 FLRA 503, 507 (2000); *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 718-19 (1999) (Member Cabaniss dissenting in part).
[80] *See J. Picini Flooring*, 356 NLRB No. 9, slip op. at 3.
[81] *See id.* at 3-4; *see also SSA, Office of Hearings & Appeals, Region II, Buffalo Office of Hearings & Appeals, Buffalo, N.Y.*, 59 FLRA 442, 442 (2003).
[82] *See* Opp'n at 1-7.
[83] *Id.* at 3.
[84] *Id.* at 6.
[85] *Id.*

Based on the foregoing, we overturn *FCI Florence's* determination that electronic-notice posting is a nontraditional remedy, and hold that electronic-notice posting is a traditional remedy. Accordingly, in this case, and in future decisions where ULPs are found, we adopt the following wording, which is similar to the wording of the Board order added in *J. Picini Flooring*: "In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with employees by such means."

In making this change, we emphasize three points. First, this change does not alter the time-tested requirement for parties to continue the physical posting of paper notices *in addition to* any electronic posting that may be required. Maintaining the requirement for the posting of paper notices is significant because not all employees have access to the internet and may not be comfortable relying on email communications. Second, this change will apply equally to both agencies and unions that have been found to have engaged in ULPs. And third, this change does not broaden the number of bargaining-unit employees or work units that must be notified in the event that a posting is required. Rather, electronic notices will have the same scope as notices posted by traditional means; that is, distribution will be limited, to the extent practicable, to the location(s) where the ULPs occurred. As with physical postings, electronic notices will extend beyond the location where the violation occurred only "where the violation involve[s] an issue of import to [employees] who do not work at the site where the violations occurred."[86]

The GC also requests that we adopt wording that the Board did not adopt in *J. Picini Flooring*, specifically: "If the Notice is disseminated by email, the cover email from the signatory shall state: We are distributing the attached Notice to All Employees to you pursuant to an Order from the [FLRA] finding that we violated [the Statute] in Case No. []."[87] But the GC provides no explanation for why we should adopt this additional wording. As such, and as the Board has not adopted such wording, we decline to grant the GC's request.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the Charging Party, the exclusive representative of bargaining-unit employees, on overtime procedures.

(b) Conditioning bargaining on overtime procedures on the Charging Party'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 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 the Charging Party by returning to the bargaining table and resuming negotiations on overtime procedures.

(b) Post at its facilities where bargaining-unit employees represented by the Charging Party are located, copies of the attached Notice on forms to be furnished by the FLRA. 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 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Dallas Region, FLRA, in writing, within thirty days from the date of this Order, as to what steps have been taken to comply.

[86] *OIA*, 55 FLRA at 395 (internal quotation marks omitted).
[87] Exceptions at 10.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States 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 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 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 the 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.

Office of Administrative Law Judges

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.

DISCUSSION

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 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

[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 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).

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 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

uring 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" 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

[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).

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 its 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.