If you require any assistance or have any questions concerning compliance in this matter, please contact Ms. Hardy at (404) 331-5300, ext. 5011.

For the Authority.

Sincerely,

Richard S. Jones
Regional Director

Enclosures (2)

Decision and Order
Notice

cc: Jose Rojas
Kenneth Pike
Union Representatives
AFGE, Local 506
848 NE 54th Terrace
Coleman, FL 33521

Complex Warden
U. S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Complex
846 NE 54th Terrace
Coleman, FL 33521

67 FLRA No. 145

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Respondent)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 506
(Charging Party)

AT-CA-11-0438

DECISION AND ORDER

September 10, 2014

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

I. Statement of the Case

In the attached decision, the Federal Labor Relations Authority's (FLRA's) Chief Administrative Law Judge (the Judge) found that the Respondent committed an unfair labor practice (ULP) under § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing to comply with a final and binding arbitration award (the award). Specifically, the Judge found that the Respondent failed to comply with the award's directions that the Respondent bargain over a change that it had unilaterally made to certain procedures, and return to the pre-change status quo while bargaining (the status-quo remedy). The Judge ordered the Respondent to comply with the award, including the status-quo remedy, "until changes in the policy . . . [are] bargained to agreement or impasse."[2]

---

[1] 5 U.S.C. § 7116(a)(1), (8).
[2] Judge's Decision at 8.

The substantive question before us is whether the status-quo remedy is contrary to law because it interferes with the Respondent's management right to determine its internal-security practices under § 7106(a)(1) of the Statute.[3] Because the Respondent did not file exceptions to the award, under Authority precedent, it cannot challenge the award's status-quo remedy in this ULP proceeding. Thus, we find that the Respondent's management-right argument provides no basis for declining to order compliance with the award.

II. Background and Judge's Decision

The Respondent unilaterally changed its inmate-escort policy (the policy). Prior to the change, the policy provided that there would be two armed escorts for each inmate who is transported to receive medical treatment outside of the Respondent's facility. After the change, the policy provided that one escort – the officer responsible for handling the inmate – would be unarmed. The Union filed a grievance over the unilateral change, and the grievance went to arbitration. In the award, the arbitrator sustained the grievance and directed the Respondent to "[r]eturn to the [pre-change] procedures" and to bargain over the change.[4]

The Respondent neither reinstated the pre-change procedures nor filed exceptions to the award. Instead, the Respondent filed a motion for reconsideration with the arbitrator, which the arbitrator denied. Following the arbitrator's denial of the motion for reconsideration, the Union submitted to the Agency numerous bargaining proposals, all of which the Respondent declared to be nonnegotiable. After the parties informally resolved their dispute regarding all but five of the disputed proposals with the assistance of the Authority's Collaboration and Alternative Dispute Resolution Office, the Authority, in *AFGE, Council of Prison Locals 33, Local 506 (Local 506)*,[5] determined that one of the five remaining proposals was negotiable.[6]

Meanwhile, as the Respondent did not implement the status-quo remedy, the Union filed a ULP charge. The FLRA's General Counsel (the GC) then issued a complaint alleging that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to comply with the award. The Judge held a hearing and, after the Authority decided *Local 506*, issued the attached decision.

In that decision, the Judge rejected a Respondent argument that, because it had alleged that none of the Union's five proposals was negotiable, it was not required to implement the status-quo remedy. The Judge explained that, because the Authority determined in *Local 506* that one of the proposals was negotiable, "the Respondent's failure to return to the status quo while that proposal was bargained in good faith to agreement or impasse defied the arbitrator's award," and was a ULP.[7] The Judge ordered

[3] 5 U.S.C. § 7106(a)(1).
[4] Judge's Decision at 2 (quoting Joint Ex. 1 at 21) (internal quotation marks omitted).
[5] 66 FLRA 929 (2012).
[6] *Id.* at 940-41.
[7] Judge's Decision at 5 (citing *Local 506*, 66 FLRA 929).

the Respondent to comply with the award, including the status-quo remedy, until it completed bargaining over the change.

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

III. Preliminary Matters

A. We waive the expired time limit for filing the Respondent's exception.

The Respondent filed, and the Authority granted, a motion for an extension of time – until Monday, March 17, 2014 – to file exceptions to the Judge's decision.[8] When the Respondent filed its exception on Tuesday, March 18, 2014, the Authority issued an order directing the Respondent to show cause why the exception should not be dismissed as untimely.[9] In its response to the Authority's order, the Respondent argues that it was unable to file its exception timely due to a snowstorm and federal-government closure on March 17.[10] According to the Respondent, because both it and the Authority were closed on the Monday due date, "[a]ny attempt at service on the Authority was a physical impossibility" even though the Respondent was otherwise "ready [and] willing" to file its exception on time.[11] The Respondent further argues that service on the Authority by courier or the U.S. Postal Service was "not possible" due to the emergency weather conditions, and that electronic service was not possible because the Respondent's counsel had no access to his files and "is not currently set-up" to file electronically through the Authority's electronic-filing system.[12] The Respondent requests that the Authority waive the expired time limit for filing its exception on the ground that the snowstorm and government closure constitute "extraordinary circumstances"[13] under § 2429.23(b) of the Authority's Regulations.[14]

Under § 2429.23(b) of the Authority's Regulations, "the Authority . . . may waive any expired time limit . . . in extraordinary circumstances."[15] The Authority has found extraordinary circumstances where the reason for the filing being untimely was outside of the filing party's control, such as, for example, where the U.S. Postal Service delivered a properly addressed and timely postmarked filing to the incorrect agency.[16] In contrast, the Authority has declined to find extraordinary circumstances where the filing party demonstrated a lack of diligence, such as, for example, when the filing party or its

---

[8] Order (Feb. 25, 2014).
[9] Order to Show Cause (Mar. 21, 2014).
[10] Respondent's Mot. to Request Waiver of Time Limit and Resp. to Show-Cause Order at 2.
[11] *Id.* at 3-4.
[12] *Id.* at 4 n.2.
[13] *Id.* at 3.
[14] 5 C.F.R. § 2429.23(b).
[15] *Id.*
[16] *U.S. Dep't of HHS, Nat'l Insts. of Health*, 64 FLRA 266, 268 n.7 (2009) (*HHS*).

internal mail system erred.[17] With specific regard to weather, the Authority declined to find extraordinary circumstances in both *SSA*[18] and *U.S. Department of Transportation & FAA (FAA)*.[19] In *SSA*, a snowstorm closed the union and agency offices on the due date, the union filed its opposition eight days later, and the union's counsel was unaware of the delay because he was on personal leave.[20] The Authority stated that "[e]ven if the Authority were to find that the office closings constituted an extraordinary circumstance, the use of 'personal leave' does not constitute an extraordinary circumstance" that excused "the additional filing delay after the office closings."[21] In *FAA*, the agency filed exceptions five days late and argued to the Authority that its decision to release employees early on the due date in anticipation of both severe weather and the Thanksgiving holiday occurring the *following* day was an extraordinary circumstance excusing its late filing.[22]

Here, unlike in *SSA* and *FAA*, the weather (and the resulting government closure) is the sole reason for the Respondent's untimely filing. Specifically, both the Respondent and the Authority's Office of Case Intake and Publication (CIP) closed, at the direction of the Office of Personnel Management, on the Monday due date because of a snowstorm.[23] It is undisputed that the Respondent's counsel is a federal employee who could not access his office on the due date because of the closure, and, because the storm occurred on a Monday, could not anticipate the need to bring files home before the weekend. Further, the Respondent could not request an additional extension for filing because the Authority was also closed. And, unable to file on the due date, the Respondent promptly filed its exception the following day, when the government offices reopened. Thus, unlike cases where filing parties demonstrated a lack of diligence, in this case, the Respondent acted diligently to file as quickly as it could. And because the Respondent's inability to file its exceptions timely was due to circumstances beyond its control, this case is akin to decisions where the Authority waived an expired deadline based on extraordinary circumstances.[24]

---

[17] *E.g.*, *U.S. Dep't of VA, VA Med. Ctr., Hampton, Va.*, 63 FLRA 593, 595 (2009) (party failed to send exceptions to correct Authority office by due date); *USDA, Farm Serv. Agency, Kan. City, Mo. & USDA, Office of the Inspector Gen., Kan. City, Mo.*, 55 FLRA 22, 22 (1998) (agency mailroom failed to postmark exceptions on due date); *Int'l Org. of Masters, Mates & Pilots*, 49 FLRA 1370, 1371 (1994) (delay caused by internal mail system); *Dep't of VA, L.A. Reg'l Office*, 44 FLRA 15, 16-17 (1992) (agency mailroom postmarked the exceptions three days after due date); *DOJ, U.S. INS, U.S. Border Patrol, El Paso, Tex.*, 40 FLRA 792, 793 (1991) (filing contained no evidence that the exceptions were postmarked by the due date); *Dep't of the Treasury, U.S. Customs Serv. & U.S. Customs Serv., Region IX, Chi., Ill.*, 34 FLRA 76, 78 (1989) (party's mailroom failed to postmark exceptions on due date).

[18] 66 FLRA 6 (2011).

[19] 40 FLRA 690 (1991).

[20] *SSA*, 66 FLRA at 7.

[21] *Id.*

[22] *FAA*, 40 FLRA at 691.

[23] Office of Pers. Mgmt., Snow & Dismissal Procedures, Archived Status, http://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/status-archives/14/3/17/Federal-Offices-are-Closed---Emergency-and-Telework-ready-Employees-Must-Follow-Their-Agencys-Policies_615/ (accessed by searching for "March 17, 2014 closure" in the OPM main-page search engine).

[24] *E.g.*, *HHS*, 64 FLRA at 268 n.7.

Accordingly, we find extraordinary circumstances in this case, waive the expired time limit, and consider the Respondent's exception.

B. Section 2429.5 of the Authority's Regulations bars the Respondent's changed-circumstances argument.

The Respondent argues that the status-quo remedy is inappropriate because, after the ULP hearing and the issuance of *Local 506*, relevant circumstances changed (the changed-circumstances argument). Specifically, the Respondent argues that it bargained over, reached agreement on, and implemented the one proposal that the Authority found negotiable in *Local 506*.[25] The Respondent acknowledges that it is raising this argument for the first time in its exception. But the Respondent contends that this is because "[t]he parties were not given the opportunity to brief the [Judge] on the effect, if any, of the Authority's decision in" *Local 506* or "on what[,] if any[,] actions had been taken by the parties subsequent to the issuing of [that] decision."[26] The Respondent argues that, while the Judge took "official notice" of *Local 506*, he did not "re-open the record" or "request briefs on the effect of that decision."[27] Consequently, the Respondent argues, the Judge failed to consider that it had implemented the one proposal found negotiable in *Local 506*,[28] and that any return to the pre-change status quo would "disrupt the efficiency and effectiveness" of its operations and not be in the public interest.[29]

Section 2429.5 of the Authority's Regulations states that "[t]he Authority will not consider any . . . arguments . . . or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the . . . Judge."[30] Thus, if events occur after a ULP hearing that may alter the judge's decision, such as a settlement or other intervening events, a party should file a motion with the judge under § 2429.26 of the Authority's Regulations, requesting that the record be reopened to receive the new evidence.[31] In a recent decision, the Authority held that a respondent was barred from presenting an argument that the parties had settled a ULP matter prior to the issuance of the judge's decision because the parties had not informed the GC or the judge of the settlement agreement.[32]

Here, as stated above, the Respondent acknowledges that it did not raise its changed-circumstances argument before the Judge. And, because all of the alleged changed circumstances occurred before the Judge issued his decision, the Respondent could have raised them below. The Respondent's arguments – that the parties were not "given" an opportunity to present supplemental evidence and that the Judge erred by failing to, on his own, reopen the record and request briefs from the parties after

---

[25] Exception at 8.
[26] *Id.* at 4 n.6.
[27] *Id.* at 7.
[28] *See Local 506*, 66 FLRA at 941.
[29] Exception at 10-11.
[30] 5 C.F.R. § 2429.5.
[31] *Id.* § 2429.26 (permitting a judge to grant leave, upon a *party's* request, to file post-hearing documents).
[32] *U.S. Dep't of the Air Force, Sheppard Air Force Base, Wichita Falls, Tex.*, 67 FLRA 509, 510 (2014) (*Air Force*) (Member Pizzella concurring).

Local 506 – do not support a contrary conclusion.[33] The Authority's precedent and Regulations support finding that the Respondent should have filed a motion requesting that the Judge reopen the record to consider its evidence of alleged changed circumstances.[34] As the Respondent failed to do so, and did not otherwise raise its changed-circumstances argument below, we find that § 2429.5 bars that argument.

IV. Analysis and Conclusion

The Respondent argues that implementing the status-quo remedy would: interfere with its management right to determine internal-security practices under § 7106(a)(1) of the Statute; disrupt the efficiency and effectiveness of the Respondent's operations; and create an unsafe environment for staff, inmates, and the general public.[35] The Respondent made this argument before the arbitrator,[36] who nevertheless included the status-quo remedy in the award.[37] But the Respondent never filed exceptions to the award.

An arbitration award becomes final and binding "for all purposes,"[38] and cannot be challenged by any means, if exceptions are not filed within the required period.[39] The Authority has consistently held that it will not review the merits of an arbitration award in a ULP proceeding,[40] because "to allow a respondent to litigate matters that go to the merits of the award would circumvent [c]ongressional intent with respect to statutory review procedures and the finality of arbitration awards."[41] Consequently, in a ULP proceeding regarding a failure to comply with an arbitration award, a party cannot do what the Respondent is attempting to do here: use an exception to the Judge's decision enforcing the award to challenge the merits of the award, including the status-quo remedy.

Accordingly, we find that the Respondent may not challenge the merits of the status-quo remedy in this ULP proceeding, and we deny the exception.

---

[33] Exception at 4 n.6.
[34] *Air Force*, 67 FLRA at 510.
[35] Exception at 10-11.
[36] Joint Ex. 1 at 16.
[37] Judge's Decision at 2 (citing Joint Ex. 1 at 21).
[38] *U.S. DOD, DOD Dependents Sch.*, 54 FLRA 773, 782 (1998) (quoting *Dep't of the Air Force v. FLRA*, 775 F.2d 727, 735 (6th Cir. 1985)).
[39] 5 U.S.C. § 7122(b) ("If no exception to an arbitrator's award is filed under subsection (a) of this section during the [thirty]-day period beginning on the date the award is served on the party, the award shall be final and binding.").
[40] *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (citing *U.S. Army Adjutant Gen. Publ'ns Ctr., St. Louis, Mo.*, 22 FLRA 200, 206 (1986)).
[41] *Id.* (citations omitted).

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[42] and § 7118 of the Statute,[43] the Respondent shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the arbitrator's May 3, 2011, award directing the Respondent to return to the status quo.

(b) 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 actions in order to effectuate the purposes and policies of the Statute:

(a) The Federal Correctional Complex (FCC) Warden must sign copies of the attached notice on forms furnished by the FLRA. The Respondent must distribute the notice, by electronic mail, to all bargaining-unit employees at the FCC in Coleman, Florida.

(b) The Respondent must comply with the arbitrator's May 3, 2011, award directing the Respondent to return to the status quo until changes in the policy for escorting inmates are bargained to agreement or impasse.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations,[44] notify the Regional Director, Atlanta Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

[42] 5 C.F.R. § 2423.41(c).
[43] 5 U.S.C. § 7118.
[44] 5 C.F.R. § 2423.41(e).

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

The Federal Labor Relations Authority (FLRA) has found that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex (FCC), Coleman, Florida, 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 or refuse to comply with an arbitrator's award to return to the status quo.

WE WILL return to the status quo, with respect to arming both officers that escort high-security inmates for medical purposes.

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

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature) (Warden, FCC Coleman)

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, FLRA, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.

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

OALJ 14-02

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 506
CHARGING PARTY

Case No. AT-CA-11-0438

Brian R. Locke, Esq.
For the General Counsel

Alicia Daniels-Lewis, Esq.
For the Respondent

Jose Rojas
Kenneth Pike
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), Part 2423.

Based upon an unfair labor practice charge and an amended charge filed by the American Federation of Government Employees, Local 506 (Union/Charging Party), a Complaint and Notice of Hearing was issued by the Regional Director of the Atlanta

Regional Office. The complaint alleges that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (Respondent/Agency/FCC Coleman) violated § 7116(a)(1) and (8) of the Statute when it failed to comply with an arbitrator's order that it return to procedures which required the officer handling the inmate be armed just like all other officers escorting the inmate. (G.C. Ex. 1(c)). The Respondent filed an Answer admitting some of the allegations set forth in the complaint, but denied that it committed a violation of the Statute. (G.C. Ex. 1(d)).

A hearing was held in Winter Garden, Florida on January 19, 2012, at which time the parties were afforded a full opportunity to be represented, heard, examine and cross-examine witnesses, introduce evidence, and make oral argument. The General Counsel and the Respondent filed post-hearing briefs that have been considered.

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

FINDINGS OF FACT

The Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (G.C. Ex. 1(c) & 1(d)).

The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent's Federal Correctional Complex in Coleman, Florida. (G.C. Ex. 1(c) & 1(d)).

The American Federation of Government Employees, Local 506, is an agent of AFGE for the purpose of representing employees within the unit recognized as appropriate for collective bargaining at the Federal Correctional Complex in Coleman, Florida. (G.C. Ex. 1(c) & 1(d)).

Before May 2008, the Respondent's standard procedure was to provide two armed escorts for each inmate leaving the facility to obtain medical treatment, however, in May 2008, the Respondent altered that procedure by requiring that the officer responsible for handling the inmate be unarmed. (Tr. 17).

In deciding a grievance filed by the Union over this change, an arbitrator issued a decision that sustained the grievance and ordered the Respondent to bargain over the change in the inmate escort policy that was unilaterally implemented when it prohibited the officer handling an inmate during a medical escort from being armed, and ordered the Respondent to "Return to the pre-May 2008 procedures which required that the officer handling the inmate be armed just like all other officers escorting the inmate." (Jt. Ex. 1 at 21).

The arbitrator directed the Respondent to take the remedial actions established by his decision within 30 days from the date of issuance, May 3, 2011. (Jt. Ex. 1).

The Respondent did not reinstate the pre-May 2008 procedures or file exceptions to the arbitration award within 30 days. (Tr. 18).

On June 3, 2011, the thirty-first day after the arbitration decision was issued, the Respondent filed a motion for reconsideration with the arbitrator, and on June 16, 2011, the arbitrator denied the Respondent's motion, declaring that the Award, in its entirety, including the remedial portion, stood as previously issued. (Jt. Ex. 2 & 4).

On July 14, 2011, the Union submitted proposals to the Respondent for the bargaining ordered by the arbitrator's award. (Jt. Ex. 6).

On July 21, 2011, the Respondent asserted that all of the proposals submitted by the Union were non-negotiable. (Jt. Ex. 6).

With assistance from the FLRA's Collaboration and Dispute Resolution Office (CADRO), the parties reached an amicable resolution on all but five of the Union proposals and those five were submitted to the Authority for a negotiability determination. (Jt. Ex. 6).

The Authority issued a decision on August 30, 2012, finding that one of the five proposals that remained in dispute was a negotiable proposal.[1] *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929 (2012).

At the time the record closed in this matter the Respondent had not complied with the arbitrator's order to reinstate procedures that permitted an officer handling an inmate during a medical escort be armed like all other officers assigned to the duty of escorting the inmate outside the facility for medical treatment. (Jt. Ex. 6).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to take the remedial action of restoring the procedures used prior to the unilateral change it implemented in May 2008, which permitted the officer handling the inmate during a medical escort to be armed.

The General Counsel contends that the arbitrator gave the Respondent thirty days to implement the remedial action of permitting the handling officer to be armed and that when it failed to comply with that order on or before June 2, 2011, the Respondent violated the Statute regardless of the request for reconsideration the Respondent filed on June 3, 2011. In support of that position, the General Counsel asserts that Authority precedent holds that absent evidence to the contrary, the date of the arbitration award is presumed to be the date of service, *Nat'l Fed'n of Fed. Employees, Local 405*, 50 FLRA 3 (1994). The General Counsel also submits that the subsequent reconsideration resulted in no alteration of the original

[1] As the Authority's decision was issued after the record closed, I take official notice of the published decision pursuant to 5 C.F.R. § 2429.5.

award and that a motion for reconsideration does not toll the time for filing exceptions unless the arbitrator subsequently modifies the decision and the exception addresses the modification. *Am. Fed. of Gov't Employees, Local 12*, 61 FLRA 628, 629 (2006) (*Local 12*). As a remedy for the violation, the General Counsel requests that an order be issued requiring the Respondent to return to the status quo and post a notice to all bargaining unit employees using the Respondent's electronic mail.

Respondent

In its pre-hearing disclosure and at the hearing, the Respondent contended that it did not violate the Statute because all of the proposals submitted by the Union subsequent to the arbitrator's Award that required a return to the status quo during negotiations were non-negotiable. Thus, it contended that the failure to return to the status quo during the pendency of negotiations was justified because new negotiations were not required as a result of the Union's failure to present negotiable proposals.

In its post-hearing brief, the Respondent concedes that it committed a violation of the Statute between July 17, 2011, the date it contends the Award became effective and July 21, 2011, when it declared the bargaining proposals submitted by the Union post Award as non-negotiable. It argues that this violation was the result of a "good faith" belief that the request for reconsideration filed on June 3, 2011, was a joint request and that it had thirty days after the request for reconsideration was denied on June 16, 2011, to implement the arbitrator's Award. Further, the Respondent contends that the failure to return to the status quo on July 17, 2011, was the result of receiving the Union's proposals on July 14, 2011. Having determined that the proposals were not negotiable prior to the July 17, 2011, date it contends applicable, the Respondent argues that thoroughly addressing the proposals with detailed explanations for why they were not negotiable justified the four day delay in informing the Union of that determination. Thus, while conceding that informing the Union on July 21, 2011, was not timely even under its interpretation of the facts, the Respondent contends that returning to the status quo before providing its response to the proposals was not required by the Award because the proposals submitted by the Union were not negotiable.

The Respondent's brief also acknowledged that it acted at its peril in declaring all of the Union's proposals non-negotiable and that absent another viable defense, an erroneous declaration of non-negotiability would be a violation and a return to the status quo would be required. Finally, the Respondent contends that electronic distribution of a notice of violation through its electronic mail system would be unnecessary, time-consuming and burdensome to the operation of FCC Coleman.

ANALYSIS AND CONCLUSIONS

Arbitration Exceptions

If no exception to an arbitrator's award is filed during the thirty day period beginning on the date the award is served on a party, the award shall be final and binding and the parties shall take the actions required by the award. 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.2(b). Further, this thirty day time limit may not be extended or waived. 5 C.F.R. § 2425.2(b); *U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 674 (2011). The

Authority has also determined that a motion for reconsideration does not toll the time for filing exceptions unless the arbitrator modifies the award and the exception addresses the arbitrator's subsequent modification. *Local 12*, 61 FLRA at 629.

Under the clear guidance provided by the Statute, Authority regulation and prior decisions, the Respondent had two options after being served with the arbitrator's award, it could file exceptions within thirty days, or implement the actions required therein. The Respondent did neither, and as a result, committed an unfair labor practice.

The Respondent's argument that the parties jointly requested reconsideration of the award thirty-one days after it was served is at best dubious and borders upon duplicitous. More importantly, even if that interpretation of the facts was devastatingly accurate, it would not change the ultimate result unless the arbitrator subsequently altered his award, which did not happen. The Respondent's request for reconsideration was denied and since it was only requested after the thirty day time limit for filing exceptions had passed, absent a modification that rescinded the actions previously ordered by the award or provided a basis for new exceptions, the failure to implement the actions required by the initial award made the violation for said failure a *fait accompli*. To be perfectly clear, there was no extension of the time limit for the filing of exceptions or implementation of the award created by virtue of filing a request for reconsideration. Whether requested jointly or unilaterally, and irrespective of whether the request was made before or after the thirty day limit had passed, once the thirty day limit passed, the Respondent was committing an unfair labor practice if it had neither implemented the award nor filed exceptions. While the dubious nature of the "joint" request and the fact that it was made only after the time for exceptions had passed makes the Respondent's position even less persuasive, the argument would be without merit even if those facts were not present. The parties get thirty days after an award is served to file exceptions. If exceptions are not filed, the actions required by the award must be implemented by the date specified therein and the failure to comply with the directives set forth in an arbitration award is an unfair labor practice under the Statute.

As the discussion above makes clear, the Respondent's argument that it only committed a violation for the four day period running from July 17, 2011 to July 21, 2011, is mistaken. However, the calculation of when the violation began is not its only error. Aside from being wrong about when implementation was required, the Respondent was also wrong when it determined that it did not need to return to the status quo as ordered by the arbitrator because none of the bargaining proposals submitted by the Union were negotiable. Thus, the Respondent's argument that any violation ended on July 21, 2011, when it told the Union that all of the proposals submitted were not negotiable is equally erroneous. A decision issued by the Authority on August 30, 2012, found that one of the proposals presented by the Union was negotiable, thus, the Respondent's failure to return to the status quo while that proposal was bargained in good faith to agreement or impasse defied the arbitrator's award and was an unfair labor practice under the Statute. *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929 (2012).

An agency's obligation to bargain in good faith is predicated upon a union's submission of negotiable proposals and while an agency may refuse to bargain when proposals are not negotiable, it acts at its peril when it unilaterally implements proposed changes to conditions of employment on that basis. If any pending union proposal is negotiable, the agency violates the Statute when it implements the changes without satisfying the bargaining obligation by reaching agreement or declaring impasse. *Pension Benefit Guar. Corp.*, 59 FLRA 48 (2003). Whether imposing a change, or refusing to rescind a change ordered by an arbitration award issued in response to a prior improper refusal to bargain in good faith, an agency must be right when it seeks to evade bargaining based upon negotiability. In this case, the Respondent wrongfully asserted that the Union did not submit any negotiable proposals and as a result, committed an unfair labor practice when it failed to comply with the arbitrator's award requiring it to return to the status quo while negotiating over the changes it wanted to make in its prisoner escort policy. As the Respondent acknowledged and conceded in the post-hearing brief, once the Authority found that one of the proposals was negotiable, a finding of violation and an order to return to the status quo is appropriate.

Electronic Posting

Rather than requesting an electronic posting of the notice of violation in addition to the traditional posting of notice of violation on employee bulletin boards, the General Counsel has requested electronic posting through the use of the Agency's electronic mail system in lieu of traditional bulletin board posting. In support of this request, the General Counsel presented testimony which challenged the usefulness and utility of bulletin boards in the working environment at FCC Coleman where employees have access to computers for at least a portion of each work shift and where the employer routinely uses individual email to communicate vital and essential information to employees.

The Authority has determined that the electronic posting of a notice of violation is a nontraditional remedy. *U.S. DOJ, Fed. BOP, FCI, 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). 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, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1021-22 (1998).

By focusing upon the manner in which the notice of violation is posted, the General Counsel's position makes it clear that the remedy sought, i.e., a notice of violation, is the same traditional remedy long recognized as a means of effectuating the Statute. What the

General Counsel seeks to alter is not the traditional remedy of a notice posting, but rather, the manner in which the notice is provided to employees. Historically, such notice was provided by posting a typewritten document where it could be viewed by employees, typically upon a bulletin board used by the employer to disseminate essential information to all employees. Just as the transition from typewriters and carbon paper to computer word processing and laser printers altered the method of generating notice of violations without altering the traditional nature of the document, altering the format into one of electronic pixels appearing on a computer screen does not change the traditional notice of violation. Furthermore, the fact that electronic mail insures that employees have at least the opportunity to review a notice of violation when it is posted to their own electronic mail inbox is superior to posting it upon a bulletin board located in an area that all employees do not frequent and is typically ignored by those who do. While neither method fully effectuates the Statute and deters future violations by insuring that employees actually read the notice of violation, delivery into their individual inbox at least calls it to their attention and increases the possibility that they go through the trouble of reading and learning from it.

While the Respondent argues that such electronic posting would be time-consuming and unduly burdensome, I find those concerns are not persuasive given their own use of electronic mail to apprise employees of matters related to work as well as non-essential events like farewells, cookouts, and promotion parties. (GC Ex. 2). As the General Counsel's elects to forego standard bulletin board posting in this case, I find that the burden of sending a single email to all bargaining unit employees that contains the notice of violation to be a reasonable and more effective manner of distributing the traditional notice posting remedy. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 50 n.4 (2012).

CONCLUSION

I find that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to return to the pre-May 2008 procedures which required that the officer handling the inmate be armed just like all other officers escorting the inmate, as required by the arbitration award issued on May 3, 2011.

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (Respondent), shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the arbitrator's May 3, 2011, award directing the Respondent to return to the status quo.

(b) 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 actions in order to effectuate the purposes and policies of the Statute:

(a) The Federal Correctional Complex Warden must sign copies of the attached Notice on forms furnished by the Federal Labor Relations Authority. The Respondent must distribute the Notice, by electronic mail, to all bargaining unit employees at the Federal Correctional Complex in Coleman, Florida.

(b) The Respondent must comply with the arbitrator's May 3, 2011, award directing the Respondent to return to the status quo until changes in the policy for escorting inmates is bargained to agreement or impasse.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta 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 herewith.

Issued Washington, D.C., January 31, 2014

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 Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, 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 or refuse to comply with an arbitrator's award to return to the status quo.

WE WILL return to the status quo, with respect to arming both officers that escort high security inmates for medical purposes.

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

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature) (Warden, FCC Coleman)

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: 404-331-5300.

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, DC

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Respondent)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 506
(Charging Party)

AT-CA-11-0438

STATEMENT OF SERVICE

I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

CERTIFIED MAIL – RETURN RECEIPT REQUIRED

Matthew E. Hirt
Agency Representative
U.S. Department of Justice
Justice Management Division
145 N Street, NE, Suite 9W.300
Washington, DC 20530

Jose Rojas
Kenneth Pike
Union Representatives
AFGE, Local 506
848 NE 54th Terrace
Coleman, FL 33521

FIRST CLASS MAIL

Brian Locke
Counsel for General Counsel
Federal Labor Relations Authority
225 Peachtree Street, Suite 1950
Atlanta, GA 30303

Dated: September 10, 2014
WASHINGTON, DC

Belinda Stevenson
Legal Assistant