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

MEMORANDUM DATE: September 29, 2006

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF DEFENSE
DEFENSE LANGUAGE INSTITUTE
FOREIGN LANGUAGE CENTER
MONTEREY, CALIFORNIA

Respondent

and Case No. SF-CA-05-0269

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

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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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

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 her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 30, 2006**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: September 29, 2006
Washington, DC

OALJ 06-36

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

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

[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)

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 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

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[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)

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

> 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

[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)

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 guarantees 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:

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 administrative 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

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

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)

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.

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[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.

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 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 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 TSP, 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, San Francisco Regional Office, whose address is: Federal Labor Relations Authority

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-05-0269, were sent to the following parties:

_____

_

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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DATED: September 29, 2006
Washington, DC