UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

NATIONAL NAVAL MEDICAL CENTER Respondent	
and DELORES H. SMITH Charging Party/Individual	Case No. WA-CA-60576

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 **SEPTEMBER 22, 1997**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: August 22, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: August 22, 1997

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: NATIONAL NAVAL MEDICAL CENTER

Respondent

and Case No. WA-CA-60576

DELORES H. SMITH

Charging Party/Individual

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

NATIONAL NAVAL MEDICAL CENTER Respondent	
and DELORES H. SMITH Charging Party/Individual	Case No. WA-CA-60576

Thomas F. Bianco, Esquire
For the General Counsel

Mr. Stuart H. Fields
For the Charging Party

Ms. Vivian I. Merritt
For Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

An unfair labor practice complaint alleges that Respondent violated sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing, from July 18, 1996, through November 4, 1996, to comply with a final and binding arbitrator's award. The award was based on a grievance over the Charging Party's removal from employment. It directed Respondent to return the grievant to her position upon her production of certain medical information. The answer denies that Respondent failed to comply with the award.

In his opening statement at the hearing held in this case in Washington, D.C., on May 29, 1997, Counsel for the

General Counsel asserted that, in certain respects, Respondent's purported compliance with the award in November 1996 and thereafter did not constitute full compliance with the award. Specifically, the General Counsel asserted that the grievant had not received pay for the period of July 18 to November 4, 1996, had not been given the opportunity to replace moneys she had been required to withdraw from her Thrift Savings Plan or to begin contributing to the plan beginning on her retro-actively established reinstatement date, and had not received the lost income from the withdrawn funds. Respondent asserted, in addition to other technical or procedural defenses or partial defenses, that the unfair labor practice was untimely with respect to the Charging Party's removal. Respondent also explained that it fully implemented the arbitrator's award when it reinstated the Charging Party, effective (retroactively) on the date that she met the condition specified by the arbitrator.

Counsel for the General Counsel and for Respondent filed post-hearing briefs. The following findings are based on the record as a whole, the briefs, my observation of the witnesses, and my evaluation of the evidence. I make no independent findings, however, concerning the merits of the grievance.

Findings of Fact

A. Background and Events Culminating in Arbitration Award

Delores H. Smith, the Charging Party, was an employee of Respondent and worked as a voucher examiner in its Office of Acquisitions, Management, and Logistics. Following an injury in May 1995, she was incapacitated and unable to return to work for an extended period. On September 22, 1995, she was removed from employment for excessive absence without leave. Ms. Smith filed a grievance contesting her removal. This grievance was filed under the negotiated grievance procedure in a collective bargaining agreement between Respondent and the exclusive representative of a unit of its employees. The grievance went to arbitration, where an award was made. No exceptions to the award were filed.

In the decision forming the basis for the award, the arbitrator stated that the issue to be resolved was: "Was the removal of Grievant for such cause as would promote the efficiency of the Federal Service?" The arbitrator sustained Smith's grievance on one of the two alternative grounds asserted to contest the removal. The successful ground was, basically, that any failure by Smith to provide

Respondent with requested information about the diagnosis and prognosis of her injury was excused by Respondent's failure to respond to the invitation by Smith's lawyer, when he responded to the request for information, to contact him if more information was needed. Thus, the arbitrator concluded that Smith was never given to understand the necessity for submitting any further information. He also found that her outstanding employment record supported her grievance. The final paragraph of the arbitrator's decision, which he labelled the "Award," is reproduced here in full:

> The Grievance is, in part, sustained. Grievant is to be returned to her position as Voucher Examiner upon Agency's and Union's receipt of this Award and after Grievant produces an unequivocal statement from her physician that she is able to perform all aspects of her posi-tion as Voucher Examiner. Since, at hearing, no evidence was presented that Grievant was then able physically to perform her job without stress, and since her injuries continued to be subject to therapy, the request for back pay and other make-whole relief is denied.

With regard to the "other make-whole relief" denied by the arbitrator, the only other references in the record to such requested relief are contained in the arbitrator's description of the history of the grievance. There, the arbitrator stated that the underlying grievance included a request for "reinstatement with all rights and entitlements," and that a letter from the union at the second step of the grievance included a request for "reinstatement and other make-whole relief."

B. Post-Award Events Leading to Filing of Charge

The arbitrator issued his decision and award on June 20, 1966. Smith obtained a copy of the award on July 19 and sought an explanation of what was required of her to comply with the arbitrator's condition for her reinstatement. She spoke with Ronald Frampton, who had been Respondent's repres-entative at the arbitration hearing. According to Smith, Frampton told her that the information she was seeking should come from her Union representative, Ronald Welch. Although Smith testified that Frampton offered no further explanation at that time, she also testified that he told her that she had to provide the information that was required by the arbitra-tion award to Frampton or to Welch, and that, after she talked to Frampton, Smith "thought that

[she] needed to provide a sick certificate releasing me from the doctor, saying that I was actually fit for duty" (Tr. 38). According to Frampton, his message to Smith was to encourage her to provide the information specified by the arbitrator expeditiously.

Smith went to her physician's office on July 18 and obtained a memorandum, on a pre-printed format with spaces for checking off appropriate information, containing Smith's name as the patient and what appears to be the stamped "signature" of Dr. Richard S. Meyer at the bottom. On a line containing the pre-printed inscription that "[t]he above-named patient was unable to work from _____ to _____," the dates, "5/22/95 [to] 3/4/96," had been written in the blank spaces. A checkmark had been applied to a pre-printed line stating that "[t]he above-named patient is now able to return to work/school on regular duty status." Under a space for additional comments is written, "patient was discharged from active care, to return if symptoms reoccur."

Smith took the memorandum to her supervisor, Lieutenant Jackson, who told her that she (Lt. Jackson) had been instructed not to accept any documentation and that Smith had to give it to Ronald Welch or to "Personnel." Smith went to Welch's office, but he would not see her at that time, so she slid it under his door. Welch phoned Smith later and told her that he had received the document and had given it to manage-ment, but that Frampton had told him that the document was not acceptable.

Smith testified that she phoned Frampton the next day, July 19, and told him that the doctor had given her a certi-ficate and that she was ready to come back to work. She testified that Frampton told her that he needed a letter from the doctor "that explained if any limitations or any stipu-lations would be on me returning back to work" (Tr. 44). Frampton testified that he had not seen the July 18 memorandum or any other medical documentation concerning Smith up to the time that he left the employ of the Department of the Navy in September 1996. However, he acknowledged that, had the July 18 memorandum been presented to him, he would have questioned its sufficiency because he did not think it was "an unequivocal release to return to performing the full range of duties of the position" (Tr. 83).

Smith called her doctor's office on July 22 and asked his secretary if the doctor could write a letter explaining in detail what Smith's limitations were, if any, and certifying that she was fully fit to come back to work.

Smith obtained such a letter on July 22. It is addressed to Mr. Frampton and states, in pertinent part, that Smith "is able to perform full duties as a voucher examiner with no limitations." Smith testified that she took this letter "back up to Commander Walters' office" (Lieutenant Commander J.M. Walters was then Respondent's Acting Director for Logistics) and gave a copy to Ronald Welch, who told her he was going to give it to Frampton.

Sometime between July 19 and July 25, Frampton drafted a letter for Commander Walters' signature, addressed to Smith. This letter, which was signed by Walters on July 25 and mailed to Smith, contains the following paragraph:

> On July 17, 1996, and again on July 19, 1996, you indicated that you had not yet obtained the required certification from your physician, but would obtain it on Monday, July 22nd and present it to Mr. Frampton so he could immediately facilitate your reinstatement. Thirty-five days have passed since the date of Arbitrator Whyte's award and neither you or your representative have presented an acceptable physician's statement, or for that matter any writing from a physician, to warrant your reinstatement. Therefore, it now appears clear that you have no intention of seeking reinstatement to your former position. The National Naval Medical Center has acted prudently in granting you more than a reasonable window of opportunity in which to present the certification. Effective with the date of this letter, the National Naval Medical Center will not honor the reinstatement award due to your lack of interest in employment in the Federal service. This foreclosure to reinstatement is the final decision of National Naval Medical Center and the Department of the Navy.

This letter was sent by first class and certified mail. The record does not reveal when Smith received it, although there is an oblique reference (Tr. 49-50) indicating that she received it. On July 26, Smith sent Frampton, by certified mail, copies of the physician's July 22 letter and July 18 memorandum, with a covering letter. The envelope in which these documents were mailed was addressed to Frampton at the Department of the Navy's Human Resources Office in Washington, D.C. A "U.S. Navy" log-in stamp shows that it arrived at a facility of the Department in Washington, D.C., in August 1966. The date-stamp is not sufficiently distinct

to permit a determination of the date in August. The envelope was not forwarded to the Human Resourses Office until November 14, after Frampton had ceased working there. It was then delivered to Teresa Tiller, head of the office's staffing and classification department. She signed the certified mail receipt and, the following day, gave the envelope, unopened, to one Tom Randall. Randall indicated to Tiller "that he had been looking for something to do with this."

On August 1, apparently after receiving Commander Walters' January 25 letter, Smith signed the unfair labor practice charge that initiated this case and sent a copy of the charge to Frampton by courier service. The charge indicated that copies of certain documents, including the physician's July 22 letter, were attached. Smith testified that the copy of the charge she sent to Frampton had the July 22 letter and earlier physician's memorandum attached, but that she did not attach other documents referenced in the charge because she knew that Frampton already had them. Smith accompanied the courier service's messenger when the messenger delivered the package to Frampton on August 1.

Frampton testified that, on opening the package, he found only one page, containing the unfair labor practice charge, with no attachments. He addressed a letter to Smith the same day, stating that the envelope he received had contained only a copy of the charge, and that he had not received the referenced attachments. The letter concluded: "Please forward to my office, as expeditiously as possible, the complete document in order that the agency m[a]y review and answer your concerns" (Ag. Exh. 1). Smith did not communicate with Frampton further.

The unfair labor practice charge was filed on August 9, 1996. The Authority's Washington Regional Office served a copy of the charge on Respondent but, as represented by Counsel for the General Counsel, did not include any of the attachments mentioned in the charge.

C. Actions Taken After Respondent Received the Charge

Apparently during the invesigation of the unfair labor practice charge, a representative of the Department of the Navy requested from an agent of the Authority's Regional Office the documentation referenced in but not attached to the charge. A copy of Dr. Meyer's July 22 letter was delivered to Fran Nangle, a Department of the Navy "OCPM representative" in Philadelphia, on October 21, 1996. Nangle informed Suzanne Page-Ralston, a labor relations specialist stationed at Respondent's facility in Bethesda,

Maryland. Page-Ralston prepared a memorandum to be sent to Smith by the appropriate assistant department head, informing Smith that her medical documentation had been received, that it was acceptable, and that Smith was to report to duty on November 4. The memorandum, dated October 31, also states that Smith's reinstatement "cannot be effective until" October 21, the date on which her medical documentation was received.

Smith returned to work on November 4. Some time after November 14, the date that the Human Resources Office in Washington finally received the envelope containing the documents Smith had mailed to Frampton on July 26, Teresa Tiller faxed to Page-Ralston in Bethesda the copy of Dr. Meyer's July 22 letter that Smith had included in that mailing. This event triggered a discussion about adjusting Smith's reinstatement date retroactively. Agency representa-tive Nangle urged that the retroactive date be July 22, the date of Dr. Meyer's letter. The then Deputy Commander of Respondent was inclined to make the effective date the date in August when the Navy received Smith's envelope. However, the exact date could not be determined because of the deficiency in the date-stamp.

A changeover in command ensued. Afterward, Page-Ralston approached the new Deputy Commander and told him that she thought Respondent could settle the unfair labor practice proceeding if Smith's reinstatement date was made retroactive to July 22. Page-Ralston was given approval to do so.

During the months after Smith's reinstatement, Respondent showered her with a number of Standard Form 50-B "Notifica-tion[s] of Personnel Action," including corrections to previous notifications, describing various aspects of her status as a reinstated employee. One such notification, carrying the approval date of April 29, 1997, changed the effective date of her reinstatement to July 22, 1996.

Although each of these notifications that were made part of the record retained the same "Service Comp. Date (Leave)" that had appeared on Smith's notification of removal in 1995, Counsel for the General Counsel attached to his brief, with a representation that its attachment was with the consent of Respondent's representative, a subsequent Form 50-B that adjusted Smith's "Service Comp. Date (Leave)" apparently to remove her seniority credit for the period between her removal and her reinstatement. Absent a motion to reopen the record to include that Form 50-B, I cannot consider it for the purpose of establishing

whether there was a violation of the Statute. However, Respondent's consent to its presentation as an attachment to the General Counsel's brief, together with Respondent's position that Smith was not an employee and was not entitled to any of the benefits of an employee during her hiatus in employment, warrant the inference that Respondent admits that it removed that period from Smith's seniority credit.

Smith's original notification of reinstatement placed her in the "FERS and FICA" retirement plan instead of the "FICA and CSRS (Partial)," plan, in which she was enrolled before her removal. This change was subsequently rescinded, with an effective date of July 22, 1996. The record does not show whether any funds that should have been placed in Smith's "FICA and CSRS (Partial)" account since her reinstatement have been so placed or transferred. Labor Relations Specialist Suzanne Page- Ralston acknowledged that Respondent is obliged to correct such "inconsistencies," and represented that an audit will be conducted to insure that the proper reallocation is made.

As of the date of the hearing, Smith had not been paid for the period between July 22 and November 4, 1996. Respondent acknowledges that she is entitled to such pay. Page-Ralston was asked whether Smith's full pay, as of July 22, will be placed "in Smith's account as soon as the Payroll people get it there." Her answer indicated that the Form 50-B notification (approved on April 29, 1997) changing her reinstatement date to July 22, 1996, constituted authorization for the "Payroll people" to do so.

One other matter that changed Smith's situation as a result of the removal was that she was required to withdraw the funds that she had contributed to and earned in the Federal employees' Thrift Savings Plan. According to Smith's uncontroverted testimony, she has not been given the opportunity to replace those funds. Moreover, because of her family's reduced financial condition following her removal, Smith was unable to place those funds in an alternative income producing account, but found it necessary to use them for family expenses. She did become eligible, after her return to work in November 1996, to make new contributions to the Thrift Savings Plan through payroll deductions.

D. Resolution of Disputed "Facts"

The above findings resolve, on the basis of credible and essentially uncontroverted evidence, all the factual issues I find to be material except for (1) the state of Frampton's knowledge of the July 18 memorandum concerning

Smith's ability to return to work and (2) whether the medical documents were included with the unfair labor practice charge in the package Smith served on Frampton or otherwise brought to his attention.

Frampton's knowledge of the July 18 memorandum is a tricky proposition, complicated by the absence of Ronald Welch as a witness. Welch, according to Smith, had undertaken to present that memorandum to Frampton and had later told her that Frampton had deemed it unacceptable. Frampton denies that he ever saw it. Did he mean to imply that he was totally unaware of its contents? If so, I do not credit such a blanket denial.

I credit Smith that Welch told her that Frampton found the July 18 memorandum unacceptable. Otherwise, it is difficult to fathom why Smith would have gone to the trouble of obtaining the July 22 letter. Her actions, in response to this information from Welch, are also consistent with her testimony, confirmed at least in part by Frampton, concerning the Smith-Frampton conversation of July 19 in which Frampton told Smith that she needed a letter explaining any limitations on her ability to return to her job. Since Smith already had the July 18 memorandum when she spoke with Frampton on July 19, I find it incredible that she would have failed to mention it. Thus, whether or not Frampton actually saw the memorandum, I find that he was informed of its nature and that he questioned its adequacy, giving Smith further instructions as to what he deemed to be acceptable. (Frampton testified that he saw the July 18 memorandum for the first time the day before the hearing, but confirmed that, had it been presented to him when Smith thought it had been, he would have questioned its adequacy.)

Smith acted on Frampton's July 19 instructions. Unfortunately, this did not resolve the problem. I find that neither the copy of the July 22 letter that Smith testified that she took "back up to Commander Walters' office" nor the copy that she testified that she gave to Ronald Welch to present to Frampton ever came to the attention of any responsible Respondent official. I so find because I do not attribute to Frampton the degree of duplicity required to draft the July 25 Walters letter, and to permit its issuance, if Frampton had been aware of the existence of Dr. Meyer's July 22 letter. (His comment in the letter about Smith's failure to present "any writing from a physician" appears to be disingenuous in light of his knowledge of the July 18 memorandum, but I have not found that it was ever physically "presented" to him. The Walters letter is at least arguably consistent with Frampton's failure to receive any document that he considered

adequate.) Such duplicity would have been manifestly futile because its natural effect would have been for Smith to produce the previously obtained documentation, demonstrate her efforts to present it, and thereby avoid the effect of the Walters letter.

Further, I find that the "attachments" were not attached to the unfair labor practice charge as Framton received it. His immediate letter to Smith, on receipt of the charge, indicating that he had not received the attachments, is another act that seems inexplicable if he had, in fact, received them. Since his letter only invited the submission of these documents, Frampton had nothing to gain from such a misrepresentation unless he was so intent on frustrating Smith that he would resort to anything. I do not believe this to be the case.

Discussion and Conclusions

A. Issues Presented

As noted, the complaint alleges only a failure to comply with the arbitrator's award from July 18 through November 4, 1996. The General Counsel argues in his brief that Respondent has not fully complied with the award since November 4. In his opening statement, Counsel for the General Counsel had mentioned certain respects in which he asserted that Respondent had not "fully" complied. However, he gave no further indication at that time that the manner in which Respondent complied with the award by or after November 4 should be deemed to be encompassed by the complaint or that these were matters that were being urged as *additional* violations of the Statute in this proceeding.

The Authority has recently demonstrated a strong commitment to "due process considerations." *U.S. Department*

of Labor, Washington, D.C., 51 FLRA 462, 467 (1995).[1] It has gone so far as to state that "[w]hen a complaint is ambiguous and the record does not clearly show that the respondent otherwise understood (or should have understood) what was in dispute, fairness requires that any doubts about due process be resolved in favor of the respondent." *Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona*, 52 FLRA 421, 431 (1996). And the Authority applies this standard even in the absence of a due process contention by the respondent. *Id.*

Here the burden on the General Counsel to show that Respondent understood that the adequacy of its compliance with the award as of November 4 was in dispute is especially heavy because the complaint, rather than being ambiguous, unequi-vocally limits its allegation to Respondent's failure to comply with the award between July 18 and November 4. The gist of the complaint is clearly Respondent's delay until November 4 in complying. This conclusion is reinforced by the fact that the essential element of the award--Smith's reinstatement--had been acted on almost five months before the complaint was issued and therefore was available for scrutiny by the Authority's Regional Office well before the complaint was drafted. In these circumstances, the complaint's express limitation to Respondent's failure to comply until November 4 strongly suggests a determination that the Authority's Regional Director, on behalf of the General Counsel, had determined that there was no basis for disputing the adequacy of Respondent's compliance when it did act to reinstate Smith. Thus, as far as the record shows, Respondent would have had no inkling, as it prepared its defense, that the adequacy of its compliance, other than its alleged tardiness, was at issue.

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[1] The "due process considerations" implicated in Authority proceedings, although analagous to those implicated in proceedings of the National Labor Relations Board, presumably are not, like those applicable in Board proceedings, *ordinarily* mandated by the Fifth Amendment to the U.S. Constitution, which protects any "person" from government action. *See Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2nd Cir. 1990); *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1073 (1st Cir. 1981). The Fifth Amendment presumably does not protect the government itself from government action. Further, as the analysis in the text proceeds, I construe the Authority's recent decisions as affording respondents, at least in some instances, more "process" than might have been minimally "due" under a constitutional standard.

Did then, the General Counsel's opening statement serve to show clearly that Respondent understood or should have understood that matters other than tardiness were the subject of the unfair labor practice allegations being litigated? In general, I find that it did not. Where, as here, the allega-tion in the complaint is affirmatively limited to a failure to act within a stated period, merely to mention at the hearing that the General Counsel also believes the action ultimately taken to be inadequate is not a clear enough notice that a new allegation is being advanced so as to satisfy the Authority's standard.

However, Respondent's representative clearly manifested an understanding that one aspect of the reinstatement action was in dispute. Thus, Respondent's representative, during discussions following the General Counsel's opening statement, demonstrated a belief that the nature of Smith's reinstatement with respect to her entitlement to "service credit benefits" during the hiatus in her employment was in dispute (Tr. 17, 20). To the extent that this dispute accords with the General Counsel's broader set of unalleged matters to be covered by this proceeding, I find no due process objection.

Evidence was taken without objection on other aspects of Respondent's reinstatement, but "[e]ven where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself." *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 16 (D.C. Cir. 1985), quoting *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981). Respondent itself introduced evidence regarding one of the issues raised by the General Counsel's opening statement--the failure as of the hearing date to have paid Smith for the retroactive reinstatement period between July and November 1996. However, whatever purpose this evidence may have had, its introduction does not in itself warrant the conclusion that this issue was "fully and fairly litigated" so as to overcome the due process problem. *See American Federation of Government Employees, Local 2501, Memphis, Tennessee*, 51 FLRA 1657, 1660-61 (1996). Respondent, as it entered the hearing, had no notice that this matter would be used to expand the allegations of the complaint. Absent its knowledge that this was to be a dispositive issue, I am not prepared to find that Respondent had a meaningful opportunity to litigate the issue. It is impossible to ascertain whether it otherwise would have proffered additional evidence. *Id.* at 1661. Conceivably, such evidence would have explained satisfactorily what appears on

its face to be an inordinate delay in processing that reimbursement. *See, for example, Department of Health and Human Services and Social Security Administration*, 22 FLRA 270 (1986).

To summarize, I conclude that the issues properly presented here are whether Respondent violated its statutory duty to comply with the arbitrator's award by (1) delaying its reinstatement of Smith and (2) failing to reinstate her with "service credit benefits" for the period between her termina-tion and her retroactively established reinstatement date.

B. Alleged Delay

An agency that fails to comply with an arbitration award in a timely manner violates section 7116(a)(1) and (8) of the Statute. *United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 44 FLRA 1306, 1313 (1992). If there is a delay in complying, the Authority "looks to whether the respondent acted promptly in light of all the facts and circumstances." *U.S. Department of Veterans Affairs Medical Center, Allen Park, Michigan*, 49 FLRA 405, 405-06, 424 (1994) (*VAMC Allen Park*).

The adequacy of a respondent's compliance with an award, apart from its timeliness, depends on whether the construction of the award pursuant to which the respondent has asserted that it complied is reasonable. *United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas*, 25 FLRA 71, 72 (1987). The Authority applies the "reasonableness" test so as to insulate a respondent from a finding that it unlawfully failed to comply with an award if its action was reasonable without respect to whether the Authority would have concluded that the respondent's construction was "compelled" by the award or was "correct." *U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois*, 53 FLRA 55, 61 (1997). In *Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma*, 46 FLRA 862, 867-68 (1992), the Authority held that the respondent's compliance with an ambiguous award was "reasonable" where

the award "could be read" in the manner in which the respondent had construed it.2

This test of "reasonableness" will be directly applicable to the second substantive issue in this case, dealing with whether reinstatement of Smith without crediting her service during the hiatus was adequate compliance. However, I find it also relevant, as a general guideline if not in detail, to the issue of delay. It indicates that the Authority, in determin-ing whether a respondent has complied with an arbitration award, for section 7116(a)(1) and (8) purposes, looks to the reasonableness of the respondent's actions (or omissions) rather than to whether, as a strict matter of interpreting the respondent's obligation according to the terms of the award, the respondent has fully complied. Thus, the Authority has not announced a test for such cases that is analagous to the test it announced in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) for the resolution of certain cases depending on interpretations of collective bargaining agreements. To the contrary, the Authority's precedent indicates that the unfair labor practice of failing to comply with a final and binding arbitration award occurs only when the respondent has acted unreasonably. This is reflected, in the test announced for determining whether there was an unlawful delay in compliance, in the phrase, "promptly in light of all the facts and circumstances." *VAMC Allen Park*.

The General Counsel has the burden of proving the allegations of this complaint by the preponderance of the evidence. I conclude that this burden has not been met as to what I have construed as the allegation of unreasonable delay.

I have found that Frampton was aware, at least in general terms, of the contents of Dr. Meyer's July 18 memorandum. Its pertinent portion is the doctor's checkmark before the pre-printed statement that: "The above-named patient is now able to return to work/school on regular duty status." The General Counsel argues that this memorandum provided all the informa-tion required by the arbitrator's award, but reasonable people could disagree on whether it constituted "an unequivocal statement . . . that [Smith was]

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I am not sure where this leaves a successful grievant who seeks an actual determination that the agency's compliance was not all that the award, interpreted correctly, afforded her. *See U.S. Department of Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682, 687 (D.C. Cir. 1994), *citing Columbia Power Trades Council v. United States Dep't of Energy*, 671 F.2d 325, 329 (9th Cir. 1982).

able to perform all aspects of her position as Voucher Examiner." Frampton's insistence on a more specific statement, tailored to his understanding of the arbitrator's requirement, was not calculated to cause more than a minimal delay in Smith's reinstatement, and would not have caused a substantial delay except for the series of miscues that followed.

I find that Frampton, as the letter he drafted for Commander Walters indicates, believed as a result of his July 19 conversation with Smith that Smith would obtain and provide the unequivocal statement on or about June 22. I also find that, as the letter indicated, he did not receive the statement. Why he did not receive it will remain a mystery the solution of which appears to reside at least in part with Ronald Welch, who told Smith he would deliver it to Frampton.

In other respects, the letter Frampton drafted for Commander Walters was, to this neutral observer, improvident and rash. Nor need one have been paranoid to detect the appearance of a degree of hostility in its tone. However, I do not accept the General Counsel's contention that the letter alone provide grounds for concluding that Respondent violated the Statute by failing to comply with the award. The letter's conclusion is based, honestly if precipitously, on an erroneous *belief* that Smith had not been sufficiently diligent in obtaining the expected documentation.

Had the matter rested there, this might have been a different case. That is, if the Walters letter had caused Smith to forego any further efforts to provide the documenta-tion, under the impression that it would be futile, the letter itself might arguably have constituted something analagous to a constructive repudiation of the award. But that is not what occurred and is not what has been alleged here. In what may have been the only instance in which fortune smiled on these hapless parties, Smith mailed the documents to Frampton on July 26, either not having received the Walters letter or not having been dissuaded by its message. Although that mailing did not resolve the problem at the time it should have, the further delay was caused by the envelope's languishing in the Navy's mailroom, technically in Respondent's control but realistically not within its capacity to act on. Nor can the further delay be attributed to the Walters letter or otherwise to any unwillingness on Respondent's part to comply with the award.

What occurred next, when Smith served the unfair labor practice charge and Frampton found the purported attachments

to be missing, serves further to neutralize any basis for inferring a dilatory motivation. Frampton promptly and expressly invited the submission of the missing papers. This act, in effect, acknowledged that Respondent's "final decision" of "foreclosure to [Smith's] reinstatement," as it was stated in the Walters letter, was no longer final but was, rather, subject to review within the "agency."

When the existence of Dr. Meyer's July 22 letter came to Respondent's attention in October, it acted promptly to reinstate Smith. When Respondent later discovered that Smith had mailed a copy of the letter on July 26, it took steps to correct her reinstatement date and ultimately made that date retroactive to a few days earlier than Smith's mailing of the letter. Although this adjustment took several months to effectuate, this delay must be viewed in light of the unusual circumstances of the difficulty in determining when the letter had been received and the changeover of command. Nor is the delay in this adjustment part of the complaint or of the General Counsel's case.

Respondent's willingness, after some internal debate, to give Smith the most favorable reinstatement date compatible with the information then before it, further undercuts any contention that it was engaged in a course of conduct designed to delay compliance, notwithstanding the fact that by that time an unfair labor practice complaint had been issued and Respondent hoped to settle the case by making that adjustment. As stated above, the complaint alleged no violation with respect to the adequacy of the original reinstatement action. Nor can I properly assume that Respondent would have failed to make an appropriate adjustment in the absence of that complaint.

As I look to whether Respondent acted promptly in light of all the facts and circumstances, I see a reasonable effort on its part first to insure that Smith provided the documentation required by the arbitrator and then to take the action it believed that the award contemplated. The delay in taking that action, to the extent that such delay is covered by the complaint or otherwise properly before me, was caused by factors other than any dilatory tactics on Respondent's part. *See Department of Health and Human Services and Social Security Administration*, 22 FLRA 270 (1986). Therefore I shall recommend that the unfair labor practice allegations in the complaint be dismissed.

C. Failure to Reinstate with "Service Credit Benefits" for the Pre-reinstatement Period

The General Counsel's argument here is that the arbitator's award directed Respondent to "rescind" Smith's termination, and that such rescission would have made her an employee, entitled to all the service credit benefits of a Federal employee, during the hiatus caused by her termination. The concept of "rescission" is the General Counsel's but is not necessarily attributable to the arbitrator, who speci-fically decided not to provide all the relief to which Smith would have been entitled had her termination been the sole reason for her absence from work during the period of her separation. At least in the private sector, arbitrators do, on occasion, award reinstatment without restoring interim seniority. Marvin H. Hill, Jr. & Anthony V. Sinicropi, *Remedies in Arbitration* 175-76, 204 n.90 (2d ed., 1991).

Respondent treated the direction that Smith be "returned to her position" as one that was to be effective as of the date that she provided the "unequivocal [medical] statement" and not to have any effect with respect to any earlier period. I find this to be at least as reasonable an interpretation as the General Counsel's. The arbitrator denied both back pay and "other make-whole relief." The only other make-whole relief that had been requested was that reinstatement be with "all rights and entitlements." The arbitrator, in denying any make-whole relief other than reinstatement, may well have meant reinstatement to be a resumption of Smith's employment status as of the date she produced the required document. Such resumption would have carried with it by implication some rights and entitlements, such as the service credits that she had earned prior to her termination, but not all the rights and entitlements that the arbitrator *could have* awarded. At least that is one reasonable construction of his disposition.

The General Counsel submits, finally, that the award, if read the way Respondent does, would be unlawful because, absent a determination that Smith had been terminated improperly, the reinstatement award interferes with the management right to hire and assign employees. The premise of the argument is unfounded. The arbitrator did find that Smith was terminated improperly. This did not, as the General Counsel apparently assumes, require the arbitrator to direct Respondent to "rescind" the termination. The arbitrator chose a remedy that he found to be appropriate, based on his view of how much of Smith's loss was attributable to the termination and how much was not. *Cf. Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Ga.*, 25 FLRA 969, 971 (1987) (*Warner Robins*) (arbitrator, acting within his "great latitude in fashioning remedies," substituted make-up

overtime for monetary "damages" in the absence of a clear showing of monetary loss). Whatever the correct interpretation of the arbitrator's remedy in the instant case may be, it became final in the absence of exceptions. Had it been attacked, it presumably would have survived the Authority's review under the "great latitude" doctrine articulated in *Warner Robins* and other Authority decisions.

I conclude that the General Counsel has not established the violation of inadequate compliance with the award by failing to credit Smith's service during her hiatus in employment. I therefore recommend that the Authority issue the following order:

ORDER

The complaint is dismissed.

Issued, Washington, D.C. August 22, 1997

_____
JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-60576, were sent to the following parties in the manner indicated:

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Dated: August 22, 1997
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