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

OALJ 13-24

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| FEDERAL BUREAU OF PRISONS<br>FEDERAL CORRECTIONAL COMPLEX<br>POLLOCK, LOUISIANA<br><br>RESPONDENT<br><br>AND<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL OF PRISON LOCALS, LOCAL 1034<br><br>CHARGING PARTY | Case Nos. DA-CA-11-0198<br>DA-CA-11-0199<br>DA-CA-11-0200<br>DA-CA-11-0253<br>DA-CA-11-0254<br>DA-CA-11-0272<br>DA-CA-11-0485<br>DA-CA-11-0508<br>DA-CA-11-0549<br>DA-CA-11-0555<br>DA-CA-11-0556<br>DA-CA-11-0558<br>DA-CA-11-0559<br>DA-CA-12-0008 |

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For the Respondent

Brian Richmond
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

## DECISION

## STATEMENT OF THE CASE

This unfair labor practice (ULP) hearing was conducted pursuant to and in accordance with the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (Statute), and the rules and regulations of the Federal Labor Relations Authority (Authority/FLRA), 5 C.F.R. Part 2423.

On November 2, 2011, the Regional Director of the Dallas Region of the FLRA issued a consolidated complaint and notice of hearing in the above cases alleging that the Federal Bureau of Prisons, Federal Correctional Complex, Pollock, Louisiana (Respondent) violated § 7116(a)(1) and (5) of the Statute by repudiating two agreements it reached with the American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 1034 (Charging Party/Union).

A hearing upon the matter was conducted in Alexandria, Louisiana, on March 28 and 29, 2012. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses.

In making this decision I have fully considered the post-hearing briefs filed by the General Counsel and Respondent. Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent unlawfully repudiated its agreements with the Union concerning augmentation. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

## FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (Jt. Ex. 1(b)). The American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 1034, is the exclusive collective bargaining representative of a unit of the Respondent's employees and is a labor organization within the meaning of § 7103(a)(4) of the Statute. (*Id.*).

The Respondent's mission is to safely and securely house incarcerated males who have been convicted of crimes. (Tr. 26). To accomplish this mission, the Respondent operates three institutions: a high-security United States Penitentiary (USP), a medium-security Federal Correctional Institution (FCI), and a satellite prison camp that houses inmates who are not detained within a fenced perimeter. (Tr. 25).

The Respondent's bargaining unit employees consist of custody personnel and non-custody staff. Custody personnel guard inmates and monitor their daily movements to maintain inmate custody control and accountability. (Tr. 26-27, 144). That is, their primary duties involve the direct supervision of inmates. (Tr. 269). For example, custody posts are located in housing units, corridors, control centers, the outside perimeter, and towers. (Tr. 26). Custody personnel bid on posts quarterly through a negotiated bidding and assignment process. (Tr. 27, 146). In order to protect the safety of inmates, the facility, and the surrounding community, certain custody posts are considered mandatory posts, and must be staffed at all pertinent times. (Tr. 29, 146-47, 298-99, 362).

Non-custody staff work in positions whose titles and duties reflect specific assignments not directly related to overseeing daily inmate custody. (Tr. 30-31, 255). For example, non-custody staff performs duties in departments such as Food Service, Education, Medical, Psychology, Facilities, Recreation, Unit Management, and the Trust Fund, which oversees the laundry and commissary. (Tr. 30, 147, 252). The normal duties of non-custody staff are specialized and working a custody position is not a duty typically performed by non-

custody staff. (Tr. 30-31). However, the position descriptions of non-custody staff include custody officer responsibilities, and a non-custody staff position receives the same law enforcement and self-defense training as custody personnel. (Tr. 95-96, 224, 281-82). Non-custody staff must also attend "annual refresher training" and qualify for firearms use every year, just like custody personnel. (Tr. 223-24).

The Respondent has experienced staffing deficiencies for at least the past several years. (Tr. 31-33, 49, 149-50, 152, 167, 278, 309-11, 317, 344, 359-60, 394, 405, 419, 458, 491-94, 517, 532-33). Specifically, for approximately the last three years, the Respondent has operated at eighty-six percent staffing. (Tr. 32, 149-50, 152, 278, 317, 491). This has resulted in consistent shortages of between thirty to sixty custody officers out of a total of approximately 391 custody posts. (Tr. 31, 149, 152, 517). These staffing shortages adversely affected the Respondent's ability to staff all mandatory custody posts with custody personnel. (Tr. 34, 154, 310-11).

One tool the Respondent has used to ensure that all mandatory custody posts are staffed was to offer overtime to custody personnel. In particular, the Respondent consistently offered overtime in order to staff mandatory custody posts on morning, evening, and weekend shifts. (Tr. 111, 204, 299, 301, 363, 379, 483, 525). Article 18 of the parties' collective bargaining agreement addresses overtime. (Jt. Ex. 2 at 38-43). Article 18 provides, in part, that "[s]pecific procedures regarding overtime assignments may be negotiated locally." (Jt. Ex. 2 at 42-43; Tr. 305). In accordance with locally negotiated procedures, the Respondent administers an overtime roster where employees may sign up to volunteer to work overtime on certain dates and shifts at particular posts. (Jt. Ex. 8; Tr. 35-36, 160, 380-81). When employees volunteer for overtime by signing up on the overtime roster, they are not bound to work that overtime if offered. (Tr. 157). Sometimes, when the Respondent contacts an employee on the overtime roster, the employee declines the opportunity to work overtime. (Tr. 157, 221-22, 226-27, 245). Article 18 authorizes the Respondent to order a bargaining unit employee to work mandatory overtime after failing to obtain a volunteer using any locally negotiated procedures. (Jt. Ex. 2 at 43).

Another tool the Respondent has used to ensure that all mandatory custody posts are staffed is known as augmentation. Augmentation is a process by which the Respondent reassigns a person from the non-custody staff to a mandatory custody post. (Tr. 163, 401). In this way, the Respondent "augments" its custody personnel by drawing from the ranks of the non-custody staff.

Beginning sometime in 2008, the Respondent began using augmentation to fill mandatory custody posts with non-custody staff during weekday "day watch" shifts. (Tr. 38, 61, 204-05, 299-300, 363, 378-79). Most non-custody staff positions work on the day watch shift Monday through Friday. (Tr. 113-15). Thus, the highest numbers of non-custody staff available for augmentation are at the institution during the day watch shift on weekdays, and the Respondent used augmentation during that shift on weekdays, but offered overtime to fill vacant mandatory custody posts on the remain shifts and weekends. (Tr. 111, 113-15, 204, 299, 301, 349-50, 363, 379, 483, 525). Another advantage of augmentation on the day watch shift was that the Respondent could augment non-custody staff who arrived to work their regularly scheduled day shift without notice, whereas assigning a non-custody employee to

work a custody post on a previously unscheduled morning, evening, or weekend shift required the Respondent to give the employee 24 hour notice pursuant to the parties' collective bargaining agreement. (Jt. Ex. 2 at 42; Tr. 112, 115-17, 350).

Although augmentation allows the Respondent the advantage of filling mandatory custody posts without paying overtime, the practice has several disadvantages. When non-custody employees are augmented, they are not able to perform their usual non-custody duties for that day. (Tr. 39, 257-58, 273-74, 490-91, 536). For example, a non-custody correctional counselor whose duties include holding hearings within specified timeframes testified that augmenting has impaired his ability to meet hearing deadlines. (Tr. 257-58). And a non-custody records officer testified that some of his duties pile up whenever he is augmented, or urgent duties are reapportioned among the rest of the department thereby requiring other employees to perform his abandon duties while he fills the mandatory custody post. (Tr. 273-74). Although non-custody staff are qualified to perform the duties of custody personnel, they are not as effective in those positions (Tr. 163-64), and the practice negatively affects employee morale because the employee is not able to complete the primary duty that prompted him or her to accept the position. (Tr. 154, 536).

When the Respondent began augmentation in 2008, it had not yet opened the FCI, so the institution was limited to the USP and the prison camp. (Tr. 205, 344). On May 13, 2008, the Union and the Respondent negotiated an agreement concerning augmentation procedures (2008 agreement). (Jt. Ex. 3; Tr. 343-45). In pertinent part, the agreement stated that augmentation would rotate among non-custody departments, and that the Respondent would use reverse seniority when augmenting non-custody staff. (Jt. Ex. 3; Tr. 355-36). In addition, the agreement specifically exempted certain departments from the augmentation rotation for various staffing and funding reasons. (Jt. Ex. 3; Tr. 345-47, 350-51). However, the complex warden who signed the agreement on behalf of the Respondent, Joe Keffer, testified that he wanted to limit the impact of augmentation by spreading it among the different non-custody departments, and thus included as many departments as possible in the augmentation rotation. (Tr. 368). The 2008 agreement did not exempt Human Resources from the augmentation rotation. (Jt. Ex. 3; Tr. 354, 368). The agreement also included a reopener provision so that either party could reopen negotiations to address any issues that might arise under the agreement. (Jt. Ex. 3; Tr. 356-57).

When the FCI opened in 2009, the Respondent began using augmentation much more frequently. (Tr. 47-48, 154, 167, 206, 359-60). At some point between the 2008 agreement and November 2010, the Respondent exempted Human Resources from the augmentation rotation. (Jt. Exs. 4-5). As a result of employees' frustration with increased augmentation, the Union emailed management on November 5, 2010, seeking an informal resolution to augmentation issues, and making several proposals for revising the augmentation procedures. (Jt. Ex. 4; Tr. 53-55). Complex Warden William Sherrod told Union president Brian Richmond to raise the matter in the Respondent's Labor Management Relations (LMR) forum. (Tr. 49-50, 55).

The next LMR forum meeting took place on November 17, 2010. (Tr. 58). At the meeting, the Union was represented by Richmond and Union vice president Richard Logan, among others. (Tr. 57). Management was represented at the meeting by Associate Warden Jeff Bowe and Human Resources Manager Scott Clarkson. (*Id.*). At the meeting, the parties negotiated over the proposals in the Union's November 5 email and initialed next to individual proposals to indicate either agreement or failure to reach agreement concerning each proposal. (Jt. Ex. 5). The resulting agreement (2010 agreement), consists of three provisions. (*Id.*). First, although the document is somewhat unclear on this point, the parties agreed that the Respondent would no longer exempt Human Resources from the augmentation rotation. (Jt. Ex. 5; G.C. Ex. 2; Tr. 69-70, 174-75, 455, 463-64, 488-89). The second provision states: "Every attempt should be made to fill all posts on the Correctional Services Roster prior to Augmentation by means of utilizing the overtime list and then seeking list exempt voluntary overtime. Other posts may also become unassigned prior to the beginning of each shift and should be filled in the same manner." (Jt. Ex. 5). Third, the parties agreed that the Respondent would staff prisoners' medical trips using overtime. (*Id.*).

Before reaching agreement, Bowe and Clarkson discussed each provision with Warden Sherrod, and Sherrod authorized Bowe to sign the agreement on behalf of the Respondent. (Tr. 323, 441-42, 452, 467, 475-76, 496). Next to each provision, Richmond and Bowe initialed their agreement on behalf of the Union and Respondent respectively. (Jt. Ex. 5; Tr. 60, 174, 323). In addition, Bowe memorialized the terms of the agreement in an email he sent to the captains of the correctional services department, all of the lieutenants, and Richmond on December 22, 2010. (G.C. Ex. 2; Tr. 67, 71, 463-66). The email stated that the procedures described therein "have been agreed to and need to be followed when augmenting staff." (G.C. Ex. 2). Bowe also recalls sharing the terms of the 2010 agreement with the executive staff at a meeting around the same time. (Tr. 465-66).

It is undisputed that, at all times, the Respondent has complied with the 2010 agreement's third provision requiring the Respondent to offer overtime for medical trips. (Tr. 37, 66, 72, 174, 175, 389, 437, 506, 523).

Regarding the second provision, there was a variety of testimony about the parties' intentions concerning the Respondent's contractual obligation to make "every attempt" to fill custody posts with overtime before resorting to augmentation. (Jt. Ex. 5). Testifying on behalf of the Respondent, Warden Sherrod said that this language meant that the Respondent would "attempt" to offer overtime in lieu of augmentation "when possible," but that the Respondent would need to consider each vacant post and determine the "most effective and efficient" way to fill that post. (Tr. 298-99). This would involve him monitoring vacancies on the rosters, considering staffing levels and budgetary constraints, and deciding where and when overtime resources could be allocated. (Tr. 325). Bowe testified that the second provision meant "[t]hat we would make every attempt possible to fill those posts during day watch in lieu of augmentation by using overtime if the money was available in the budget to do so." (Tr. 448). However, Bowe admitted that the agreement does not specifically discuss budgetary constraints. (*Id.*). Clarkson testified that he understood the second provision to mean that, when a post was vacant, the lieutenant would contact the captain, who would contact the associate warden, and the associate warden would determine if the Respondent would pay overtime or augment. (Tr. 497).

Richmond's testimony on behalf of the General Counsel varied on the requirements of the provision, but he clearly stated that "if no effort is made, then the spirit of the agreement is gone." (Tr. 110). Similarly, Logan testified that the spirit of the parties' agreement was to slow augmentation down, and that compliance would require some kind of attempt to offer overtime, even if the Respondent ultimately decided to augment. (Tr. 171-72, 228, 236-37).

Focusing on the cumulative testimony of the relevant witnesses, I find that the parties did not intend that the second provision of the 2010 agreement *require* the Respondent to offer overtime before it could augment. (Tr. 130-31, 234-36, 305-06, 499-500). In this regard, Sherrod testified unambiguously that management retained the right to decide whether to offer overtime under the 2010 agreement (Tr. 305-06), and nothing in Bowe's testimony indicated otherwise. Although Clarkson initially testified that the agreement required the Respondent to offer overtime before augmenting (Tr. 499), he later clarified that the Respondent had agreed to offer overtime "if it was within our overtime budget [.] . . ." (Tr. 499-500). Similarly, although Richmond and Logan occasionally implied at the hearing that the Respondent had agreed to seek overtime volunteers before augmenting (Tr. 71, 214), they also testified that the agreement did not *require* the Respondent to offer overtime before augmenting. (Tr. 109-11, 130-33, 230, 234-36). That the Union understood at the bargaining table that the agreement did not require the Respondent to offer overtime before augmenting is corroborated by Richmond's testimony that the Union *could not* require the Respondent to offer overtime. (Tr. 130, 132-33). Thus, I find that the weight of the evidence establishes that the parties intended the second provision of the 2010 agreement to require the Respondent to make a good faith effort to offer overtime before resorting to augmentation. But the parties did not intend for that provision to constitute an absolute requirement that the Respondent offer overtime before augmenting.

Although the precise timeline is unclear, it appears that the Respondent complied with the second provision of the 2010 agreement to the satisfaction of the Union for approximately two weeks. (Tr. 66, 73, 120, 277). In January 2011, Bowe informed Logan that the Respondent would need to augment ten non-custody staff during annual refresher training when many custody staff would be unavailable. (Tr. 176, 214-15. 230-32). After that point, the Respondent frequently augmented and never again discussed its decisions to augment with the Union prior to the utilization of augmentation. (Tr. 232-33).

From sometime in January 2011, until sometime in February or March 2012, the evidence establishes that the Respondent never – or almost never – offered overtime prior to augmenting during the day watch shift on weekdays, with the exception of medical trips. (Jt. Ex. 8; Tr. 37-38, 151, 176-84, 187-89, 200, 232-33, 277-78, 347, 361, 378-79, 393, 436, 440-44, 503, 506-07, 509, 527-28, 530, 539). In this regard, the Respondent's managers consistently testified that it was the Respondent's policy to use augmentation in lieu of overtime on day watch shifts during weekdays to save overtime funds. (Tr. 347, 361, 378-79, 393, 436, 440-44, 503, 506-07, 509, 527-28, 530, 539). For example, Associate Warden Sekou Ma'at testified that Warden Sherrod informed him of the 2010 agreement at a meeting

that took place sometime in May 2011. (Tr. 433-34). At that meeting, Sherrod emphasized that managers should try to be "good stewards of taxpayer dollars[,]" and to save overtime funds by always augmenting on day watch shifts, Monday through Friday. (Tr. 443-44). In compliance with these instructions, Ma'at consistently augmented on weekday day watch shifts rather than paying overtime. (Tr. 436, 440-42).

Captain James Cartrette testified that he was also at this meeting, and that the concept that managers should protect taxpayers' money by limiting overtime and augmenting instead was frequently discussed. (Tr. 507-09). As a result, Cartrette testified that he never offered – or even considered offering – overtime on weekday day watch shifts because it was his understanding that doing so was "not an option for [him]." (Tr. 509). Captain Tony Wingo testified that the Respondent had an "established procedure" of augmenting weekday day watch "as a method to prevent overtime for your budget." (Tr. 378-79). Wingo did not direct his staff to comply with the second provision of the 2010 agreement (Tr. 383), and had no knowledge of his staff ever attempting to comply with that provision (Tr. 392-93). Associate Warden Carlos Rivera testified that he only became aware of the 2010 agreement when he was tasked with participating in LMR forum meetings in approximately June 2011. (Tr. 399, 402-03, 428). Rivera also testified that it was his impression that the Respondent was not complying with the second provision of the 2010 agreement. (Tr. 413). Ricardo Martinez became complex warden in September 2011, but only became aware of the 2010 agreement when the Respondent began preparing for this case. (Tr. 524). Martinez also testified that he used augmentation to reduce overtime spending by making every effort to augment on weekday day watch shifts. (Tr. 527-28, 530, 539).

The testimony of these managers is consistent with the testimony of Union witnesses that the Respondent consistently augmented on weekday day watch shifts without contemplating let alone offering overtime during that time period. (Tr. 37-38, 187-89, 232-33, 277-78). For example, Logan testified that by comparing overtime rosters and the corresponding daily assignment rosters, he could determine whether the Respondent offered overtime on each shift where the Respondent augmented. (Tr. 176-84). Using this process, he identified over 1,000 instances when the Respondent augmented without offering overtime. (Tr. 184).

Richmond and Logan also testified that various managers, including Sherrod, Bowe, and Cartrette informed them that the Respondent would no longer be following the second provision of the 2010 agreement – that is, the Respondent would not be offering overtime before augmenting on weekday day watch shifts. (Tr. 73-74, 76, 85-86, 118, 127, 184, 187, 228-29). In particular, at an LMR forum meeting on August 25, 2011, Richmond and Logan testified that Cartrette informed them that the Respondent would no longer be following the agreement (Tr. 86, 187, 229), and Cartrette admitted that he said at that meeting that the Respondent would be augmenting in lieu of offering overtime on weekday day watch shifts, (Tr. 523).

In January 2011, the Union started filing grievances concerning each non-custody employee who was augmented and the corresponding custody employee on the overtime roster who was not offered overtime as a result. (Jt. Ex. 9; Tr. 79-80, 176, 185, 211-12, 235).

These thirty-two grievances allege a total of forty-six violations of the 2010 agreement because the Respondent made "no attempt . . . to fill [the augmented] post utilizing the overtime list." (Jt. Ex. 9). On May 5, 2011, after the Union had begun filing the ULP charges discussed below, the Union filed a request with Human Resources to withdraw the grievances. (Jt. Ex. 10; Tr. 235-36, 485).

Beginning on March 7, 2011, and continuing until October 6, 2011, the Union filed a series of ULP charges alleging that the Respondent violated the 2010 agreement, the parties' collective bargaining agreement, and § 7116(a)(1) and (5) of the Statute when it augmented non-custody staff "without any attempts to utilize the Overtime Roster" on dates from February to September 2011. (Jt. Ex. 1(a)(1)-(11), (14)-(21)). Beginning with the ULP filed on July 28, 2011, these ULP charges specifically stated that the Respondent's actions constituted "a complete repudiation" of the 2010 agreement. (Jt. Ex. 1(a)(10)-(11), (14)-(21)).

The Respondent's exemption of Human Resources from the augmentation rotation is also at issue in this case. Pursuant to the 2010 agreement, the Respondent returned Human Resources to the augmentation rotation in approximately November or December of 2010. (G.C. Ex. 2; Tr. 175, 464-66, 488-89). However, in a July 25, 2011, memorandum, Human Resources Manager Clarkson and Associate Warden Rivera asked Warden Sherrod to remove Human Resources from the augmentation roster "until further notice[ ]" in order to facilitate the department's efforts to increase hiring. (Jt. Ex. 6; Tr. 419, 488-90). Warden Sherrod granted the request and the Respondent removed Human Resources from the augmentation rotation. (Jt. Ex. 6; Tr. 73, 175, 314-16, 419). Shortly after Warden Martinez replaced Sherrod as complex warden, Clarkson and Rivera submitted a nearly identical memorandum to Martinez on October 4, 2011. (Jt. Ex. 7). Clarkson and Rivera never consulted with the Union concerning these memoranda (Tr. 489), and the Union never agreed that the Respondent could exempt Human Resources from the augmentation rotation. (Tr. 82-83). According to Clarkson, the Respondent returned Human Resources to the augmentation rotation in approximately January or February 2012. (Tr. 478). On August 11, 2011, the Union filed a ULP alleging that by exempting the Human Resources department from the augmentation rotation, pursuant to the July 25, 2011, memorandum, the Respondent violated the 2008 and 2010 agreements, the parties' collective bargaining agreement, and § 7116(a)(5), (7) and (8) of the Statute. (Jt. Ex. 1(a)(12); Tr. 83-85).

## DISCUSSION

### Positions of the Parties

#### General Counsel

As a preliminary matter, the General Counsel disputes the Respondent's assertion that § 7116(d) of the Statute bars the ULP charges upon which the consolidated complaint in this case is based. Because the grievances relate to isolated contractual breaches, and the ULP charges allege wholesale repudiation, the General Counsel asserts that § 7116(d) does not apply.

Regarding the merits of the consolidated complaint, the General Counsel makes two arguments in support of its contention that the Respondent violated 5 U.S.C. § 7116(a)(1) and (5) by repudiating the 2008 and 2010 agreements. First, the General Counsel argues that the Respondent's admissions – in its Answer to Amended Complaint – that it repudiated the agreements should be given dispositive weight. The General Counsel argues that the Authority has held that a judge may not ignore a Respondent's admissions. *U.S. Dep't of the Air Force, AFMC, Wright-Patterson AFB, Ohio*, 55 FLRA 968 (1999) (*Wright-Patterson*). Thus, the General Counsel argues that the Respondent's admissions provide a sufficient basis to support a finding that the Respondent committed the alleged violations.

Second, even without the Respondent's admissions, the General Counsel argues that the evidence establishes that the Respondent committed the alleged violations. Regarding the second provision of the 2010 agreement, the General Counsel asserts that the Respondent agreed to make a good faith effort to try to slow augmentation by attempting to offer overtime, but that the provision does not require the Respondent to offer overtime before augmenting. However, the General Counsel asserts that the Respondent breached the agreement by making "no attempt" rather than "every attempt" to offer overtime before augmenting. Because the Respondent ignored the agreement and used augmentation to avoid paying overtime, and managers informed the Union of this decision not to comply with the agreement on multiple occasions, the General Counsel argues that the Respondent's breach was "clear and patent." Also, the General Counsel argues that this breach went to "the heart of the agreement" because the 2010 agreement was intended to slow augmentation.

In addition, the General Counsel argues that the Respondent repudiated both the 2008 and 2010 agreements when it unilaterally exempted Human Resources from the augmentation rotation. Regarding the 2008 agreement, the General Counsel asserts that the Respondent's exemption of Human Resources from the augmentation rotation, despite the parties' intention for the agreement to spread augmentation among as many departments as possible, constituted repudiation. As for the 2010 agreement, the General Counsel emphasizes that the parties specifically agreed that the Respondent would return Human Resources to the augmentation rotation. Therefore, the General Counsel asserts that the Respondent's unilateral written exemption of Human Resources from the augmentation rotation "until further notice" amounted to a "clear and patent" breach. And, because a central tenet of the 2010 agreement was the fair distribution of augmentation among non-custody staff, including Human Resources employees, the General Counsel argues that the Respondent's breach went to "the heart of the agreement."

In addition, the General Counsel claims that the Respondent's asserted defenses are without merit. In particular, the General Counsel argues that the 2010 agreement does not conflict with the Respondent's management rights under § 7106 of the Statute because the Respondent retains the right to augment rather than offering overtime under the agreement. Similarly, to the extent that the Respondent argues that it was not bound by the 2010 agreement because it conflicts with the parties' collective bargaining agreement, the General Counsel asserts that there is no such conflict. Further, the General Counsel argues that the Respondent's asserted "covered by" defense is inapplicable in the repudiation context.

As a remedy, the General Counsel seeks an order for unpaid overtime under the Back Pay Act. The General Counsel argues that the requirements of the Back Pay Act are met here because the Respondent's repudiation constituted an unjustified or unwarranted personnel action and, but for that repudiation, bargaining unit employees would have received overtime pay. *U.S. Dep't of HHS*, 54 FLRA 1210, 1218-19 (1998) (*HHS*). The General Counsel concedes that "it will be a challenge to determine which employees to compensate[,]" but contends that, by comparing the instances of augmentation as documented on the daily assignment rosters with the overtime rosters that list which employees volunteered for overtime on the corresponding shifts, the parties can determine the employees entitled to lost overtime backpay and the amounts owed. (G.C. Br. at 38-39).

Finally, the General Counsel asks that notice of the violation be posted on bulletin boards and circulated via email. Regarding e-mail notice, the General Counsel argues that distribution of the notice by email would effectuate the purposes and policies of the Statute, and that limiting the posting to traditional bulletin boards would not.

**Respondent**

As a preliminary matter, the Respondent argues that the allegations in the complaint regarding violations of the 2010 agreement are barred by § 7116(d) of the Statute. Specifically, the Respondent asserts that because the Union began filing grievances alleging violations of the 2010 agreement in January 2011, and did not begin filing ULP charges until March 7, 2011, the ULP charges concerning violations of the 2010 agreement arose out of the same factual predicate and same legal theory. In support of its argument that the grievances and the ULP charges share a legal theory because both allege contractual violations, the Respondent notes that the Union did not begin using the term "repudiation" in its ULP charges until July 28, 2011. Thus, according to the Respondent, § 7116(d) bars the ULP charges.

Regarding the merits of the consolidated complaint, the Respondent concedes that it admitted in its Answer to Amended Complaint that it had violated § 7116(a)(1) and (5) of the Statute when it repudiated the 2010 and 2008 agreements. The Respondent does not explain – or ask to modify – these admissions, but asserts a number of defenses.

First, the Respondent asserts that the 2010 agreement is not enforceable because there was no meeting of the minds regarding the meaning of the second provision. In particular, the Respondent asserts that the Union intended the provision to require the Respondent to offer overtime before augmenting.

Second, the Respondent argues that, if this interpretation of the agreement is upheld – meaning that the 2010 agreement does not permit the Respondent to make an individualized determination of whether overtime is possible or necessary – then the agreement is contrary to management's rights to assign work and manage its budget under § 7106(a) of the Statute.

Similarly, the Respondent argues that an interpretation of the 2010 agreement that does not permit the Respondent to make individualized determinations regarding overtime is unenforceable because it violates the parties' collective bargaining agreement.

Next, the Respondent argues that the complaint is "covered by" Article 18 of the parties' collective bargaining agreement because Article 18 "preempts" all challenges to the overtime assignment process.

Finally, regarding the General Counsel's proposed remedy, the Respondent argues that backpay is not warranted under the Back Pay Act because the General Counsel has not established the required causal connection between the Respondent's alleged breach of the 2010 agreement and employees' loss of overtime pay. Specifically, the Respondent emphasizes testimony by Union witnesses that employees on the volunteer overtime roster do not always accept opportunities to work overtime. And the Respondent contends that the Authority has repeatedly held that an award of backpay is improper where, as here, the loss of pay is purely speculative. *See SSA, Office of Hearings & Appeals, Orlando, Fla.*, 54 FLRA 609, 614 (1998) (*SSA Orlando*); *U.S. Dep't of HHS, SSA, Balt., Md.*, 37 FLRA 278 (1990) (*SSA Balt.*).

## CONCLUSIONS OF LAW

### Preliminary Matter

The Respondent argues that the allegations in the consolidated complaint regarding violations of the 2010 agreement are barred by § 7116(d) of the Statute as a result of the Union's earlier-filed grievances alleging contractual violations. Under § 7116(d) of the Statute, "issues which can be raised under a grievance procedure may . . . be raised under the grievance procedure or as an unfair labor practice . . . but not under both procedures."

Determining whether a ULP is barred by an earlier-filed grievance requires examining whether the ULP involves the same "issues," that is: (1) whether the ULP arose out of the same factual predicate as the grievance; and (2) whether the legal theory advanced in support of the ULP and the grievance are substantially similar. When both tests are met, § 7116(d) bars the later action. *See U.S. DOL, Wash., D.C.*, 59 FLRA 112, 114 (2003) (*DOL*).

In determining whether a ULP and grievance advance "substantially similar" legal theories for purposes of § 7116(d), "the Authority has drawn a clear distinction between legal theories supporting allegations of *statutory* violations and allegations of *contract* violations." *DOL*, 59 FLRA at 115) (emphasis added). In particular, the Authority has held that a grievance alleging contract *violation* and a ULP alleging contract *repudiation* are not substantially similar for purposes of § 7116(d). (*Id.* at 116-17). Although a contract breach is an element of both of these theories, the Authority has explained that merely showing a breach is not sufficient to establish repudiation under the Statute. (*Id.* at 116). Rather, to establish repudiation, the breach must be of a specific type – clear and patent – and the contract provision must be of a specific type – one that goes to the heart of the parties' agreement. (*Id.*). Because repudiation is a statutory violation, and because proving repudiation requires establishing significant additional elements besides a mere contractual violation, the Authority has held that the two theories are "fundamentally different[ ]" for purposes of § 7116(d). (*Id.*).

In this case, all of the earlier-filed grievances allege only violations of the 2010 agreement. (Jt. Ex. 9). In contrast, all of the ULP charges that form the basis for the consolidated complaint allege statutory violations. (Jt. Ex. 1(a)). In this regard, although the Union did not use the term "repudiation" in all of the ULP charges, these charges all allege repudiation by asserting that the Respondent's actions violated § 7116(a)(1) and (5) of the Statute. (Jt. Ex. 1(a)(1)-(11), (14)-(21)). Thus, the Union's grievances alleging contractual violations and ULP charges alleging repudiation are based on legal theories that are not "substantially similar" for purposes of § 7116(d). *DOL*, 59 FLRA at 116-17. Accordingly, I find that the ULP charges alleging repudiation of the 2010 agreement are not barred.

**The Parties Reached a Meeting of the Minds Regarding the Second Provision of the 2010 Agreement**

Under § 7114 of the Statute, an agreement exists where "authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining." *U.S. DHS, Customs & Border Prot., San Diego, Cal.*, 61 FLRA 136, 137 (2005) (quoting *U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 317 (1997)) (internal quotation marks omitted).

In this case, contrary to the Respondent's argument, the evidence in the record demonstrates that the parties reached a meeting of the minds regarding the second provision of the 2010 agreement. The second provision states: "Every attempt should be made to fill all posts on the Correctional Services Roster prior to Augmentation by means of utilizing the overtime list and then seeking list exempt voluntary overtime. Other posts may also become unassigned prior to the beginning of each shift and should be filled in the same manner." (Jt. Ex. 5). As discussed above, I find that the weight of the evidence establishes that the parties intended this provision to require the Respondent to make a good faith effort to offer overtime before resorting to augmentation. For example, Warden Sherrod testified that this provision meant that the Respondent would "attempt" to offer overtime in lieu of augmentation "when possible," but that the Respondent would need to consider each vacant post and determine the "most effective and efficient" way to fill that post. (Tr. 298-99). This would involve him monitoring vacancies on the rosters, considering staffing levels and budgetary constraints, and deciding where and when overtime resources could be allocated. (Tr. 325). Clarkson testified that he understood the second provision to mean that, when a post was vacant, the lieutenant would contact the captain, who would contact the associate warden, and the associate warden would determine if the Respondent would pay overtime or augment. (Tr. 497). Richmond testified that "if no effort is made, then the spirit of the agreement is gone." (Tr. 110). And Logan testified that the spirit of the parties' agreement was to slow augmentation down, and that compliance would require some kind of attempt to offer overtime, even if the Respondent ultimately decided to augment. (Tr. 171-72, 228, 236-37).

Although the Respondent asserts that the parties did not reach a meeting of the minds because the Union intended the provision to require the Respondent to offer overtime before augmenting, as discussed above, I find that the parties did not intend for the second provision of the 2010 agreement to constitute an absolute requirement that the Respondent offer overtime before augmenting. (Tr. 130-31, 234-36, 305-06, 499-500). For example, Sherrod

testified unambiguously that management retained the right to decide whether to offer overtime under the 2010 agreement. (Tr. 305-06). And Richmond and Logan testified that the agreement did not require the Respondent to offer overtime before augmenting. (Tr. 109-11, 130-33, 230, 234-36). Further, as discussed above, Richmond testified that the Union *could not* contractually require the Respondent to offer overtime. (Tr. 130, 132-33).

Thus, I find that the weight of the evidence establishes that the parties achieved a meeting of the minds concerning the second provision of the 2010 agreement. It requires the Respondent to make a good faith effort to offer overtime before resorting to augmentation, but does not constitute an absolute requirement that the Respondent offer overtime before augmenting.

**The Respondent Repudiated the 2008 and 2010 Agreements in Violation of the Statute**

The Authority has identified a two-prong test for determining whether a repudiation has occurred. *Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 862 (1996). Under this test, the Authority examines two elements: (1) the nature and scope of the alleged breach of an agreement – i.e., was the breach clear and patent; and (2) the nature of the agreement provision allegedly breached – i.e., did the provision go to the heart of the parties' agreement? (*Id.*).

The General Counsel argues that the Respondent's admission that it repudiated the 2008 and 2010 agreements set forth in its Answer to Amended Complaint should be given dispositive weight. In this regard, the General Counsel argues that the Authority has held that a judge may not ignore a Respondent's admissions. *Wright-Patterson*, 55 FLRA at 970-71. Although the Authority held in *Wright-Patterson* that a judge must address parties' admissions, this does not equate to a requirement that a judge is bound to give such admissions dispositive weight. Although I do not ignore the Respondent's admissions and my ultimate findings are consistent with those admissions, I will nevertheless explain why I find that the Respondent's actions violated the Statute even if the admissions were not considered.

Augmentation and Overtime Under the Second Provision of the 2010 Agreement

As discussed above, the second provision of the 2010 agreement required the Respondent to make a good faith effort to offer overtime before resorting to augmentation. This good faith effort included making individualized determinations about the Respondent's ability to offer overtime prior to deciding to augment. For example, Sherrod testified that this would involve him monitoring vacancies on the rosters, considering staffing levels and budgetary constraints, and deciding where and when overtime resources could be allocated. (Tr. 325). Logan testified that the spirit of the parties' agreement was to slow augmentation down, and that compliance would require some kind of consideration or attempt to offer overtime, even if the Respondent ultimately decided to augment. However, the agreement was not intended to eliminate augmentation. (Tr. 171-72, 228, 236-37).

As discussed above, the record is replete with evidence that, from sometime in January 2011 until sometime in February or March 2012, the Respondent with the exception of medical trips, failed to offer overtime prior to augmenting and unilaterally adopted a policy of using augmentation by default during day watch shifts, Monday through Friday. (Jt. Ex. 8; Tr. 37-38, 151, 176-84, 187-89, 200, 232-33, 277-78, 347, 361, 378-79, 393, 436, 440-44, 503, 506-07, 509, 527-28, 530, 539). Union witnesses also testified that the Respondent consistently augmented on weekday day watch shifts without first offering overtime. (Tr. 37-38, 187-89, 232-33, 277-78). For example, Logan testified that by comparing overtime rosters and the corresponding daily assignment rosters, he could identify over 1,000 instances when the Respondent augmented without offering overtime. (Tr. 176-84).

More importantly, the evidence establishes that managers did not even *consider* offering overtime because it was the Respondent's policy to use augmentation in lieu of overtime on weekday day watch shifts in order to save overtime funds. (Tr. 347, 361, 378-79, 393, 436, 440-44, 503, 506-07, 509, 527-28, 530, 539). For example, at a May 2011 meeting, Sherrod told Ma'at that managers should try to be "good stewards of taxpayer dollars[,]" and instructed him to save overtime funds by always augmenting on weekday day watch shifts. (Tr. 443-44). Cartrette was also at this meeting and, as a result of Sherrod's instructions, he never offered, or even considered offering overtime on weekday day watch shifts because it was his understanding that doing so was "not an option for [him]." (Tr. 509). That the Respondent had a policy of always augmenting on weekday day watch shifts without considering offering overtime is further corroborated by managers' testimony that they were unaware of the 2010 agreement at the time of its implementation. (Tr. 433-34 (Ma'at unaware of agreement until at least May 2011); (Tr. 399, 402-03, 428) (Rivera unaware of agreement until at least June 2011); (Tr. 524) (Martinez unaware of agreement until Respondent began preparing for this instant litigation)).

Although the Respondent's apparent justification for failing to offer overtime was one of budgetary necessity, its evidence on this issue was inconsistent at best. For example, although Warden Sherrod testified that "[t]here is no budget for overtime[,]" (Tr. 302), several managers testified that they were given annual overtime budgets (Tr. 347-48, 389-91, 399-400, 439-41, 502, 510). And Keffer and Ma'at testified that they may not have spent their entire overtime budgets during the pertinent time period, meaning that it was possible that the Respondent could have offered overtime on at least some weekday day watch shifts without exceeding the allotted overtime budget. (Tr. 372, 440).

However, even if the Respondent's overtime funding would have permitted it to offer overtime on occasions when it augmented, the 2010 agreement preserved the Respondent's discretion to decide whether to augment in those circumstances. What is important for purposes of the 2010 agreement is whether the Respondent made *any* effort to offer overtime, that is, whether the Respondent made individualized determinations about whether to augment to fill a particular vacancy. This, the record clearly establishes, the Respondent did not do. In this regard, the Respondent did not offer evidence that managers considered whether they could afford to offer overtime on a day-by-day, or even pay-period-by-pay-period basis. Rather, the Respondent's directive to managers was to cut overtime costs by always augmenting on weekday day watch shifts, and managers understood that offering

overtime on those shifts was "not an option for [them]." (Tr. 509). And the Respondent communicated this breach of the second provision of the 2010 agreement to the Union both by its actions, and by its statements to Union representatives that it would not be offering overtime before augmenting on weekday day watch shifts. (Tr. 73-74, 76, 85-86, 118, 127, 184, 187, 228-29, 457, 467-68, 523).

The Respondent's categorical refusal to even consider offering overtime before augmenting establishes that the Respondent's breach of the second provision of the 2010 agreement was clear and patent. *U.S. DOD, Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 747 (2010) (finding clear and patent breach where party "clearly refused to comply with the agreement"). Pursuant to that provision, the parties agreed to turn augmentation into a last resort. But the Respondent not only failed to treat augmentation as a last resort, it turned to augmentation as a first resort for the day watch shift on weekdays. Stated another way, no reasonable interpretation of the 2010 agreement's requirement that the Respondent would make "every attempt" to fill vacant posts using overtime permitted the Respondent to make *no* attempt to fill vacant posts using overtime, as it did here. Thus, applying the first prong of the Authority's repudiation test, I conclude that the Respondent's breach of the second provision of the 2010 agreement was clear and patent.

With respect to the second prong of the repudiation test, the 2010 agreement was intended to decrease the adverse impact of augmentation on employees by minimizing the number of times a given employee would be augmented. (Tr. 132, 171-74, 458). The parties intended the agreement's three provisions to accomplish this goal by: (1) spreading augmentation among as many non-custody departments as possible, including Human Resources (first provision); (2) trying to slow the use of augmentation (second provision); and (3) mandating that a particular type of shift would only be filled using overtime (third provision). (Jt. Ex. 5). Because the second provision was central to accomplishing the intention of the 2010 agreement to decrease the adverse impact of augmentation on employees, I find that the Respondent's breach of this provision goes to the heart of the parties' agreement for purposes of the second prong of the Authority's repudiation test.

Accordingly, as evidenced by the Respondent's statements, actions, and admissions, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by ceasing to make any effort to comply with the second provision of the 2010 agreement and informing the Union that it would not be offering overtime before augmenting on weekday day watch shifts.

Augmentation of Human Resources Employees Under the 2008 and 2010 Agreements

The General Counsel argues that the Respondent repudiated both the 2008 and 2010 agreements when it unilaterally exempted Human Resources from the augmentation rotation. As discussed above, the 2008 agreement stated that augmentation would rotate among non-custody departments, and specifically exempted certain departments from the augmentation rotation, but did not exempt the Human Resources department. (Jt. Ex. 3). Because, at some point between the 2008 agreement and November 2010, the Respondent exempted Human Resources from the augmentation rotation (Jt. Exs. 4-5), the parties agreed in the 2010 agreement that the Respondent would no longer exempt Human Resources from the augmentation rotation. (Jt. Ex. 5; G.C. Ex. 2; Tr. 69-70, 174-75, 455, 463-64, 488-89).

Pursuant to the 2010 agreement, the Respondent returned Human Resources to the augmentation rotation in approximately November or December of 2010. (G.C. Ex. 2; Tr. 175, 464-66, 488-89). However, pursuant to a request in a July 25, 2011, memorandum from Human Resources Manager Clarkson and Associate Warden Rivera, Warden Sherrod removed Human Resources from the augmentation roster "until further notice." (Jt. Ex. 6; Tr. 73, 175, 314-16, 419, 488-90). Rivera acknowledged that this effectively superseded the first provision of the 2010 agreement. (Tr. 419). Shortly after Warden Martinez replaced Sherrod as complex warden, Clarkson and Rivera submitted a nearly identical memorandum to Martinez on October 4, 2011. (Jt. Ex. 7). Clarkson and Rivera never consulted with the Union concerning these memoranda (Tr. 489), and the Union never agreed that the Respondent could exempt Human Resources from the augmentation rotation. (Tr. 82-83).

Based on the foregoing, I find that the Respondent unilaterally exempted the Human Resources department from the augmentation rotation thereby breaching the 2008 and 2010 agreements. The 2008 agreement did not exempt Human Resources from the augmentation rotation (Jt. Ex. 3; Tr. 354, 368), and the Respondent explicitly agreed to include Human Resources in the rotation in the 2010 agreement. (Jt. Ex. 5; G.C. Ex. 2; Tr. 69-70, 174-75, 455, 463-64, 488-89). The unequivocal nature of the Respondent's breach is evident from the July 25, 2011, memorandum exempting the department from augmentation "until further notice." (Jt. Ex. 6). Thus, regarding the first prong of the Authority's repudiation test, I conclude that the Respondent's breach of the 2008 and 2010 agreements was clear and patent.

With respect to the second prong of the repudiation test, Warden Keffer, who signed the 2008 agreement on behalf of the Respondent, acknowledged that the intention of the agreement was to "includ[e] as many people in the augmentation [rotation] as possible to lessen the amount of impact" of augmentation. (Tr. 368). To achieve this result, the parties included as many departments as possible in the augmentation rotation. (*Id.*). Similarly, as discussed above, the 2010 agreement was intended to decrease the adverse impact of augmentation on employees, and one of the parties' tools for accomplishing this goal was to spread augmentation among as many non-custody departments as possible, including Human Resources. Because the breached provisions of the 2008 and 2010 agreements were central to the agreements' shared goal of decreasing the impact of augmentation by minimizing the number of times a given employee would be augmented, I find that the Respondent's breach of these provisions goes to the heart of the parties' agreements for purposes of the second prong of the Authority's repudiation test.

Accordingly, as evidenced by the Respondent's statements, actions, and admissions, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by unilaterally exempting the Human Resources department from the augmentation rotation in violation of the 2008 and 2010 agreements.

**The Respondent's Asserted Defenses Are Without Merit**

The 2010 Agreement Is Not Contrary to § 7106 of the Statute

The Respondent argues that, if the 2010 agreement is interpreted to require the Respondent to offer overtime before augmenting – meaning that the 2010 agreement does not permit the Respondent to make an individualized determination of whether overtime is possible or necessary, then the agreement is contrary to management's rights to assign work and manage its budget under § 7106(a) of the Statute.[1] In this regard, the Authority has held that the right to assign work under section 7106(a)(2)(B) of the Statute encompasses management's right to assign overtime and to determine when the overtime will be performed. *See, e.g., AFGE, Local 1302, Council of Prison Locals C-33*, 55 FLRA 1078, 1079 (1999) (proposal requiring agency, in all circumstances other than emergencies, to staff vacant posts using overtime, rather than permitting a post to be vacant, outside the duty to bargain).

However, as discussed above, I find that the 2010 agreement does not require the Respondent to offer overtime before augmenting. Although the agreement requires the Respondent to make a good faith effort to offer overtime before augmenting, the Respondent retains the right to decide when, if at all, to offer overtime prior to augmenting. Thus, because the Respondent's management rights argument is based on an erroneous interpretation of the breached provision of the 2010 agreement, it is inapposite.[2]

The 2010 Agreement Does Not Conflict With the Parties' Collective Bargaining Agreement

Similarly, the Respondent argues that an interpretation of the 2010 agreement that does not permit the Respondent to make individualized determinations regarding overtime is unenforceable because it violates the parties' collective bargaining agreement.[3] However, because I find that the Respondent retains its right to make individualized determinations regarding overtime under the 2010 agreement, the Respondent's argument is inapposite.

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[1] Because the Respondent's § 7106 argument is specific to the second provision of the 2010 agreement, this defense, even if proven, would not excuse the Respondent's unlawful repudiation of the 2008 agreement and the first provision of the 2010 agreement when it unilaterally exempted the Human Resources Department from the augmentation rotation.

[2] The Respondent and the General Counsel disagree over the standard the Authority applies to determine whether a contractual breach is not an unlawful repudiation because the breached provision is contrary to § 7106 of the Statute. Specifically, the Respondent asserts that the Authority determines whether the breached provision abrogates the asserted management right (Resp. Br. at 22), and the General Counsel contends that the Authority determines whether the breached provision excessively interferes with the asserted management right. (G.C. Br. at 33). Because, as discussed above, the Respondent's management rights argument relies on an erroneous interpretation of the breached provision of the 2010 agreement, it is not necessary to resolve this question here.

[3] Once again, the Respondent's asserted defense, even if proven, is specific to the second provision of the 2010 agreement and would not excuse the Respondent's unlawful repudiation of the 2008 agreement and the first provision of the 2010 agreement when it unilaterally exempted the Human Resources Department from the augmentation rotation.

The "Covered By" Defense is Inapplicable

The Respondent argues that the complaint is "covered by" Article 18 of the parties' collective bargaining agreement because Article 18 "preempts" all challenges to the overtime assignment process. The "covered by" defense is available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue. *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000). However, "the 'covered by' defense does not apply to allegations that an agency repudiated a collective bargaining agreement." *U.S. Dep't of the Treasury, IRS, Plantation, Fla.*, 64 FLRA 777, 780 (2010). Thus, the Respondent's asserted "covered by" defense is inapplicable here.

**Remedy**

Backpay

As a remedy, the General Counsel seeks an order for unpaid overtime under the Back Pay Act. The Authority has long held that, under the Back Pay Act, backpay is authorized when: (1) employees have been affected by an unjustified or unwarranted personnel action and; (2) that has resulted in the withdrawal or reduction of their pay, allowances, or differentials. *See, e.g.*, *U.S. SEC*, 62 FLRA 432, 438 (2008).

Regarding the first requirement, "the Authority has expressly ruled that employees have been affected by an unjustified or unwarranted personnel action 'when it is determined that [employees] w[ere] affected by an unfair labor practice under the Statute.'" *(Id.)* (quoting *FAA, Wash., D.C.*, 27 FLRA 230, 232-33 (1987)). Thus, I find that the first requirement under the Back Pay Act is met here.

In determining whether the causal connection requirement is met, the Authority examines whether, but for the unwarranted action, the loss of pay, allowances, or differentials would not have occurred. *SSA Orlando*, 54 FLRA at 612-13. In this regard, where the effect on employees is "totally speculative" the Authority will deny make-whole relief under the Back Pay Act. *SSA Balt.*, 37 FLRA at 292. Here, the General Counsel concedes that "it will be a challenge to determine which employees to compensate[,]" but contends that, by comparing the instances of augmentation as documented on the daily assignment rosters with the overtime rosters that list which employees volunteered for overtime on the corresponding shifts, the parties can determine the employees entitled to lost overtime backpay and the amounts owed. (G.C. Br. at 38-39). But this argument is based on two faulty premises: (1) that but for its repudiation of the 2010 agreement, the Respondent would have offered overtime on every occasion when it augmented; and (2) that the employees on the overtime roster would have accepted all offered opportunities to work overtime on the shifts that the Respondent augmented.

As discussed above, the Respondent repudiated the 2010 agreement by failing to make a good faith effort – or any effort whatsoever – to offer overtime before resorting to augmentation. However, the 2010 agreement did not require the Respondent to offer overtime before augmenting on any particular shift, let alone on *every* shift when the Respondent chose to augment. Thus, the General Counsel takes the inconsistent position that

although the 2010 agreement did not require the Respondent to offer overtime before augmenting, the Respondent's compliance with the 2010 agreement as reconstructed in an award of backpay would have included an offer of overtime for every post on every shift that the Respondent augmented. In short, the General Counsel seeks as a remedy for repudiation, a result that the Union could not achieve in bargaining the agreement that was repudiated. Even the Union concedes that it could not have negotiated a mandatory offer of overtime prior to any use of augmentation, thus, a remedy that assumes such a result exceeds the bounds of any possible agreement and the causal connection requirement of the Back Pay Act does not permit such a result.

The 2010 agreement required the Respondent to make a good faith effort to avoid augmentation, which would include making individualized determinations about the Respondent's ability to offer overtime prior to deciding to augment. For example, Warden Sherrod testified that this would involve him monitoring vacancies on the rosters, considering staffing levels and budgetary constraints, and deciding where and when overtime resources could be allocated. (Tr. 325). The record clearly establishes that the Respondent repudiated the agreement by making no such individualized determinations and, instead, unlawfully implementing a policy of using augmentation in lieu of overtime on weekday day watch shifts in order to save overtime funds. However, the record does not permit me to ascertain to any level of certainty how much overtime, if any, the Respondent would have offered prior to augmentation, if it had given good faith consideration to the use of overtime.

This uncertainty distinguishes this case from the Authority's decision in *HHS*, 54 FLRA at 1210, upon which the General Counsel relies. In that case, unlike here, the fact finder interpreted the parties' agreement to *require* the agency to provide certain benefits under certain circumstances, and was also able to make "specific factual findings" as to each instance when the agency had the available funds to comply with the parties' agreement. (*Id.* at 1220-21). In contrast, an award of backpay in this case would require pure speculation regarding how many employees would have been offered overtime, what days it would have been offered, and which employees would have actually received overtime and not turned the opportunity down on that date. It cannot be determined in this case what would have happened had the Respondent complied with the agreement and made a good faith effort to consider overtime on each day it was not considered. The one thing that is certain and upon which the parties agree, is that the Respondent, having considered the use of overtime to avoid augmentation for a mandatory custody post, did not have to actually offer overtime. Thus, a determination about the affected employees and whether the unjustified or unwarranted personnel action resulted in an actual loss of pay cannot be made. Therefore, the General Counsel's request for make-whole relief in the form of lost overtime is not supported by the evidence in the record. *SSA Balt.*, 37 FLRA at 292.

Moreover, even if the record permitted me to ascertain which day shifts or mandatory custody positions the Respondent would have staffed using overtime "but for" its repudiation, the evidence in this case demonstrates that employees on the overtime roster sometimes decline the opportunity to work overtime. (Tr. 157, 221-22, 226-27, 245). For example, Logan testified that an employee may sign the roster with the intention to volunteer for an overtime shift, but that for "a multitude of reasons" an employee might actually decline the shift if offered. (Tr. 157). And Logan also testified that he had witnessed

situations wherein a manager sought to fill a post with a volunteer from the overtime roster, called every volunteer on the roster, was turned down by all volunteers, and was forced to fill the post by assigning mandatory overtime. (Tr. 226-27). Thus, the evidence in the record does not support the General Counsel's assertion that, on every shift where the Respondent chose to augment, the most senior employee on the overtime roster would have accepted an opportunity to work overtime, if offered. As a result, determining after the fact which employees would have worked which overtime shifts, especially when those decisions would also be impacted by the choices of other employees on the volunteer overtime roster, would be an exercise in total speculation that is not permitted by the Back Pay Act. *SSA Balt.*, 37 FLRA at 292.

Notice

The General Counsel asks that notice of the violation be posted on bulletin boards and circulated via email. Regarding email notice, the General Counsel argues that distribution of the notice by email would effectuate the purposes and policies of the Statute, and that limiting the posting to traditional bulletin boards would not.

The General Counsel introduced evidence at the hearing that bargaining unit employees check their email daily (Tr. 87, 201, 261, 280), and referred to examples of email communications between the Respondent and employees (G.C. Ex. 3; Tr. 88-89, 262, 280). However, the General Counsel's witnesses also acknowledged that the Respondent uses bulletin boards to post certain types of documents and that employees have access to those bulletin boards. (Tr. 90, 202, 262, 280). In addition, Logan testified that employees in certain posts, such as the towers and mobile units, do not have access to computers at their posts and would have to check their email on their own time. (Tr. 201-02).

The Authority has determined that the electronic posting of a notice is a nontraditional remedy. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Florence, Colo.*, 59 FLRA 165, 174 (2003). If there are no legal or public policy objections to a proposed nontraditional remedy, it must be reasonably necessary and effective to recreating 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 violations. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*F.E. Warren AFB*). Further, nontraditional remedies will be fashioned only where traditional remedies will not adequately redress the wrong incurred by the unfair labor practice. *Fed. BOP, Wash., D.C.*, 55 FLRA 1250, 1259 (2000); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Ocean Serv., Coast & Geodetic Survey Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1021-22 (1998).

The General Counsel states that it is not seeking email notice distribution as an "extraordinary remedy" or claiming that its request for email notice is "warranted by extraordinary circumstances . . . ." (G.C. Br. at 36). Rather, the General Counsel argues that email distribution is appropriate under the Statute and Authority doctrine. (*Id.*). However, I find that the General Counsel did not introduce sufficient evidence to support its contention that posting to traditional bulletin boards would not adequately redress the wrong or

sufficiently effectuate the purposes and policies of the Statute. Given the evidence in the record that the Respondent uses email *and* bulletin boards to communicate with agents, the findings mandated in the *F.E. Warren AFB* case cannot be made under the evidence in the record. Therefore, ordering a nontraditional remedy is not appropriate in this case.

## FINDINGS AND RECOMMENDATION

I find that the Respondent violated § 7116 (a)(1) and (5) of the Statute when it repudiated the 2008 and 2010 agreements and recommend that the Authority adopt the following Order:

## ORDER

Pursuant to § 2423.41(c) of the rules and regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Federal Bureau of Prisons, Federal Correctional Complex, Pollock, Louisiana, shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the 2008 and 2010 agreements reached with the American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 1034 (Union) concerning augmentation.

(b) In any like or related manner, interfering with, restraining, or coercing its 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) Post at its institutions 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 highest official of the Federal Correctional Complex, Pollock, Louisiana, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) 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 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., August 29, 2013

CHARLES R. CENTER
Chief 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 Federal Bureau of Prisons, Federal Correctional Complex, Pollock, Louisiana violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** fail or refuse to comply with the 2008 and 2010 agreements reached with the American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 1034 (Union) concerning augmentation.

**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.

_____

(Respondent/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 Regional Office, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-6266.