

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

DEPARTMENT OF LABOR OFFICE OF WORKERS' COMPENSATION PROGRAMS BOSTON, MASSACHUSETTS Respondent and NATIONAL COUNCIL OF FIELD LABOR LOCALS, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 948 AFL-CIO Charging Party	Case No. BN-CA-01-0051

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/her 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 **APRIL 24, 2002**, and addressed to:

Office of Case Control
Labor Relations Authority
607 14th Street, NW., Suite 415
Washington, DC 20424-0001
Federal

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 25, 2002
Washington, DC

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

MEMORANDUM

DATE: March 25, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
BOSTON, MASSACHUSETTS

Respondent

and
CA-01-0051

Case No. BN-

NATIONAL COUNCIL OF FIELD LABOR
LOCALS AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 948, AFL-CIO

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

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

OALJ

02-28

WASHINGTON, D.C.

DEPARTMENT OF LABOR OFFICE OF WORKERS' COMPENSATION PROGRAMS BOSTON, MASSACHUSETTS Respondent and NATIONAL COUNCIL OF FIELD LABOR LOCALS AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 948, AFL-CIO Charging Party	Case No. BN-CA-01-0051

Mr. Scott S. Wilkinson
For the Charging Party

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Lawrence L. Kuo, Esquire
For the General Counsel

David L. Peña, Esquire
Mr. Jerry Lelchook

On Brief: Howard Radzely, Esquire
Acting Solicitor of Labor

Robert A. Shapiro, Esquire
Associate Solicitor
for Legislation and Legal Counsel

Mark J. Maxin, Esquire
Counsel for Labor Relations
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.¹, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether the parties reached an agreement on October 3, 2000, for the basis of settling outstanding claims and pending litigation at the Longshore Office of the Boston Office of Workers Compensation Programs. For reasons set forth hereinafter, I concluded that the parties did reach agreement for the basis of settling outstanding claims and litigation but did not reach agreement on the wording and form of the settlement agreement. Because Respondent refused to bargain over terms of an agreement embodying the agreed basis for settlement, it violated §§ 16(a)(5), and (1) of the Statute.

This case was initiated by a charge filed on October 27, 2000 (G.C. Exh. 1(a)) and by a first Amended charge filed on November 29, 2000 (G.C. Exh. 1(b)). The Complaint and Notice of Hearing issued on February 12, 2001 (G.C. Exh. 1(c)); an Amendment to the Complaint issued on February 23, 2001 (G.C. Exh. 1(e)); and the hearing was set for June 19, 2001, pursuant to which a hearing was duly held on June 19 and 20, 2001, in Boston, Massachusetts, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent and Charging Party exercised. At the conclusion of the hearing, by agreement of the parties, for good cause shown, July 30, 2001, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to August 13, 2001. Respondent and General Counsel each timely mailed an excellent brief, received on or before, August 16, 2001, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "\$ 16(a)(5)."

BACKGROUND

The Boston District Office of Respondent's Longshore and Harbor Workers' Compensation Division of the Office of Workers' Compensation Programs, employs GS-11 Claims Examiners and GS-12 Claims Examiners. The GS-11 Claims Examiners believed they were doing the same work as the GS-12 Claims Examiners and in 1995 a desk audit was conducted, but the Classification Specialist concluded that the GS-11s were doing GS-11 work. In 1996, a grievance was filed which, the Union asserted, concerned only Article 18 which provided as follows:

"Section 1 - Equal Pay for Equal Work

Management and the Union agree to the principle of equal pay for equal work.

"Section 2 - Position Description

Management will maintain an accurate position description for each position, reflecting the significant duties of the employee filling the position."
(Jt. Exh. 2, Article 18, p. 59).

Respondent denied the grievance and the matter was taken to arbitration by the Union. After a hearing the Arbitrator, David R. Bloodsworth, on February 13, 1997, issued his Decision and Award stating in part, as follows:

"AWARD

. . .

"2. Management violated Article 18, Section 1 of the Collective Bargaining Agreement and the principle of equal pay for equal work by paying the Grievant less than other higher paid employees performing the same work.

"3. The arbitrator is without authority to provide any relief or remedy."
(G.C. Exh. 2, p. 14) (hereinafter, "Bloodsworth decision").

The Arbitrator noted that, “. . . it is crystal clear under the terms of Article 15, Section 2.D.1.(a), supported by decisions of the Federal Labor Relations Authority, that classification issues are not subject to review under the negotiated agreement.” (G.C. Exh. 2, p. 11); and that, while GS-12 Examiners are denominated as the journeyman level, have signature authority when serving as Acting District Director, whereas GS-11s are not designated as “Acting” nor do they have signature authority, and GS-12s have handled special projects (id. at 13), in the day-to-day handling of claims, they perform substantially the same work. Thus, he stated,

“. . . I conclude that the difference are peripheral and that the work performed by GS-11 and GS-12 Longshore Examiners is substantially the same. . . .” (id. at 14)

After issuance of the Bloodsworth decision, the parties engaged in negotiations over what the Union viewed as outstanding issues relating to the Bloodsworth decision but were unable to reach agreement. The Union filed a negotiability appeal with the Authority, pursued further negotiations with the assistance of CADRO, without success, and on June 30, 1999, the Authority issued its decision and order on negotiability issues, American Federation of Government Employees, Local 948 and U.S. Department of Labor, Employment Standards Administration, Office of Workers Compensation Programs, Boston, Massachusetts, 55 FLRA 582 (1999). There were five Union proposals before the Authority, numbered 1, 2, 4, 5 and 6; the Authority dismissed the petition as it related to proposal 4 because Respondent had not alleged that it was inconsistent with law, rule or regulation; the Authority found Proposal 1 [“There will be six GS-12” LWC Claims Examiner Positions in the Boston District Office] and 6 [“When a GS-12 LSCE is unavailable, a GS-11 LSCE will act as the District Director when she is absent”] to be non-negotiable; and the Authority found Proposal 2 [“All GS-11 and GS-12 LWC Claims Examiners in the Boston Office shall share equally, on a rotating basis, in performing all off site work”] and 5 [management will define, in writing, what it describes as GS-12 “Complex Cases”] to be negotiable and ordered Respondent to bargain over Proposals 2 and 5.

On, or about, December 3, 1998, Respondent had decided to allocate work between GS-11 and GS-12 Claims Examiners by giving all soft tissue and asbestos claims to GS-12s; the Union filed an unfair labor practice charge and, to settle the ULP charge [BN-CA-90200] and to carry out the Authority's Order on negotiability, the parties on September 11, 2000, entered into a Memorandum of Understanding which provided, in relevant part, as follows:

"The Activity and Union agree to negotiate to the extend required by law over all negotiable proposals resulting from the Decision and Order on Negotiability Issues dated June 30, 1999 and over the December 3, 1998 management decision to 'sort' the work performed by GS-11 and GS-12 employees. Negotiations will commence within 30 days from the execution of this agreement. If the parties are unable to reach agreement, the parties agree that impasse and/or negotiability appeal procedures may be invoked as appropriate.

"By the execution of this Agreement, the Charging Party requests that the Regional Director of the Boston Region of the Federal Labor Relations Authority approve the withdrawal of the charge in BN-CA-90200.

. . . ." (G.C. Exh. 3)

FINDINGS AND CONCLUSIONS

A. Agreement on Basis for Settlement

1. The National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO (hereinafter, "Council"), is the certified exclusive representative of a nationwide consolidated unit of employees of the Department of Labor in field duty stations, etc., as more fully described in Article 1, Section 2 of the parties' National Agreement (Jt. Exh. 2, Art. 1, Sec. 2). The American Federation of Government Employees, AFL-CIO, Local 948 (hereinafter, "Union") is an agent of the Council for the representation of unit employees at the Department of Labor, Office of Workers' Compensation Programs, Boston, Massachusetts (hereinafter, "Respondent").

2. The Boston Office of Workers Compensation Programs is part of the New York/Boston Region; the Director of the New York/Boston Region is Mr. Kenneth Hamlett who is located in New York City. Ms. Dorothy E. Reed, is Deputy Regional Director of the New York/Boston Region; is located in Boston; and she had been placed in this specially created position in June, 2000, in part, in an effort to address the poor employee relations in the Boston Office (Tr. 312-13). Mr. Shelby Hallmark is now Director of the Office of Workers' Compensation Programs and prior to June 17, 2001, when he was made Director, he had been Acting Director since December, 1999, and previously had been Deputy Director for 11 years (Tr. 308-09). He is located in Washington, D.C. Ms. Marcia Finn is District Director, Longshore/OWCP, in Boston.

Mr. Scott S. Wilkinson has been employed by the Department of Labor since 1975; had been in the Wage and Hour Division until March, 2001, when he was elected to the National Council of Field Labor Locals; and is now employed in the Office of the Administrative Secretary in Management, OASAM (Tr. 45). He, also, is President of Local 948, a Vice President of the National Council of Field Labor Locals; in 2000 had been Chairman of the Regional Collective Bargaining Committee and was the chief negotiator for the Union; and he is a Vice President of the New Hampshire AFL/CIO (Tr. 45-46).

Mr. Robert L. Giuliano, who has been employed by the Department of Labor for more than 20 years, is now a Team Leader, Personnel Management Specialist (Tr. 216). In October, 2000, and for about two or three years before (Tr. 265-66), Mr. Giuliano had been the Labor Relations Officer for Respondent in Boston. He no longer is the Labor Relations Officer (Tr. 278). Mr. Richard V. French is now the Deputy Director of Budget for the Department of Labor and is located in Washington, D.C., but in August through October, 2000, Mr. French had served in Boston as Acting Regional Administrator for Administration and Management for the New York/Boston Region (Tr. 351).

Mr. Paul R. Tracy is an investigator for the Wage and Hour Division in Boston, is Executive Vice President of the Union and Chairman of the Regional Collective Bargaining Committee (Tr. 523). From 1991 to 2001, he had also been a National Vice President of the Council (Tr. 523-24).

Mr. James W. Peckham has been employed by the Wage and Hour Division for 23 years; is located in Hartford, Connecticut; is a shop steward; and is a member of the Regional Collective Bargaining Committee (Tr. 145-46).

Mr. Christopher R. Piper has been employed since 1987 as a Longshore Claims Examiner in Boston (Tr. 182). In 2000, Mr. Piper had been a shop steward and Regional Representative (Tr. 183). In March, 2001, he was elected Chief Steward of the Union (Tr. 182).

3. The parties met on October 3, 2000, to negotiate pursuant to the MOU of September 11, 2000 (G.C. Exh. 3). Negotiations began at about 10:30a.m. and present for the Union were: Messrs. Wilkinson (chief negotiator and spokesman), Peckham, Piper and Tracy; and present for the Respondent were: Ms. Reed (chief negotiator), Ms. Finn and Messrs. French and Mr. Giuliano (chief spokesman). (I am aware that the record shows Ms. Reed's and Mr. Giuliano's positions as reversed; but this reflects their actual performance). The Union presented 13 proposals (G.C. Exh. 10). Management requested a short recess to consider the proposals in caucus and, upon their return to the meeting, Mr. Wilkinson read the Union's first proposal ["The draft MOU attached" (G.C. Exh. 3) will be incorporated into the final MOU." (G.C. Exh. 10)] which, after discussion, was agreed to. Mr. Wilkinson read the Union's second, third and fourth proposals and Mr. Giuliano declared each in turn was non-negotiable. After Mr. Wilkinson read the Union's fifth proposal, Mr. Giuliano again said, "Non negotiable-pay is not negotiable" (Resp. Exh. 1) when Ms. Reed interrupted and said, according to Mr. Wilkinson, ". . . 'Wait a minute. You mean if we agree to this, that's it; that's the end of everything?' And the Union said, "Well, yeah.'" (Tr. 71). Union Proposal 5 was,

"5) All Boston Longshore Claims Examiners who have been certified by Management as qualified to be promoted to the GS-12 grade but have received GS-11 pay since the Arbitrator's Decision dated 02/13/97 will receive back pay sufficient to bring their pay retroactively to the GS-12 level from 02/13/97." (G.C. Exh. 10).

4. Ms. Reed testified as follows,

"Q Did the Union express any terms that they were willing to accept to settle the matter?

"A They volunteered that . . . in return for a monetary settlement -- which I think is what was proposed -- that they would waive a number of EEO complaints and grievances. I think there was a ULP. Anyway, there were a number of issues that were pending, and they were willing to make everything go away, which sounded like a pretty good idea." (Tr. 411).

. . .

"Q What did you say to Mr. Wilkinson?

"A About what?

"Q About the settlement.

"A Oh, basically . . . it sounded like a pretty good idea. I had authority to negotiate these items, but I didn't have authority to obligate money . . . So I had to get permission. So I needed to call my boss.

"Q Did you tell that to Mr. Wilkinson?

"A Yes.

"Q What exactly did you say, if you recall?

"A I had to call Ken Hamlett to obligate money. I don't have a budget." (Tr. 412).

The record shows without dispute that Ms. Reed had authority to negotiate the matters set forth in the MOU of September 11, 2000, and she so informed the Union. I find, as Ms. Reed very credibly testified, that she did not have authority to commit funds and that she so told the Union before leaving to call her boss. Her testimony is fully corroborated by the testimony of Mr. Giuliano (Tr. 234-35, 287) and by the testimony of Mr. French (Tr. 357). I reject the testimony of the Union witnesses that they did not know who Ms. Reed left the meeting to call and/or that she did not say she had to submit the settlement proposal to her supervisor. Indeed, Mr. Piper candidly stated that Paul Tracy said, ". . . Dottie was probably going to have to make

some phone calls, possibly to Shelby Hallmark (Tr. 186-87).²

5. There is considerable divergence in the recollection of the witness concerning the time of the events on October 3, 2000. For example, Mr. Wilkinson testified that after management reviewed the Union's proposals, "Well, we took a break, like I said, and came back in the early afternoon." (Tr. 68); Mr. Peckham said, "So we took a long break until--we took a lunch break until about a quarter of one" (Tr. 155); Mr. Piper said, "It was about 15-20 minutes later. . . a number of us left the room to go get coffee across the way from the cafeteria" (Tr. 187). Accordingly, the following chronology is a composite based on testimony which seems most credible and most consistent with the whole record.

6. Mr. Wilkinson said that he presented the Union's proposals at 11:00a.m. (Tr. 67); following the short management caucus, the acceptance of Union Proposal 1 and the fairly summary rejection of Proposals 2, 3 and 4 by Mr. Giuliano, the parties reached the Union's Proposal 5 rather quickly; and the Union's offer of settlement was spelled out and Ms. Reed left to make her call about 11:30a.m. She called her boss, Regional Director Hamlett, and Mr. Hamlett said he did not have the authority to approve the settlement; that he would have to call Mr. Hallmark (Tr. 413). Ms. Reed made the call in Mr. French's office with Mr. French present (Tr. 414) and she reported her conversation with Mr. Hamlett to Mr. French (Tr. 358). Mr. Hamlett could not reach Mr. Hallmark immediately and after waiting a while, Ms. Reed called Mr. Hamlett again, but he still had not reached Mr. Hallmark so, since it was nearly noon, the meeting was recessed for lunch. While Ms. Reed thought she went back to the negotiations to adjourn for lunch, from all the testimony, I conclude that she did not and that the meeting was adjourned for lunch, probably by Mr. French who said he had gone back to the conference room. (Tr. 358) During the lunch break, Mr. Hallmark called Ms. Reed, in Mr. French's office, and Ms. Reed very credibly testified as follows:

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General Counsel has permitted himself to be mesmerized by the "red herring" of Ms. Reed's authority and thus blind to the fact that Ms. Reed called the Director of OWCP, Mr. Hallmark, who unquestionably had authority to commit funds, and he approved the proposed basis for settlement.

"A . . . I got a call back from Mr. Hallmark.

"Q Where did you take that call?

"A In Mr. French's office.

"Q What happened in that conversation?

"A Mr. Hallmark was amendable to the idea, a little bit reluctantly. But he was amendable to consider it. But there were two things that he wanted to make sure would happen. One, he wanted to have an exact monetary amount. You know, he didn't specify anything that was to be, you know, supplied. And the other thing was the Union's agreement to waive everything had to be airtight.

"Q Is that your expression, airtight, or was that his?

"A I don't know. Basically, he wanted an agreement that could not be reneged upon. Do you want me to explain that, or just -- That's it in essence.

"Q What did you understand that to mean when he said it to you?

"A My understanding was that there had been a long history of renegotiation of things, it seemed like endlessly. And he just wanted to make sure that everything the Union said would go away, would go away, and that it would not be brought up again.

"Q Did he give you any particular instruction at the end of the discussion?

"A Those were the only instructions."

(Tr. 415-16).

Ms. Reed said that, after the conversation with Mr. Hallmark, she,

"A . . . went back into the room and told them that Mr. Hallmark was basically in agreement with this, and that, you know, we would have to draft something, and that we needed to come up with a, you know, a monetary amount. Oh, and Mr. Hallmark said that it could not be expressed as back pay. He was adamant about that." (Tr. 416).

Mr. French testified that, when Ms. Reed came back to the conference room where the negotiations were being conducted,

"A She indicated that Shelby had called her back in Boston, and they'd had a conversation. And while he was not opposed to any such settlement, he wanted to make sure that it was language that was acceptable to him, and that it was airtight -- that's my word, not his. But that was, in essence, what was conveyed.

"Q She said this to you?

"A She said it to the group.

"Q To the group, meaning the Union participants, as well?

"A Correct.

"Q Then what happened?

"A I believe not long after that, we adjourned.

"Q What was the understanding that the parties were to do after the meeting adjourned?

"A The management side would work up some draft language based upon what was discussed at the session, and follow up with the Union."

(Tr. 358-59).³

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On cross-examination, Mr. French said, ". . . Shelby called Dottie back that same day in my office. He was then asked,

"Q This is after the meeting?

"A It was -- yes, it would have been after the meeting.

. . .

"A I did not speak with Shelby, but Dottie had reported in that conversation that that is when he not necessarily opposed to a settlement, but needed something acceptable and airtight. But again, that's my word, not his.

"Q Now, you stated that someone was tasked to draft up language at the end of the meeting, draft language, as you had stated?

"A I don't know that anyone was specifically tasked, but management was going to put something together." (Tr. 380).

In context, I conclude that Mr. French's reference to "after the meeting" meant only the morning session before the lunch break and that, as he previously stated, Ms. Reed reported Mr. Hallmark's comments to the entire negotiating group when they reconvened.

Mr. Giuliano's testimony concerning the October 3 meeting is not credible, is contradicted by every other witness present and is rejected. For example, Mr. Giuliano said Ms. Reed came back and ". . . indicated that she was not able to get an answer" (Tr. 236) and the meeting broke up, ". . . we did not go any further." (id.) But he said he drafted a "settlement" based on what had occurred. (Tr. 237).

7. Mr. Wilkinson testified as follows:

"Q And upon their return what, if anything, was said?

"A Well, we talked about having to get the waivers.

"Q 'We' meaning who now?

"A The Union talked about, you know, having to get the waivers from Mary Ellen Mead.

"Q Who from the Union said that?

"A I was talking about that. I did most of the talking. And management indicated that they were going to want a list of everything the Union was giving up, a very specific list that would be included in the Memorandum of Understanding. They didn't want any misunderstandings about what was out there, and they did not want to get blind-sided by an action that might be left out. So we brain-stormed about what was out there. And Dottie Reed said, 'We'll do it.'" (Tr. 78) (emphasis supplied).

. . .

"Q So was it your understanding that an agreement had been reached?

"A Yes.

"Q And what was your understanding of that agreement?

"A That the Union was going to waive all outstanding actions related to equal pay for equal work, basically, every action that was related to the Longshore Claims Examiners, except some grievances that were already filed related to performance appraisals. Dottie Reed felt that those should be, in fairness to employees, were unrelated to equal pay for equal work, and should continue to be processed. The Union would

have given those up if -- or agreed not to arbitrate them. But Dottie thought that those should go forward."

"And we agreed that we wouldn't file any more equal pay for equal work actions down there. And if people have any problems with their grade, they would go through the classification appeal process.

"We also talked a great deal about the positive change that was going to take place in Labor Relations down there. And we tried to assure management there was going to be a new day dawning." (Tr. 79-80).

When asked when the meeting ended, Mr. Wilkinson stated,

"A I would estimate it was sometime around 2:30p.m. The Union left charged with getting the waivers, and Mr. Giuliano was going to write -- well, management was going to write the MOU. And later in the day, I came back through the conference room to advise Mr. Giuliano that we had found Mary Ellen Mead; she was coming in the next day to have lunch with us, and we expected that she would sign a waiver of her EEO complaints at that time. . . ." (Tr. 83) (Emphasis supplied)

8. Mr. Peckham testified as follows:

"Q So did management return?

"A Yes.

"Q Did all of them return, or some of them?

"A I'm not sure if Rick French came back. I remember Dottie, Dottie Reed coming back in and, basically saying we were all -- they were all set, and they could do this. They could meet our needs for back pay. I think there was some more discussion about money. . .

"The other thing was that we had to talk about the individual grievants. I think at that point, there was some discussion. Management wasn't sure about everything that was out there. We had to provide them a list of what we meant by everything; that we had to provide them a list of everything that we were going to drop.

"The only -- The other thing was that Dottie Reed, near the very end of the discussion, talked about trying to keep it from happening again. You know, she still was looking at the possibility of an equal pay for equal work problem, how to resolve that. . . ." (Tr. 165-66)

9. Mr. Piper testified as follows:

"Q Did the management team return?

"A It was about 15-20 minutes later. A number of us ended up having -- a number of us left the room to go get coffee across the way from the cafeteria, to entertain the rest room. And then, we came back at a certain point. I think -- I recall that I was out in the hall, and Bob Giuliano stuck his head out in the hallway and said, 'We're ready to go back.' And at that point, Dottie and Rick French were sitting down at that point, and everybody had big smiles.

"Q The Union and management?

"A Yes. And Dottie said, 'It looks like we've reached an agreement of this.' Bob Giuliano said that he would -- he and Rick French had boilerplate language, that they would go ahead. They would write this up. And then, once they had this written up, this agreement in kind, it would be presented to the Union.

"Scott Wilkinson raised the issue -- or Bob Giuliano phrased the issue that, you know, there was, the issue as to what the Union was giving up in turn for this settlement monetary figure. And Scott said, well, we would have to basically try to detail or articulate, account for exactly what it was for the various members to give up. Also, Scott Wilkinson made it clear to the folks on the management side of the team that there were other people involved, people that were not there at the time, and that they were -- we were representing them, but they would have to sign individual waivers or releases.

"Q So was there anything in dispute at that point?

"A No. Management had -- Scott had said to the effect that we would trust management to come up with the accurate numbers, based on hours that people had

actually worked from the time of the Bloodsworth arbitration decision up until the time of this meeting on October 3rd. . . ." (Tr. 187-88) (Emphasis supplied).

10. Mr. Tracy testified as follows:

"Q Can you tell us what happened when the Union reached Proposal Number 5?

"A Proposal Number 5 was one where Dottie Reed kind of seized upon that as perhaps a proposal that could wrap up or resolve all of these issues. That was her question, 'would this resolve everything for you?' And we indicated, yeah, probably, it would.

"Q When she said 'everything,' was there any understanding of what that term meant?

"A Well, it was to -- It was a back pay proposal, basically. We've had, as I said, the ongoing issue had been the disparity in grades, and we had won an arbitration some years ago where the Arbitrator held that he saw no difference between the work being done by Grade 11's and Grade 12's. And so, we held that it was Grade 12 work, and we felt that they should be made whole to the Grade 12, or somehow be paid at the Grade 12 from the date of that decision. And that's the substance of this proposal, I believe.

"Q Do you recall who had raised the other grievances and EEO's?

"A Well, in conjunction with this being the, you know, the fix for all of the ills that we felt we had to address, the management -- and I don't recall who on that side of the table -- proposed that we -- if that were to happen, we would have to waive all of the other pending grievances/EEO/ULP's, anything we had flying at the time. In fact, I think there was an Office of Special Counsel complaint in there, one or two of those.

"And we indicated that we as a union didn't have control over all of those, especially the third-party appeals procedures such as an EEO, and that we'd have to get that signed off by those people.

"Q So was it the Union or management that had raised the possibility of withdrawing the outstanding grievances and other claims?

"A I believe management set that as a pre-

condition of meeting this proposal.

"Q At any time, did the Union or management leave the room?

"A Yes, management left the room, I believe.

"Q Did they say what they were going to be doing when they left?

"A Caucusing, as we do. I mean, each side caucuses, and I believe they called for a caucus then.

"Q Did they return to the room?

"A Yeah.

"Q Did anyone ask them what they were doing?

"A Yeah. We asked them what their issues were. I mean, I can't place the timing of their -- I mean, their issue of resolving or waiving these other appeals may have come at that point. I can't recall, but they were pretty clear to us that if we could obtain those waivers, i (sic) we could resolve those, that they could meet this condition and stop, you know, resolve everything.

"The only other issue was, we talked round about what this might mean, how much money.

"Q Was that before or after management left the room?

"A After, when they came back." (Tr. 535-37)
(Emphasis supplied).

. . .

"Q Now, going back to the October 3rd negotiations, at what point did the parties break, or adjourn, I should say?

"A For that day, I believe it was right after we reached the agreement on the substance of this resolution, that Bob would go -- or someone would go and write this thing, and I'm quite sure it was Bob. And that we would then, at the same time, try to find these people and get them to sign waivers. . . .

"Q So when you left the meeting, what was your feeling?

"A There was no doubt in my mind we had reached an agreement, that we had a deal, and it was going to resolve a lot of stuff that had been flying around for a long time and had consumed us on both sides. . . .
(Tr. 541-42).

Ms. Reed credibly testified about her conversation with Mr. Hallmark on October 3 and, when she returned to the Conference Room, her telling the group that, ". . . Mr. Hallmark was basically in agreement. . . ." (Tr. 416); ". . . I told them that Mr. Hallmark essentially was willing to consider this proposal if we could come up with an agreement that he approved of." (Tr. 443); ". . . That Mr. Hallmark was in agreement with us trying to work out an agreement. And we had to come up with a written agreement that was acceptable to both parties, and we had to come up with a dollar amount." (Tr. 445).

Mr. French credibly testified that Ms. Reed came back to the Conference Room and told the group, ". . . that Shelby had called her back . . . And while he was not opposed to any such settlement, he wanted to make sure that it was language that was acceptable to him, and that it was airtight. . . ." (Tr. 358-59). Although the Union representatives did not confirm Ms. Reed's reference to Mr. Hallmark, Mr. Piper conceded she had mentioned having to make at least a phone call (Tr. 205), they confirmed and corroborated the substance of her statements to them when she returned to the Conference Room. Thus, Mr. Wilkinson said that, ". . . management indicated that they were going to want a list of everything the Union was giving up . . . They didn't want any misunderstandings And Dottie Reed said, 'We'll do it.'" (Tr. 78); Mr. Peckham said, ". . . I remember Dottie, Dottie Reed coming back in and, basically saying we were all -- they were all set, and they could do this. They could meet our needs for back pay." (Tr. 165); Mr. Piper said, ". . . and Dottie said, 'It looks like we've reached an agreement of this.' . . . And Scott said, well, we would have to basically try to detail or articulate, account for exactly what it was for the various members to give up. Also, Scott Wilkinson made it clear . . . that there were other people involved . . . we were representing them, but they would have to sign individual waivers or releases." (Tr. 187-88); and Mr. Tracy said, ". . . they were pretty clear to us that if we could obtain those waivers, i (sic) we could resolve those, that they could meet this condition and stop, you know, resolve everything" (Tr. 537).

Not only did their words show agreement on the basis for settlement but the actions of the parties confirm it. The Union was galvanized into action and tracked down

Ms. Mary Ellen Mead in a sanitarium (Tr. 81); talked to Messrs. Lizotte and Cloutterbuck (Tr. 85); Mr. Wilkinson came back to advise Mr. Giuliano that they had found Ms. Mead and she was coming in the next day to have lunch with them and he expected her to sign a waiver of her EEO complaints at that time (Tr. 83). Ms. Reed said that when the meeting ended, she, ". . . Ran like crazy to SOL [Solicitor of Labor] . . . I went to see Connie Franklin . . . Connie called another attorney named Paul Katz, and he joined us and I told her what had happened in the meeting. She thought it was a terrific idea, and she had no problem with drafting it for us" (Tr. 418).

Mr. Hallmark testified, stated that he talked to Ms. Reed about negotiations before October 6 (Tr. 313-14), but was never asked about a conversation with Ms. Reed on October 3. Because Respondent studiously avoided asking Mr. Hallmark if he had spoken to Ms. Reed on October 3, I draw the inference that, if asked, he would have confirmed her testimony that he agreed to settle the matter. Indeed, his statement that on October 6, he said, ". . . I was adamant, as I had told them earlier, that I was not going to agree to any kind of a settlement agreement that capitulated on the notion of back pay . . ." (Tr. 316), confirms, as Ms. Reed testified, that Mr. Hallmark told her that while he was basically in agreement, but ". . . we needed to come up with a, you know, a monetary amount. Oh, and Mr. Hallmark said that it could not be expressed as back pay. He was adamant about that." (Tr. 414). Finally, Mr. Hallmark stated that, ". . . I agreed ultimately to go along the lines of the settlement that this second document lays out, the one that you've called Joint Exhibit 3." (Tr. 318), which, while it does not confirm that he had been, ". . . basically in agreement" on October 3, it does show a consistent mind set.

Accordingly, I conclude that Respondent on October 3, 2000, did agree on the basis for agreement by paying a sum of money, to be computed by the difference in the earnings of the Longshore Claims Examiners paid at the GS-11 rate and the GS-12 rate had they been promoted to GS-12 on February 13, 1997, to October 3, 2000 (Tr. 72, 75, 60-61, 188); but the GS-11 Longshore Claims Examiners would remain GS-11 Claims Examiners and after October 3, 2000, would be paid as GS-11 Claims Examiners (Tr. 80, 461, 554). In return, the Union would waive all pending grievances/EEO/ULP/Office of

Special Counsel, anything they had flying at this time; would obtain signed waivers from the employees; the settlement would constitute compliance with the Authority's negotiability decision; there would be no more issues over equal pay for equal work; and if any employee has a problem with the grade he, or she, is working, he, or she, would have to utilize the classification appeal procedure and the Union would not file a grievance or EEO complaint in the future over equal pay. (Tr. 73, 162, 536).

I so conclude notwithstanding Mr. Hallmark's disclaimers (Tr. 316, 322, 324). The settlement was not a capitulation on the Classification of Longshore Claims Examiners and was not a payment of back pay claims, although for computing the amount to be paid the difference in pay between a GS-11 and GS-12 was utilized. GS-11 Longshore Claims Examiners remain GS-11 Claims Examiners and after October 3, 2000, they will be paid as GS-11 Claims Examiners. The payment was to resolve a wide range of pending litigation; bargaining concerning definition of a GS-12 complex case and equal distribution of off-site work; union's agreement that there would be no more issues over equal pay for equal work, and if any employee has a problem with grade, the classification appeal procedure must be used and Union will not file any grievance or EEO complaint in the future over equal pay. Of course, Respondent's December, 1998, allocation of work between GS-11 and GS-12 Claims Examiners will, to the extent made, further differentiate the work performed by each classification.

Mr. Hallmark may have been ill served by Ms. Reed's impetuous embrace of the Union's offer and her submission of the proposal to him without ascertaining the cost⁴; but Mr. Hallmark agreed to her recommendation and gave her, ". . . the instructions on what had to be in the agreement." (Tr. 443)

B. No Agreement on Wording and Form of Agreement

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Ms. Reed said that when she talked to Mr. Hallmark, ". . . we had no idea what the back pay would approximate" (Tr. 444) and Mr. Tracy said they did not talk about cost until after Ms. Reed came back, i.e., after talking to Mr. Hallmark (Tr. 537).

Messrs. Peckham (Tr. 167), Piper (Tr. 187) and Tracy (Tr. 540) believed that Mr. Giuliano was told to prepare the written document. I do not credit their recollection. Rather, I credit the testimony of Mr. Wilkinson that when the meeting ended at about 2:30 p.m., ". . . The Union left charged with getting the waivers, and Mr. Giuliano was going to write -- well, management was going to write the MOU . . ." (Tr. 83). That "management", and no particular person, was designated at the meeting to write the document is corroborated by the testimony of Mr. French (Tr. 380). Nevertheless, Mr. French believed that his Office, ". . . the Administration and Management and, specifically, Bob Giuliano" was to work on the language (Tr. 360) while Ms. Reed understood that she was to draft the document.

As noted above, when the meeting ended, Ms. Reed immediately went to see Ms. Connie Franklin in the Solicitor's Office about preparing the document. Mr. Giuliano, ". . . did not receive my [Reed's] message" (Tr. 444) and on the afternoon of October 3 began work on a document, as he informed Mr. Wilkinson (Tr. 83). The following afternoon, October 4, the Union delivered the signed waivers of Ms. Mead (G.C. Exh. 4) and Mr. Clutterbuck (G.C. Exh. 5) and Mr. Wilkinson, in Mr. French's Office, saw that Mr. Giuliano had a copy of a MOU he, Giuliano, had prepared (Jt. Exh. 1) and asked to see it. Mr. Wilkinson stated, ". . . I said, 'Well, can I see it?' And Bob looked over -- Bob Giuliano looked over at Mr. French, and Mr. French nodded, made a gesture for him to give it to me. And I read it, and I said, 'This looks pretty good. Can I keep this?' And they said yes." (Tr. 89).

Mr. Giuliano stated,

"A Basically, that Mr. Wilkinson was anxious to get something in writing regarding the discussions of the day before, the negotiations of the day before. And basically, I was very reluctant to give it to him.

"Q Why was that?

"A Well, because I had not shared it with the full management team yet.

. . .

"Q What did you say to them?

"A Essentially, that; that, you know, this was just a draft, and I had not shared it with the management team, and I really didn't want to give it to them.

"Q What happened then?

"A . . . Mr. French said, 'Give it to him.' So I gave it to him." (Tr. 240-41).

I credit Mr. Giuliano's testimony on this matter, although I found his testimony in other regards not credible, because it was confirmed and corroborated by the testimony of Mr. French who I found to be a wholly credible witness. Mr. French stating, in part, that he told Mr. Wilkinson ". . . it had not been completed; that Bob was working on it, and it had not yet been shared with anyone else . . . that Scott was insistent on seeing some language before he left, and I was comfortable with showing Scott where we were informally headed with language . . . Bob was reluctant, and indicated that it was his draft; and he had not yet shared it with any other management team member . . . Bob shared the draft, with the previous caveat that no one else had seen it. And Scott took it, and left not long thereafter." (Tr. 362-64).

As I have previously found, Ms. Reed on October 3 had told the Union that,

". . . Mr. Hallmark was basically in agreement with this, and that, you know, we would have to draft something, and that we needed to come up with a, you know, a monetary amount. Oh, and Mr. Hallmark said it would not be expressed as back pay. He was adamant about that." (Tr. 416).

After Mr. Giuliano had given Mr. Wilkinson a copy of his draft MOU (Jt. Exh. 1), Mr. Giuliano on October 4, showed a copy to Ms. Reed and he said she told him she didn't think Shelby would go along with it (Tr. 244) which, he said, made him very unhappy. Ms. Reed credibly stated as follows:

"A Mr. Giuliano came to my office [on October 4] and he had this in hand.

"Q What did he say to you?

"A He said that he had drafted this, and that he had shown it to Scott Wilkinson, and Scott was very, very pleased with it. And he wanted to know what I thought about it.

. . .

"A Well, I read it, and I said, 'Shelby Hallmark will never approve this.'

. . .

"A I said, 'I can't send this to Shelby.' And Mr. Giuliano said, 'Why not?' And I said, 'Because Shelby will not approve this. This is going to annoy him.' And he wanted to know why, and I said, 'Well, this is not the box that he wanted constructed to make sure that everything would go away forever.' And Mr. Giuliano was very insistent that I send it to him, so I sent it to him.

"Q On that day, the 4th?

"A Yeah." (Tr. 420).

Predictably, Mr. Hallmark was furious and very shortly after she had faxed Mr. Giuliano's document, Mr. Hallmark's secretary called to say she was setting up a telephone conference for October 6 and they wanted Ms. Reed, Mr. Giuliano, Ms. Finn and the Solicitor (actually Ms. Franklin) present on the call (Tr. 421).

Mr. Wilkinson stated that he called Ms. Reed on October 5 and when he asked about signing the MOU, she responded,

". . . she said she couldn't do that just yet. She was going to have a phone conference with Shelby Hallmark, the administrator the next day, and wouldn't be able to sign anything until she did that." (Tr. 102).

I have grave reservations, in view of her statement to Mr. Giuliano, that this truly represents Ms. Reed's comments to Mr. Wilkinson about Mr. Giuliano's MOU, but, as Ms. Reed

recalled no conversation with Mr. Wilkinson about the MOU (452), Mr. Wilkinson's testimony is unchallenged.

In the telephone conference on October 6, Mr. Hallmark expressed his anger at Mr. Giuliano for giving a copy to the Union before showing it to all of the management team, for writing a document that wholly failed to comply with his specific instructions that there must be a fixed amount of money and that it could not be expressed as back pay, and that did not provide adequate protection that issues sought to be settled, be settled. Mr. Hallmark rejected Mr. Giuliano's MOU but eventually agreed to a settlement based on payment of a fixed sum and an agreement to be prepared by Ms. Franklin. On October 19, 2000, Mr. Giuliano effectively withdrew his "exploratory" proposal and submitted Respondent's committed offer (Jt. Exh. 3; G.C. Exh. 7) which made the sum to be paid \$8,000. On October 24, 2000, the Union rejected Respondent's offer (G.C. Exh. 8) and insisted that Respondent sign the MOU Mr. Giuliano had given them on October 4th.

From all the evidence, I conclude that Mr. Giuliano told Mr. Wilkinson on October 4 that the MOU he, Giuliano, had prepared (Jt. Exh. 1) had not been shown to the other team members and in particular Ms. Reed who was Respondent's chief negotiator. Indeed, Mr. Wilkinson recognized that Ms. Reed was Respondent's Chief Negotiator when he called her the next day, October 5, about the MOU and was told at that time that Mr. Giuliano's MOU could not be signed. Neither Mr. Giuliano nor Mr. French had any authority to submit any document to the Union without approval and both knew, or should have known, that Mr. Giuliano's draft did not comply with any of the very specific terms Ms. Reed had stated, namely: a) that there must be a fixed sum of money; b) that it could not be expressed as back pay; and c) the language must be acceptable to Mr. Hallmark. (Tr. 358-59; 416). Because the actions of Messrs. French and Giuliano in giving Mr. Giuliano's draft MOU to the Union was unauthorized and was contrary to instructions given by Respondent, Respondent made no offer on the form and language on October 4th. Although Mr. Wilkinson, at the hearing, stated that, had Respondent adhered to its October 3 agreement as the basis for computing the amount of money, he would have agreed to the form and language of the Agreement submitted by Respondent on October 19, except, of course the amount of \$8,000 in paragraph II (Tr. 111), nevertheless, the Union

made no such offer to Respondent and, plainly, the parties did not reach agreement on the form and language of an agreement on October 4, or thereafter, and Respondent has not failed to comply with §14(b)(5) of the Statute and has not violated §16(a)(8) of the Statute. Accordingly, these allegations of the Complaint are hereby dismissed.

Having found that Respondent on October 3, 2000, agreed to the basis for settlement⁵, which it subsequently disavowed, in violation of §§16(a)(5) and (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(c), and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the Department of Labor, Office of Workers' Compensation Programs, Boston, Massachusetts, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate in good faith with the National Council of Field Labor Locals, AFGE, AFL-CIO, Local 948 (hereinafter, "Union"), the representative of bargaining unit employees, by refusing to adhere to the basis for settlement agreed to by the parties on October 3, 2000.

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

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Namely to pay a sum of money, computed by the difference in pay for GS-11 Longshore Claims Examiners in the Boston Office and pay at the GS-12 level from February 13, 1997, to October 3, 2000; the GS-11 Longshore Claims Examiners to remain GS-11 Claims Examiners; and after October 3, 2000, will be paid as GS-11 Claims Examiners, in exchange for the Union's withdrawal of all grievances/EEO/ULP Office of Special Counsel cases relating to equal pay and or classification; compliance with the Authority's negotiability decision would settled thereby; and the Union would agree that no future grievance or EEO complaint would be filed over equal pay and if any employee has any problem with his or her grade, the Classification Appeal Procedures must be used.

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 Union, bargain in good faith over the terms and language of an agreement adhering to the basis for settlement agreed to on October 3, 2000.

(b) Post at its Boston Office of Workers' Compensation Programs, Boston, Massachusetts, 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 Director, Office of Workers' Compensation Programs, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 25, 2002
Washington, D.C.

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

The Federal Labor Authority has found that the Department of Labor, Office of Workers' Compensation Programs, Boston, Massachusetts, 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 negotiate in good faith with the National Council of Field Labor Locals, AFGE, AFL-CIO, Local 948 (hereinafter, "Union"), the representative of bargaining unit employees, by refusing to adhere to the basis for settlement agreed to by the parties on October 3, 2000.

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

WE WILL, upon request of the Union, bargain in good faith over the terms and language of an agreement adhering to the basis for settlement agreed to on October 3, 2000.

DIRECTOR _____

DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION
PROGRAMS

Dated: _____

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, Boston Region, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617)424-5730. [BN-CA-01-0051]

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. BN-CA-01-0051, were sent to the following parties:

CERTIFIED MAIL _____

CERTIFIED NUMBERS:

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MARCH 25, 2002
WASHINGTON, DC