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

MEMORANDUM DATE: January 28, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEER
NORTHWESTERN DIVISION
PORTLAND, OREGON

Respondent

and Case No. SF-CA-04-0275

UNITED POWER TRADES ORGANIZATION

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(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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| DEPARTMENT OF THE ARMY<br>U.S. ARMY CORPS OF ENGINEER<br>NORTHWESTERN DIVISION<br>PORTLAND, OREGON<br><br>Respondent | |
| and<br><br>UNITED POWER TRADES ORGANIZATION<br><br>Charging Party | Case No. SF-CA-04-0275 |

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 28, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

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PAUL B. LANG
Administrative Law Judge

Dated: January 28, 2005
Washington, DC

OALJ 05-13

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

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| DEPARTMENT OF THE ARMY<br>U.S. ARMY CORPS OF ENGINEER<br>NORTHWESTERN DIVISION<br>PORTLAND, OREGON<br><br>Respondent | |
| and<br><br>UNITED POWER TRADES ORGANIZATION<br><br>Charging Party | Case No. SF-CA-04-0275 |

Vanessa Lim
For the General Counsel

David D. Hlebechuk
For the Respondent

Travis Brock
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

**DECISION**

**Statement of the Case**

On February 20, 2004,[1] the United Power Trades Organization (Union) filed an unfair labor practice charge against the Department of the Army, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon (Respondent). On April 27 the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §§7121, 7122 and 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by refusing to comply with an arbitration award.

[1] All subsequently cited dates are in 2004 unless otherwise indicated.

The General Counsel filed a motion for summary judgment on May 28 and, by Order of June 4, the hearing date, originally set for June 10, was indefinitely postponed so as to allow the Respondent time to respond to the General Counsel's motion and to file its own motion for summary judgment. The Respondent subsequently filed a cross-motion for summary judgement. By Order of June 30 the Chief Administrative Law Judge granted the parties' joint motion to hold the case in abeyance. Each of the parties filed oppositions to the other party's motion for summary judgment.

By Order of August 26, following the submission of a joint status report, the case was restored to active status in spite of the opposition of the Respondent. On September 8 both of the motions for summary judgment were denied and the case was set for hearing in Portland, Oregon on November 16.

The hearing was held on November 16 as scheduled. Each of the parties was represented by counsel and was afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, the demeanor of witnesses and the post-hearing briefs submitted by each party.

**Preliminary Issue**

On November 15 the Respondent submitted a Renewed Motion for Stay of Proceedings and Objection to Evidence.[2] In support of its motion the Respondent maintains that the arbitration award upon which this case is based is not final because the Authority has not ruled on its exceptions to the

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[2] §2423.21(b) of the Rules and Regulations of the Authority requires that, unless otherwise directed or approved by the Administrative Law Judge, pre-hearing motions are to be filed at least 10 days prior to the hearing and responses are to be filed within 5 days after the date of service of the motion. Although the Respondent's renewed motion was filed one day before the hearing, I have concluded that the unusual procedural posture of this case justifies additional consideration of the motion on its merits. Accordingly, the General Counsel was allowed to include his response to the motion in his post-hearing brief.

clarification of the award.[3] Alternatively, the Respondent argues that, since the Arbitrator's clarification (GC Ex. 2) is not final, it should be excluded from evidence or accorded no weight.

As additional grounds for a stay of proceedings the Respondent argues that, if it is required to fill the training position with an employee rather than a contractor, it will be required to take action which will ultimately be deemed unnecessary if the Authority upholds the Respondent's exceptions to the clarification of the award.[4]

In opposition to the Respondent's motion the General Counsel maintains that the finality of the original award is not diminished by the Respondent's pending exceptions to the clarification. Furthermore, any uncertainty as to the nature of the remedy can be addressed during the compliance phase of the proceedings.

The Respondent's position as to the lack of finality of the original award has been effectively rebutted by *National Archives and Records Administration and American Federation of Government Employees, Local 2578* (Applethwaite, Arbitrator), 42 FLRA 664, 669 (1991). In that case the Authority held that the issuance of a clarification award does not extend the time to file exceptions to the original award, although exceptions may be filed based upon alleged deficiencies in the clarification. Even if, as argued by the Respondent, the clarification was actually a modification of the original award, there is no legal basis for the proposition that the finality of the original award was affected in any way.

Upon careful consideration of the record and of the arguments of the parties, I have concluded that the proceedings should not be stayed. There has already been an inordinate delay in the disposition of this case and, in

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[3] The Respondent's exceptions to the original award were denied by the Authority on technical grounds that did not reach the merits of the exceptions, *United States Department of the Army, Corps of Engineers, Northwestern Division, Portland District, Portland, Oregon and United Power Trades Organization* (Nelson, Arbitrator), 59 FLRA 86 (2003).

[4] On July 8 the Arbitrator issued Post-Arbitration Award Findings and Rulings (GC Ex. 2) in which she stated that the original award requires that the Respondent fill the training position with an employee rather than a contractor. As of the date of this Decision the Respondent's exceptions to the ruling of July 8 are still pending.

spite of the uncertainty as to the timing and the substance of the Authority's ruling on the pending exceptions, there are issues of fact and law which can and should be addressed immediately. The effect of the pendency of the Respondent's exceptions to the clarification will be addressed in the portion of the Decision which sets forth conclusions of law.

The clarification has already been admitted into evidence. That document is peripherally relevant inasmuch as it pertains to the history of the arbitration proceedings thus far. However, the clarification was issued after the issuance of the Complaint. The question of the adequacy of the Respondent's actions subsequent to the original award must be judged in light of the reasonableness of its interpretation of the award as it existed at the time it became final, *Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma*, 46 FLRA 862, 868 (1992). That determination depends upon the clarity of the original award, and not on the subsequent clarification, *U.S. Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 44 FLRA 1306, 1315 (1992). Therefore, the clarification will be assigned no weight in my determination as to whether the Respondent has adequately complied with the award.

## Findings of Fact

Background

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization within the meaning of §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining.

At all times pertinent to this case the Union and the Respondent were parties to an agreement concerning the Regional Hydropower Trainee Program (Jt. Ex. 1).5 The agreement provides, in pertinent part, that:

> IV. There should be a North Pacific regional educational director/trainer for the regional hydropower trainee program. The trainer should be a professional educator and shall be responsible for:

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5 The signature of the Union's representative is dated February 25, 1997, while the signature of the Respondent's representative is dated February 25, 1998. According to the Arbitrator's award (Jt. Ex. 2, p.3) the 1998 date is correct.

1. Ensuring the course material is correct and sufficient.

2. Developing new course material.

3. Ensuring testing is properly done and evaluated.

4. Teaching some materials.

5. Maintaining training files on trainees.

6. Assisting district training officers with their duties.

7. Ensuring district training officials are managing their programs.

8. Arranging for out-sourced training.

V. Each district shall have an individual training officer responsible for the management and execution of that district's hydropower training program including:

1. Arranging mentors and evaluators for trainees.

a. The trainees shall be mentored by willing and knowledgeable craft experts who can offer support, encouragement and helpful suggestions to the trainee.

2. Testing trainees.

a. The trainees shall be evaluated on a periodic basic (*sic*) by a craft expert, working foreman, or crew foreman in the task for which they are being evaluated. Periodic evaluation shall occur at one month intervals and shall be documented.

b. Phase evaluation shall occur at six month intervals for four year in-house training programs and four month intervals for all other trainees and shall be documented. Phase evaluations shall be conducted by the training officer.

c. Successful completion of each phase will be required, documented and approved by the

district training officer before the trainee is allowed to progress to the next phase of training.

3. Teaching or assisting as necessary.

4. Maintaining training files on each trainee including documentation on periodic and phase evaluations.

5. The training officer should be available at the training site and available to the trainees.

The Arbitrator's Award and Clarification

On August 23, 2002, pursuant to a grievance by the Union, Arbitrator Elinor S. Nelson issued an Arbitration Opinion and Award in which she sustained the grievance and directed the Respondent:

> . . . with deliberate speed and in accordance with the Agreement . . . to fill the position of North Pacific Regional Educational Director with a professional educator, assigned the responsibilities detailed in Clause IV of the Agreement. Also, with deliberate speed and in accordance with the Agreement, the Agency in its Portland District is to fill the Individual Training Officer position with a qualified individual, assigned the responsibilities detailed in Clause V of the Agreement.[6]

In accordance with the collective bargaining agreement between the parties[7] the Arbitrator retained jurisdiction in order to resolve any disputes concerning the interpretation or application of the award (Jt. Ex. 2, pp. 14 and 15).

The Respondent filed timely exceptions to the award. The Authority denied the exceptions by its Decision of August 29, 2003.[8]

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[6] The General Counsel has indicated in his post-hearing brief that the position of the North Pacific Regional Educational Director (NPRED) is the only one at issue (GC brief, footnote 2).

[7] The collective bargaining agreement is not in evidence.

[8] See footnote 3.

Peter Gibson, who was then the Chief of the Respondent's Operations Division, was responsible for filling the training positions set forth in the arbitration award. At the time of the denial of the Respondent's exceptions Gibson was on a temporary assignment to Iraq; he left home on April 13, 2003, and returned to his permanent duty station on November 3 of the same year. During that period he returned to the United States for a number of meetings (Tr. 87).

Travis Brock, the President of the Union, was under the impression that, during Gibson's absence, he had turned over the responsibility for labor relations to Hiroshi Ito, the Hydropower Program Manager.[9] Brock also testified that the Union had some contact with Charley Crandell who was Acting Chief of Operations during Gibson's absence. Brock was not contacted between August and December regarding any action taken by the Respondent to comply with the award. Furthermore, he was aware of no such action (Tr. 42, 43).

On December 16, 2003, Gibson met with Brock to discuss a number of issues. During the course of the meeting Brock brought up the fact that the Respondent had not yet implemented the arbitration award.[10]

On January 27, 2004, Brock sent an e-mail message to Gibson (Jt. Ex. 4) stating in part:

> I understand from our conversation on the phone last week that the Division does not intend to comply with the Arbitrator's remedy. . . . . As I see it, the Division is obligated to comply with the Arbitrator's remedy or persuade the Union to accept something of equal value in lieu of the remedy.
>
> * * * * *
>
> I have attached a draft of an agreement that we could accept "in lieu of" the Arbitrator's

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9 According to Gibson's testimony, Brock's assumption about Ito's authority was correct (Tr. 107).

10 Brock also testified that he first discussed the implementation of the award with Gibson during the course of a telephone call in January of 2004. He also acknowledged that he might have mentioned it to Gibson in December of 2003 as an aside (Tr. 43).

> remedy.[11] I believe this is an equal value offer. I would be remiss in my duties to the Union if I let the fruits of our arbitration just evaporate or accepted something of substantially less value.

Gibson responded by e-mail message dated January 29, 2004 (Jt. Ex. 4), in which he stated:

> Travis - I agree that COE [presumably, Corps of Engineers] should have been better at coordinating but from my perspective I've been gone for 6 months and since being told about this been attempting to work it - enough of my problems. Seems you are right about the decision but we do have some impacts under this new reorganization and congressional funding for GE positions. Seems for us the answer to promote the training program is to have the three districst (*sic*) working in the same direction - Portland is hiring a training coordinator. We need a Division wide leader (ruling said it had to be a Divsion (*sic*) FTE) [presumably, full time employee]) but I'm hoping because of my restricitions (*sic*) there might be another way - hopefully better for the training program. One opportunity available to us would be to hire a contractor to oversee the technical

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[11] The draft agreement is not in evidence. However, Gibson testified that the Union proposed that the Respondent grant an additional 2,000 hours of official time per year to Union representatives instead of hiring a training director (Tr. 95).

> merits of the program and to unify the three districts approach. . . . .[12]

Subsequent discussions between Brock and Dixon did not result in an accommodation between the parties. The Union thereupon filed an unfair labor practice charge so as to avoid the effect of the six-month limitation period set forth in §7118(a)(4)(A) of the Statute.

At some time after the filing of the unfair labor practice charge Brock learned that the Respondent intended to fill the NPRED position with a contractor. Brock told Dixon that he did not believe that such action would be in compliance with the award. When the Respondent persisted in its intention the Union requested that the Arbitrator resolve the dispute. Each of the parties submitted briefs to the Arbitrator and, on July 8, 2004 (subsequent to the issuance of the Complaint and Notice of Hearing), the Arbitrator issued Post-Arbitration Award Findings and Rulings (GC Ex. 2). The Arbitrator identified the issues before her as follows:

> 1) Does the Agency's proposal to contract out the duties of the [NPRED] position rather than fill the position with a governmental employee/Division FTE violate the Arbitrator's Award?
>
> 2) By not filling the NPRED position using any method as of April 20, 2004, has the Agency failed to comply with the Arbitrator's Award? (GC Ex. 2, p. 3)

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[12] There is a conflict in testimony as to whether Gibson stated that the Respondent was not bound by the award. According to Brock, during their meeting in January of 2004 Gibson told him that he did not think that the Respondent needed to do anything in response to the award and that the Respondent did not need an Educational Director (Tr. 43). Gibson denied making such a statement (Tr. 93). The exchange of e-mail messages suggests that Gibson did not disavow the Respondent's obligations under the award but did express concern about the Respondent's ability to hire a full time training director because of an ongoing reorganization process. Gibson briefly described the reorganization process, known as 2012, in his testimony (Tr. 88-90). In any event, the issue of Gibson's alleged statement is not crucial to this Decision since the Respondent subsequently made an effort, whether or not an adequate one, to comply with the award by engaging the services of a contractor.

The Arbitrator ruled that the term "position" as used in the applicable agreements between the parties denotes an employee of the Respondent rather than a contractor. She also ruled that, in failing to fill the NPRED position by any means, the Respondent had not complied with the award as of April 20, 2004, and ordered the Respondent to fill the position with a full-time employee "with all deliberate speed."[13] The Arbitrator deferred to the Authority with regard to the question of whether the Respondent had committed an unfair labor practice.

The Effect of Gibson's Absence on the Implementation of the Arbitration Award

David Hlebechuck, the Assistant District Counsel for the Portland District, acted as a labor counselor and represented the Respondent in labor-related matters. As such, he was involved in preparing written submissions to the Arbitrator and in drafting the Respondent's exceptions to the award. Shortly after learning that the Authority had denied the Respondent's exceptions, Hlebechuck met with Deborah Chenowith, Chief of Operations for the Portland District, and Katie Deley-Foster, the management and employee relations representative at the District. During the course of the discussions Chenowith decided to explore the possibility of combining the Division and District training functions. Chenowith stated that she would discuss the idea with someone at the Division level. She did not say whom she planned to contact, but Hlebechuck was under the impression that she intended to confer with Gibson who was still in Iraq at the time (Tr. 135).

Hlebechuck also had one conversation with Ito about the effect of the denial of the exceptions. He informed Ito of Chenowith's thoughts on the subject and suggested that Ito direct any questions to her.

Hlebechuck next discussed the award with Gibson on or about January 21, 2004. During that and subsequent meetings in January and early February, Gibson described certain proposals which the Union had made regarding training during the course of contractual negotiations. Hlebechuck expressed irritation and informed Gibson that it was too late to raise defenses to the grievance. Gibson also raised concerns as to whether the addition of a full-time employee would be prohibited under the new organizational plan.

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[13] The Arbitrator did not indicate whether the Respondent had already violated the directive in the original award to fill the NPRED position with all deliberate speed.

Hlebechuck subsequently had several conversations with Brock in an attempt to overcome the Union's objections to using a contractor to fill the NPRED position. Those conversations were unsuccessful. Finally, on June 2 the Respondent decided to fill the NPRED position by revising a contract between the Spokane District and Spokane Community College for the services of Larry Gazaway (Resp. Ex. 1)[14]; the revision was executed on June 18. The contract was originally set to expire on August 19, but was eventually extended (Resp. Ex. 2). The contract for Gazaway's services currently runs through August 19, 2005.

Chenowith's testimony was generally consistent with that of Dixon and Hlebechuck. When she learned of the dismissal of the Respondent's exceptions to the award she felt that the job of District trainer would only require a half-time employee. At that point she considered the feasibility of combining the training functions at the District and Division level. She felt that it was appropriate to await Gibson's return from Iraq which was expected in the near future. However, Gibson's overseas tour was extended for about six weeks (Tr. 124).

Gibson testified that he considered himself to have been the only person in the Northwestern Division who could have solved the problem of filling the NPRED position because of, "my understanding of the program and my vision for the program" (Tr. 102). Charles Krahenbuhl temporarily filled Gibson's position during his absence; he had been selected at Gibson's recommendation. Krahenbuhl was authorized to fill the training position with a contractor, but, prior to leaving for Iraq, Gibson had instructed him not to take such action (Tr. 104).

## Discussion and Analysis

The Legal Framework

The question of whether the Respondent is required to fill the NPRED position with a full-time employee rather than a contractor has been removed from my consideration by virtue of the pendency of the Authority's review of the Respondent's exceptions to the clarification of the arbitration award. Pursuant to §7122(a) of the Statute and Part 2425 of the Rules and Regulations of the Authority such review is within the exclusive purview of the Authority. Even if that were not so, it would be inappropriate to make a ruling that might be inconsistent with the Authority's

[14] Brock testified that he considered Gazaway to be qualified for the position (Tr. 51, 52).

action regarding the Respondent's exceptions. If I were to do so, the parties would be faced with the dilemma of whether to relitigate the issue in exceptions to my Decision.

The dispute over whether the Respondent is required to hire a full-time employee is not the only issue to be resolved. The Authority has held that an unreasonable delay in implementing an arbitration award is itself a violation of §7116(a)(1) and (8) of the Statute, *National Naval Medical Center*, 54 FLRA 1078, 1080 (1998). Since that issue was not addressed by the Arbitrator, I am required to consider whether the Respondent unjustifiably delayed the process of filling the NPRED position even with a contractor.

The Nature of the Delay in Implementing the Award[15]

A determination as to whether an agency has adequately complied with an arbitration award depends upon the clarity of the Arbitrator's ruling, *U.S. Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 44 FLRA 1306, 1315 (1992). In the context of the timeliness of the Respondent's compliance, the only language of the award that is subject to question is the phrase "deliberate speed". While that language does not establish a specific deadline for the filling of the NPRED position, it cannot rationally be construed as justifying an unnecessary or an inordinate delay. Therefore, the reasonableness of the delay must be determined by an examination of the circumstances as they existed on August 29, 2003, when the Respondent's exceptions were denied and the award became final and binding within the meaning of §7122(b) of the Statute, *U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington*, 55 FLRA 293, 296 (1999).

The Respondent did not decide to engage the contractor until June 2, 2004. Once the decision was made, the contract was executed on June 18. However, approximately 9½ months transpired from the time the award became final and the date when the contractor was engaged.[16] According

[15] For the reasons already stated, I will assume, for the purpose of this Decision only, that the Respondent was entitled to fill the NPRED position with a contractor.

[16] Gazaway was already performing services for the Seattle District but it is unclear when he actually began his service for the Northwestern Division.

to the testimony of Gibson, Hlebechuck and Chenowith, all of whom were witnesses for the Respondent, when the Respondent learned that the arbitration award had become final, its responsible representatives decided to delay action on implementation until Gibson had returned from his detail in Iraq. Further delay after Gibson's return was caused by Gibson's work load and leave schedule and discussions with Brock as to whether the Union would agree to the use of a contractor rather than a full-time employee.[17]

While it might have been understandable for the Respondent to have delayed action for a short time due to Gibson's absence, his absence did not justify a delay from August 29, 2003, to June 18, 2004. Contrary to the Respondent's assertions, it took no substantive action to implement the award prior to June 2 when it arranged for the expansion of Gazaway's services. Even after Gibson's return in December of 2003[18], the Respondent further delayed implementation of the award while Gibson again tried to convince Brock to accept the use of a contractor.

The Union's willingness to consider something other than the filling of the NPRED position indicates that the Respondent was justified in spending a reasonable amount of time exploring that alternative. Indeed, Hlebechuck had already had at least one conversation with Brock on the subject. However, the Respondent was not justified in delaying further communication with the Union or in failing to take any substantive action to implement the award during Gibson's absence.[19] Gibson admitted that Krahenbuhl, who acted for him while he was in Iraq, was authorized to engage

[17] The Respondent's discussions with Brock did not represent uncertainty as to what the award meant because Gibson, in his e-mail of January 29, 2004 (Jt. Ex. 4), had expressed the belief that the award required the hiring of a full time employee. Rather, the Respondent was attempting to convince the Union to agree to something other than what the Arbitrator had ordered. Because of the pendency of the Respondent's exceptions to the clarification, I will not address the issue of whether Gibson's e-mail was an admission which is binding on the Respondent. However, it at least indicates the Respondent's motivation when it approached the Union through Brock.

[18] Gibson testified that he took unpaid leave during most of December so as to avoid having to pay back about $10,000 in excess compensation.

[19] Contrary to the Respondent's assertion, the decision to await Gibson's return was not substantive action.

a contractor but that he had instructed Krahenbuhl not to do so (Tr. 104). The short time which elapsed between the date when the Respondent finally decided to use a contractor and the date of the contract for Gazaway's services (Resp. Ex. 1) indicates that the Respondent could have filled the NPRED position much earlier, even allowing for reasonable delays to await Gibson's return and for discussions with the Union.

The Respondent has emphasized that there is no evidence that it deliberately delayed the implementation of the award or that it was grossly negligent in doing so. Assuming that the Respondent's contention is correct, its reliance on that contention is misplaced. The clear import of *Department of Health and Human Services and Social Security Administration*, 22 FLRA 270 (1986), a case cited by the Respondent, is that, while evidence of deliberate delay or gross neglect may make *any* delay excessive, the absence of those elements does not mean that any delay is justified. In affirming the Administrative Law Judge's dismissal of the complaint in that case, the Authority specifically noted that the Administrative Law Judge did not improperly apply a standard of gross negligence or deliberate delay, 22 FLRA at 271.

The Respondent's position is not enhanced by its uncertainty as to whether the ongoing reorganization of the Corps of Engineers prohibited the hiring of additional employees. The fact remains that the Respondent through Gibson eventually decided that it was authorized to engage a contractor for the NPRED position. There is no valid reason why that decision could not have been reached by one of the Respondent's managers other than Gibson.

The Respondent also argues that the Union has not "suffered unduly" from the delay in implementing the award because Gazaway is acceptable to the Union. Again the Respondent misses the point. The lack of serious harm is not a valid element of defense in the case of an alleged failure to implement an arbitration award in a timely manner. Once having prevailed before the Arbitrator and the Authority, the Union was entitled to the fruits of its victory without undue delay.

Once the arbitration award became final the Respondent was obligated, both by the terms of the award and by applicable legal standards, to implement it as soon as possible. The totality of the evidence indicates that, regardless of its good faith, the Respondent failed to meet that obligation. In reaching this conclusion it is not necessary to determine how much of a delay would have been reasonable. The pertinent point is that Gibson's prolonged

absence and the Respondent's uncertainty as to the effect of its reorganization did not absolve it of the responsibility to promptly begin the process of filling the NPRED position.

The Remedy

The General Counsel has proposed two alternative orders. Both proposed orders would direct the Respondent to promptly fill the NPRED position with a professional educator. One of the proposed orders provides for the Respondent's compliance to be determined after the Authority issues its decision as to the Respondent's exceptions to the clarification.

I will not accept either of those orders. As stated above, the decision as to whether the Respondent is obligated to hire a full-time employee rather than a contractor will await resolution by the Authority. The Respondent will be obligated to take further action in compliance with the award only if the Authority dismisses its exceptions. Therefore, I will not include the proposed language directing the Respondent to fill the NPRED position.

I will not include the proposed language regarding a future determination of compliance with the award because that language rests on the implied assumption that the Respondent will defy an adverse ruling on its exceptions. The evidence does not support such an assumption. It would not be appropriate to frame a remedy based only on conjecture. An order containing such a remedy would be akin to an advisory opinion which is prohibited by §2429.10 of the Rules and Regulations of the Authority, *American Federation of Government Employees Local 1864 and U.S. Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina*, 45 FLRA 691, 695 (1992).

In view of the foregoing, I have concluded that the Respondent committed an unfair labor practice in violation of §§7121, 7122 and 7116(a)(1) and (8) of the Statute by failing to implement the arbitration award at issue in a timely fashion. Accordingly, I recommend that the Authority adopt the following Order:

**ORDER**

Pursuant to §2423.41 of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the

Army, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon shall:

1. Cease and desist from:

(a) Failing or refusing to comply promptly with any final arbitration award issued pursuant to its collective bargaining agreement with the United Power Trades Organization (Union).

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply promptly with any final arbitration award issued pursuant to its collective bargaining agreement with the Union.

(b) Post at its facilities, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt, such forms shall be signed by the Commander of the Northwest Division and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that these Notices are not altered, defaced or covered by any other material.

(c) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the San Francisco Regional Office, in writing within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, January 28, 2005.

PAUL B. LANG
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF**

**THE FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of the Army, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon has 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 fail or refuse to comply promptly with any final arbitration award issued pursuant to its collective bargaining agreement with the United Power Trades Organization.

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 comply promptly with any final arbitration award issued pursuant to our collective bargaining agreement with the United Power Trades Organization.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Gerald Cole, Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791 and whose telephone number is: 415-356-5002.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-04-0275 were sent to the following parties:

_____

**CERTIFIED MAIL AND RETURN RECEIPT** **CERTIFIED NOS:**

Vanessa Lim **7000 1670 0000 1175 4977**
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