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

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1458, AFL-CIO Charging Party	Case No. AT-CA-50860

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JANUARY 13, 1997**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 13, 1996
Washington, DC

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

MEMORANDUM DATE: December 13, 1996

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE

Respondent

and Case No. AT-CA-50860

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1458, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1458, AFL-CIO Charging Party	Case No. AT-CA-50860

David Graf, Esquire
For the Respondent

Mr. Daniel P. Tarasevich
For the Charging Party

John F. Gallagher, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent was bound by an oral agreement made by an employee who retired shortly thereafter and who, Respondent asserts, was not authorized to make such agreement.

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

This case was initiated by a charge filed on July 6, 1995 (G.C. Exh. 1(a)). By order dated February 7, 1996 (G.C. Exh. 1(c)), this and other cases were, pursuant to § 2429.2 of the Authority's Rules and Regulations, 2 C.F.R. § 2429.2, transferred to the Authority's Chicago Region. The Complaint and Notice of Hearing issued on June 6, 1996, and set the hearing for August 15, 1996, pursuant to which a hearing was duly held on August 15, 1996, in Miami, Florida, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, September 16, 1996, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on, or before, September 19, 1996, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees, AFL-CIO (hereinafter, "AFGE") is the certified exclusive representative of a nationwide unit of certain employees of the Respondent, Immigration and Naturalization Service, and American Federation of Government Employees, Local 1458, AFL-CIO (hereinafter, "Union") is an agent of AFGE for the representation of unit employees of Respondent's Miami District (G.C. Exhs. 1(e) and (g); Tr. 13).

2. On April 19, 1994, the Union filed an unfair labor practice charge with the Authority, Case No. AT-CA-40522 (G.C. Exh. 2), which alleged that Respondent unilaterally changed a practice of overtime call out assignment of inspectors stationed at the Miami International Airport (Airport) to the Port of Miami whereby inspectors from the Airport were relieved at the Port of Miami before completion of the inspection duty if a regularly scheduled Port of Miami employee became available, causing a loss in overtime pay for the Airport inspectors (Tr. 14-16).

3. Mr. Richard G. Gainey, Jr., who filed the April 19, 1994, charge (G.C. Exh. 2), later left INS (Tr. 17); but, before he left, had worked out a list of officers and how much time and money he asserted they had lost (Tr. 43). Mr. Gainey had discussions with Mr. Dewayne Wicks, a labor relations specialist in the Dallas Administrative Center of the Immigration and Naturalization Service, who assisted the Miami District in labor relations matters (Tr. 50-51); but those discussions were not fruitful (Tr. 43-44).

4. Mr. Michael Wixted became President of the Union in August 1994 (Tr. 14). On August 25, 1994, Mr. Wixted participated in a conference call with Mr. Wicks and Mr. Robert E. Bailey, an employee of the Authority's Atlanta Region who initiated the telephone conference. The three discussed six pending unfair labor practice cases, including 40522 (G.C. Exh. 2), and agreed to a disposition of each. No written agreement was made. By letter dated August 29, 1994, the Regional Director of the Authority advised the Charging Party (Union) that its request to withdraw the six unfair labor practice charges, including 40522, was approved (G.C. Exh. 3).

5. Mr. Wixted made notes of the ULP Settlements and, as to AT-CA-40522, he wrote,

"1. 40522: Change in O.T. . . .

- Inspectors were being ordered off ships prior to completion of Assignment. Lost o.t.

"Agreement Reached:

1. Mgt. will backpay Inspectors who lost o.t. due to policy change for a 6 week period 1/23/94 until 3/8/94.

2. Union will be able to negotiate I&I of change." (G.C. Exh. 4).

Mr. Wixted testified that he wrote these notes, "At the time we were discussing it." (Tr. 21); and expanded a bit in his testimony, as follows.

> "We basically agreed that the Agency would discontinue the change and revert back to the original practice. And we came up with a back pay settlement for a narrow period of time.
>
> "We also agreed that if the Agency wanted to reimplement the changes they would properly notify us under the contract and negotiate with us on the impact." (Tr. 20).

Mr. Wixted made it clear that the six week period (1/23/94 - 3/8/94) was an arbitrary period, urged by Mr. Bailey, and accepted, "In an effort to reach a mutually acceptable solution. . . ." (Tr. 21); however, the change, which began on, or about January 23, 1994 (G.C. Exh. 2), was still in effect in August, 1994 (Tr. 21).

6. Mr. Wixted stated that, at the time they were making the settlements, ". . . we were unable to determine exactly which officers would be back pay. . . ." (Tr. 23), but Mr. Wicks was going to get a list together. Thereafter, Mr. Wixted and Mr. Wicks had numerous discussions (Tr. 41) and, finally, in late February, 1995, they reached a ". . . round figure of $65.00 per eligible officer would be back payed . . . for the six week period. . . ." (Tr. 24).

Mr. Wixted further stated,

> "We could identify them [the individuals harmed]. The problem was that Mr. Wicks didn't want to go through all the 202's and determine the exact dollar amount. So he threw out a ballpark figure of $30.00. I threw out one of $200.00. And after a half hour or so we reached $65.00. . . ." (Tr. 42-43).

7. Shortly after Mr. Wixted and Mr. Wicks had agreed upon the $65.00 figure, Mr. Wicks, in March 1995, retired. (Tr. 24). Mr. Wicks was not called as a witness.[2] Mr. Wixted's testimony was wholly credible, was not contradicted and is credited in all respects, including his statement that Mr. Wicks was the designated agency representative in all matters with which Mr. Wixted dealt (Tr. 34) and that Mr. Wicks never said he was not authorized to obligate funds (Tr. 35). Indeed, Mr. Wixted stated that Mr. Wicks had expressed to him concern as to whether it was legal to pay a blanket $65.00 to each officer; that that was what Mr. Wicks ran, ". . . past the finance people" (Tr. 28); and that, "I believe that he [Wicks] finally determined it was okay to pay the blanket $65.00." (Tr. 28-29).

8. No payment was ever made (Tr. 27) and after Mr. Wicks retired Mr. Wixted spoke to a Mrs. Kellner (Tr. 42), but the record does not show their conversation; and then to Patricia Beechem, at the time, a labor management relations specialist (Tr. 26) and now a supervisory labor management relations specialist (Tr. 26), about the agreement and Ms. Beechem said,

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[2] Mr. Wicks' statement, dated August 8, 1996, (Res. Exh. 4, for identification) was rejected. He was not called as a witness and was not subject to cross-examination. On its face, his statement appears to be contrary to all other credible evidence and testimony and without clarification and substantiation was not competent evidence.

". . . she didn't know of any FLRA charges that involved any kind of back pay settlement . . . She did not have any knowledge of them." (Tr. 27).

Mr. Wixted then spoke to Mr. Walter D. Cadman, District Director (Tr. 25), who told him,

". . . he didn't authorize any settlement agreement involving monetary awards. He told me that Mr. Wicks wasn't authorized to make any kind of monetary settlements with the Union." (Tr. 26).

Mr. Cadman was not called as a witness.[3]

9. Mr. Wayne Lawson Joy, Assistant District Director for Management, Miami District, has been employed by INS for 35 years and has been in Miami since 1987 (Tr. 47). Mr. Joy is program manager for fiscal and human resource functions (Tr. 48). He testified that Mr. Wicks was a labor relations specialist in the Dallas Administrative Center (Tr. 50-54); that Mr. Wicks assisted the Miami District in labor relations matters, gave technical advice and acted as an intermediary for the District Director (Tr. 51); but Mr. Wicks, to his knowledge, was not authorized to enter into settlement agreements and was not authorized to obligate funds for the Miami District and, to his knowledge, never did. (Tr. 51).

Mr. Joy stated that District Director Cadman liked to handle the labor relations functions personally and he, Joy, had a very, very small role - primarily as custodian for labor relations records (Tr. 48). Mr. Joy stated that as custodian of records he was familiar with the form and nature of settlement agreements that the Miami District entered into with labor unions; that those agreements were normally reduced to writing; and District Director Cadman signed them (Tr. 49). Respondent Exhibit 1, and attachments, constitute a draft settlement agreement dated March 7, 1995, of a grievance and, although not an executed copy, shows that the proposed agreement was prepared for execution by District Director Cadman (Tr. 52 - 53). Respondent Exhibit 2, dated May 19, 1994, is an executed Settlement Agreement of an arbitration case, was signed by District Director Cadman and by Mr. Wicks for management and

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[3] Mr. Cadman's statement, dated May 5, 1996 (Res. Exh. 3, for identification), was rejected. He was not called as a witness and was not subject to cross-examination. Absent substantiation his statement is wholly self-serving and is not competent evidence.

by James McIntyre and Mildred M. Williams for the Union. This case involved the payment of $6,066.00 in back pay.

CONCLUSIONS

A. The Agreement

There is no dispute whatever that on August 25, 1994, Mr. Dewayne Wicks, on behalf of Respondent, entered into an agreement with Mr. Michael Wixted, on behalf of the Union, in settlement of Case No. AT-CA-40522, whereby: Respondent would discontinue the change of overtime assignment of Airport Inspectors to the Port of Miami, pursuant to which Airport Inspectors were relieved before completion of the inspection duty for which they were assigned if a regularly scheduled Port of Miami Inspector became available, and revert to the original practice of Airport Inspectors completing the inspection duty for which they were assigned; Respondent would pay back pay for overtime lost for a six week period, January 23, 1994 to March 8, 1994; Respondent would give notice under the contract and negotiate with the Union on impact and implementation if it wanted to implement the change in the future; and the Union would withdraw its charge in Case No. AT-CA-40522. Mr. Wixted so testified, his testimony was uncontradicted, was wholly credible and has been fully credited. Moreover, his testimony was fully corroborated by his written notes of the settlement discussions, of AT-CA-40522 and five other pending unfair labor practice cases, made on August 25, 1994 at the time of the discussions (G.C. Exh. 4); by the fact that on, or after August 25, 1994, the Union requested that Case No. AT-CA-40522, as well as the five other unfair labor practice cases discussed and settled on August 25, 1994, by Messrs. Wixted and Wicks be withdrawn; and by the fact that the Regional Director of the Atlanta Region on August 29, 1994, approved the Union's request to withdraw Case No. AT-CA-40522, as well as the other five unfair labor practice cases settled by the parties on August 25, 1994 (G.C. Exh. 3). Finally, as Mr. Wixted further testified, the August 25, 1994, settlement discussion of Case No. AT-CA-40522, and the five other unfair labor practice cases, was instituted and participated in by Mr. Robert E. Bailey, an employee of the Authority's Atlanta Region.

B. Simplification of payment of backpay

Although the change in overtime assignment policy, which had begun on January 23, 1994, continued until settlement was reached on August 25, 1994, Mr. Wixted stated that the arbitrary six week period of January 23, 1994, to

March 8, 1994, urged by Mr. Bailey, was accepted in an effort to reach a mutually acceptable resolution. As of August 25, 1994, the parties had not identified the Inspectors who had lost over-time pay during the January 23 to March 8, 1994, period, nor the amount of backpay due each, although this could have been determined from Respondent's records (Tr. 42). Accordingly, Mr. Wixted and Mr. Wicks continued to work on the determina-tion of backpay and Mr. Wicks agreed to prepare, from Respondent's records, a list of Inspectors who had suffered a loss of overtime pay; but Mr. Wicks did not do so because, as Mr. Wixted stated, Mr. Wicks did not want to go through all the records to determine the exact dollar amount due, so he suggested a flat payment and; after extended bargaining, he and Mr. Wixted, in late February 1995, reached a, ". . . round figure of $65.00 . . . For the six week period . . ." (Tr. 24). Mr. Wixted first stated that Mr. Wicks told him, "He was having some problems convincing the finance people to cut checks" (Tr. 25); but later said, "Mr. Wicks had some concern about paying a blanket of $65.00 to each officer. He didn't know whether that was legal or not. That's what he was running past the finance people. . . . I believe that he finally determined it was okay to pay the blanket $65.00." (Tr. 28-29). Before any payment had been made, Mr. Wicks, in March, 1995, retired.

C. Repudiation of agreement

Following Mr. Wick's retirement, Mr. Wixted about May, 1995 (G.C. Exhs. 1(e), Par. 13; 1(g), Par. XIII), spoke to Ms. Beechem[4], another labor management relations specialist in the Dallas Administrative Center, about the settlement agreement and Ms. Beechem responded,

> ". . . that she didn't know of any FLRA charges that involved any kind of back pay settlement . . . She did not have any knowledge of them." (Tr. 27).

Ms. Beechem was not called as a witness and Mr. Wixted's testimony, being wholly credible and uncontradicted, is

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[4] Mr. Wixted stated that he spoke to Mrs. Kellner (Tr. 42); but the conversation between Mr. Wixted and Mrs. Kellner (Tr. 42) was not shown.

fully credited.[5] Moreover, General Counsel's Exhibits 2 (the charge in Case No. AT-CA-40522) and 3 (Regional Director's approval of the withdrawal, inter alia, of AT-CA-40522) show that there was, indeed, as the charge, filed on April 19, 1994, claimed, ". . . significant loss of compensation" and that the Union had requested withdrawal of that charge which was approved by the Regional Director on August 29, 1994.

Thereafter, Mr. Wixted spoke to District Director Cadman who stated,

> ". . . he didn't authorize any settlement agreement involving monetary awards. He told me that Mr. Wicks wasn't authorized to make any kind of monetary settlements with the Union." (Tr. 26).

As noted in n.5, above, Respondent in its Answer stated, in relevant part, "The District Director denies approving alleged agreement." (G.C. Exh. 1(g)). No payment was ever made for the loss or overtime pay (Tr. 27). Mr. Cadman was not called as a witness and Mr. Wixted's testimony, being wholly credible and uncontradicted, is fully credited.

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[5] Paragraph 13 of the Complaint states,

> "13. In and around May 1995, Respondent, by Cadman and Beechem, informed AFGE Local 1458 that Respondent would not comply with the settlement agreement . . ." (G.C. Exh. 1(e), Par. 13).

Respondent's Answer states,

> "XIII
>
> "Paragraph 13 of the Complaint and Notice of Hearing is partially denied. The Respondent has no record of a settlement agreement. The District Director denies approving alleged agreement." (G.C. Exh. 1(g), Par. XIII).

The statement by Respondent in its Answer, which Ms. Beechem signed, is a reasonable interpolation of what she told Mr. Wixted, namely, that she could find no record of a settlement agreement. It is interesting that the Answer does not deny the existence of the settlement, but, rather, that, "The District Director denies approving alleged agreement."

As General Counsel states (General Counsel's Brief, p. 10), the agreement of August 25, 1994, had three provisions: First, Respondent would rescind the change; Second, Respondent would pay for overtime lost because of the change for the period between January 23 and March 8, 1994, and Third, Respondent would give notice to the Union of any future change and bargain. Respondent did rescind the change, and there is no indication on the record that it later acted to re-establish the change of overtime assignment policy; but its repudiation of its agreement to pay for overtime lost was a clear and patent breach of a provision of the August 25, 1994, settlement which went to the very heart of the agreement. Department of the Air Force, 357th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA No. 72, 51 FLRA 858-863 (1996); Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211, 1218-1219(1991). Respondent denied any record of any such agreement and the District Director denied approving the asserted agreement and denied that he had authorized a settlement agreement. By denying the existence of the agreement and, if it existed, denying its validity, Respondent repudiated the agreement. Moreover, a refusal to effectuate a settlement agreement, by paying for lost overtime pay in accordance with the agreement, constitutes a repudiation in violation of §§ 16(a)(1) and (5) of the Statute. Defense Logistics Agency, Defense Distribution Region East, New Cumberland, Pennsylvania, 50 FLRA 282 (1995).

Respondent, in his Brief (Respondent's Brief, pp.8-9), dutifully argues that there was no agreement between Messrs. Wicks and Wixted, on August 25, 1994, which contentions have been categorically rejected, but principally argues: a) that, ". . . if . . . Respondent and the Union plausibly entered into an unwritten agreement . . . the terms of the agreement were clearly unsettled at the close of the August 25, 1994 telephone discussion . . . No specific amount of money was identified nor were the actual individuals who were allegedly harmed identified. While these terms may qualify as a form of general agreement between the parties, they fail to provide sufficient substance to meet the very specific requirements of 'Backpay' as defined by **5 CFR § 550.710** (sic.)[6] **Subpart H.**" (Respondent's Brief, p. 10); and b) that Mr. Wicks, ". . . did not have the actual, apparent, or financial authority to obligate the government to this alleged agreement" and/or that, ". . . Mr. Wicks was not an

[6] Subpart H begins at 5 C.F.R. § 550.801. Presumably, Respondent intended to refer to § 550.805, "Back pay computations".

'appropriate authority' as defined by the Back Pay Act, **5 CFR 550.803.**" (Respondent's Brief, p. 10).

I do not agree with either of Respondent's principal contentions.

a) Agreement was complete and definite

Contrary to Respondent's first contention, the agreement of August 25, 1994, fully met all requirements of the Back Pay Act, 5 U.S.C. § 5596, and accompanying regulations, 5 C.F.R. § 550.801. The agreement, as pertinent, specified the unjustified or unwarranted personnel action (i.e., Respondent's unilateral change whereby Inspectors were ordered off ships prior to completion of assignment); acknowledged that that unilateral change had resulted in a loss of overtime earnings; the unjustified or unwarranted personnel action was terminated; and the parties agreed that Inspectors would be paid back pay for overtime lost as a result of the unlawful policy change for a six week period: 1/23/94 to 3/8/94. Respondent is correct that no specific amount of money was specified and neither were any individuals identified who had lost overtime pay during the period specified. Nevertheless, the agreement to pay backpay to Inspectors who had lost overtime pay as a result of the unlawful, unilateral change during the January 23 to March 8, 1994, period was a complete, definite and specific agreement. Indeed, Authority orders involving backpay routinely order all bargaining unit employees made whole for all monies lost as a result of an unlawful action, without specification of either the employees adversely affected or the amount due each employee. See, for example, Department of Defense Dependents Schools, 50 FLRA 197, 198 (1995).

b) Mr. Wicks had apparent authority

Mr. Wicks acted wholly within the scope of his authority as a labor relations specialist (Tr. 20-23, 28-29, 34, 35, 42-43); he was a management official and acted for Respondent during the period covered by the complaint as Respondent admitted in its Answer (G.C. Exh. 1(e), pars. 6-8; G.C. Exh. 1(g), pars. VI-VIII); the Union dealt with Mr. Wicks on a regular basis on grievances and unfair labor practices (Tr. 19); and Mr. Wayne Lawson Joy, Assistant Director for management for the Miami District, stated that, "He [Mr. Wicks] assisted the Miami District in labor matters, he gave technical advice, and acted as an intermediary for the district director." (Tr. 51, emphasis supplied). Further the only executed Settlement Agreement, which was in an

arbitration case and involved $6,066.00 in backpay, while signed by the District Director, was also signed by Mr. Wicks (Res. Exh. 2). Mr. Wicks held himself out to Mr. Bailey, an employee of the Authority who instituted the telephone conference of August 25, 1994, as well as to Mr. Wixted, as having authority to make the agreement of August 25, 1994, to terminate the unilateral change of overtime assignment policy and to pay back pay to Inspectors who lost overtime pay because of the unlawful unilateral change. Thereafter, Mr. Wicks continued to hold himself out as fully authorized to settle the backpay due under the August 25, 1994, agreement as he and Mr. Wixted had numerous discussions until, in late February, 1995, they agreed, as Mr. Wicks had urged, to pay a blanket amount to each officer.7

Mr. Wixted testified that District Director Cadman told him that he, Cadman, did not authorize any settlement involving monetary awards and that Mr. Wicks wasn't authorized to make any kind of monetary settlements with the Union. Mr. Joy testified that, to his knowledge, Mr. Wicks was not authorized to enter into settlement agreements and was not authorized to obligate funds for the Miami District. Mr. Joy's assertions that, so far as he knew, Mr. Wicks was not authorized to enter into settlement agreements; that the normal practice was to reduce settlement agreements to writing; and that he knew of no exception (Tr. 51) is belied by the fact that Mr. Wicks on August 25, 1994, did precisely that with respect to five unfair labor practice cases, in addition to 40522 (G.C. Exh. 4; Tr. 17, 18, 19, 20).

7 Respondent is entirely correct that this case involves solely whether Respondent repudiated the August 25, 1994, agreement to pay Inspectors for call out inspectional overtime pay lost, because of Respondent's unilateral change, for a six week period, January 23, 1994 through March 8, 1994 (Respondent's Brief, p. 7).

Mr. Wixted's testimony that Mr. Wicks wanted to settle the backpay obligation of the August 25, 1994, agreement by payment of a flat amount to each Inspector, rather than determining the amount due each, and that, in mid-February 1995, they agreed on a blanket payment to each officer of $65.00, was unchallenged and has been fully credited. Nevertheless, only repudiation of the August 25, 1994, agreement is alleged by the Complaint and I express no opinion whatever concerning the validity under the Back Pay Act of payment of an arbitrary sum to settle an undetermined, but ascertainable, amount of overtime pay lost by employees during the period specified.

Respondent relies on U.S. Small Business Administration, Washington, D.C., 38 FLRA 386 (1990), and the cases cited by the Authority. I am well aware that the Authority stated, inter alia, that,

> "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). . .
>
> "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).

Respondent asserts that, ". . . the General Counsel failed to provide any substantive evidence Mr. Wicks . . . had been delegated the actual authority to agree to the terms and conditions of the alleged settlement agreement . . . Mr. Wicks simply did not possess such authority and therefore the agreement is void ab initio." (Respondent's Brief, p. 14).

It is true that there is no proof that Mr. Wicks had actual authority to make the agreement of August 25, 1994; but Mr. Wicks had the apparent authority to enter into the settlement agreement, he acted wholly in accordance with his conceded designation as the intermediary for the District Director, and the agreement was crafted to limit Respondent's monetary liability to the pay otherwise due but for Respondent's unjustified or unwarranted personnel action and, further, limited that liability to a six week period rather than the six month period Respondent's unlawful change of policy had been in effect. Because the agreement of August 25, 1994, was, in its entirety, to the benefit of Respondent, because Respondent, pursuant to the agreement, terminated its unlawful unilateral change, because the Union, in accordance with the settlement, withdrew Case No. AT-CA-40522, and because neither Mr. Wicks nor Mr. Cadman was called as a witness, I conclude that Mr. Cadman did delegate authority to Mr. Wicks to enter into the settlement agreement of August 25, 1994. cf. U.S. Department of Veterans Affairs, Regional Office, Cleveland, Ohio, 47 FLRA 363, 367-368 (1993). By its failure to pay the employees for the loss of overtime pay, pursuant to the August 25, 1994, agreement, Respondent violated §§ 16(a)(1) and (5) of the Statute. Department of Defense Dependents Schools, 50 FLRA 424, 426-427 (1995); Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois, 9 FLRA 499, 500 (1982).

Having found that Respondent violated §§ 16(a)(1) and (5) of the Statute, it is recommended that the Authority and adopt the following:

Order

Pursuant to § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. §7118, the U.S. Department of Justice, Immigration and Naturalization Service shall:

1. Cease and desist from:

(a) Repudiating the oral agreement of August 25, 1994, negotiated with the American Federation of Government Employees, Local 1458, AFL-CIO, the employees' exclusive representative in connection with the settlement of Case No. AT-CA-40522.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise by the employees of any right under the Statute.

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

(a) Effectuate and honor the oral agreement negotiated with American federation of Government Employees, Local 1458, AFL-CIO, the employees' exclusive representative, in connection with the settlement of Case No. AT-CA-40522, including the payment to all employees for overtime call out pay lost as the result of the unlawful, unilateral change of policy, for the period January 23, 1994, to March 8, 1994.

(b) Post at its facilities in the Miami District, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Director, Miami District, Miami, Florida, and shall be posted and maintained by the Director for 60 consecutive days thereafter, at each of its facilities in the Miami District, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Chicago Region of the Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

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WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 13, 1996
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Miami District of the Immigration and Naturalization Service, United States Department of Justice, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT repudiate the oral agreement of August 25, 1994, negotiated with the American Federation of Government Employees, Local 1458, AFL-CIO, the employees' exclusive representatives, in connection with the settlement of Case No. AT-CA-40522.

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

WE WILL effectuate and honor the oral agreement negotiated with American Federation of Government Employees, Local 1458, AFL-CIO, the employees' exclusive representative, in connection with the settlement of Case No. AT-CA-40522, including the payment to all employees for overtime call out pay lost as the result of our unlawful, unilateral change of policy, for the period January 23, 1994, to March 8, 1994.

Miami District,
Immigration and Naturalization
Service, U.S. Department of
Justice

Date: By:
(Signature)(District
Director)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, and whose telephone number is: (312) 353-6303.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CA-50860, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

David Graf, Esquire
Immigration and Naturalization
Service, DOJ/INS
HR&D, ACD, ELRM
7701 North Stemmins Freeway
Dallas, TX 75247

Mr. Daniel P. Tarasevich
American Federation of Government
Employees, Local 1458
8529 Southwest 210 Terrace
Miami, FL 33189

John F. Gallagher, Esquire
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603

Michael Wixted, President
SLETC, Immigration Officer Academy,
Building 64
Glyncoe, GA 31524

REGULAR MAIL:

Walter D. Cadman, District Director
U.S. INS, Miami District
7880 Biscayne Boulevard
Miami, FL 33138

Union President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: December 13, 1996
Washington, DC