**64 FLRA No. 137**

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LANGUAGE INSTITUTE
FOREIGN LANGUAGE CENTER
MONTEREY, CALIFORNIA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1263, AFL-CIO
(Charging Party)

SF-CA-05-0269

DECISION AND ORDER

April 30, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

## I. Statement of the Case

This case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions. [1]

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to comply with an oral agreement, entered into with the Union, concerning the administrative rank advancement of certain employees to higher pay bands under the Faculty Personnel System (FPS). [2] The Judge found that the Respondent violated the Statute and recommended that the Respondent be ordered to comply with the agreement and make whole eligible employees.

Upon consideration of the Judge's decision and the entire record, we deny the Respondent's exceptions and adopt the Judge's findings, conclusions, and recommended Order to the extent consistent with this decision.

## II. Background and Judge's Decision

The DOD, DLI is a training center for linguists. The Union represents a unit of Respondent employees, consisting of approximately 1200 faculty members.

The FPS is authorized under 10 U.S.C. § 1595. [3] DOD issued an implementing regulation, approving the FPS and delegating authority to implement the pay system to the Respondent. Judge's Decision at 4 (citing J. Ex. 1). [4]

The Respondent and the Union entered into a final agreement regarding implementation of the FPS at DLI. The Respondent and Union also agreed upon an FPS Handbook, which "sets out the general principles and procedures underlying [the] FPS, such as the faculty rank structure and salary administration, as well as procedures for an open season during which faculty members could choose to transfer to FPS or remain as GS [General Schedule] employees." Judge's Decision at 4-5. Later, a new FPS Handbook was issued that no longer contained the transition procedures.

Before the FPS Regulation was issued and a final agreement was reached, the Respondent's Chancellor [5] and the Union President entered into a Transition Period Agreement (TP Agreement). That agreement provided, among other things, that during the transition period,

1. The Respondent filed a motion requesting that the Authority strike the GC's opposition as untimely filed under §§ 2423.40(b) and 2429.21 of the Authority's Regulations. In response, the GC claims that the Respondent has misconstrued the Authority's Regulations governing time limits, and that the GC's submission is timely. The Respondent served its exceptions by mail on Monday, October 30, 2006. Thus, both the 20-day time limit under § 2423.40(b) and the 5-day mail period under § 2429.22 would have expired on a weekend day and, with respect to the latter period, the next workday was Monday, November 27, 2006. As such, pursuant to §§ 2423.40(b), 2429.21, and 2429.22 of the Authority's Regulations, the GC Opposition filed on November 27, 2006 is timely. Therefore, we deny the Respondent's motion to strike the GC's opposition.

2. Documents of the United States Department of Defense (DOD) refer to this system as the Faculty Pay System, but the Defense Language Institute, Foreign Language Center (DLI) has referred uniformly to the system as the Faculty Personnel System. Because the two systems are the same pay system, FPS refers to both.

3. The relevant provisions of 10 U.S.C. § 1595 are set forth in the Appendix to this decision.

4. Joint Exhibit 1 contains a memorandum from the Assistant Secretary of Defense, Force Management Policy (ASD) approving the DLI FPS and the FPS regulation implementing the FPS. The pertinent text of the regulation (hereafter referred to as the FPS Regulation) is set forth in the Appendix to this decision.

5. During the relevant time period, the Chancellor also held the title of Provost before it was changed to Chancellor.

which would run until February 28, 2001, "FPS Charter members [6] who consistently meet performance expectations should not be financially disadvantaged for having left the GS system in either total annual or base pay." *Id.* at 5 (quoting J. Ex. 5). [7] The transition period was later extended and was in effect at the time of the hearing. Judge's Decision at 6.

Since 1997, all faculty members are hired into the FPS. Each faculty member holds one of the following academic ranks: Assistant Instructor, Instructor, Senior Instructor, Assistant Professor, Associate Professor, or Professor. *Id.* Each academic rank has a pay range that specifies the minimum and maximum salary that can be paid to an FPS member holding that rank. At the beginning of each year, pay increases are determined through a performance point system in which contribution points (merit points) are given to each employee based on the employee's annual performance evaluation and other accomplishments. *Id.* Using a formula based on where an employee's salary falls along the pay range continuum for his/her rank, a determination is made regarding what portion of merit pay will go to base pay and what portion will be paid as a one time cash bonus. *Id.* at 7. Once an employee reaches the maximum salary for his/her rank, the base salary does not increase; the year's merit pay is all paid as a cash bonus. *Id.*

In March 2004, the Union raised the issue of administrative rank advancement for Charter Members with the Chancellor. *Id.* at 9. Noting that a number of employees had reached the top of their pay band, the Union worried that, because there was a limited amount of money for increases to base pay, these employees would lose money to their base pay, which could impact their contributions to the Thrift Savings Plan (TSP) and retirement. The Union subsequently submitted a proposal regarding this matter and met several times with the Chancellor. The Union believed that it had reached an oral agreement with the Chancellor that Charter Members "at the top of their pay band[s] would be administratively advanced." *Id.* at 11.

In 2004, an issue also was raised regarding faculty who had been competitively promoted. *Id.* at 8. Per FPS policy, these employees had not received pay increases at the time of their promotions. *Id.* As a result, DLI increased their salary to make it consistent with what it would have been had they been hired from the outside. *Id.* at 9. According to the Judge, this change was implemented mid-year, without a written agreement. *Id.*

In January 2005, faculty members received letters detailing their merit pay and bonus for the year. At that same time, the Chancellor resigned, and an Acting Chancellor was named to replace him.

Concerned about the implementation of the agreement regarding administrative rank advancement, the Union met with the Acting Chancellor. *Id.* at 11. The Acting Chancellor indicated that he was unaware of the agreement and asked if the Union had anything in writing. The Union replied that it did not and suggested the Acting Chancellor contact the former Chancellor. *Id.* at 12. The Acting Chancellor informed the Union that, if he had known of such an agreement, he would have "quashed it" and noted that this type of an agreement "could only be done with the Assistant Commandant." *Id.* The Union replied that it had "never discussed anything like this with the Assistant Commandant, and that FPS issues, agreements and implementation were always [discussed] with [the former Chancellor]." *Id.* The Union subsequently sent a letter to the Acting Chancellor, asking him if he had contacted the former Chancellor. The Acting Chancellor responded by reiterating his position and asking for a written agreement and documentation. The Union then filed the unfair labor practice (ULP) charge that resulted in the instant complaint.

The Judge stated that the issue before her was "[w]hether or not the Respondent violated [§] 7116(a)(1) and (5) of the Statute by failing to and refusing to comply with the provisions of an oral agreement entered into [by the former Chancellor] and the Union." *Id.* at 13. To answer this question, the Judge stated that she needed to determine "whether [the former Chancellor] had actual or apparent authority to enter into an agreement with the Union on behalf of the Respondent, and, if so, whether the agreement was such that the Respondent was obligated under the Statute to abide by it." *Id.* at 19.

6. Faculty members working at DLI in 1996 who transferred into the FPS are identified as "Charter Members."

7. Employees were placed in the FPS according to their GS salary: the majority — GS-9s and GS-11s — became Assistant Professors; GS-7s became instructors; GS-12s became Associate Professors; and GS-15s became Professors. Judge's Decision at 5 n.5. At the time of the hearing, there were approximately 350 Charter Members, or approximately 10% of the faculty at DLI.

The Judge concluded that the former Chancellor "had actual authority to enter into the agreement," noting that such authority can be found in the FPS regulation as well as the parties' FPS Handbooks. [8] *Id.* at 23. The Judge found that the evidence shows that the former Chancellor exercised this authority until his retirement.

Moreover, the Judge determined that, even if the former Chancellor did not have actual authority, he had apparent authority to bind the Respondent. The Judge noted that the Union dealt exclusively with the former Chancellor on FPS issues on an ongoing basis; that the former Chancellor was the primary contact on all FPS matters; and that there is "no evidence that the Respondent ever discredited" the former Chancellor's authority. *Id.* at 23 & 24. Citing *U.S. Small Business Administration, Washington, D.C.*, 38 FLRA 386 (1990) (*SBA*), the Judge found that the former Chancellor's actions are distinguishable from those of the manager in *SBA*, where the Authority found the manager had no actual or apparent authority to enter into an agreement. The Judge found that the former Chancellor's actions were more similar to those of the union officer in *AFGE, Local* 2207, 52 FLRA 1477, 1481 (1997), where the Authority found that the officer had apparent authority.

The Judge also determined that the evidence established that the former Chancellor "entered into an agreement with the Union regarding the administrative rank advancement" of Charter Members at the top of their pay bands to the next rank. *Id.* at 24. The Judge found that the GC witnesses — the Union President, Chief Steward, and former Chancellor — "all credibly testified regarding . . . the agreement reached in December 2004." *Id.* The Judge noted that even the Respondent's witnesses "acquiesced in the knowledge that an agreement had been reached." *Id.*

The Judge further found that the terms of the agreement were "quite clear": "[C]harter [M]embers at the top of their pay band[s] would be administratively rank advanced to the next rank[.]" *Id.* Moreover, noting that it is "well settled that an oral agreement may be binding," the Judge found that the agreement was binding on the parties, even though it was oral and had never been reduced to writing. *Id.* at 25.

The Judge then examined whether the agreement was "clear and unambiguous." *Id.* at 26. The Judge found that the Union and the former Chancellor were of "one mind" as to the terms of the agreement and that the agreement was both "clear and concise." *Id.* at 27. The Judge, although noting that "the parties did not discuss [the] specific numbers of employees to be involved" and that it "appear[ed] that both [the Union President and the Chief Steward] would benefit from the agreement[,]" concluded that "these failures [could] not overcome the evidence that the parties had a simple agreement[.]" *Id.* at 26. Moreover, according to the Judge, there was no evidence that the agreement was inconsistent with prior agreements reached by the former Chancellor and the Union on the FPS or "Transition Agreements[.]" *Id.* at 27.

Accordingly, the Judge found that, by refusing to comply with the subject agreement, the Respondent committed a ULP under the Statute. *Id*. at 27 (citing *U.S. Dep't of Def., Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 40 FLRA 1211 (1991) (*Robins AFB*)). The Judge also found that this failure constituted an unjustified and unwarranted personnel action that resulted in the withdrawal or reduction of employees' pay under the Back Pay Act, 5 U.S.C. § 5596, and recommended, among other things, a make whole remedy, including backpay, for eligible Charter Members.

## III. Positions of the Parties

### A. Respondent's Exceptions

#### 1. Procedural Matters

The Respondent requests that the Authority strike GC's Ex. 10 from the record or not consider it. *See* Exceptions at 36 (citing 5 C.F.R. § 2423.24(e)). [9]

The Respondent asserts that, pursuant to § 2423.23 [10] of the Authority's Regulations, the parties were required to disclose, prior to the hearing, the documents that they intended to offer into evidence. The Respondent contends that the GC did not disclose GC Ex. 10 and that the Respondent's representative stated during the hearing that he had not seen the document previously. *See* Exceptions at 36. The Respondent acknowledges that its representative "should have objected to the document at the hearing," but asserts that this failure should not be held against it because the GC "ambushed" the Respondent's representative by producing the . . . document at the hearing. *Id.* at 36 n.49. The Respondent also contends that its failure to object

8. The pertinent text of the former and current FPS Handbooks are set forth in the Appendix to this decision.

9. Section 2423.24(e) of the Authority's Regulations is set forth in the Appendix to this decision.

10. Section 2423.23 of the Authority's Regulations concerns prehearing disclosures and, among other things, requires parties to exchange documents "at least 14 days prior to the hearing[.]" 5 C.F.R. § 2423.23.

should be excused because of the "extraordinary circumstances created by the GC's failure to adhere" to the disclosure rules.[11] *See id.* (quoting 29 U.S.C. § 160(e)).

In addition, the Respondent requests that the Authority, pursuant to § 2429.5 of its Regulations, take official notice of certain documents enclosed with the Respondent's Exceptions (Tabs A to P). *Id.* at 36-39. The Respondent contends that it is proper for the Authority to take official notice of the documents at: (1) Tabs A, B, K, L and O because official notice permits the acceptance of matters within the specialized or expertise of the administrative agency, including agency regulations (citing *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875, 875 (1990) (*Customs*)); (2) Tab C because it is relevant to the Authority's review of the case; (3) Tabs D to H and M because they address matters the Judge relied on in her decision and "bear upon the credibility of the [GC's] witnesses"; (4) Tabs I and J because of their "widespread applicability" (citing *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 56 FLRA 381, 384 (2000) (*Veterans Affairs*)); (5) Tab N because it is "merely a modification of a document . . . already . . . admitted into evidence"; and (6) Tab P because it "bears upon" the Respondent's motion to strike GC Ex. 10. Exceptions at 39.

2. Merits

The Respondent's thirteen exceptions challenging the Judge's credibility (Exception A), factual findings (Exceptions B to L), and conclusion (Exception M) focus primarily on three issues: (1) whether the former Chancellor had actual or apparent authority to enter into the agreement; (2) whether the Judge erred in finding that the agreement was valid; and (3) whether the Judge erred when she concluded that the Respondent violated the Statute by refusing to comply with the agreement.

Exceptions A to D concern the credibility of the GC's witnesses — the former Chancellor, the Union President and the Union's Chief Steward — and relate to all three issues. The Respondent challenges the Judge's determination that these witnesses testified credibly regarding the agreement, asserting that the Judge offered no "explanation for how she reconciled obvious [bias of the GC's witnesses and] inconsistencies [in] the[ir] testimony" with her credibility findings. Exceptions at 2.

The Respondent contends that the record shows that the Union President and the Chief Steward "will each benefit" from the subject agreement because they are "[C]harter [M]embers at the top of their pay bands." *Id.* at 3 (footnote omitted). The Respondent further claims that the Union President testified that he never met with the Commandant or the Assistant Commandant on FPS matters, but that the "weight of the evidence suggests" that this is not true. *Id.* According to the Respondent, the record shows that the former Chancellor was not one of the management officials who negotiated with the Union on the "implementation of the FPS Handbook"; instead, the Respondent asserts, the negotiating team was led by an Assistant Commandant. *Id.* at 10. The Respondent also asserts that the Union President "conceded in his testimony that he . . . me[t] with the Commandant" about other DLI issues, and that one of its witnesses testified that both Assistant Commandants often met with the Union to discuss faculty issues. *Id.* at 11.

The Respondent contends that the record also reveals examples of bias regarding the former Chancellor. For example, the Respondent notes that: (1) the former Chancellor believed his salary was "'below market'"; (2) the Respondent "refused to give [the former Chancellor] a separation bonus"; and (3) the former Chancellor's actions were motivated by a "desire to thank" people who had supported him. *Id.* at 4 (quoting Tr. at 121 & citing Tr. at 151-52, 173-74). The Respondent also asserts that "significant" parts of the former Chancellor's testimony are "inherently implausible." Exceptions at 4. For example, the Respondent notes that the former Chancellor "claimed that he did not need the consent of the Commandant to implement changes to the FPS . . . even though . . . [the FPS Handbook] made the Commandant 'responsible for all actions associated with . . . the FPS[.]'" *Id.*

The Respondent further asserts that there is "no evidence" to show that its witnesses were "motivated by either bias or self-interest." *Id.* at 5. The Respondent also contends that the testimony of many of its witnesses is "diametrically opposed" to that of the former Chancellor and the Union officials. *Id.* at 6. According to the Respondent, this is particularly true with respect to the individuals whom the former Chancellor "supposedly told about the alleged agreement before his retirement." *Id.* (citing Tr. at 60, 119, 125, 146, 210, 256-57). The Respondent argues that the "clear preponderance" of the evidence shows that the Judge's credibility find-

11. 29 U.S.C. § 160(e) provides:

> No objection that has not been urged before the Board [National Labor Relations Board], its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

ings were incorrect. Exceptions at 6 (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 61 FLRA 515, 518) (2006) (*BOP, Elkton, Ohio*)).

In Exception B, the Respondent also disputes the Judge's finding that, in 2004, the former Chancellor entered into a different oral agreement with the Union to increase the pay of certain faculty members mid-year. Exceptions at 7. The Respondent asserts that a witness at the hearing testified that this agreement had been reduced to writing. Further, according to Respondent, witnesses of the GC also testified that this agreement was implemented as a "special action" in conjunction with the normal merit pay procedures for fiscal year 2004. *Id.* at 8. The Respondent notes that normal pay procedures occur in January of the following year, not mid-year. *Id.* The Respondent thus argues that this finding should be overruled, particularly because the Judge appeared to rely on it to show that the agreement at issue in this case was consistent with prior agreements. *Id.*

Exceptions E and F challenge the Judge's factual findings regarding whether the former Chancellor had actual or apparent authority to enter into the agreement with the Union. The Respondent contends that evidence in the record, including the FPS Regulations and Handbooks, does not support the Judge's findings that the former Chancellor had "full authority over the FPS program" and "actual authority to enter into the agreement . . . ." *Id.* at 11 (quoting Judge's Decision at 21, 23). The Respondent asserts that the ASD "delegated the authority to implement the FPS to the Commandant . . . who was given responsibility for executing [it]." Exceptions at 12 (quoting J. Ex. 1, § 3.b.). The Respondent contends that the FPS Handbook shows that the "Commandant was 'responsible for all actions associated'" with the FPS. *Id.* at 13 (citing J. Ex. 2 , § 5).

The Respondent also challenges the Judge's finding that the former Chancellor "had apparent authority to bind the Respondent." Exceptions at 15 (quoting Judge's Decision at 23). According to the Respondent, the Judge based this finding on the Union's claim that it dealt "exclusively" with the former Chancellor on FPS issues and the fact that there was no evidence showing the Respondent ever discredited the former's Chancellor's authority. *Id.* The Respondent asserts that the record shows the Commandant had no reason to discredit the former Chancellor's authority because the former Chancellor previously had sought the Commandant's approval regarding FPS changes and the former Chancellor "concealed" the agreement from management officials until after his retirement. *Id.* Also, the Respondent claims that the Union had "reason to know that [the former Chancellor's] authority . . . was limited[]" because the FPS Handbook required him to act "[u]nder the direction of the Commandant[,]" and "there is no evidence to [show] that the Commandant [had] ever delegated that authority to [him]." *Id.* at 15, 16 (quoting J. Ex. 2, § 5.b.), & 17 n.22. The Respondent further claims that the Judge's reliance on *AFGE, Local 2207* is misplaced because, unlike that case, here: (1) the former Chancellor failed to brief the Commandant on either the Union's proposal or the subsequent discussions the former Chancellor had with the Union and (2) the limitation on the former Chancellor's authority pre-dated the negotiations and the Union had actual notice of the limitation. Exceptions at 17. The Respondent asserts that the former Chancellor's actions are thus more like those of the management official in *SBA*.

Exceptions G to L concern the issues of whether the Judge erred in finding that the agreement was valid and whether the Respondent violated the Statute by failing to comply with the agreement. The Respondent asserts that the agreement is void because it conflicts with the parties' collective bargaining agreement (CBA). [12] The Respondent next contends that the agreement is invalid because it is inconsistent with 10 U.S.C. § 1595 and the FPS program. The Respondent asserts that § 1595 gives the "Secretary of Defense the authority to employ civilians as professors, instructors, and lecturers at the [DLI], as well as the authority to set the employees' compensation." *Id.* at 12. According to the Respondent, the statute's purpose is to "enhance the [DLI's] ability to retain high quality instructors, and to establish a faculty structure consistent with the civilian academic environment." *Id.* at 19 (emphasis and citations omitted). The Respondent asserts that, because the agreement establishes a means for personnel to advance to higher academic ranks that is contrary to the rank advancement principles at similar academic institutions within DOD, the agreement conflicts with the intent of § 1595 and the "rank-in-person" concept that Congress intended to create. The Respondent asserts that the FPS contemplates that employees at the top of their pay bands "would need to sustain a high level of quality

12. To address this argument, the Respondent included the CBA as an attachment (Tab C) to its exceptions. For the reasons discussed in Section IV.A.2., that document has not been considered; accordingly, there is no support for the Respondent's assertion. Therefore, this argument will not be addressed further.

contribution toward mission accomplishment." *Id.* at 22 (quoting J. Ex. 1, § 4.b.3.a.). [13]

The Respondent further contends that the agreement is invalid because it "lacked any indicia of good faith bargaining [.]" *Id.* at 23. In support, the Respondent raises arguments similar to those mentioned previously, i.e., that the former Chancellor did not have authority to enter the agreement and was trying to reward employees who had supported him, and that there was a lack of consideration. The Respondent also claims that the weight of the evidence does not support the Judge's finding that the former Chancellor "entered into agreement with the Union." *Id.* at 24 (citing Judge's Decision at 24). The Respondent asserts that the negotiations were not formal, that the terms of the Union's proposal were not discussed, and that the former Chancellor did not tell any management official about the agreement. The Respondent also objects to the Judge's finding that its witnesses "acquiesced" in the knowledge that an agreement had been reached. Exceptions at 27. According to the Respondent, the record "shows only that two of [its] witnesses acknowledged that they were told about the alleged agreement" after the former Chancellor's retirement. *Id.* (citing Tr. at 182 & 256-57).

The Respondent also challenges the Judge's finding that the subject agreement was clear and the parties were of "one mind" as to its terms. Exceptions at 27. The Respondent contends that the agreement was "ambiguous." *Id.* In support of this contention, the Respondent notes that the Union's March proposal listed four criteria that employees would have to meet to qualify for rank advancement, but that two of the criteria – that employees be tenured faculty and that they have no adverse disciplinary actions taken against them since the inception of the FPS – were not addressed by the former Chancellor and the Union President in their testimony. *Id.* at 28. The Respondent, thus, asserts that there was no "meeting of the minds" because it is "unclear . . . whether [C]harter[] [M]embers" must also be tenured faculty and free from prior adverse discipline. *Id.* at 28-29.

The Respondent contends that the Judge's findings that "it was not possible to furnish a written agreement" and that "such an agreement was not required" are contrary to § 7114(b)(5) of the Statute because the Acting Chancellor had the right to request that the Union "reduce . . . [the] agreement to writing[.]" *Id.* at 30 (citing Tr. at 25). The Respondent asserts that this case is distinguishable from *U.S. Department of Defense, Dependents Schools,* 55 FLRA 1108 (1999) (*DODDS*), because an oral agreement had been memorialized in that case.

The Respondent further asserts that the Judge erred in finding that the agreement was consistent with prior agreements regarding the implementation of the FPS. The Respondent notes, in this regard, that the former Chancellor had authority to implement the prior agreements, whereas he had "no authority" to implement the agreement at issue here. Exceptions at 33.

The Respondent also disputes the Judge's finding that the agreement is "consistent with the Transition Agreements . . . which specifically set forth the guiding principle that 'FPS Charter [M]embers who consistently meet performance expectations should not be financially disadvantaged for having left the GS system in either total annual or base pay.'" *Id.* at 34 (quoting Judge's Decision at 27). According to the Respondent, there is "no evidence to suggest that the [C]harter [M]embers . . . have been disadvantaged financially because of their decision to convert to the FPS." Exceptions at 35. Moreover, Respondent claims that its Ex. 3 shows that all Charter Members, except one, are making more money than they would have had they remained in the GS system. [14] *Id.*

B. GC's Opposition

1. Procedural Matter

The GC contends that the Respondent "has offered no basis" for any of its documents, Tabs A to P, to be accepted into evidence; accordingly, the GC asserts, the Authority should deny the Respondent's request "in its entirety." Opposition at 3. According to the GC, aside from the documents at Tab P and Tab N, all of the documents "were in existence at the time of the hearing and nothing prevented [the] Respondent from offering [them] into the record . . . at that time." *Id.*

The GC asserts that none of the documents are appropriate for official notice. Specifically, the GC contends that: (1) although the Respondent claims that the

13. The text of Jt. Ex. 1, § 4.b.3.a. is set forth in the Appendix to this decision.

14. The Respondent claims that Resp., Ex. 3 "does not reflect . . . bonuses that individual[s] at the top of their pay bands have received in lieu of an increase to their merit pay[]" and refers to another document (Tab N) submitted with its exceptions that concerns employee pay. Exceptions at 35 n.47. For the reasons discussed in Section IV.A.2, to the extent that the Respondent relies on such argument and attachment to support this exception, the argument and document have not been considered.

documents at Tabs A, B, K, L, and O are matters "within the specialized knowledge or expertise of the . . . agency," *id*. at 4, the Authority has regularly refused to take official notice of internal agency documents that were in existence at the time of the hearing; (2) although the Respondent claims the documents at Tabs I and J are "materials of widespread applicability," such documents "are not issued by any federal agency, have no reference to any federal statutes or regulations, are unauthenticated and their reliability is unexplained," *id.* at 5 (quoting Respondent's Exceptions at 39); (3) the documents at Tabs D, E, F, G, and H are all internal documents that were in existence and available to the Respondent prior to the hearing, Opposition at 5-6; (4) the Respondent has not explained how the document at Tab C is "relevant," *id.* at 6; (5) the Respondent could have entered the document at Tab N into evidence at the hearing or requested to keep the record open in order for it to do so; (6) the document at Tab N is a new exhibit, which contains information that it has not had an opportunity to review; and (7) pursuant to § 2423.30(d) of the Authority's Regulations, [15] the Respondent waived its right to object to the admission of the document at Tab P, which was accepted into evidence by the Judge**.**

2. Merits

As to the Judge's credibility findings, the GC contends that the Respondent relies on "testimony taken out of context to discredit [the former Chancellor and the Union officials]." *Id.* at 7.

The GC further asserts that the Judge's factual findings are supported by the record. The GC contends that the Respondent's exception challenging the Judge's finding that it was not possible to furnish a written agreement "misconstrues" the law concerning enforceable agreements under § 7114(b) of the Statute. *Id.* at 9. The GC also disputes the Respondent's claim that the record does not support the Judge's finding that the Union dealt only with the former Chancellor on FPS issues and argues that the only support for this assertion is the FPS agreement contained in the FPS Handbook, GC Ex. 3, which was negotiated by the DLI team led by the Assistant Commandant. The GC asserts that the fact that the former Chancellor was not involved in negotiating the original FPS agreement is not disputed, but that the "credited testimonial evidence of [the Union officials] establish[] that from the time that FPS was implemented . . . and for the next 7 years until [the former Chancellor's] retirement, the [U]nion dealt only with [him] and his staff" on FPS issues. *Id.* at 10. The GC concedes that the Respondent's assertion concerning when the agreement was implemented is correct. However, the GC contends that a prior agreement was implemented mid-year and further argues that, notwithstanding this finding, the time frame "is immaterial to the [Judge's] findings" that the agreement is valid. *Id.* at 9 n.4.

The GC asserts that the Respondent "misrepresents" the Union's President's testimony to support its claim that the Union President "conceded . . . that he did . . . meet with the Commandant 'about other DLI issues'" when, in fact, the Union President testified that he did not meet with the Commandant "about the FPS." *Id.* at 10-11 (quoting Tr. at 62). The GC also asserts that the former Commandant's testimony concerning whether he met with the Union about FPS was "evasive." Opposition at 11 (citing Tr. at 232-234). The GC further contends that neither the first Assistant Commandant nor the Assistant Commandant at the time of the agreement testified at the hearing.

## IV. Analysis and Conclusions

### A. Preliminary Matters

#### 1. The Respondent's request to strike GC Ex. 10 is denied

The Respondent asserts that GC Ex. 10 should be struck from the record or not considered because the GC did not disclose the document prior to the hearing. The Respondent also requests that the Authority take official notice of the document at Tab P, [16] asserting that this document "bear[s]" on its request to strike. Exceptions at 39. GC Ex. 10 was shown to the Respondent's representative at the hearing. That individual, after being shown the document, stated "we basically already have the document in evidence — the contents in evidence now." Tr. at 154. Moreover, later, when asked by the Judge if he had any objections to the document, the individual stated he had "[n]o objection." Tr. at 154-55. The Judge then received the document into evidence. The Respondent's representative, thus, had an opportunity to view GC Ex. 10 and formally object to it at the hearing, but chose not to do so. Accordingly, the Respondent's request to strike GC's Ex. 10 or that it not

15. Section 2423.30(d ) of the Authority's Regulations provides as follows: "(d) *Objections.* Objections are oral or written complaints concerning the conduct of a hearing. Any objection not raised to the . . . Judge shall be deemed waived." 5 C.F.R. § 2423.30(d).

16. The document contained in Tab P is the GC's prehearing disclosure, which includes a list of the GC's proposed witnesses, and an index of/and documents proposed to be offered into evidence.

be considered is denied. 5 C.F.R. § 2423.30(d) ("Any objection not raised to the Administrative Law Judge shall be deemed waived.").

Moreover, 29 U.S.C. § 160(e) provides no basis for granting the Respondent's request. This provision requires extraordinary circumstances for a court to consider an objection that has not been made to the National Labor Relations Board. As stated previously, under the Authority's Regulations, any objection not raised to the Judge is deemed waived. Further, the record shows that the Respondent's representative had an opportunity to view and formally object to GC Ex. 10, but did not do so. Additionally, as to the Respondent's request that we take official notice of the document at Tab P because it bears on its request to strike GC's Ex. 10, we grant this request, but find that as the Respondent's representative had an opportunity to view and formally object to GC Ex. 10, but did not do so, this document provides no basis for granting the Respondent's request. Accordingly, we deny the Respondent's request to strike GC's Ex. 10.

2. The Respondent's request that the Authority take official notice of documents contained in Tabs A to O is denied

Section 2429.5 of the Authority's Regulations provides, in pertinent part, that "the Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . Judge. The Authority may, however, take official notice of such matters as would be proper." 5 C.F.R. § 2429.5. The Authority generally has taken official notice of documents that were not presented for the appropriate authority's consideration when those documents have been of widespread application and did not apply solely to one agency. *AFGE, Local 2142*, 58 FLRA 692, 693 (2003) (*comparing Veterans Affairs*, 56 FLRA 381 *with SSA*, 57 FLRA 530, 533-34 (2001)). In *Veterans Affairs*, the Authority took official notice of a government-wide Office of Personnel Management classification standard because it was a public document, while in *SSA*, the Authority refused to take official notice of an agency's National Promotion Plan because it applied only to the agency.

In this case, the Respondent asserts that the Authority should take official notice of the documents at Tabs A, B, K, L, and O [17] because these documents are within the specialized knowledge or expertise of the Agency. The record shows that these documents were in existence at the time of the hearing, but were not offered into the record. As stated previously, the Authority will not consider evidence and/or issues that were not presented in proceedings before the Judge. *Nat'l Park Serv., Nat'l Capital Region, U. S. Park Police*, 48 FLRA 1151, 1163 n.10 (1993) (*Nat'l Park Serv.*). Moreover, unlike the documents in *Veterans Affairs*, which had widespread applicability, these documents are internal Agency documents that apply only to the Agency. Additionally, unlike the matter in *Customs*, which was submitted directly to the Authority on a stipulation of facts, the matter here was presented to a judge; as a result, the Respondent had an opportunity to introduce the documents into evidence, but did not do so. Therefore, we deny the Respondent's request to take official notice of the documents at Tabs A, B, K, L, and O.

The Respondent further requests that the Authority take official notice of the documents at Tabs C, D, E, F, G, H, M, and N [18] because they: (1) address matters the Judge relied on in making her decision and (2) concern the credibility of the GC's witnesses. Because the record reveals that the documents at Tabs C to H and M were in existence at the time of the hearing, but were not presented into evidence, we deny the Respondent's request that we take official notice of these documents. *See Nat'l Park Serv.*, 48 FLRA at 1163 n.10. Further, regarding the document at Tab N, given the GC's objection and because there is no claim the information contained in the document was not available to the Respondent at the time of the hearing, we deny the Respondent's request.

17. Tabs A and B are DoD Directives on the Defense Language Program; Tab K is the United States War College Faculty Personnel System; Tab L is The Asian-Pacific Center for Security Studies Faculty Handbook; and Tab O is an Army Regulation on Incentive Awards.

18. Tab C is the parties' CBA; Tab D is the former Chancellor's response to questions posed by the Respondent regarding the FPS program; Tab E is the Respondent's witness memorandum concerning administrative rank advancement; Tab F is a legal opinion regarding the FPS Charter Member Pay cap; Tab G is a Respondent's witness e-mail concerning the former Chancellor's request for authority to include DLI top administrators in the FPS and a note of his concerning rank; Tab H are documents concerning the increase in pay for FPS personnel; Tab M are meeting agenda prepared by the Union for meetings with the Commandant; and Tab N is a modification of Respondent's Exhibit 3.

The Respondent also requests that the Authority take official notice of the documents at Tabs I and J [19] because these documents have "widespread applicability." Exceptions at 39. The documents at Tabs I and J were not issued by the federal government, but rather, were issued by bodies in the State of California. Thus, unlike the documents at issue in *Veterans Affairs*, there is no evidence that these documents have widespread applicability to federal agencies. Moreover, these documents were in existence before the hearing and could have been, but were not, presented to the Judge. Accordingly, we deny the Respondent's request.

Based on the above, we deny the Respondent's request that we take official notice of the documents at Tabs A to O.

B. Merits

1. The Judge's credibility findings are not erroneous

The Authority will not overrule a judge's credibility determination unless a clear preponderance of all relevant evidence demonstrates that the determination was incorrect. *See BOP, Elkton, Ohio*, 61 FLRA at 518 (citing *24th Combat Support Group, Howard AFB, Republic of Pan.*, 55 FLRA 273, 279 (1999) (*Howard AFB*)). Credibility determinations may be based on a number of considerations including, but not limited to: (1) the witness' opportunity and capacity to observe the event in question; (2) the witness' character as it relates to honesty; (3) prior inconsistent statements by the witness; (4) the witness's bias or lack thereof; (5) the consistency of the witness's testimony with other record evidence; (6) the inherent improbability of the witness's testimony; and (7) the witness's demeanor. *See BOP, Elkton, Ohio*, 61 FLRA at 518 and cases cited therein. With respect to witness demeanor, the Authority has recognized that only the judge has the benefit of observing the witnesses while they testify, and accordingly, the Authority attaches great weight to a judge's determinations based on demeanor. *See id.* at 518-19 (citing *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1204 (2000) (*Dep't of the Air Force*)). Where a party raises exceptions to credibility determinations based on considerations other than witness demeanor, the Authority will review those determinations based on the record as a whole. *See id.* at 519.

Exceptions A to D challenge the Judge's finding that the former Chancellor, the Union President, and Union Chief Steward testified credibly concerning the agreement. The Respondent contends that the Judge offered no "explanation for how she reconciled obvious [bias of the GC's witnesses and] inconsistencies [in] their testimony" with her credibility findings. Exceptions at 2. To the extent that the Respondent's contentions dispute the Judge's credibility determinations on grounds other than witness demeanor, for the following reasons and based on the record as a whole, we find that the Judge did not err in her credibility determinations.

The Respondent asserts that the Judge "offered no rationale for finding that obvious biases on the part of the GC witnesses" — that is, evidence that shows that certain Union officials will benefit from the disputed agreement — "did not affect their credibility." *Id*. The Respondent misunderstands the Judge's finding. Contrary to the Respondent's assertion, the record shows that the Judge found that there was "no evidence that the parties discussed which specific employees would be directly impacted by th[e] oral agreement, although it appear[ed] that [the Union officials] would benefit from the agreement." Judge's Decision at 26. The record also shows that the Judge found that the failure of the parties to discuss which employees would benefit from the agreement, or the specific number of employees to be involved, could not "overcome the evidence" that they had a "simple agreement" with respect to Charter Members. *Id.* The record evidence, thus, does not support the Respondent's claim.

The Respondent asserts that the weight of the evidence suggests that the Union President's testimony that he did not meet with the Commandant or Assistant Commandant on FPS matters is untrue. According to the Respondent, the Union President "conceded in his testimony that he did in fact meet with the Commandant 'about other DLI issues . . .'" and that a former Commandant of DLI "often talked to [the Union President] about faculty issues[.]" Exceptions at 11. Contrary to the Respondent's claim, the record shows that the Union President, when asked if he meets with the Commandant about the FPS, testified "[n]o. I meet with the Commandant about other DLI issues or a mutual subject of interest concerning everybody else, but not about the FPS." Tr. at 61-62. The record also shows that the former Commandant did not testify that he met with the Union President about the FPS and was not certain whether the Assistant Commandant had met with the Union President about the FPS. *See* Tr. at 232, 233 & 234. Further,

19. The document at Tab I is the 2005 Edition of the Western Association of Schools and Colleges (located in California) Accreditation Manual for Postsecondary Title IV Institutions. The document at Tab J is the Minimum Qualifications for Faculty and Administrators in California Community Colleges for 1996 and 2006.

that the Union President and the Assistant Commandant participated in negotiations on the implementation of the FPS provides no basis for finding that the Judge erred. The Union President, while testifying that he participated in such negotiations, testified that, once the FPS was implemented, he dealt only with the former Chancellor or his staff on FPS issues. *See* Tr. at 32.

The Respondent also contends that the former Chancellor's testimony regarding whether he needed the consent of the Commandant in implementing changes to the FPS is implausible. We disagree. The FPS Handbook provides that the Commandant "may delegate authority to develop and implement . . . policies and procedures [of the FPS] to other offices." Judge's Decision at 5. Moreover, the former Chancellor's own performance evaluation shows that he was responsible for "oversee[ing] the operation of the [FPS]. . . ." *Id*. at 21. *See also* GC's Exs. 2 & 3.

Moreover, the testimony that the Respondent references does not show that the former Chancellor needed the consent of the Commandant to implement changes to the FPS. The former Chancellor testified that the "Commandant and the Assistant Commandant did not . . . want to go into detail on the things I was running." Tr. at 128-29; *see also id.* at 147. Additionally, the record shows that the Judge considered the Respondent's arguments that the agreement was made as a reward to a Union official and as a "desire to thank" people who had supported him. Exceptions at 4. However, the Judge found that the evidence did not show that the parties discussed which "specific employees would be directly impacted" by the subject agreement or that this agreement was not consistent with prior agreements reached between the former Chancellor and the Union. Judge's Decision at 17-18, 26 & 27. The Judge's findings are supported by the record as a whole. Thus, the Respondent has not demonstrated that the Judge's decision to credit the former Chancellor's testimony was in error.

2. The Judge's factual findings are not erroneous

In determining whether a judge's factual findings are supported, the Authority looks to the preponderance of the record evidence. *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009) (Member Beck concurring) (citing, among others, *U.S. Dep't of the Air Force, Air Force Materiel Command, Space and Missile Systems Ctr., Detachment 12, Kirkland Air Force Base, N.M.*, 64 FLRA 166, 171 (2009) (Member Beck concurring in part)). [20] Errors of fact that do not affect the outcome of the case are disregarded. *BOP, Elkton, Ohio,* 61 FLRA at 517.

The authority of the former Chancellor to enter into the agreement is determined under the principles of agency law. The authority of an agent to act on behalf of the principal can be either actual or apparent. *See AFGE*, 52 FLRA at 1480. Actual authority is authority that the principal has intentionally conferred upon the agent. *Id.* (citing *U.S. v. Schaltenbrand*, 930 F.2d 1554, 1560 (11th Cir. 1991)). Apparent authority occurs where the principal has held out the agent as having such authority or has permitted the agent to represent that he has such authority. *Id.* (citation omitted).

Here, the Respondent argues that the evidence, including the FPS Regulation and Handbook, do not support the Judge's finding that the former Chancellor had actual authority to enter into the agreement. Exceptions at 2. The evidence does not support this assertion, however. The FPS Regulation provides that the "Commandant . . . is responsible for executing this plan. The [C]ommandant shall develop necessary operating guidance or other internal requirements consistent with this plan." J. Ex. 1, § 3.b. Further, the FPS Handbooks provide that "[t]he Commandant may delegate authority to develop and implement [FPS] policies and procedures to other offices." J. Exs. 2 & 4, § 5.a. These documents, thus, provide that the Commandant may delegate authority to develop and implement policies and procedures concerning FPS to other offices. Moreover, in finding that the former Chancellor had actual authority to enter into the agreement, the Judge examined the evidence, including these documents, and determined that the former Chancellor's "actual authority is found in the D[O]D regulation as well as the parties' Handbooks[.]" Judge's Decision at 23. The Judge also found that the evidence revealed that the former Chancellor "was responsible for the FPS program from its inception . . . until his retirement" and that his performance evaluation reports stated that "he had the responsibility to oversee the operation of the [FPS] . . . ." *Id.* at 21. The Respondent has not established that the Judge's findings are inconsistent with the delegation of authority permitted under the FPS Regulation or Handbooks. Additionally, contrary to the Respondent's contention, *SBA* is distin-

20. Member Beck notes that, for the reasons stated in his separate opinions in *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256 (2009) and *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166 (2009), he reviews the Judge's factual findings using a "substantial evidence in the record" standard rather than a "preponderance" standard.

guishable from this case. In that case, the Authority set aside an award upholding a settlement agreement between a union and an agency because the management official lacked actual authority to sign the agreement. Here, however, the record evidence shows that the former Chancellor had such authority to enter into the agreement.

The Respondent also contends that the Judge's alternate finding that the former Chancellor had apparent authority is erroneous. According to the Respondent, this finding is based on the Judge's erroneous determination that the Union dealt exclusively with the former Chancellor on FPS issues. Exceptions at 15. The Respondent contends that this determination is not supported by the evidence. We disagree. As found above, the Respondent failed to establish that the Union President's testimony that he did not deal with the Commandant on FPS matters, but only dealt with the former Chancellor, was unsupported by the record evidence. Moreover, the evidence clearly supports the Judge's finding that the former Chancellor had apparent authority. *See* Tr. at 33, 61, 80 & 81. Also, contrary to the Respondent's assertion, we find that the Judge's reliance on *AFGE, Local 2207* is not misplaced. In *AFGE, Local 2207*, the Authority found that a union's vice-president had apparent authority to negotiate a disputed agreement because: he had been appointed to negotiate the agreement; such authority was not limited and had not been terminated; and he continued to exercise this authority. 52 FLRA at 1481. Similar to *AFGE, Local 2207,* the evidence supports a finding that the former Chancellor had apparent authority like that of the union vice-president in that case. In this regard, the record shows that since the implementation of the FPS, the former Chancellor was the management official with whom the Union dealt regarding FPS issues, including the Transition Agreements, *see* J. Ex. 7, and, during such time, there was "no evidence that the Respondent ever discredited [his] authority, or even tried to lessen it." Judge's Decision at 24.

Accordingly, we find that the Judge's conclusion that the former Chancellor had actual and apparent authority to enter into the agreement is supported by the preponderance of the record evidence.

3. The Judge's finding that the oral agreement constitutes a valid agreement is not contrary to law

Exceptions G to L concern the validity of the oral agreement providing that "[C]harter [M]embers at the top of their pay bands would be administratively rank advanced to the next rank[.]" Exceptions at 27 (quoting Judge's Decision at 27.)

a. 10 U.S.C. § 1595

The Respondent contends that the disputed agreement — that "[C]harter [M]embers at the top of their pay band[s] would be administratively rank advanced to the next rank" — is invalid because it is contrary to 10 U.S.C. § 1595. Judge's Decision at 24. We find this contention meritless.

Section 1595 provides that the "Secretary of [DoD] may employ as many civilians as professors, instructors, and lecturers [at the DLI ] as the Secretary considers necessary" and that the "compensation of persons employed under this section shall be as prescribed by the Secretary." 10 U.S.C. § 1595. The FPS Regulation implementing § 1595 states that the authority concerning compensation "has been delegated through the Secretary of the Army to the Commandant." J. Ex. 1, § 2.a. *See also* Judge's Decision at 5. The Respondent claims that the agreement conflicts with the Congressional intent of § 1595.[21] *See* Exceptions at 20-21. However, the Respondent has pointed to nothing in the agreement that is inconsistent with the wording of § 1595 and the delegation of authority provided under its implementing regulation. *See e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning."). Accordingly, we find that the Respondent has failed to establish that the agreement is invalid because it is inconsistent with § 1595.

b. §7114(b) of the Statute

Under § 7114(b) of the Statute, the duty of an agency and an exclusive representative includes the obligation to negotiate "with a sincere resolve to reach a collective bargaining agreement[.]" 5 U.S.C. § 7114(b)(1). If an agreement is reached, then the parties are obligated, "on the request of any party" to the negotiations, to execute a written document embodying the agreed terms. 5 U.S.C. § 7114(b)(5); *see also U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 317 (1997) (*Standiford Air Traffic Control Tower*) and cases cited therein. An "agreement," within the meaning of

21. In support, the Respondent relies on information contained in documents at Tabs K to L. For the reasons discussed previously, these documents have not been considered in resolving this exception.

§ 7114(b)(5) of the Statute, is reached when authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining. *Pan. Canal Comm'n*, 36 FLRA 555, 560 (1996).

Although parties are required, on request, to reduce to writing any oral agreement they have reached, that an agreement need be reduced to writing only when requested implies that a written agreement is not always necessary. Consistent with this, the Authority has held that parties may enter into oral agreements, and that such agreements bind the parties. *See, e.g., Standiford Air Traffic Control Tower*, 53 FLRA at 317. Moreover, parties may be bound by their oral, or even "tacit," agreements. *DODDS*, 55 FLRA at 1111-12.

The Authority has held that the question of the existence of a collective bargaining agreement is a question of fact, not a question of law. *U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Virginia*, 60 FLRA 869, 880-81 (2005) (*PTO*). A meeting of the minds of the parties — which can be shown by conduct manifesting an intention to abide by agreed-upon terms — must occur before a labor contract is created. *Brooks, Inc. v. Int'l Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987) (citing *Interprint Co.*, 273 NLRB 1863 (1985)).

In this case, the Respondent contends that the agreement is invalid because it lacked any indicia of good faith bargaining. This claim is based on the Respondent's previous arguments that the former Chancellor did not have authority to enter into this agreement and was trying to reward employees who supported him. These contentions were rejected in Section IV.B.1. and 2., and thus, provide no support for this claim.

The Respondent also argues that the former Chancellor did not enter into a valid agreement because: (1) negotiations on the agreement were not formal; (2) the terms of the proposal were not discussed; and (3) the former Chancellor did not tell any management official about the agreement. These assertions also provide no support for finding the agreement invalid. The evidence shows that the former Chancellor testified that he agreed to the agreement after discussing the Union's proposal (GC Ex. 6) with the Union over several months. The former Chancellor went on to describe several points of their discussion, including the second bullet on the Union's proposal, which he testified he found unnecessary. *See* Tr. at 112-114. The Union President also testified that discussions occurred regarding the proposal and its terms, including that the Charter Member should be successfully performing and have no negative behavior. *See* Tr. at 72 and 73.

The Respondent's objection to the Judge's use of the term "acquiesced" provides no support for finding the agreement invalid. The Judge's finding only indicates, as the Respondent acknowledges, that the Respondent's witnesses were told that an agreement had been reached between the former Chancellor and the Union.

The Respondent also has not established that the Judge erred in finding that the parties were of one mind regarding the terms of the agreement or that the agreement is ambiguous. A meeting of the minds of the parties can be shown by conduct manifesting an intention to abide by agreed-upon terms. As the Judge found, the terms of the agreement were: "[C]harter [M]embers at the top of their pay band[s] would be administratively rank advanced to the next rank[.]" Judge's Decision at 24. Also, the record shows that, before reaching this agreement, the parties discussed and addressed the criteria listed in the Union's proposal. Thus, based on the record evidence, the Respondent has not demonstrated that there was "no meeting of the minds" regarding the agreement; rather, the evidence as a whole shows that the former Chancellor and the Union intended to abide by the agreement.

The Respondent also has not established that the Judge erred in finding that the agreement was consistent with prior agreements.[22] As stated above, the evidence supports the Judge's finding that the former Chancellor had authority to enter into the agreement. Further, contrary to the Respondent's claim, its Ex. 3 does not establish that Charter Members who reached the top of their pay band were not disadvantaged financially. As the Judge found, evidence in the record shows that Charter Members who reached the top of their pay band as of January 2005 were not administratively ranked advanced, which affected their base pay, their contributions to the TSP, and their salary calculations for retirement. The Respondent's claim that the agreement is invalid because it was not produced in writing also does not provide a basis for finding the Judge erred. The Authority has interpreted § 7114(b) of the Statute and found that parties may enter into oral agreements and that such agreements bind the parties. The evidence in

22. The Respondent's claim that the evidence shows the agreement was implemented in January 2005 rather than mid-year, as the Judge found, is correct. However, the evidence shows that a prior agreement was implemented mid-year. *See* Tr. 107-108. Thus, there is no basis for overruling the Judge's finding that the subject agreement was consistent with prior agreements. Moreover, notwithstanding this finding, the time that the agreement was implemented is not material because evidence in the record supports the Judge's finding that the parties entered into a valid agreement.

the record as a whole establishes that the former Chancellor and the Union entered into a valid oral agreement. Therefore, there is no basis to conclude that the Judge's finding is erroneous.

4. The Judge did not err in concluding that the Respondent's failure to comply with the oral agreement constituted a violation of § 7116(a)(1) and (5) of the Statute

Citing *Robins AFB*, the Judge found that the Respondent, by refusing to comply with the oral agreement, violated the Statute. In *Robins AFB*, the Authority found that, under the circumstances of that case, the agency's refusal to comply with the parties' agreement constituted a repudiation of the agreement's terms, and, therefore, violated § 7116(a)(1) and (5) of the Statute.

An allegation of repudiation is analyzed using the two-prong test set forth by the Authority in *Department of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858 (1996) (*Scott AFB*). Under this test, the following elements are examined: (1) the nature and scope of the alleged breach of an agreement — *i.e.*, was the breach clear and patent?; and (2) the nature of the agreement provision allegedly breached — *i.e.*, did the provision go to the heart of the parties' agreement? *Id.* at 862; *see also Robins AFB*, 40 FLRA at 1218-19 (Authority held that failure to comply with a negotiated agreement is not a *per se* violation, but depends on the "nature and scope" of the conduct).

Applying the first prong of this test, we conclude that the breach was clear and patent. The Respondent clearly refused to comply with the agreement, claiming that: (1) the former Chancellor had no authority to enter into the agreement; (2) the agreement itself "was not clear and unambiguous"; and (3) the parties had no "meeting of the minds" regarding the terms of the agreement. Exceptions at 28 & 29. As found above, the evidence establishes, however, that: (1) the former Chancellor had authority to enter into and approve the agreement; (2) the agreement clearly provided that "[C]harter [M]embers at the top of their pay band[s] would be administratively rank advanced to the next rank," Judge's Decision at 24; and (3) the former Chancellor and the Union discussed and addressed criteria listed in the Union's proposal and, after these discussions, agreed to the terms of the agreement and to abide by it.

With respect to the second prong of the test, the terms of the agreement concern solely the manner in which employees who left the GS system to become Charter Members of the FPS system would be administratively rank advanced and, thus, go to the heart of the agreement. *See, e.g., Howard AFB*, 55 FLRA at 282 (1999). Accordingly, we find that the Respondent's failure to comply with the agreement constitutes a repudiation in violation of §§ 7116(a)(1) and (5) of the Statute. *See id.* at 283; *Robins AFB*, 40 FLRA at 1220.

Accordingly, on review of the record as a whole, we find, in agreement with the Judge, that the preponderance of the record evidence establishes that the Respondent's conduct violated the Statute, as alleged in the complaint.

## V. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, the United States Department of Defense, Defense Language Institute, Foreign Language Institute, Foreign Language Center, Monterey, California, shall:

1. Cease and desist from:

(a) Failing and refusing to implement the agreement reached by the former Chancellor and representatives of the American Federation of Government Employees, Local 1263, AFL-CIO (Union) in December 2004 which provides that FPS Charter Members who reached the top of their pay bands will be administratively rank advanced.

(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) Implement the agreement reached by the former Chancellor and representatives of the Union to administratively rank advance FPS Charter Members who reach the top of their pay bands, retroactive to January 2005.

(b) In accordance with the Back Pay Act, 5 U.S.C. § 5596, make whole all eligible Charter Members for salary and benefits lost as a result of the Respondent's failure to implement the agreement in January 2005. This will include, *inter alia*, providing eligible Charter Members the opportunity to contribute retroactively to the TSP, and providing pay adjustments for any eligible Charter Members who retired since January 2005.

(c) 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 of such forms, they shall be signed by the Commandant, 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.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

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

The Federal Labor Relations Authority has found that the United States Department of Defense, Defense Language Institute, Foreign Language Center, Monterey, California, has violated the Federal Service Labor-Management Relations Statute (the Statute) and had ordered us to post and abide by this notice:

We hereby notify bargaining unit employees that:

WE WILL NOT fail or refuse to implement the agreement reached by the former Chancellor and representatives of the American Federation of Government Employees, Local 1263, AFL-CIO (Union) in December 2004 which provides that FPS Charter Members who reached the top of their pay bands will be administratively rank advanced.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Statute.

WE WILL implement the agreement reached by the former Chancellor and representatives of the Union to administratively rank advance FPS Charter Members who reach the top of their pay bands, retroactive to January 2005.

WE WILL make whole all eligible Charter Members for salary and benefits lost as a result of our failure to implement the agreement in January 2005, in accordance with the Back Pay Act, 5 U.S.C. § 5596. This will include, *inter alia*, providing eligible Charter Members the opportunity to contribute retroactively to the Thrift Savings Plan, and providing pay adjustments for any eligible Charter Members who retired since January 2005.

_____
(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 for the Federal Labor Relations Authority, San Francisco Regional Office, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: (415) 356-5000.

**APPENDIX**

1. The relevant text of the FPS Regulation provides as follows:

> (a) Contribution-Based Increases CBIs are based on the member's rate of basic pay and his or her level of contributions toward meeting the mission of the organization. That is, an FPS member receiving greater pay is expected to take on more responsibilities and more difficult assignments with less supervision than an employee receiving less pay, even though both are within the same academic rank. An FPS member in the lower quartile of the range would be expected to move relatively quickly toward the mid-point by performing his or her duties in a consistently more proficient manner. For the most part, a competent FPS member receiving pay in the middle of the rank's rate range should be expected to remain more or less in the middle of the rate range. In order for an employee to move into, and remain in, the top quartile of the range the employee would need to sustain a high level of quality contributions toward mission accomplishment.

J. Ex. 1, § 4.b.3.a.

2. The FPS Handbooks Provide as follows:

> 5. RESPONSIBILITIES
>
> a. DLIFLC Commandant. The Commandant, by virtue of delegated authority directly from DoD, is responsible for all actions associated with the development, implementation, and on-going operation of the FPS. The Commandant may delegate authority to develop and implement those policies and procedures to other offices.
>
> b. Provost. Under the direction of the Commandant, the Provost manages and administers the FPS. The Provost may delegate portions of this Authority to other offices.

J. Ex. 2 at 2; J. Ex. 4 at 2.

3. Section 2423.24(e) of the Authority's Regulations provides, in relevant part, as follows:

> (e) *Sanctions.* The Administrative Law Judge may, in the Judge's discretion or upon motion by any party through the motions procedure in § 2423.21, impose sanctions upon the parties as necessary and appropriate to ensure that a party's failure to fully comply with subpart B [Post Complaint, Prehearing Procedures] or C [Hearing Procedures] of this part is not condoned.

5 C.F.R. § 2423.24(e).

4. 10 U.S.C. § 1595 provides, in relevant part, as follows:

> § 1595. Civilian faculty members at certain Department of Defense Schools: employment and compensation
>
> (a) Authority of Secretary. — The Secretary of Defense may employ as many civilians as professors, instructors, and lecturers at the institutions specified in subsection (c) as the Secretary considers necessary.
>
> (b) Compensation of faculty members. — The compensation of persons employed under this section shall be as prescribed by the Secretary.
>
> (c) Covered Institutions. — This section applies with respect to the following institutions of the Department of Defense:
>
> . . . .
>
> (2) The Foreign Language Center of the Defense Language Institute.
>
> . . . .

Office of Administrative Law Judges

DEPARTMENT OF DEFENSE
DEFENSE LANGUAGE INSTITUTE
FOREIGN LANGUAGE CENTER
MONTEREY, CALIFORNIA
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1263, AFL-CIO
Charging Party

Case No. SF-CA-05-0269

Stefanie Arthur, Esq.
For the General Counsel

Jere Diersing, Esq.
For the Respondent

Philip White
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

**DECISION**

**Statement of the Case**

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On March 9, 2005, the American Federation of Government Employees, Local 1263, AFL-CIO (Union or Local 1263) filed an unfair labor practice charge in this matter against the Department of Defense, Defense Language Institute, Foreign Language Center, Monterey, California (Respondent or DLI). (G.C. Ex. 1(a)). On January 10, 2006, the Regional Director of the San Francisco Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) by failing and refusing to comply with the provisions of an oral agreement entered into with the Union. (G.C. Ex. 1(b)). On February 6, 2006, the Respondent filed an answer to the complaint in which it admitted certain allegations of the complaint while denying the substantive allegations of the complaint. (G.C. Ex. 1(d)).

A hearing was held in Monterey, California on March 27 and 28, 2006, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel (GC) and the Respondent have filed timely post-hearing briefs which I have fully considered. [1/]

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

**Statement of the Facts**

The Department of Defense, Defense Language Institute, Foreign Language Center, Monterey, California (Respondent or DLI) is an agency under 5 U.S.C. § 7103(a)(3). (G.C. Ex. 1(b) and 1(d)) During the time covered by this complaint, Col. Michael R. Simone was the Commandant of Respondent; Ray T. Clifford was Provost and later Chancellor; [2/] and Dr. Stephen D. Payne was Vice Chancellor and later Acting Chancellor. (G.C. Ex. 1(b) and 1(d)). Respondent admits that during the period covered by this complaint, the above individuals were supervisors or management officials under 5 U.S.C. § 7103(a)(10) and (11), acting on behalf of the Respondent. (G.C. Ex. 1(b) and 1(d)) The Commandant is the commanding officer for DLI and also serves as the installation Commander of the Presidio and the remaining military community at Ford Ord. (Tr. 196, 197) During Colonel Simone's tour as Commandant, Colonel Sandra Wilson and later Colonel Daniel Scott served as Assistant Commandants. (Jt. Ex. 10; Tr. 198)

The American Federation of Government Employees, Local 1263, AFL-CIO (Union or Local 1263) [3/] is a labor organization under 5 U.S.C. § 7103(a)(4) and is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Ex. 1(b) and 1(d)) This bargaining unit includes approximately 1200 faculty members, as well as about 600 support and other personnel at DLI and the Presidio of Monterey, such as members of the

1. The GC filed a Motion To Strike Portions of Respondent's Closing Brief on May 9, 2006, in which it requested that I strike or disregard all references to "facts" in the Respondent's Closing Brief which are not contained in the record evidence. The GC cited several instances in which it asserted that the Respondent's brief contained no citations to the transcript or exhibits. Having carefully considered the briefs before me, the GC's motion is granted and I will disregard any factual references not supported by the record.

2. Dr. Clifford was Provost when the title was changed to Chancellor; the terms are used interchangeably in this decision. (Tr. 90-91)

3. The Union was originally certified as the National Federation of Federal Employees, Local 1263, but became affiliated with AFGE sometime after February 2000. (Jt. Ex. 4; Tr. 19)

police department and employees of the child care center. (Tr. 19) Alfie Khalil, an Assistant Professor at Respondent, has been the Union's President since 1987. (Tr. 18, 19) Dr. Phil White, an Associate Professor at Respondent, has been the Union's Chief Steward since 1996. (Tr. 357, 358)

The DLI is a language training center, with the responsibility ". . . to produce more proficient linguists in support of Department of Defense missions and national security needs . . . ." (Jt. Ex. 1) For several years, the Respondent, with the agreement of the Union, had sought to change its pay system to a contributions-based system. (Tr. 93-94) In 1992, Title 10, United States Code, Chapter 81, Section 1595 was amended to authorize a faculty pay system for DLI. On November 15, 1996, the DoD issued its implementing regulation, approving the Faculty Pay System (FPS) [4] and delegating authority to implement FPS to Respondent. (Jt. Ex. 1)

The implementing regulation sets forth the following purpose:

> The Faculty Pay System (FPS) of the Defense Language Institute Foreign Language Center (DLIFLC) provides for paying FPS faculty by applying a contributions-based system to a formal academic rank-in-person concept. This plan enhances DLIFLC's capabilities to produce more proficient linguists in support of Department of Defense missions and national security needs by permitting it to attract and retain the best professional faculty available. This plan covers all DLIFLC civilian faculty who are appointed on or after the implementation date and those who elected to convert to the FPS during the open season. DLIFLC employees who do not convert to the FPS during the open season may subsequently enter the FPS only through competition.

(Jt. Ex. 1, p. 3, number 1)

Under the Responsibilities and Administration section, the enabling regulations states:

> The Commandant, DLIFLC, is responsible for executing the plan. The commandant shall develop necessary operating guidance or other internal requirements consistent with this plan.

(Jt. Ex. 1, p. 3, number 3 )

Upon receipt of the DoD regulation, the Respondent and the Union entered into negotiations and on November 25, 1996, entered into a final agreement providing for the implementation of the FPS at DLI. The FPS Handbook sets out the general principles and procedures underlying FPS, such as the faculty rank structure and salary administration, as well as procedures for an open season during which faculty members could choose to transfer to FPS or remain as GS employees. (Jt. Ex. 2) In February 2000, a new FPS Handbook was issued which no longer contained the transition procedures. (Jt. Ex. 4; Tr. 30) [5]

Both Handbooks contain the following section related to responsibilities:

> A. DLIFLC Commandant. The Commandant, by virtue of delegated authority directly from DoD, is responsible for all actions associated with the development, implementation, and on-going operation of the FPS. The Commandant may delegate authority to develop and implement those policies and procedures to other offices.
>
> B. Provost. Under the direction of the Commandant, the Provost manages and administers the FPS. The Provost may delegate portions of this authority to other offices.

In October 1996, before the DoD's November issuance and the subsequent negotiations on the Handbook, Khalil and Dr. Clifford entered into a Transition Period Agreement, in which they agreed that during the transition period that would run until February 28, 2001, ". . . FPS Charter members who consistently meet performance expectations should not be financially disadvantaged for having left the GS system in either total annual or base pay." (Jt. Ex. 5) According to Dr. Clifford, the transition period agreement was his method of insuring that employees taking the risk of transferring into the new system, "who voluntarily gave up the guar-

4. DoD documents refer to the system as the Faculty Pay System but DLI has uniformly referred to it as the Faculty Personnel System.

5. Out of 850-860 GS employees, about 670 became charter members of the FPS. (Tr. 27) Employees were placed in the FPS according to their GS salary. The majority of faculty were GS-9 and GS-11 and became assistant professors; GS-7 became instructors; GS-12 became associate professors, and GS-15 became professors. (Tr. 30-31) New faculty at DLI are automatically hired into the FPS. (Tr. 32) At the time of the hearing, there were approximately 350 charter members, approximately 10% of the faculty at DLI. (Tr. 136, 292)

antees that they had under the General Schedule, or standard civil service, to join this brand new untested Faculty Pay System", would not be financially harmed by their choice. (Tr. 96-97) This would enable the parties to respond to every situation that would arise in the implementation of the new pay system. (Tr. 97) The transition period was extended for an additional three years beginning January 1, 2002 (Jt. Ex. 6) and an additional four years beginning on January 1, 2004. (Jt. Ex. 7) The transition period remains in effect at this time. (Tr. 27)

***Summary of the FPS Merit Pay Process***

Jt. Ex. 9 contains the agreement of the parties concerning a summary of the FPS merit pay process.

> FPS was implemented at DLI in 1997. Faculty members working at DLI in 1996 who transferred into the FPS are identified as "Charter Members." Since 1997, all faculty members are hired into the FPS.
>
> Each faculty members (sic) holds one of the following *academic ranks*: Assistant Instructor, Instructor, Senior Instructor, Assistant Professor, Associate Professor, Professor. For the Instructor and Assistant Professor ranks, FPS provides a process for rank advancement upon completion of qualification criteria with approval of the supervising School Dean. FPS has a separate process for competitive rank advancement, using Rank Advancement Boards, for the Associate Professor and Professor ranks.
>
> Each academic rank has a pay range which specifies the minimum and maximum salary that can be paid to an FPS member holding that rank. For example, the FPS Salary Schedule for 2005 was as follows:
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> | | |
> |---|---|
> | Assistant Instructor | $24,677 - $34,896 |
> | Instructor | $30,567 - $43,221 |
> | Senior Instructor | $37,390 - $57,688 |
> | Assistant Professor | $37,390 - $65,431 |
> | Associate Professor | $45,239 - $78,426 |
> | Professor | $54,221 - $106,673 |
>
> At the beginning of each year, pay increases are determined through a performance point system in which *contribution points* (merit points) are given to each employee based on the employee's annual performance evaluation and other accomplishments. These contribution points are distributed by the Dean of each School and by Merit Pay Boards which are convened for each academic rank for each School or academic area.
>
> Each year, the number of contribution points is translated into a *percentage of salary* that is the employee's annual *merit pay* amount. For example, in 2005, the following schedule was in place:
>
> Merit Points:
>
> 1 2 3 4 5 6 7 8 9 10
>
> Merit Pay:
>
> 1% 2% 3.9% 5.10% 6.3% 7.5% 8.7% 9.9% 11.10% 12.30%
>
> Using a formula based on where the employee's salary falls along the pay range continuum for his or her academic rank, a determination is made as to what portion of the merit pay will go into *base pay* and what portion will be paid to the employee as a *one time cash bonus*. Once the employee reaches the maximum salary for his or her rank, base salary does not increase; the year's merit pay is given all as cash bonus.**
>
> ** This is a simplified version of the FPS merit pay process focusing on specific issues relevant to this ULP. Base salary may also increase for other reasons.

(Jt. Ex. 9)

***Previous Adjustments to FPS***

In February 2001, several faculty members were informed that their contributions-based increase exceeded the academic pay band for their specific rank, either Associate Professor or Assistant Professor. The employees were informed that DLI did not have the authority to set basic pay above the maximum rate of the appropriate pay bands. They were informed that their merit pay would be changed from salary to bonus. (Jt. Ex. 11) Employees filed grievances over this correction. A settlement agreement was signed by Dr. Clifford and representatives of the Union in which grievants were advanced to the next rank, either Professor from Associate Professor or Associate Professor from Assistant Professor. (Jt. Ex. 11)

Also in January 2001, as a result of the inclusion of Monterey in the San Francisco locality pay area which increased the salary for GS grades, a number of employees were advanced administratively to the next rank. These ranks were designated as "charter" in their title.

The following criteria were used to determine which employees would be affected:

> 1) DLIFLC is still within the FPS transition period,
>
> 2) You are a charter member of FPS,
>
> 3) DLIFLC has not reached the maximum allocations for the Professor and Associate Professor ranks (15% and 25% respectively),
>
> 4) The base pay portion of the merit pay you have earned this year raises your base salary above the top of your 2001 FPS pay band, and
>
> 5) The salary cap for your previous GS permanent grade, using the 2001 salary table for the locality pay area of San Francisco, exceeds the top of your current FPS pay band.

(G.C. Exs. 4; Tr. 34-35) According to Dr. Clifford, the rationale for this administrative rank advancement was that charter members should not be financially disadvantaged for having volunteered to join the new system. (Tr. 106)

In June 2003, Khalil and Dr. Clifford signed a settlement agreement concerning grievances that had been filed concerning the appropriate pay for Assistant Professors who had been advanced from an "instructor" rank with no adjustment to their annual salary. DLI agreed to adjust the listed employees' annual salary. This agreement was found legally sufficient by an Agency legal counselor. (G.C. Ex. 5; Tr. 107-108)

And in 2004, another issue came up regarding faculty who had been competitively promoted. These employees had not received pay increases at the time of their promotions per FPS policy. As a result, Dr. Clifford indicated that some of their best faculty advanced in rank so fast that they were not able to keep up with their colleagues in terms of salary. DLI therefore increased their pay salary to put it in line with what their salary would have been if they had been hired from outside. There was no written agreement on this issue and it was implemented mid-year. (Tr. 108-111)

***Union Proposal Regarding FPS***

In March 2004, the Union raised the issue regarding administrative rank advancement for charter members. The Union was concerned that a number of employees had reached the top of their pay band, where there was limited money for base pay. (Tr. 43-44) According to the Union, high performers who have received merit points reach the top of the pay band faster than other employees. Therefore, with only a limited amount of money available for increases to base pay, those employees, while receiving bonuses, start losing money to base pay, which has an impact on contributions to TSP and retirement. (Tr. 43-44)

The Union submitted a proposal to Dr. Clifford, which stated the following:

> DLIFLC should also recognize those Charter Members of the FPS who displayed initiative and took a risk in initially joining the FPS at its inception. Many of the original class of FPS who, by virtue of their GS-11 or GS-12 rank, have been advance{d} to a higher rank without competition. However, several members have been left behind in the salary advancement.
>
> As of March 19, 2004 six Charter Assistant Professors and five Charter Associate Professor members have reached the top of their respective pay bands. This fact shows that these people have superior performance within the FPS allowing them to reach the top of the payband within seven to eight years. But as the situation is now, they will not receive full increases to their base salaries even though their performance indications (sic) a minimum of superior achievement.
>
> The Union suggests the following criteria for advancement for current and former FPS members:
>
> · They are at the top of their payband.
>
> · They have received at least six points or more each year over the past three years.
>
> · They have had no adverse disciplinary actions taken against the{m} since the inception of the FPS.
>
> · They are tenured faculty.
>
> Most if not all of these faculty members are likely at or near the end of their federal government careers. Their pioneering achievement should be recognized and rewarded. Perhaps more so than those advanced because of their last GS salary, these few FPS members have made significant and meaningful contributions to the FPS, DLIFLC and to the Defense Foreign Language Program.

(G.C. Ex. 6; Tr. 44-45)

Apparently, there were several meetings between the Union and Dr. Clifford on this issue, although there is little specific evidence regarding any of these discussions. According to Khalil, on December 1, 2004, after a training session for the merit pay board, Dr. Clifford told Khalil that they (the Respondent) would move "the faculty at the top of the band administratively to the next higher band." Dr. Clifford did not include any criteria, but just agreed to promote or move the charter members at the top of their pay band to the next higher pay band. (Tr. 46, 112-113)

Dr. Clifford explained that his primary reason for the agreement was because charter members had been promised that they would not be financially disadvantaged by joining the system. The second reason was a desire to have internal consistency that would allow DLI to defend the adminis-trative rank advancement. (Tr. 114) The third reason concerned management's failure to run the competitive rank advancement process on a routine basis. As the fourth reason, Dr. Clifford also felt that DLI had set its criteria for rank advancement too high. And finally Dr. Clifford asserted that any accommodation made for charter members would be automatically self-correcting as part of the transition to the FPS. (Tr. 115-116)

Neither Dr. Clifford or Khalil put this agreement in writing. According to Khalil, when Dr. Clifford agreed to something, the Union believed it would be implemented. Dr. Clifford's word was final and respected. (Tr. 48, 79)

***Merit Pay Presentations in January 2005***

Under the FPS, Dr. Clifford held meetings with the faculty to discuss merit pay in January of each year. The meetings are scheduled for all of the faculty in groups by schools. Generally, Khalil addresses the employees and then Dr. Clifford gives a merit pay presentation. In January 2005, Dr. Clifford gave several merit pay presentations, using slides to discuss the various issues in FPS. One of the slides on page 3 of R. Ex. 1, "Estimated Allocation of Merit Pay" and under "Special considerations", stated, "Some Charter FPS Members will be advanced in rank to maintain pay comparability with their prior GS status." (R. Ex. 1) This slide apparently referenced the previous administrative rank advancement that took place in 2001. At some, but not all of the meetings, Dr. Clifford used this slide to mention the new advancements, stating that charter members at the top of their pay band would be administratively advanced to the next band. There was not much discussion, if any, at the meetings, although some employees did ask Khalil about the announcement. (Tr. 48-49, 51-52, 123) [6/]

***Implementation of Agreement***

Dr. Clifford retired from DLI immediately after the merit pay meetings, in early January 2005. Also in January, faculty under FPS received letters detailing their merit pay and bonus for the year. The Union was concerned about the implementation of the administrative advancement for the employees at the top of the band, and arranged a meeting with Dr. Stephen Payne, Acting Chancellor, on January 28. At the meeting Khalil and Dr. White informed Dr. Payne that the Union had an oral agreement with Dr. Clifford that charter members at the top of the pay band would be administratively advanced. Dr. Payne had not heard anything about this agreement and was not aware of the agreement. He asked if Khalil had anything in writing, and Khalil indicated that they did not have the agreement in writing but they had reached agreement. Khalil suggested that Dr. Payne get in touch with Dr. Clifford and ask him about the agreement. (Tr. 53-55, 283-287)

Dr. Payne then said that there was nothing in the slides at the briefings to indicate the agreement. Khalil said that Dr. Clifford made the announcement when he got to the slide about administrative rank advancement, and briefly mentioned that charter members at the top of the pay band would be advanced to the next higher rank. (Tr. 123)

Dr. Payne told the Union officials that if he had known about the agreement, he would have quashed it. He indicated that this type of agreement could only be done with the Assistant Commandant. Khalil responded that the Union had never discussed anything like this with the Assistant Commandant, and that FPS issues, agreements and implementation were always with Dr. Clifford. (Tr. 53-55)

On February 11, 2005, Khalil sent a letter to Dr. Payne asking if he had contacted Dr. Clifford, and to inform the Union. (Jt. Ex. 8; Tr. 56)

On February 14, 2005, Dr. Payne responded, reiterating his position and asking for a written agreement and documentation. (G.C. Ex. 7; Tr. 56)

Khalil also contacted Dr. Clifford, explaining what was happening at DLI. (G.C. Ex. 8; Tr. 58-59, 125) Khalil later received an email response from Dr. Clifford, who apologized for the confusion and indicated he was still looking into the issue. (G.C. Ex. 9; Tr. 59)

6. None of the Respondent's witnesses present at these meeting construed Dr. Clifford's remarks as announcing a new administrative rank advancement. (Tr. 311)

While Dr. Clifford was at DLI, the Union only dealt with him or his staff, including Esther Rodriguez, Faculty Personnel Administrator, on FPS issues (Tr. 32-33, 61, 81). The Union met with Dr. Clifford almost monthly on FPS matters. (Tr. 33) The Union further asserted that it never dealt with the Commandant or the Assistant Commandant on FPS issues, or that it was ever informed that Dr. Clifford did not have the authority over FPS matters. (Tr. 33, 62)

The Union filed the unfair labor practice charge in this matter on March 9, 2005. (G.C. Ex. 1(a))

Charter members who have reached the top of their pay bands have not been administratively rank advanced at DLI. According to Khalil, he initially thought only about eleven charter members would benefit from the agreement (Tr. 63), although he admitted the agreement could conceivably effect every charter member. (Tr. 64) He also agreed that there were no limitations on the number of times an employee could be administratively promoted.

**Issue**

Whether or not the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to and refusing to comply with the provisions of an oral agreement entered into by Dr. Clifford and the Union.

**Positions of the Parties**

**General Counsel**

The General Counsel (GC) asserts that the evidence clearly establishes that in December 2004, Dr. Clifford, the Respondent's Chancellor, agreed with the Union to administratively rank advance charter members who reach the top of their pay bands. This action would have been effected with the merit pay increases disseminated to all FPS faculty members in January 2005. It is undisputed that the Respondent did not implement the terms of this agreement and has not provided for charter members who have reached the top of their respective pay bands to be administratively rank advanced. The GC therefore asserts that the only issues in this matter are: 1) Whether Dr. Clifford had the authority to enter into the subject agreement with the Union; and if so, 2) What should be the remedy for the Respondent's refusal to comply with the agreement?

With regard to the agreement, the GC asserts that the parties reached this oral agreement after discussions between Dr. Clifford and the Union representatives, Alfie Khalil and Phil White. Further, it is well founded that an oral agreement may be binding on the parties, citing to *U.S. Department of Defense Dependents Schools and Federal Education Association,* 55 FLRA 1108 (1999) (*DoDDS*).

The GC further asserts that the terms of the oral agreement between Dr. Clifford and the Union are clear and unambiguous providing that charter members who reach the top of their pay bands will be administratively rank advanced. Both the Union and the Agency representatives are of one mind as to the specific terms of their oral agreement, distinguishable from *Department of the Interior, Washington, D.C. and Bureau of Indian Affairs, Washington, D.C. and Flathead Irrigation Project, St. Ignatius, Montana,* 31 FLRA 267 (1988) (Despite the union representative's belief that the management representative had agreed to make the call-back pay retroactive to a date a year earlier, the Authority found that the management representative's words were sufficiently ambiguous as to preclude finding that a meeting of the minds had occurred.)

Therefore, the GC asserts that, consistent with the duty to bargain in good faith under the Statute, the Respondent committed an unfair labor practice by refusing to comply with the provisions of this negotiated agreement. *See Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211 (1991) (*Robins AFB*) (Refusal to comply with ground rules agreement to assign union's negotiator to day shift was a ULP.)

The GC further asserts that, as Chancellor, Dr. Clifford had the authority to enter into this agreement on behalf of the Respondent. The GC asserts that the Respondent's attempts to show Dr. Clifford did not have authority to enter into this agreement were primarily testimony by representatives who felt that rank advancing charter members who reached the top of their pay scale significantly altered the FPS system, was contrary to the merit principles underlying FPS, would result in unqualified individuals being promoted and would fill up the professor and associate professor ranks. The GC asserts that whether the Respondent's witnesses disagreed with the agreement is not a basis to find it unenforceable. If Dr. Clifford had authority to enter into that agreement, real or apparent, then the agreement binds the Respondent, regardless of the Commandant or Dr. Payne's personal objections to the terms of the agreement. *See American Federation of Government Employees, Local 2207 and U.S. Department of Veterans Affairs, Medical Center, Birmingham, Alabama*, 52 FLRA 1477, 1479 (1997) (AFGE); *Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois*, 9 FLRA 499 (1982).

**Agreement does not significantly alter FPS**

Although the Respondent argues that the change is of such magnitude that it essentially rewrites the FPS and thus required higher level approval, the GC asserts that the agreement is consistent with the FPS as it has been implemented by the Respondent. To Dr. Clifford, the new agreement was necessary to ensure that the promises of the Transition Agreement were met. Further, Dr. Clifford viewed the agreement as consistent with the administrative rank advancement policy which had been in place since 2001, a policy which had already rank advanced over 100 employees without regard to their academic "qualifications", *i.e.*, whether they had a PhD to be promoted to professor or an M.A. to be promoted to associate professor. That policy was considered competitive, particularly when one considered that FPS members move up the pay band based on their performance and that only high performers will reach the top of the band. The new administrative rank advancement is consistent with other modifications Dr. Clifford made to the FPS during its lifetime, such as giving pay adjustments to those hired at the lower end of the ranks in the early years, or giving pay adjustments to faculty members who were advanced through the competitive rank advancement process.

**Agreement is consistent with Dr. Clifford's authority to manage the FPS program and should be found enforceable**.

The GC submits that the record evidence clearly establishes that Dr. Clifford had full authority to run the FPS program from its beginning, whether through actual or implied delegation from the Commandant at the time FPS was implemented, and that for the next seven years, through the terms of several Commandants, Dr. Clifford routinely exercised this authority. There was no evidence of any attempts to question or circumscribe Dr. Clifford's authority. Although the Commandant is the Chancellor's superior and could have questioned his actions, there is no evidence that this was ever done. Therefore, there is no basis to conclude that Dr. Clifford did not have the authority he understood and represented to the Union.

**Regardless of his actual authority, Dr. Clifford acted with apparent authority to negotiate and enter into agreements to bind the Respondent**.

The uncontroverted testimony of Alfie Khalil and Phil White establishes that from the time FPS was implemented at the Respondent in 1997, and until his retirement in January 2005, the Union dealt only with Dr. Clifford or with the Chancellor's staff, on all matters concerning the FPS. Further, at all times the Union representatives understood that Dr. Clifford had full authority to negotiate and enter into agreements on behalf of the Respondent on matters concerning FPS. In the instant case, the evidence is clear that Dr. Clifford possessed authority to act on behalf of the Respondent concerning all matters involving FPS, including resolution of grievances and negotiation of agreements, and that the Union reasonably believed Dr. Clifford to have the authority to enter into the agreement providing rank advancement of charter members involved in this case.

**Respondent's suggestion that Dr. Clifford agreed to administrative rank advancement for faculty at the top of their pay scale as a reward for Khalil and White's support is completely specious.**

The GC further argues that the Respondent's suggestion that Dr. Clifford agreed to the rank advancement for charter members as a gratuitous "gift" to Alfie Khalil and Phil White for having supported Dr. Clifford during his long tenure, is simply without any foundation and must be rejected out of hand. As Dr. Clifford's testimony makes clear, agreement to the administrative rank advancement was not "rewarding" his friends or supporters, but was keeping a promise he made in 1996 in the Transition Agreement to those faculty members who took the risk with an untried system that they not be financially disadvantaged by having taken that risk. If administrative rank advancement was acceptable for FPS charter members whose former GS salary exceeded their FPS salary as a reflection of their meritorious performance, then it was equally or more applicable to those charter members who, by virtue of exemplary performance, had advanced so rapidly to the top of their pay band.

**Remedy**

The GC asserts that the appropriate remedy in this matter is to require the Respondent to comply with the agreement into which it entered. Respondent's failure to comply with its agreement meant that faculty members who reached the top of their pay bands as of January 2005 were not administratively rank advanced; this affected the amount of their base pay during all of 2005, thereby affecting the amount they contributed to TSP or, if any affected faculty members retired, their high three salary for purposes of retirement under CSRA; and it affected their bonuses in 2006 since merit pay is based on the percentage of base pay. As to the faculty who should have been rank advanced in 2006, at this point in time, their total salary, including bonus, would not have changed; however, the failure to do the rank increase has affected the amount of that total salary that would be

allocated to base salary and thus, has affected their contributions to TSP, the amount of pay for retirement, and any other purposes for which base pay is used to compute benefits.

Thus, Respondent's failure to comply with its enforceable agreement constituted an "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee" under the Back Pay Act, 5 U.S.C. 5596,, and the Respondent should be ordered to make faculty members whole for all pay and benefits lost as a result of the Respondent's unlawful action, including the opportunity to contribute to TSP or any other contribution based on base pay.

**Respondent**

The Respondent asserts that there was not an enforceable agreement entered into between the Union and the Respondent for several different reasons. Specifically, the Respondent takes the position that Dr. Clifford did not have the authority to make an agreement of such magnitude without approval from higher authority within the organization. There is also a lack of a "clear and unambiguous" agreement between the parties concerning the alleged agreement, as well as a failure to reduce the alleged agreement to writing upon the request of Respondent's representative once the alleged agreement was finally made "public" by the Union. Further, the Respondent asserts that the "agreement" reached between the Union and Dr. Clifford was of such a nefarious nature that it was clearly done for personal, and not management or government interests. As such, there was no "good faith" bargaining (at least on the part of management) on this matter, thus preventing any legitimacy to any agreement reached. Furthermore, the rationale repeatedly offered at hearing as the justification for this "agreement" is obviously of a pretextual nature. Instead, it is apparent that the "agreement" allegedly made by Dr. Clifford appears to be an attempt by Dr. Clifford to provide promotions to a number of FPS employees who are either not qualified for promotion under the FPS or who were qualified for promotion but were not previously selected for promotion.

**Lack of Written Agreement**.

The Respondent asserts that, pursuant to section 7114(b)(5) of the Statute, there is an obligation to execute a written document that embodies the agreed terms of an agreement reached through good faith bargaining. In this matter, no written document was ever produced despite several requests from the Respondent. The Authority has consistently held that when a bilateral agreement is reached, there is a need to execute a written agreement to ensure there was in fact a "meeting of the minds" on the issue in question. *See International Organization of Masters, Mates and Pilots and Panama Canal Commission*, 36 FLRA 555 (1990). Both Parties had previously ensured that various agreements were reduced to writing (See Jt. Exs. 4, 5, 6, and 7), and there is no justification for their failure to do so in this matter.

**Lack of Authority.**

Citing to *U.S. Small Business Administration and American Federation of Government Employees, Council 228, Local 2532*, 38 FLRA 386 (1990) (*SBA*), the Respondent asserts that this case is analogous to the instant matter, although noting the behavior in the *SBA* case is much more egregious. In the *SBA* case, the Authority found that an agency official acted without authority in entering into a settlement agreement on behalf of the agency. There, the settlement was clearly detrimental to the agency and there was no communication with the agency on the terms of the settlement and the terms of the agreement clearly exceeded the authority of the management official acting on behalf of the agency in the settlement.

Here, there is strong similarity in the outcome of the "bargaining" that took place in both matters. The evidence clearly shows that the "agreement" reached had virtually no benefit for DLIFLC. The agreement was made as a reward to certain charter members. Further, Dr. Clifford made this agreement in very close proximity to his separation from the agency and made no attempt to communicate the alleged changes to any DLIFLC senior management prior to his retirement. And according to Jerry Merritt, a former contractor at DLI, none of the normal procedures used for analyzing changes to the FPS were utilized prior to the alleged agreement on the modification to the Charter Member Administrative Rank Advancement system. (Tr. 186-187)

**Lack of Clear and Concise Agreement**.

The Respondent also asserts that there continue to be significant questions as to the exact nature of the agreement. The Authority has consistently held that an agreement must be a "meeting of the minds" in order to be enforced. *IRS and NTEU Chapter 87*, 55 FLRA 223 (1999). The Respondent notes that the ambiguity of the agreement is apparent from the testimony of Khalil and Dr. Clifford. In G.C. Ex. 9, Dr. Clifford writes in an email that ". . . I am still working on this, and have requested some data reports so the discussion can be based on real numbers rather than impressions." The

final impact of the alleged agreement was not clear to either party.

**Contradictory evidence**.

The Respondent finally asserts that contradictory testimony and unusual actions taken by the Union and Dr. Clifford show a lack of good faith on the part of Dr. Clifford in representing management when the alleged agreement was reached. The Respondent notes the serious disagreement between various witnesses with exactly what Dr. Clifford stated to the faculty in the various Merit Pay presentations in January 2005. Further Dr. Clifford testified that there would be no negative effect upon DLIFLC by the agreement, although there was ample evidence from other witnesses to the contrary, particularly with regard to the agreement undercutting the underlying philosophy of the FPS as a competitive system.

**Analysis and Conclusion**

The two primary issues to be dealt with in this case are whether Dr. Clifford had actual or apparent authority to enter into an agreement with the Union on behalf of the Respondent, and, if so, whether the agreement was such that the Respondent was obligated under the Statute to abide by it.

**Actual or apparent authority.**

I will first deal with the issue of whether Dr. Clifford, as Chancellor, had the authority to enter into the agreement with the Union to administratively advance charter members who were at the top of their rank to the next position. Both the GC and the Respondent correctly cite to the Authority's decision in *SBA*, in which the Authority discussed agency:

> It is well settled that a question of whether a settlement agreement is enforceable is a question of law. See, for example, McCall v. U.S. Postal Service, 839 F.2d 664 (Fed. Cir. 1988). Accordingly, the findings and conclusions of the Arbitrator are entitled to no deference. We must resolve the question of law as to whether Stanton had the authority to bind the Agency to the terms and conditions of the settlement agreement.
>
> It is also well settled that the United States is not bound by the unauthorized acts or representations of its agents. For example, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (Merrill). See generally Office of Personnel Management v. Richmond, 110 S. Ct. 2465, 2469-71 (1990). When the terms and conditions of an agreement with the Federal Government are disputed by the Government, those terms and conditions are not valid in the absence of proof that the agent had the actual authority to agree to such terms and conditions. See Jackson v. United States, 573 F.2d 1189, 1197 (Ct. Cl. 1978) (Jackson). Individuals who purport to contract with the Government assume the risk that the official with whom they are dealing is not clothed with the actual authority to enter into the alleged agreement. Merrill, 332 U.S. at 384. Moreover, the Government is not estopped to deny the authority of its agents. Jackson, 573 F.2d at 1197. Consequently, there can be no relief from any negative consequences flowing from assurances that an agent was not authorized to make. For example, Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1100 (9th Cir. 1981). Furthermore, the doctrine that principals may be bound by the acts of their agents acting in violation of specific instructions is not applicable to the acts of an officer of the Federal Government. United States v. 45.28 Acres of Land, etc., 483 F. Supp. 1099, 1102 (D. Mass. 1979) (Acres of Land). The courts have explained the reasoning for this approach to be that it is better for an individual to suffer from mistakes of such officers than to adopt a rule which by collusion or otherwise might result in detriment to the public. Acres of Land, 483 F. Supp. at 1102. In sum, the U.S. Supreme Court has stated that the often quoted observation in Rock Island, Arkansas & Louisiana L. R. Co. v. U.S., 254 U.S. 141, 143 (1920) that "[m]en must turn square corners when they deal with the Government," does not reflect a callous outlook, but merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury. Merrill, 332 U.S. at 385.

38 FLRA at 406-407.

The evidence reflects that Dr. Clifford, as Chancellor, was responsible for the FPS program from its inception in 1997 until his retirement in January 2005. During those seven years, he had full authority over the FPS program. Dr. Clifford's own performance evaluation reports related that, among his many duties, he had the responsiblity to oversee "the operation of the Faculty Personnel System to insure its support of Institute goals and mission accomplishment." (G.C. Exs. 2 and 3)

From the implementation of the FPS, Dr. Clifford was the individual that the Union dealt with regarding the various issues that arose. Even before implementation, Dr. Clifford entered into the Transition Agreement with the Union that was specifically designed for the protection of those employees who left the GS system to become charter members of the FPS. These transition agreements (Jt. Exs. 5, 6 and 7) were the foundation of the processing of the FPS program at DLI and Dr. Clifford referenced the Respondent's need to ensure that those charter members "should not be financially disadvantaged". Further, Dr. Clifford entered into settlement agreements for grievances involving issues related to the processing of the FPS and how it affected various bargaining unit employees. These settlement agreements were with the Union and Dr. Clifford was decidedly the designated management official involved in these matters. The FPS was a program that required adjustments and fine-tuning as it was implemented. There is no evidence that the Commandant, as the Chancellor's superior and as commander, ever questioned Dr. Clifford's actions or his authority until after his retirement.

The facts in this case are distinguishable from the actions of the manager in the *SBA* case. In that case the Authority found the manager lacked actual authority to bind the Agency to the terms and conditions of a settlement agreement. The agreement provided, among other things, for the promotion of eight employees, seven retroactively with back pay and three with multiple promotions; reversed several disciplinary actions with backpay and admissions of wrongdoing by the agency; awarded extraordinary monetary compensation to the Union, and also granted specific relief to one of the union representatives and a signatory to the agreement. The settlement agreement also called for the Union to represent the manager in an impending agency disciplinary action and required that he not be held responsible for the terms and conditions of the agreement. The Authority, understandably, found this conduct unreasonable and determined that the manager had no actual or apparent authority to enter into the settlement agreement.

The conduct of Dr. Clifford in reaching the agreement at issue in this matter, based on the analysis above, is not comparable to that found in *SBA*. Rather his position is more similar to that found in *AFGE*, 52 FLRA 1477, in which the Authority found that the union's vice president had been appointed to negotiate an agreement and therefore had apparent authority. The Authority further found that the vice president's authority had not been terminated and he continued to exercise his authority. As the Authority stated in that decision:

> In an agency relationship a principal confides to an agent the management of business to be transacted in the former's name. See generally 3 Am. Jur. 2d Agency § 1 (1986). The authority of an agent to act on behalf of the principal can be either actual or apparent. Actual authority is authority that the principal has intentionally conferred upon the agent. See, for example, U.S. v. Schaltenbrand, 930 F.2d 1554, 1560 (11th Cir. 1991). Apparent authority occurs where the principal has held out the agent as having such authority or has permitted the agent to represent that he has such authority. 3 Am. Jur. 2d Agency § 78 (1986). It has been held that "when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." Metco Products, Inc. v. NLRB, 884 F.2d 156, 159 (4th Cir. 1989) (Metco) (citing University of Bridgeport, 229 NLRB 1074 (1977)).
>
> Authority will be terminated if the agent is given sufficient notice. 3 Am. Jur. 2d Agency § 51 (1986). Sufficient notice occurs if the agent actually knows, or has reason to know, facts indicating that the authority has been terminated. Id. However, the acts of an agent whose authority has been revoked may continue to bind a principal as against third persons who, in the absence of notice of the revocation of the agent's authority, rely upon its continued existence. 3 Am. Jur. 2d Agency § 52 (1986). See Southwest Sunsites, Inc. v. F.T.C., 785 F.2d 1431, 1438 (9th Cir. 1986) (a principal is bound by the acts of its agent if those acts are within the scope of the agent's authority, unless the third party has actual notice that the acts are unauthorized).

55 FLRA at 1480, 1481.

In reviewing the evidence before me, I find that Dr. Clifford had actual authority to enter into the agreement in question with the Union. This actual authority is found in the DoD regulation as well as the parties' Handbooks setting forth the procedures for implementing FPS. Further, the evidence reflects that Dr. Clifford exercised this authority for the entire time that the FPS was in effect and until his retirement from DLI.

Even if Dr. Clifford did not have actual authority, he had the apparent authority to bind the Respondent.

As noted above, the Union dealt exclusively with Dr. Clifford on FPS issues on a regular and ongoing basis. Dr. Clifford was the primary DLI contact on all matters dealing with FPS since its inception. There is no evidence that the Respondent ever discredited Dr. Clifford's authority, or even tried to lessen it.

**Validity of Agreement**

In my view, the record evidence establishes that Dr. Clifford entered into an agreement with the Union regarding the administrative rank advancement of charter members at the top of their pay band to the next rank. The GC witnesses, Union President Kahlil, Drs. White and Clifford, all credibly testified regarding the presentation of the issue and the agreement reached in December 2004. Even Respondent's witnesses acquiesced in the knowledge that an agreement had been reached, although they universally testified that they were unaware of the agreement until after Dr. Clifford retired.

The terms of the agreement were also quite clear: that charter members at the top of their pay band would be administratively rank advanced to the next rank, *i.e.*, assistant professor to associate professor and associate professor to professor. There were no other conditions for the agreement.

It is also clear that the agreement was oral, and was never reduced to writing. Section 7114(b)(5) of the Statute states:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation–
>
> . . .
>
> (5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms; and to take such steps as are necessary to implement such agreement.

The Respondent argues that since it requested, but was never furnished, the agreement in writing, that the agreement cannot be valid. However, the evidence reflects that neither Dr. Clifford nor the Union officials felt a written agreement was necessary and it was not reduced to writing. [7/] It was only after Dr. Clifford retired and the Union spoke to Dr. Payne about enforcement of the agreement, that a written copy was requested. By then, it was not possible to furnish a written agreement.

It is well settled that an oral agreement may be binding on the parties. In *DoDDS*, the Authority stated:

> Under section 7114(b) of the Statute, the duty of an agency and an exclusive representative includes the obligation to negotiate "with a sincere resolve to reach a collective bargaining agreement[.]" If an agreement is reached, then the parties are obligated, "on the request of any party" to the negotiations, to execute a written document embodying the agreed terms. 5 U.S.C. § 7114(b)(5). *See U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 317 (1997) (*Standiford Air Traffic Control Tower*), and cases cited therein. An "agreement," within the meaning of section 7114(b)(5) of the Statute, is reached when authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining. *Panama Canal Commission*, 36 FLRA at 560.
>
> Although parties are required, on request, to reduce to writing any oral agreement they have reached, the fact that an agreement need only be reduced to writing *when requested* implies that a written agreement is not always necessary. Consistent with this, the Authority has held that parties may enter into oral agreements, and that such agreements bind the parties. *See, e.g., Standiford Air Traffic Control Tower*, 53 FLRA at 317. Contrary to the assertion of the Agency, *Panama Canal Commission* did not establish a rule that only written agreements may bind the parties. In *U.S. Department of the Treasury, Bureau of Engraving and Printing and International Plate Printers, Die Stampers and Engravers Union, Washington Plate Printers Union, Local 2*, 44 FLRA 926, 940 (1992) (*DOT*), the Authority upheld the arbitrator's finding that the parties had entered a binding, "tacit" agreement. In so holding, the Authority distinguished *Panama Canal Commission* on the ground that there

7. The Union gave no specific explanation for its failure to have the agreement reduced to writing, other than it trusted Dr. Clifford to do what he said he would do. In view of Dr. Clifford's imminent departure due to retirement, this failure by either party to reduce the agreement to writing is imprudent, if not, foolish. As the Respondent points out, the parties had reduced almost all of their previous agreements to writing (*i.e.*, Transition Agreements, Settlement Agreements). However, I do not find this failure to be sufficient to overcome the substantial evidence that there was an agreement reached between the parties.

> was no finding by an arbitrator in that case that the parties had entered any sort of agreement. Consistent with the Authority precedent set forth above, parties may be bound by their oral, or even "tacit," agreements.

55 FLRA at 1108.

Since it is obvious that an oral agreement can, in fact, be an agreement that the Respondent is obligated to implement/enforce, the next question in this matter is whether the agreement is clear and unambiguous. *Internal Revenue Service, North Florida District, Tampa Field Branch, Tampa, Florida*, 55 FLRA 222 (1999). (Preponderance of the evidence demonstrates that the parties did not reach agreement on a term of the MOU that both regarded as material, therefore, no violation).

In this matter, the Union and Dr. Clifford were of one mind as to the specific terms of their oral agreement. There is no evidence that the parties discussed which specific employees would be directly impacted by this oral agreement, although it appears that both Khalil and Dr. White would benefit from the agreement. Although some projections were run, the parties did not discuss specific numbers of employees to be involved. However, these failures cannot overcome the evidence that the parties had a simple agreement that charter members who had reached the top of their pay band would be administratively rank advanced.

While the Respondent disagrees with the wisdom of this agreement, there is no evidence that this agreement is not consistent with prior agreements reached by Dr. Clifford and the Union regarding the implementation of the FPS or that it is not consistent with the way in which the FPS has been implemented at the DLI. Further, this oral agreement is entirely consistent with the Transition Agreements that have been in place since the inception of the FPS and which specifically set forth the guiding principle that "FPS Charter members who consistently meet performance expectations should not be financially disadvantaged for having left the GS system in either total annual or base pay." (Jt. Ex. 5)

I therefore reject the Respondent's arguments that there are significant questions as to the exact nature of the agreement. Rather, I find that the oral agreement is clear and concise and the Union and the Respondent were of one mind as to the specific terms of their agreement. By refusing to comply with the provisions of this negotiated agreement, the Respondent committed an unfair labor practice. *See Robins AFB,* 40 FLRA 1211. (Refusal to assign a designated union negotiator to the day shift pursuant to an agreement between the parties.)

**Remedy**

I further find that the appropriate remedy in this matter is to require the Respondent to comply with the oral agreement. *Robins AFB*. Since the Respondent's failure to comply with its agreement meant that charter members who reached the top of their pay band as of January 2005 were not administratively rank advanced, this affected the amount of their base pay during all of 2005. Further, this affected the amount they could contribute to TSP or if any affected faculty members retired, their high three salary for purposes of retirement under CSRA; and it affected the bonuses in 2006 since merit pay is based on the percentage of base pay. For faculty who should have been rank advanced in 2006, their total salary would not have changed; however, the failure to do the rank increase has affected the amount of that total salary that would be allocated to base salary and thus, has affected the amount contributed to TSP, the amount of pay for retirement, and any other purposes for which base pay is used to compute benefits.

Respondent's failure to comply with its enforceable agreement constitutes an "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee" under the Back Pay Act, 5 U.S.C. § 5596, *United States Department of Homeland Security, Border and Transportation, Security Directorate, Bureau of Immigration and Customs Enforcement, Philadelphia District, Philadelphia, Pennsylvania*, 60 FLRA 993 (2005). The Respondent, therefore, is ordered to make faculty members whole for all pay and benefits lost as a result of its unlawful action, including the opportunity to contribute to TSP or any other contribution based on base pay. Such back pay should include interest. *Department of the Interior, Bureau of Reclamation Washington, D.C. and Department of Interior, Bureau of Reclamation, Lower Colorado Regional Office, Boulder City, Colorado*, 33 FLRA 671 (1988).

Having found that the Respondent violated the Statute by refusing to implement the December 2004 oral agreement, I recommend that the Authority issue the following Order.

**ORDER**

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of Defense, Defense Language Institute, Foreign Language Center, Monterey, California, shall:

1. Cease and desist from:

(a) Failing and refusing to implement the agreement reached by Chancellor Ray Clifford and representatives of the American Federation of Government Employees, Local 1263, AFL-CIO (Union) in December 2004 which provides that FPS charter members who reached the top of their pay bands will be administratively rank advanced.

(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:

(a) Implement the agreement reached by Chancellor Ray Clifford and representatives of the Union to administratively rank advance FPS charter members who reach the top of their pay bands, retroactive to January 2005.

(b) In accordance with the Back Pay Act, 5 U.S.C. § 5596, make whole all eligible charter members for salary and benefits lost as a result of the Respondent's failure to implement the agreement in January 2005. This will include, *inter alia*, providing eligible charter members the opportunity to contribute retroactively to TSP, and providing pay adjustments for any eligible charter members who retired since January 2005.

(c) 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 of such forms, they shall be signed by the Commandant, 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.

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

Issued, Washington, DC, September 29, 2006

_____
SUSAN E. JELEN
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 Defense, Defense Language Institute, Foreign Language Center, Monterey, California, violated the Federal Service Labor-Management Relations Statute (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 implement the agreement reached by Chancellor Ray Clifford and representatives of the American Federation of Government Employees, Local 1263, AFL-CIO (Union) in December 2004 which provides that FPS charter members who reach the top of their pay bands will be administratively rank advanced.

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 Statute.

WE WILL implement the agreement reached by Chancellor Ray Clifford and representatives of the Union to administra-tively rank advance FPS charter members who reach the top of their pay bands, retroactive to January 2005.

WE WILL make whole all eligible charter members for salary and benefits lost as a result of our failure to implement the agreement in January 2005, in accordance with the Back Pay Act, 5 U.S.C. § 5596. This will include, *inter alia*, providing eligible charter members the opportunity to contribute retroactively to TSP, and providing pay adjust-ments for any eligible charter members who retired since January 2005.

_____
(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, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: 415-356-5000.