FOOD AND DRUG ADMINISTRATION ORLANDO DISTRICT, ORLANDO, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-30515

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 **MARCH 4, 1996**, and addressed to:

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

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

Dated: January 31, 1996
Washington, DC

MEMORANDUM DATE: January 31, 1996

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: FOOD AND DRUG ADMINISTRATION
ORLANDO DISTRICT, ORLANDO,
FLORIDA

Respondent

and Case No. AT-CA-30515

NATIONAL TREASURY EMPLOYEES
UNION

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 motions, 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

FOOD AND DRUG ADMINISTRATION, ORLANDO DISTRICT, ORLANDO, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-30515

Peter A. O'Donnell, Esq.
Counsel for the Respondent

Sherrod G. Patterson, Esq.
Counsel for the General Counsel, FLRA

Jay B. Landay
Representative of the Charging Party

BEFORE: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (the Statute).

Based upon an unfair labor practice charge filed by the Charging Party, National Treasury Employees Union (NTEU or the Union), a Consolidated Complaint and Notice of Hearing was issued by the Regional Director for the Atlanta Region of the

Federal Labor Relations Authority.[1] The complaint (as amended at the hearing) alleges that the Food and Drug Administration, Orlando District, Orlando, Florida (the Respondent) violated section 7116(a)(1) and (5) of the Statute by relocating bargaining unit employees to, and changing its office space at, Boca Raton, Florida, without completing negotiations over the substance, impact and implementation of such changes.

A hearing was held in Atlanta, Georgia, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.[2] Counsel for the General Counsel and the Respondent filed briefs which have been carefully 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

A. *Background*

The Union is the exclusive bargaining representative of the Respondent's employees involved in this case. A Memorandum of Understanding (MOU) between the parties, applicable to these employees when the events herein occurred, states in part as follows:

ARTICLE 57. - MIDTERM NEGOTIATIONS

* * * * * * *

SECTION 2. Where the Employer intends to change a personnel policy, practice, or working condition which is a mandatory subject of negotiation, the following procedures shall apply:

* * * * * * *

B. *Changes Applicable To A Component Of The Bargaining Unit:*

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[1] On March 30, 1995, the Acting Regional Director ordered Case No. AT-CA-30634 severed from the consolidated complaint based on a party settlement.

[2] An earlier scheduled hearing had been indefinitely postponed by the Chief Administrative Law Judge at the General Counsel's request, with the Respondent's concurrence, due to the hospitalization of an important witness for the Respondent.

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4. When the Union wishes to negotiate over the proposed change, the component will delay the implementation. In extraordinary situations in which a delay beyond the proposed implementa-tion date would cause a severe disruption in carrying out the mission of the agency, as opposed to mere inconvenience, the change may be implemented on the proposed date on an interim basis pending resolution through negotiations, or if necessary, impasse procedures. However, the change is only interim and will be superseded by a negotiated agreement on the matter, requiring, if necessary, a return to the *status quo ante*. In any event, the Employer will cooperate in impasse resolution procedures set forth in A. 3. above if the Union seeks the services cited therein to resolve an impasse related to such changes.

B. *The Proposed Boca Raton Resident Post*

In early 1992, the Respondent decided to establish an office in Broward County, Florida, north of Miami, to conduct inspections of food, drugs, cosmetics, medical devices, and blood banks in Broward, Palm Beach, and adjoining counties. Before the decision was made to open a resident post in Broward County, the Respondent's investigators assigned to the Orlando and Miami offices handled the cases originating in that area. According to Keith Ehrlich, the Respondent's Supervisory Consumer Safety Officer who was assigned to the new resident post and was directly involved in the acquisition of the new office space, the purpose behind the establishment of an office in Broward County was to cut down on the expenditure of travel monies. However, Ehrlich conceded that the Respondent's mission could have been fully accomplished even if the new office had not been opened or had been delayed while negotiations with the Union were completed.

Ehrlich further testified that in April 1992 the General Services Administration (GSA) located eight or nine potential sites for an office in Boca Raton, a city located in Broward County. Ehrlich spent two days with a representative of the GSA inspecting each potential location. At the latter's request, Ehrlich prepared a hand-drawn sketch depicting the Respondent's proposed layout of the office space which was presented to each potential landlord during the two-day survey of the available locations. On May 22, 1992, GSA, using a "fast track" procedure on behalf of the Respondent, and attaching a copy

of Ehrlich's floor plan, entered into a five-year lease commencing on July 1, 1992.[3] According to the lease, the lessor agreed to "build out" the space by providing two offices, a conference room, a file/copy/fax room, and a "sample prep" room (used for analysis and examination of samples such as water or fish). The floor plan accompanying the lease also specified that a portion of the space would include room for an "open office to be furnished with modular furniture."

The Respondent began ordering the modular furniture and other equipment for the new office as early as May 13, 1992. On May 21, 1992, Respondent's Acting Director, Michael A. Chappell, notified all employees based in the Miami office that "[p]lans are almost final for the establishment of a new resident post in Boca Raton, Florida. . . . We hope to occupy that space as early as August."

C. *The Union is Notified of the New Boca Raton Office and Requests to Negotiate*

On May 28, 1992, Acting Director Chappell provided a floor plan of the Boca Raton resident post to the Union, indicated that the build out of the new office space would be accomplished by GSA in coordination with the lessor, and asked for the Union's comments by June 15, 1992. James Price, the Union's Chapter President, responded by letter dated June 1, requesting to negotiate concerning the substance, impact and implementation of the Respondent's plans for the Boca Raton office; asking for information relating to the establishment of the Boca Raton office; and identifying Jim Simpson, the Union's Architectural Committee Chairman, as the Union's negotiator. On June 8, 1992, Respondent's Director, Douglas Tolen, provided Price with a revised floor plan that showed the planned placement of modular furniture for use by bargaining unit employees and stated that supervisor Ehrlich would occupy a private, windowed office at the new facility. The Union found these proposals unacceptable and sought to negotiate concerning the office design. The parties subsequently agreed to meet in Miami on June 25, 1992, on a number of matters, including the Boca Raton resident post.

At the June 25 meeting, Union representative Simpson learned from Respondent representative Chappell that the Boca Raton office was already being "built out" even though the parties had not negotiated over the matter. After the meeting, Simpson and William Spates, one of the management

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[3] Ehrlich testified that the only reason for using the fast track approach was to allow the construction or "build out" costs to be "buried" in the lease.

representatives who attended the meeting, traveled by car to Boca Raton to inspect the build out. They discovered that the build out had progressed to the point that the studs for the walls had been erected and the rough plumbing and wiring had been started. Even though the construction work had proceeded before negotiations were completed, the Union submitted its proposals to the Respondent by letter dated July 1, 1992. Essentially the Union sought to have the two private offices and the "prep" room moved to an interior wall so that the "premium" space along the exterior wall (with windows and better ventilation) would be accessible to bargaining unit employees, and further proposed that each professional's work station be 120 square feet and of a design acceptable to unit members.[4] The Union reaffirmed these proposals by letter dated August 7, to which the Respondent replied on September 1 that it could not agree to the Union's proposed elimination of private offices; also could not agree to provide a specifically identified workspace for each unit employee of any particular size; and agreed to discuss furniture options concerning the employees located at the Tampa resident post but made no mention of the employees at Boca Raton.[5] Given the lack of agreement concerning the Boca Raton resident post, the parties in mid-September separately asked the Federal Mediation and Conciliation Service (FMCS) to appoint a mediator to assist them with the negotiations. The record does not indicate what assistance, if any, the FMCS provided, but it is clear that the parties did not reach an agreement by the time that the Boca Raton office opened in early October 1992.

D. *The Operation and Configuration of the Boca Raton Office*

Respondent opened the Boca Raton resident post in early October 1992, although the parties had not completed negotiations over the matter. Despite its earlier assurances to the contrary, the Respondent transferred one

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On July 2, 1992, the Union informed HHS' Regional Director that because the Respondent was continuing with the construction of the Boca Raton office prior to completion of collective bargaining on that issue, the Union intended to file an unfair labor practice charge, but suggested that the parties meet in an effort to resolve the dispute through negotiations. In response, HHS acknowledged that the building's owner and GSA had begun construction at the facility, but stated that "[f]or the immediate future, FDA has put on hold any plans to reassign bargainin[g] unit employees to Boca Raton. We intend to honor our labor management obligations and will make every effort to ensure that negotiations are completed prior to implementation (reassignment of bargaining unit employees to Boca Raton)."

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As previously indicated, it appears that the Respondent already had contracted to purchase modular furniture for the Boca Raton office as early as May 1992.

supervisor (Ehrlich) and five bargaining unit employees from its Miami office to Boca Raton before negotiations had been completed. The office configuration was virtually identical to the plans that the Respondent provided to the Union in May. That is, the supervisor was given a private, windowed office along an exterior wall; a partitioned conference room and a partitioned "prep" room with windows also were constructed on exterior walls; and the unit employees were placed at the modular furniture previously purchased by the Respondent, which furniture was constructed in two "pods" of four desks each within the open interior office space so that only two of the employees had a view of the windows.6

E. *The Union Seeks FSIP and General Counsel Assistance*

On November 30, 1992, the Union filed a request for assistance with the Federal Service Impasses Panel (FSIP). On June 14, 1993, the Union asked to withdraw the case from FSIP consideration so that it could pursue the unfair labor practice charge filed in this case on February 18, 1993. The FSIP on June 28, 1993, approved the Union's request to withdraw. Thereafter, by letter dated July 2, 1993, the Respondent informed the Union that "[b]ecause the Union has elected not to proceed with impasse resolution procedures, the Agency believes that it has satisfied all its bargaining obligations concerning the . . . establishment of the Boca Raton Resident Post. Therefore, the Agency will, effective July 9, 1993, implement the changes regarding the . . . Boca Raton Resident Post[] based on our last best offer."

Conclusions of Law and Recommendations

A. *The Respondent Violated its Duty to Bargain*

The interior design of the Respondent's new Boca Raton resident post, including the location of the employees' work space and the type of furnishings to be used, affected the working conditions of unit employees and constituted "conditions of employment" within the meaning of section 7103(a)(14) of the Statute. As the Authority stated in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Fitchburg, Massachusetts District Office,* 36 FLRA 655, 668 (1990):

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Ehrlich testified that it would be possible to reconfigure the modular furniture to give the unit employees better access to the windows, and that such a task would take approximately a day to accomplish.

> [T]he location in which employees perform their duties, as well as other aspects of employees' office environments, are "matters at the very heart of the traditional meaning of 'conditions of employment.'" *Library of Congress v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983). Further employees' and management's competing interests in office space "present the sort of questions collective bargaining is intended to resolve." *National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service*, 35 FLRA 398, 414 (1990).

See also Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 51 FLRA 35, 44-45 (1995)*; Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia*, 46 FLRA 396 (1992).

Based upon the record evidence in this case, I conclude that the Respondent did not provide the Union with appropriate notice and an opportunity to negotiate over the reassignment of unit employees to the new Boca Raton resident post and the design and furnishing of that office prior to implementation, and thereby violated section 7116 (a)(1) and (5) of the Statute.

Thus, the record indicates that the Respondent first notified the Union of its decision to open a new resident post in Boca Raton on May 28, 1992, when the Respondent's Acting Director Chappell provided the Union with a floor plan and asked for comments by June 15. Unfortunately, by May 28 the Respondent already had taken the following action: (a) located suitable office space; (b) drawn up a floor plan for the office space which was attached to and became an integral part of the Respondent's five-year lease; (c) executed the lease on May 22; (d) ordered modular furniture and other equipment for installation in the new resident post as specified in the lease; and (e) notified unit employees that the new office would be opened as early as August and solicited their applications to relocate to the new resident post. Accordingly, while the Union made a timely request to bargain over such matters as how the new office would be designed, how large each employee's work space would be, and what type of furniture would be used, in effect these issues all had been decided before the parties had their first and only negotiating session on June 25.

Moreover, as the Union learned at that June 25 meeting with the Respondent's representatives, and verified later that day during a physical inspection of the premises, work

was already well under way to "build out" the office space in accordance with the floor plan previously drawn up by the Respondent and attached to the lease. Needless to say, the floor plan used to build out the office space did not address any of the Union's legitimate concerns regarding the unit employees' access to windows, the size of their work space, or their preferences in furnishing it.

Additionally, while the Respondent subsequently assured the Union that every effort would be made to complete negotiations before unit employees were reassigned to the Boca Raton office and the Respondent's Director acknowledged that the office space might need to be redesigned based on negotiations with the Union, neither of these occurred. Thus, the five unit employees were reassigned from Miami to Boca Raton early in October and placed in the modular furniture previously purchased and installed unilaterally by the Respondent, and the Respondent's original floor plan remained unchanged despite the Union's efforts to change them. Under these circumstances, I conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged in the complaint.

B. *The Respondent's Contractual Defense Must Be Rejected*

The Respondent contends, however, that Article 57, Section 2 of the parties' MOU provides a defense to the unfair labor practice allegations in this case, and that Authority precedent requires me to interpret the applicable MOU provision before determining whether a violation was committed. It is true that in *Internal Revenue Service*, 47 FLRA 1091 (1993) (*IRS*), the Authority concluded, following a remand from the District of Columbia Circuit in *Internal Revenue Service v. FLRA*, 963 F.2d 429 (D.C. Cir. 1992), that:

> We now hold that when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.
>
> [O]nce the General Counsel makes a *prima facie* showing that a respondent's actions would constitute a violation of a statutory right, the respondent may rebut the General Counsel's showing

> of a *prima facie* case. This may be done by establishing by a prepon-derance of the evidence that the parties' collective bargaining agreement allowed the respondent's actions.

IRS, 47 FLRA at 1103, 1110.

Having concluded that the General Counsel has made a *prima facie* showing of a violation of section 7116(a)(1) and (5) of the Statute, I now turn to the Respondent's assertion that the parties' MOU allowed its actions. The express language of Article 57 provides, in pertinent part, that "[w]here the Employer intends to change a . . . working condition which is a mandatory subject of negotiation,"[7] and "the Union wishes to negotiate over the proposed change, the [Employer] will delay the implementation." The provision then addresses what should occur in "extraordinary situations" where "a delay beyond the proposed implementation date would cause a severe disruption in carrying out the mission of the agency, as opposed to mere inconvenience." In such circumstances, "the change may be implemented on the proposed date on an interim basis pending resolution through negotiations, or if necessary, impasse procedures." The provision further contemplates that such extraordinary interim changes are to be superseded by a subsequent negotiated agreement and may require a return to the *status quo ante*. It also requires the Employer to cooperate in impasse resolution procedures if the Union seeks the services of the FSIP.

In my judgment, the Respondent has failed to demonstrate that the foregoing contractual provision allowed its actions in this case. Thus, the general rule embodied in the above provision is that the Respondent was required to delay the implementation of its proposed change in working conditions until the parties had negotiated concerning the proposed change. The Respondent concedes that did not happen here, but claims that an "extraordinary situation" existed which justified its actions. I disagree.

First, the Respondent never notified the Union of an "extraordinary situation." Indeed, the Respondent never even advised the Union of a "proposed implementation date" by which the Boca Raton office had to be operational. The

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7 I shall assume without deciding that the reassignment of bargaining unit employees to the newly-opened Boca Raton resident post and the layout and furnishing of their work space are changes in working conditions which are "mandatory subject[s] of negotiation." Otherwise, Article 57 simply would not apply to the circumstances of this case, and the Respondent would have no contractual defense.

reason is clear: no "extraordinary situation" existed as defined by the parties in their MOU. That is, if the opening of the Boca Raton office had been delayed, it would not have "cause[d] a severe disruption in carrying out the mission of the agency, as opposed to mere inconvenience." In fact, the record testimony of the Respondent's own witness, Ehrlich, conceded that the Respondent's mission could have been fully accomplished without opening a Boca Raton office at all, since the only reason for doing so was to save travel monies. The unit employees assigned to the Respondent's Miami and Orlando offices could have continued to handle the workload in Broward County and the surrounding area.

Additionally, there was no set time by which the Boca Raton office had to be operational. As Ehrlich conceded, the implementation of Respondent's decision to open an office in Boca Raton could have been deferred until negotiations with the Union were completed. The Respondent's acquiescence in the use of a "fast track" procedure by the GSA cannot be the basis for an "extraordinary situation" since management retained the authority not to proceed on a fast track from the outset and to discontinue the process thereafter until its statutory obligations were satisfied. Instead, the Respondent not only took no such action but contributed to its own inconvenient circumstances by providing a floor plan to the GSA and ordering modular furniture prematurely, all of which was embodied in the lease executed by the GSA on the Respondent's behalf before the Union was notified that the Boca Raton office would be opening.

Since I have concluded that no "extraordinary situation" existed which justified the Respondent's actions contractually even on an interim basis, I find it unnecessary to consider the remaining procedures contained in Article 57 of the parties' MOU which pertain to the resolution of bargaining disputes after the Respondent has taken interim action where an "extraordinary situation" did exist. However, because the Respondent relies on the Union's request for FSIP assistance and the subsequent withdrawal of that request to justify its own actions, I shall briefly address that contention below.

C. *Withdrawal of the Union's Request for FSIP Assistance Cannot Justify the Respondent's Actions*

As I interpret Article 57 of the parties' MOU, the Employer is required to "cooperate in impasse resolution procedures . . . if the Union seeks [such] services . . . to

resolve an impasse *related to such changes*." (Emphasis added) "Such changes" refers back to the immediately preceding sentences which describe the interim changes that management may implement when an "extraordinary situation" exists. Since I have found that no such extraordinary situation existed in this case to justify the Respondent's actions, it is unnecessary to decide whether the Union would have been at liberty contractually to withdraw from the FSIP's procedures once it had invoked them to resolve an impasse following management's interim changes in the face of an "extraordinary situation."[8]

D. *The Appropriate Remedy*

As a remedy for the unfair labor practice found in this case, the General Counsel has requested, in addition to the usual cease and desist and posting requirements, a "partial/ limited *status quo ante*" order which would not be overly disruptive but would merely require the Respondent to disassemble the unit employees' modular furniture and reassemble it in order to maximize the number of employees with uninhibited window views. The General Counsel also requests that while such reassembly of the modular furniture is taking place, the employees should be permitted to work at home or outside the office, and that the Respondent should not be permitted to require them to take leave during this period. The General Counsel further requests as an affirmative remedy that the Respondent should be ordered to install all shelves and cabinets and a lock on the main entrance door of the office.

By contrast, the Respondent contends that a *status quo ante* order which would require the destruction or modification of the office's physical structure is not a proper remedy against the sovereign, citing a recent court

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[8] Certainly there is nothing in the *Statute* which would preclude a party from asking to withdraw its request for FSIP assistance in order to pursue a subsequently filed unfair labor practice charge arising out of the same circumstances. Unlike section 7116(d) of the Statute, which requires a party to select either the negotiated grievance procedure or the statutory unfair labor practice procedure, but not both, a party may invoke both the FSIP's impasse resolution procedures under section 7119 of the Statute and the ULP procedures of section 7118. If that party wanted to proceed with the ULP procedures first, it would be necessary to seek a withdrawal of the pending FSIP case, because the General Counsel's established policy is not to process a charge when a related FSIP case is pending. That is what the Union did in this case: it sought the FSIP's approval to withdraw a pending request for assistance in order to pursue the unfair labor practice allegations. When the FSIP granted the Union's request for withdrawal, the unfair labor practice case went forward.

decision;[9] that such a remedy requiring the expenditure of money to destroy or modify real property would constitute a penalty against the Respondent which is beyond the Authority's remedial powers; and that the only proper remedy would be an order to resume bargaining.[10]

I conclude that the limited *status quo ante* order requested by the General Counsel in this case, which would simply require the Respondent, at the request of the Union, to reposition the modular furniture so that as many unit employees as possible will have unobstructed views of the windows, is appropriate to remedy the unfair labor practice.

Such a remedy is very limited in scope. It would not require the Respondent to eliminate the private offices along the exterior walls or to replace the unit employees' modular furniture with furnishings mutually agreed upon as a result of good faith bargaining. It would merely require, at the Union's request, the reassembly of the modular furniture already purchased for that office by the Respondent. According to the testimony of the Respondent's witness, Ehrlich, such work could be accomplished in little more than one day.

I will not order the Respondent to have the furniture repositioned while the unit employees are working at home. Since the entire job can be accomplished in a very short period of time, and the record evidence indicates that the unit employees spend a substantial majority of their duty time outside the office performing field investigations, I find such a remedy unnecessary. Similarly, there is no need to prohibit the Respondent from requiring unit employees to use a day of leave while the modular furniture is being repositioned. Such work can be completed on a weekend or while the employees are working on location outside the office as part of their regular duties. Finally, I will not order the Respondent to install the shelves and cabinets previously requisitioned for the Boca Raton resident post but not yet installed, or to lock the entrance door to the

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Department of the Army, Fort Benjamin Harrison v. FLRA, 56 F.3d 273 (D.C. Cir. 1995).

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The Respondent further asserts that an order to eliminate the supervisor's private office would conflict with management's reserved rights under section 7106(a) of the Statute. Inasmuch as the General Counsel is not seeking such a remedy in this case, I express no opinion concerning the Respondent's assertion in this regard.

office. Such matters can be addressed during the negotiations that I shall order the parties to resume.[11]

The foregoing remedy, along with the traditional cease and desist and posting requirements, is well within the Authority's broad remedial powers, *see National Treasury Employees Union v. FLRA*, 910 F.2d 964, 967 (D.C. Cir. 1990) (in banc), and is consistent with orders issued in similar cases, *see Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia*, 46 FLRA 396, 398-99 (1992); *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Fitchburg, Massachusetts District Office*, 36 FLRA 655, 672-74 *(1990)*. Contrary to the Respondent's assertions, such a remedy is neither inconsistent with the concept of sovereign immunity[12] nor a penalty by requiring the expenditure of federal funds.[13] Accordingly, I recommend that the Authority issue the following:

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 Food and Drug Administration, Orlando District, Orlando, Florida, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions of its employees in the bargaining unit

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I note, however, that the Respondent indicated at the hearing an intention to take care of these matters promptly. Accordingly, there may be nothing left to negotiate in this regard.

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The Respondent's reliance on the *Fort Benjamin Harrison* case is misplaced. In that decision, the court concluded that an order requiring a federal agency to pay compensatory damages (i.e., money) to all employees who suffered financial losses as a result of a unilateral change in their pay date was inappropriate because the sovereign had not clearly waived its right to immunity from a requirement to make such payments. By contrast, the remedy in this case does not require the Respondent to pay compensatory damages. In any event, the Authority has not adopted the court's reasoning in *Fort Benjamin Harrison* and therefore I am constrained to follow the Authority's caselaw in this regard.

13
The mere fact that a remedial order would require an agency to incur costs does not render such an order inappropriate. Otherwise, a *status quo ante* order would rarely if ever be available. *See U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri*, 23 FLRA 435, 437 (1986); *Office of Civil Rights*, 46 FLRA at 429 n.21.

exclusively represented by the National Treasury Employees Union, including the reassignment of bargaining unit employees to the new resident post in Boca Raton, Florida and the design and furnishing of that office, without first notifying the Union and affording it the opportunity to bargain to the extent consonant with law and regulation.

(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) Upon request of the National Treasury Employees Union, reposition the modular furniture of bargaining unit employees in the Boca Raton resident post so that as many unit employees as possible will have unobstructed views of the windows.

(b) Upon request of the National Treasury Employees Union, bargain to the extent consonant with law and regulation concerning the reassignment of bargaining unit employees to the new resident office in Boca Raton, Florida and the design and furnishing of that office.

(c) Post at its offices where bargaining unit employees 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 District Director, Orlando District, Food and Drug Administration, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to bargaining unit employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Regional Office, 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, DC, January 31, 1996

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in working conditions of our employees in the bargaining unit exclusively represented by the National Treasury Employees Union, including the reassignment of bargaining unit employees to the new resident post in Boca Raton, Florida and the design and furnishing of that office, without first notifying the Union and affording it the opportunity to bargain to the extent consonant with law and regulation.

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, upon request of the National Treasury Employees Union, reposition the modular furniture of bargaining unit employees in the Boca Raton resident post so that as many unit employees as possible will have unobstructed views of the windows.

WE WILL, upon request of the National Treasury Employees Union, bargain to the extent consonant with law and regulation concerning the reassignment of bargaining unit employees to the new resident office in Boca Raton, Florida and the design and furnishing of that office.

(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, Atlanta Regional Office, whose address is: Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is:
(404) 331-5212.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case No. AT-CA-30515, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Peter A. O'Donnell, Esq.
Department of Health and Human Services, Region IV
101 Marietta Tower, NW, Suite 1601
Atlanta, GA 30323

Sherrod G. Patterson, Esq.
Federal Labor Relations Authority
Marquis Two Tower, Suite 701
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Jay B. Landay, Chief Steward
National Treasury Employees Union
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Atlanta, GA 30323

REGULAR MAIL:

National President
National Treasury Employees Union
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Assistant Counsel
National Treasury Employees Union
2801 Buford Highway, Suite 430
Atlanta, GA 30329

Dated: January 31, 1996
Washington, DC