UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

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| U.S. PENITENTIARY<br>FLORENCE, COLORADO<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1301<br><br>Charging Party | Case Nos. DE-CA-60378<br>DE-CA-60283<br>DE-CA-60287<br>DE-CA-60291<br>DE-CA-60383 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 24, 1997**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

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GARVIN LEE OLIVER
Administrative Law Judge

Dated: January 21, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: January 21, 1997

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. PENITENTIARY,
FLORENCE, COLORADO

Respondent

and Case Nos. DE-CA-60378
DE-CA-60283
AMERICAN FEDERATION OF GOVERNMENT DE-CA-60287
EMPLOYEES, LOCAL 1301 DE-CA-60291
DE-CA-60383
Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

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| U.S. PENITENTIARY<br>FLORENCE, COLORADO<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1301<br><br>Charging Party | Case Nos. DE-CA-60378<br>DE-CA-60283<br>DE-CA-60287<br>DE-CA-60291<br>DE-CA-60383 |

Steven R. Simon
Counsel for the Respondent

Jesse Weiser
Representative of the Charging Party

Timothy Sullivan
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

I. Statement of the Case

These five unfair labor practice cases were consolidated for hearing and decision. The complaint in Case No. DE-CA-60378 alleges that Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1), (5) and (8), by refusing to implement and enforce the parties' supplemental agreement, and by unilaterally printing and distributing a document which Respondent purported to be a supplemental agreement, but which was materially different from the parties' actual negotiated agreement. The other four complaints allege that Respondent violated section 7116(a)(1) and (5) of the Statute by repudiating the parties' supplement agreement in certain respects: Article 12, Section G, concerning surplus office equipment (Case No. DE-CA-60283); Article 27, Section C, concerning providing

sanitary napkins and tampons in female rest rooms (Case No. DE-CA-60287); Article 12, Section I, concerning providing hot water in the guard towers (Case No. DE-CA-60291); and Article 12, Section G, concerning the Union's access to a copy machine (Case No. DE-CA-60383).

Respondent's answers denied any violation of the Statute.

A hearing was held in Denver, Colorado. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

## II. Case No. DE-CA-60378

### A. Findings of Fact[1]

The American Federation of Government Employees, National Council of Prison Locals (AFGE) is the exclusive representa-tive of a nationwide consolidated unit of Bureau of Prisons employees. The Charging Party, AFGE Local 1301 (Local or Union) represents unit employees at the U.S. Penitentiary Florence, Colorado. The Bureau of Prisons and AFGE negotiated a master collective bargaining agreement which became effective on September 1, 1992.

The Respondent and the Local negotiated a supplemental agreement in June 1995. The parties executed the agreement on June 27, 1995. The parties forwarded the agreement to their respective national offices, and shortly thereafter the Local ratified it. On July 24, 1995 the national office of the Bureau of Prisons issued an Agency head review under section 7114(c) of the Statute declaring approximately 35 provisions to be either in conflict with the master agreement or otherwise contrary to law, rule or regulation.

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[1] Where the findings relate to more than one of these consolidated cases (e.g., concerning the bargaining relationship), they have been considered, but generally not repeated.

On August 9, 1995, the Local requested review by the Federal Labor Relations Authority of 13 provisions of the supplement disapproved in the Agency head review.2

The parties received an order from the Authority dated August 31, 1995 requesting that the parties submit their positions on how the Agency review was served on the Union. The chief union negotiator provided no response to the Authority order but "could read between the lines that they were concerned that the union was . . . probably not properly served."

Shortly thereafter, Respondent's labor relations representatives contacted the Local regarding management's desire to renegotiate six contract provisions which had some language stricken in the Agency head review, but which had not been included in the Union's petition to the Authority. Article 9, Section d of the master agreement contemplated that stricken provisions could be renegotiated and provided that "[i]f the parties renegotiate stricken provisions [of the supplemental agreement], such renegotiated provisions must be submitted for review on the same terms as the original proposed supplemental agreement." The Local agreed to renegotiate these six provisions.

The parties agreement concerning the six provisions was signed by the chief union negotiator on October 23, 1995 and by the chief management negotiator on October 24, 1995.

At the time the parties entered into the agreement concerning the six provisions they were unaware of an Authority order of October 5, 1995 dismissing the Union's petition for review. The Authority determined that, as a FAX transmission did not constitute service within the meaning of section 2429.27(b) of the Authority's Regulations, the Agency had not properly served its disapproval within 30 days after the supplemental agreement was submitted for review and approval. Accordingly, the Authority: (1) dismissed the Union's petition for review on the ground that, as the Agency failed to properly and timely serve its disapproval on the Union, the Union's petition for review did not raise a dispute cognizable under section 7117

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The supplemental agreement provided that review would be in accordance with the master agreement. Article 9, Section d of the master agreement provided that "matters rejected solely as violating the Master Agreement shall be resolved through arbitration" and "matters rejected solely as violating law or government-wide regulations shall be submitted to the Federal Labor Relations Authority for resolution as a negotiability dispute[.]"

of the Statute and section 2424.1 of the Authority's Regulations; and (2) dismissed as moot the Agency's motion to dismiss the Union's petition for review as untimely filed. The Authority noted that, although the entire supplemental agreement became effective, provisions in that agreement may not be enforceable, if they are contrary to the Statute or other applicable law, rule or regulation.

After receipt of the Authority's order by the Union on October 24, 1995, the Union advised management of the existence of the order and that, in view of the Authority's order, the Union considered the original supplemental agreement to be in effect as of July 28, 1995 and the six renegotiated provisions to be null and void.

The Agency moved for reconsideration of the Authority's order issued on October 5, 1995 dismissing the Union's petition for review.

On November 20, 1995, the results of an Agency head review of the renegotiated six provisions was sent to the Respondent. The Agency advised the Respondent that the substituted language did not pose any negotiability problems and could be inserted in place of the stricken provisions.

In early December 1995, the Union distributed to some bargaining unit employees copies of the original June 27, 1995 agreement.

Article 9, Section Q and Article 12, Section B of the supplemental agreement provided that the employer would publish and distribute copies of the agreement to all employees and to the Union.

Based on advice from the Agency, on or about December 12, 1995, Respondent published the supplemental agreement without the 35 original provisions stricken in the July 24, 1995 Agency head review. Respondent included the six renegotiated provisions, but not the remaining 29 provisions stricken by the Agency. Respondent also included at the back of this document the signature page as signed by the parties on June 27, 1995. Over the Union's objections, this version was distributed to all bargaining unit employees and was subsequently furnished to new employees during the period December 1995 to August 1996.

Since distribution of the different versions of the agreement by the Union and the Respondent, the Union has received complaints that employees are confused, or are unaware, concerning their rights as between the Union's version of the agreement and the agreement distributed by

management. Employees have also expressed dissatisfaction with the Union and threatened to withdraw from the Union because of its failure to have the original agreement published.

On May 30, 1996, the Authority denied the Agency's motion for reconsideration of the Authority's order, issued on October 5, 1995, dismissing the Union's petition for review. The Authority found that the Agency failed to establish extraordinary circumstances warranting reconsideration. The Authority noted, "As the disapproval was not properly and timely served, the supplemental agreement went into effect, subject to the provisions of the Statute and other law, rule, and regulation. IRS, Austin District, 23 FLRA [720] at 722."

Following the Authority's order, the Respondent, in August 1996, published and distributed to bargaining unit employees the supplemental agreement as originally negotiated but updated with the six renegotiated provisions. The Union objected to the inclusion of the six renegotiated provisions.

The Respondent advised supervisors and managers at the time that, although management was publishing and distributing the supplement as negotiated, some 29 provisions were believed to be illegal or in conflict with the master agreement and therefore were unenforceable. These provisions were not to be considered in force and were cited and explained for the benefit of the supervisors and managers.

B. Positions of the Parties

The General Counsel claims that Respondent violated section 7116(a)(1), (5), and (8) by refusing to implement and enforce the parties supplemental agreement which became effective and binding on July 28, 1995 and by unilaterally printing and distributing a document which Respondent purported to be the parties' supplemental agreement, but which was materially different from the actual agreement. The General Counsel states that Respondent could not exclude provisions based on the Agency head review, nor could it include the renegotiated six provisions in the printed agreement because the Union objected to these when it appeared the renegotiation was the product of a mutually mistaken belief that the Agency head review was valid.

Respondent defends on the basis that the Authority's decision of October 5, 1995 did not become final until the Authority acted on its motion for reconsideration.

Therefore, it could print the supplemental agreement with provisions stricken on the Agency head review and with the provisions which the Union freely and voluntarily renegotiated. Respondent points out that, after the Authority decision on Respondent's motion for reconsideration, it published the supplemental agreement as originally negotiated and as changed only by the renegotiated provisions.

C. Discussion and Conclusions

As the Agency's disapproval of July 24, 1995 was held by the Authority not to have been properly and timely served, the agreement took effect on July 28, 1995 and was binding on the Respondent and the Union subject to the Statute and any other applicable law, rule, or regulation. 5 U.S.C. § 7114(c)(3). As the Authority noted, "Provisions in the local supplemental agreement that are contrary to the Statute or other applicable law, rule or regulation may not be enforceable. 5 U.S.C. § 7114(c)(3)." The Authority had explained this concept further in a case cited in the decision, namely that of National Treasury Employees Union, Chapter 52 and Internal Revenue Service, Austin District, 23 FLRA 720, 722 (1986), which provided, in part, as follows:

> Our conclusion that this case does not present a negotiability dispute does not, of course, mean that any provisions in the agreement which are contrary to the Statute or any other applicable law, rule or regulation, are enforceable. Rather, as the Authority has repeatedly held in like cases, a question as to the validity of such provisions may be raised in other appropriate proceedings (such as grievance arbitration and unfair labor practice proceedings) and, if the agreement provisions are found to be violative of the Statute or any other applicable law, rule or regulation, they would be void and unenforceable. See American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, Redstone Arsenal, Alabama, 4 FLRA 361 (1980), motion for reconsideration denied, 4 FLRA 363 (1981). These requirements are applicable to agency head review of all collective bargaining agreements, including local agreements which are subject to national or other controlling agreements at higher levels of an agency, as is involved in this case. National Federation of Federal Employees, Local 1862 and Department of Health, Education and Welfare, Public Health Service, Indian Health Service, Phoenix, Arizona,

3 FLRA 182 (1980); American Federation of Government Employees, AFL-CIO, Local 1625 and Fleet Combat Training Center, Atlantic, U.S. Department of the Navy, 14 FLRA 162 (1984).

Accordingly, Respondent could not unilaterally strike individual provisions from the agreement it published on or about December 12, 1995. Pursuant to section 7114(b)(5) and 7114(c)(3) of the Statute, the agreement was effective and binding on the Respondent and the Union consistent with the Statute and any other applicable law, rule or regulation. To the extent the Respondent would choose not to honor individual provisions as being in violation of law, the enforceability of the provisions was subject to being raised and decided in further appropriate proceedings, as noted by the Authority.

Respondent's motion for reconsideration of the Authority's order of October 5, 1995 did not operate to stay the effectiveness of the action of the Authority in the absence of an Authority order to that effect. See 5 C.F.R. § 2429.17 ("[T]he filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority."); Veterans Administration Medical Center, Northport, New York and National Federation of Federal Employees, Local 387, Independent, 10 FLRA 675, 676 (1982). The court of appeals cases cited by Respondent, are not on point. NTEU v. FLRA, 712 F.2d 669 (D.C. Cir., 1983) involves a negotiability proposal concerning a stay of agency action pending MSPB review and Mountain States Telephone and Telegraph Co. v. FCC, 939 F.2d 1021 (D.C. Cir., 1991), holding that a Federal agency's order lacks finality while it remains subject to reconsideration by the issuing agency, relates to the requirement that an agency decision must be ripe for appellate review, and it did not deal with when agency action ordered by an agency decision must be implemented.

I do agree with Respondent that it could publish the agreement as amended by the six renegotiated provisions following the Agency head approval of these six provisions. The parties' agreement specifically provided that provisions stricken by the Agency head could be renegotiated and submitted for further review. As the Authority said in Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office, Washington, D.C., 48 FLRA 546, 547 (1993), "[N]othing precludes a union, following an agency head's disapproval of collective bargaining provisions, from filing a negotiability petition while continuing to pursue negotiations with the agency to

reach agreement on revised agreement provisions." See, e.g., International Organization of Masters, Mates and Pilots, Marine Division, Panama Canal Pilots Branch and Panama Canal Commission, 52 FLRA 251 (1996) (Subsequent valid agreement disposed of subject matter in dispute in negotiability petition). The opportunity for the parties to renegotiate stricken provisions was especially appropriate here where the provisions to be renegotiated were not even involved in the Union's negotiability appeal.

The Union could not rescind its agreement concerning the renegotiated six provisions under the doctrine of mutual mistake. Under this doctrine, a contract may be rescinded if the contracting parties entertained a material mistake of fact that went to the heart of their bargain. Harbor Ins. Co. v. Stokes, 45 F.3d 499, 501 (D.C. Cir., 1995). The General Counsel claims that such a mistake was the validity of the Agency head review. However, the doctrine is inapplicable if the party bore the risk of a particular mistake. Id. Here the parties were aware, shortly after the Authority's August 15, 1995 order, that the issue of the timeliness of service of the Agency head review on the Union and, thus, the validity of the Agency head review, was being considered by the Authority. Nevertheless, the parties freely and volun-tarily pressed forward to renegotiate six provisions without further inquiry or explicit provision in their agreement about the effect of an Authority decision or the validity of the Agency head review. Therefore, they bore the risk as to the timing and outcome of the Authority decision. The Union cannot now assert mutual mistake to avoid the renegotiated provisions. Cf. Harbor Ins. Co., supra (parties were consciously ignorant of timing of decision on appeal at the time they entered settlement agreement and, thus, agreement allocated risk from uncertain timing of judgment, and plaintiff could not assert mutual mistake doctrine to avoid settlement upon learning that the court had decided the appeal in plaintiff's favor on the day before the parties entered into the settlement agreement.)[3]

Accordingly, after November 20, 1995, when the Agency head approved the six renegotiated provisions, Respondent was obligated to implement the July 27, 1995 agreement as amended only by the six renegotiated provisions. Respondent's failure to do so, and its conduct on or about December 12, 1995, in printing and distributing to

[3] Mr. Sullivan, Counsel for the General Counsel, is commended for his professionalism in directing my attention to this recent case which did not support his position, but which discussed the doctrine of mutual mistake in a similar situation with conclusions which I find impelling.

bargaining unit employees an agreement which did not contain some 29 other provisions of the July 27, 1995 agreement (stricken on the invalid Agency head review) violated section 7116(a)(1), (5), and (8) of the Statute as alleged.

It is noted that the Respondent, in August 1996, did publish and distribute to bargaining unit employees the effective agreement, namely the supplemental agreement as originally negotiated and updated with the six renegotiated provisions. Accordingly, the normal cease and desist order and posting as well as a clarifying notice to employees will be recommended in this case and not, as additionally urged by the General Counsel, an order requiring the printing and distribution of the original agreement.

## III. Cases No. DE-CA-60283, 60287, 60291, 60383

### A. The Complaints

These four complaints allege that Respondent violated section 7116(a)(1) and (5) of the Statute by repudiating the parties' supplement agreement in certain respects: Article 12, Section G, concerning surplus office equipment (Case No. DE-CA-60283); Article 27, Section C, concerning providing sanitary napkins and tampons in female rest rooms (Case No. DE-CA-60287); Article 12, Section I, concerning providing hot water in the guard towers (Case No. DE-CA-60291); and Article 12, Section G, concerning the Union's access to a copy machine (Case No. DE-CA-60383).

### B. Analytical Framework

In Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA 858 (1996) (Scott) the Authority clarified the analytical framework it will follow for determining whether a party's failure or refusal to honor an agreement constitutes a repudiation of a collective bargaining agreement.

Consistent with the framework that was set forth in Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211 (1991), the Authority held that it will examine two elements in analyzing an allegation of repudiation: (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?). The examination of either element may require an inquiry into the meaning of the agreement provision allegedly breached.

With regard to the first element, the Authority held that it is necessary to show that a respondent's action constituted a clear and patent breach of the terms of the agreement. If the meaning of a particular agreement term is unclear and a party acts in accordance with a reasonable interpretation of that term, that action will not constitute a clear and patent breach of the terms of the agreement. 51 FLRA at 862. In such a case it is not necessary to examine the second element. 51 FLRA at 864.

With regard to the second element, the Authority stated that if a provision is not of a nature that goes to the heart of the parties' collective bargaining agreement, a breach of the provision could not amount to a repudiation and, therefore, would not constitute an unfair labor practice. 51 FLRA at 862.

C. Case No. DE-CA-60283

1. The Complaint

The complaint alleges that in or about the first week of November 1995, the Respondent, by Jack Davis, told the Vice President of Local 1301 words to the effect that the Respondent was not bound by the agreement provisions relating to furnishing surplus office equipment to the Union. The complaint also alleges that since the first week of November 1995, the Respondent refused to comply with such agreement provision. The complaint alleges that Respondent thereby violated section 7116(a)(1) and (5) of the Statute.

2. Findings of Fact

The Union's ability to request surplus equipment was contained in Article 12, Section G of the parties' supplemental agreement of June 27, 1995 which provided as follows:

> The Employer will consider renovation of the existing Union Office at USP Florence as a work request is submitted and renovation appears to be needed. In addition to current equipment and furniture, the Union may request surplus equipment if equipment becomes available, i.e., computer, printer, and fax. Union may have access to copier, but must provide their own paper. A code to utilize the copier in the Administration Building will be provided. AFGE Union Representatives, employees, or former employees requiring or providing representa-tion, shall be

allowed to enter the facility by escort, approved by the Warden.

This provision was stricken in the Agency head review on the basis that it presumed that a union office was a contractual right and called for management to consider renovating it if the Union requests. The parties renegotiated this provision in late October 1995 to remove the first sentence pertaining to the union office. The renegotiated provision (Article 12, Section Q) provided:

> In addition to current equipment and furniture, the Union may request surplus equipment if equipment becomes available, i.e. computer, printer and fax. Union may have access to copier, but must provide their own paper. A code to utilize the copier in the Administration Building will be provided. AFGE Union Representatives, employees, or former employees requiring or providing representation, shall be allowed to enter the facility by escort, approved by the Warden.

In early November 1995, Christopher Kester, Local 1301 Vice President, approached Jack Davis, Associate Warden and Respondent's labor-management relations (LMR) chairperson, at the conclusion of a LMR meeting, and inquired what the Union needed to do to obtain the surplus equipment. Davis told Kester to see John Sudo in the business office, and instructed Kester to give Sudo a list of the equipment that the Local was requesting. Kester contacted Sudo and gave him a list of equipment. Several days later, when Sudo would not process the request on alleged instructions from Davis, Kester contacted Davis to find out what was going on. Davis responded that the Local had no right to the equipment

because the supplemental agreement was not enforceable according to Warden Knowles.[4]

By letter dated November 20, 1995 the Agency advised the Respondent that the renegotiated provisions, including the one set forth above, posed no negotiability problems and "may be inserted in place of the stricken provisions and implemented immediately."

Gerald Kavanaugh, Associate Warden and Respondent's LMR chairperson since January 1996, was unaware of any Union requests for surplus equipment since January 1996.

3. Discussion and Conclusions

During the first week of November 1995 there was no clear and patent breach of the agreement provisions relating to furnishing surplus office equipment to the Union. At that time, the entire Article 12, Section G of the agreement, which contained this provision, had been voluntarily renegotiated by the parties and was pending Agency head review during the applicable 30 day period. Therefore, no part of Article 12, Section G was in effect in early November 1995 and the Respondent was not bound to comply with any portion of it. The new Article 12, Section G was not approved by the Agency until late November 1995, and there is no evidence that the Union made a subsequent request for surplus equipment after that date. Accordingly, the Respondent did not fail or refuse to honor the agreement in this respect as alleged, and it will be recommended that the complaint in this case be dismissed.

D. Cases No. DE-CA-60287 & 60291

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[4] Davis admits instructing Kester to submit a request for the equipment but denied telling Kester to give the request to any particular individual. Davis claimed that to his knowledge the Local never submitted any requests for surplus equipment. However, Davis admitted that he might not be aware of all requests for surplus equipment submitted at the institution and that John Sudo was the property officer responsible for generating a list of surplus property. Davis denied instructing Sudo to deny Union requests for surplus equipment or telling Kester that management was not bound by the supplemental agreement provision relating to Union requests for surplus equipment. I have credited Kester's version. The statements and positions of the parties which Kester reported is consistent with other evidence as to the parties' positions on the state of the supplemental agreement at that time.

1. The Complaints

The complaints alleges that at all times since July 28, 1995, the Respondent, by Joel Knowles, Warden, has failed and refused to comply with Article 27, Section C of the supplemental agreement concerning providing sanitary napkins and tampons in female rest rooms (Case DE-CA-60287) and with Article 12, Section I of the supplemental agreement concerning the supplying of hot water dispensers in each institution tower (DE-CA-60291). The complaints allege that this conduct in each instance violated section 7116(a)(1) and (5) of the Statute.

2. Findings of Fact

a. Sanitary napkins and tampons

Article 27, Section C of the parties' supplemental agreement states:

> Sanitary napkins and tampons shall be provided in female rest rooms.[5]

The language in this provision resulted from a proposal initiated by the Local during contract negotiations. The Local initiated the proposal at the request of females in the bargaining unit, based on the unique work environment which often necessitated long hours on the job. It was agreed that the hygiene items would only be placed in the female staff restroom adjacent to the staff lounge. The parties did not intend the contract language to require that an actual request by the Local was necessary to trigger Respondent's obligation to provide these products.

Based on complaints from some female employees, Union vice president Kester checked the restroom on several occasions after the agreement had been finalized and found that the hygiene products were not available. The Respondent acknowledges that, due to a confluence of the factors described below, the tampons were not stocked in the rest room until September 24, 1996.

b. Hot Water Dispenser

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[5] This contract provision was not stricken or otherwise altered by the section 7114 Agency head review issued on July 24, 1995. The language in this provision remained unchanged when Respondent printed and distributed its version of the supplemental agreement in December 1995. However, the provision was relabeled as Article 27, Section B.

Article 12, Section I of the parties' supplemental agreement states:

> The Employer agrees to provide each institution tower with a padded chair and a hot water dispenser. The Employer agrees to provide adequate seasonable climate control and maintain current fixtures and equipment.[6]

During negotiations the parties discussed the inadequacy of the hot water from the faucets for purposes of heating soup, etc., and agreed that the water in the towers would be heated by a separate heating element attached to the existing water supply. The parties did not intend the contract language to require that an actual request by the Local was necessary to trigger the Respondent's obligation to provide these heating units.

The Respondent acknowledges that, due to a confluence of the factors described below, the heating units were not installed until September 10, 1996.

c. Compliance Factors

On August 18, 1995 a major disturbance occurred at the institution. As a result, all inmates were locked in their cells while a number of physical upgrades were made. The institution has one plumber and one electrician and each has a high volume of backlogged work.

After September 15, 1995, normal fiscal year end purchas-ing restraints precluded purchases except for the immediate need of items which could be delivered by September 30th.

The October 1995 lapse of appropriations and the ensuing budget impasse resulted in a near complete loss of purchasing authority from October 1, 1995 to January 12, 1996. During this period the Respondent restricted its expenditures to salaries and items considered essential to the safe and orderly running of the institution.

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[6] This contract provision was not stricken or otherwise altered by the section 7114 Agency head review issued on July 24, 1995. The language in this provision remained unchanged when Respondent printed and distributed its version of the supplemental agreement in December 1995. However, the provision was relabeled as Article 12, Section H.

The prior Human Resource Manager, Dawn Hellickson, initiated paperwork for the purchase of the hot water dispensers in October 1995 but, due to the budget impasse, the Budget Officer did not place the order until January 18, 1996. The items were received February 7, 1996, but were not installed until September 10, 1996. The high volume of facilities work for the one institution plumber and the one institution electrician contributed to the delay in the installation of the hot water dispensers.

A consolidation of personnel functions and another serious inmate disturbance in October 1995 also disrupted normal labor relations functions. It took about two weeks in early October for the personnel services of three activities to be consolidated into one. Staff members of the personnel office also had to work custody posts during a disturbance at the institution which began on October 20, 1995.

Respondent's key personnel for labor management relations changed in late 1995. Assistant Human Resource Manager Becky Hale took over administrative responsibilities for labor management relations from the outgoing Manager Dawn Hellickson, and Associate Warden Gerald Kavanaugh took over Respondent's labor management chairperson responsibilities from Associate Warden Jack Davis.

The Union filed unfair labor practice charges with the Respondent in these cases on November 27, 1995. The Union merely alleged noncompliance with the applicable sections of the supplement and did not raise the specifics of their concerns regarding tampons and hot water dispensers. This made specific identification of the issue difficult in the case of the hot water dispensers as the section referred to several different matters.

The Union did not raise the issues during normal monthly labor management relations meetings pursuant to Article 2 of the supplement. Associate Warden Kavanaugh and Assistant Human Resource Manager Hale did not learn of the problems with the hot water dispensers and the tampons until they were contacted by Respondent's counsel in July 1996.

Once notified of the problem, Associate Warden Kavanaugh acted promptly to have the hot water dispensers installed and, as noted, they were installed September 10, 1996. Associate Warden Kavanaugh obtained a supply of tampons from Agency inmate stock, although their use by staff initially raised some legal concerns. The tampons were placed in the restroom on September 24, 1996, as noted.

3. Discussion and Conclusions

There is no dispute that after July 28, 1995 the Respondent was obligated by the collective bargaining agreement to provide sanitary napkins and tampons in the female restroom next to the staff lounge and install hot water dispensers in the towers. The Respondent did not achieve compliance with these provisions until some fourteen months later in September 1996.

The Respondent may have been somewhat lax in following up on its obligations under the agreement. This had a deleterious effect on labor relations and the Respondent's lapses are not condoned.

Nevertheless, examining the nature and scope of the alleged breach of the agreement during this lengthy period in light of all the evidence, I conclude that a preponderance of the evidence does not demonstrate that the Respondent's breach was so clear and patent as to constitute a repudiation or rejection of the agreement itself. The record reflects that a series of events seriously hampered the Respondent's compliance with the agreement. It was faced with operational and construction project concerns resulting from serious inmate disturbances, year-end purchasing restraints, a lapse of appropriations, a consolidation of personnel offices and the use of such personnel in custodial posts during a disturbance, and a change of responsible management personnel who had no immediate knowledge of the lack of compliance. When responsible management personnel learned of the lack of compliance with the agreement in this respect, steps were taken to ensure compliance. Respondent never disowned, rejected, or refused to honor its obligations in this regard.

It is concluded that the Respondent did not violate section 7116(a)(1) and (5) of the Statute, as alleged, by refusing to comply with Article 27, Section C of the supplemental agreement concerning providing sanitary napkins and tampons in female rest rooms (Case DE-CA-60287) and with Article 12, Section I of the supplemental agreement concerning the supplying of hot water dispensers in each institution tower (DE-CA-60291). It will be recommended that these complaints be dismissed.

E. Case No. DE-CA-60383

1. The Complaint

The complaint alleges that Respondent repudiated Article 12, Section G of the supplemental agreement which provided that the Union may have access to the copy machine located in Respondent's facility. The complaint alleges that this conduct violated section 7116(a)(1) and (5) of the Statute.

2. Findings of Fact

Article 12, Use of Official Facilities, of the master agreement provides, in pertinent part, as follows:

> Section c. Under no circumstances will Employer manpower or supplies be used in support of internal Union business, except that the use of bulletin board and file cabinet space is negotiable at the institution level. The Employer, at its discretion, may informally authorize the use of office space when available.
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> . . . .
>
> Section f. The parties at the local level may negotiate the Union's use of Employer's equipment and services that promote efficient labor-management relations.

Article 12, Section G of the supplemental agreement provides, in pertinent part, as follows:

> Union may have access to copier, but must provide their own paper. A code to utilize the copier in the Administration Building will be provided.

During the negotiations concerning the supplemental provision it was agreed that "the copier in the Administration Building" referred to the one copy machine located in the mailroom, about 30 feet from the Union office. The Union was to have unrestricted access to the copier as long as the Union provided its own paper.

On September 13, 1995, Respondent confirmed that access to the copier would be provided and instructed the Union on how to obtain the access code. The Union obtained the code and used the copier until December 1995.

In early December 1995, Union president Dale Lewsader used the copier to make a copy of a Union dental insurance program. The copy had been requested by an employee. When Warden Joel H. Knowles observed Lewsader using the copier

for this purpose, he advised Lewsader that the copier could not be used for internal Union business. Lewsader contended that making a copy of the Union dental plan was not internal Union business, but Warden Knowles immediately had the code changed so that the Union could no longer use the machine.

Warden Knowles followed up with a letter to Lewsader on December 4, 1995, reiterating that the copier could not be used for internal Union business under the agreements and advising him that "[w]hen you have requests meeting Section F criteria, please contact the LMR Chairman or Ms. Hale in Human Resources." Warden Knowles' letter stated that Lewsader had acknowledged to him that he had used the copier for internal Union business on this occasion.

Lewsader replied to Warden Knowles, stating that he intended to file an unfair labor practice charge over the Warden's failure to follow the agreement.

Since December 4, 1995, the Union has not had unrestricted access to the copier in the Administration Building, but has received certain copying services from the Respondent. Ms. Hale of Human Resources has provided copies of disciplinary and adverse action files to the Union when it has represented the affected employees, and the Union treasurer has requested and received copies of some payroll deduction forms filled out by employees for the payment of Union dues. Hale has not denied any copying requests from the Union. There is no evidence that the Union has requested Hale for renewed and unrestricted access to the copier.

3. Discussion and Conclusions

Although Article 12, Section G of the supplemental agreement provides that the Union will be provided a code for access to the copier, Article 12 of the master agreement makes clear that "[u]nder no circumstances will Employer manpower or supplies be used in support of internal union business[.]"

In view of all the circumstances, the Respondent's action in removing the code and the Union's access on the basis that it was violating the master agreement by using the machine for internal Union business was a reasonable interpretation of the agreement and raised issues for resolution under the grievance/arbitration terms of the agreement.

It is unclear whether the Union's use of the copier to make a copy of a Union dental plan was internal Union

business and, if it was, whether the Respondent could totally eliminate the Union's access to the copier on the basis of such one-time use, if such was the case. It is equally unclear whether the Respondent intended to totally deny the Union further unrestricted access. The Respondent advised the Union to contact the LMR Chairman or Ms. Hale in Human Resources whenever it had requests meeting the criteria of the agreements.

I conclude that the nature and scope of the alleged breach of an agreement, that is, Respondent's action in removing the code and denying the Union unrestricted access at the time, did not, under all the circumstances, constitute a clear and patent breach of the agreement. It will be recommended that this alleged violation of section 7116(a)(1) and (5) of the Statute be dismissed.

F. The Four Cases Viewed Collectively

As the specific findings and conclusions in each of these four cases demonstrate that the alleged conduct did not violate the Statute, the General Counsel's argument that the four cases viewed collectively illustrate a pattern of conduct that goes to the heart of the agreement itself and constitutes a repudiation of the agreement, is also rejected.

## IV. Recommendations

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

## ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Penitentiary, Florence, Colorado (the Penitentiary) shall:

1. Cease and desist from:

(a) Printing and distributing any version of the local supplemental agreement except that which became effective on July 28, 1995 as amended by the parties' agreement of October 1995 concerning six renegotiated provisions.

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

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

(a) Issue and distribute a notice to all bargaining unit employees advising them that, pursuant to a decision and order of the Federal Labor Relations Authority, the local supplemental agreement issued to employees in August 1996, containing the version of the agreement effective on July 28, 1995, as amended by the parties' agreement of October 1995 concerning six renegotiated provisions, is the effective version of the local supplemental agreement and binding on the Penitentiary and the Union, subject to the provisions of applicable law, rule, or regulation, and all other versions in their possession should be disregarded or destroyed.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

3. The complaints in Cases No. DE-CA-60283, DE-CA-60287, DE-CA-60291, and DE-CA-60383 are dismissed.

Issued, Washington, DC, January 21, 1997

_____

GARVIN LEE OLIVER
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 U.S. Penitentiary, Florence, Colorado violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT print and distribute to bargaining unit employees any version of the local supplemental agreement between U.S. Penitentiary, Florence, Colorado (Penitentiary) and American Federation of Government Employees, Council of Prison Locals, C-33, Local 1301 (Union) except that which became effective on July 28, 1995 as amended by the parties' agreement of October 1995 concerning six renegotiated provisions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL issue and distribute a notice to all bargaining unit employees advising them that, pursuant to a decision and order of the Federal Labor Relations Authority, the local supplemental agreement issued to employees in August 1996, containing the version of the agreement effective on July 28, 1995, as amended by the parties' agreement of October 1995 concerning six renegotiated provisions, is the effective version of the local supplemental agreement and binding on the Agency and the Union, subject to the provisions of applicable law, rule, or regulation, and all other versions should be disregarded or destroyed.

(Activity)

Date: By:

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. DE-CA-60378, DE-CA-60283, DE-CA-60287, DE-CA-60291, DE-CA-60383, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

Mr. Steven R. Simon
Federal Bureau of Prisons
Office of General Counsel
522 North Central Ave., Suite 247
Phoenix, AZ 85004

Jesse Weiser, Technical Advisor
American Federation of Government
Employees, Local 1301
P.O. Box 1350
Canon City, CO 81212-1350

Timothy Sullivan, Esq.
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

**REGULAR MAIL:**

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dale Lewsader, President
American Federation of Government
Employees, Local 1301
P.O. Box 1350
Canon City, CO 81212-1350

Dated: January 21, 1997
Washington, DC