**FEDERAL LABOR RELATIONS AUTHORITY** OALJ 12-04
Office of Administrative Law Judges
WASHINGTON, D.C.

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| SOCIAL SECURITY ADMINISTRATION<br>OFFICE OF DISABILITY ADJUDICATION<br>AND REVIEW<br>RESPONDENT<br><br>AND<br><br>ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICIAL ENGINEERS<br><br>CHARGING PARTY | Case No. CH-CA-10-0540 |

Greg A. Weddle, Esq.
For the General Counsel

Michelle M. Murray, Esq.
For the Respondent

Robert H. Stropp, Jr., Esq.
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

## DECISION

## STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

A Complaint and Notice of Hearing was issued on April 29, 2011, based on an unfair labor practice charge filed on August 4, 2010, against the Social Security Administration, Office of Disability Adjudication and Review (Respondent/Agency/ODAR) by the Association of Administrative Law Judges (Charging Party/Union). The complaint alleges that the Respondent failed to execute an agreement reached in settlement of a grievance thereby, failing to comply with §7114(b)(5) of the Statute and violating §7116(a)(1), (5) and (8) of the Statute.

A hearing was held in Chicago, Illinois, on July 13, 2011, where all parties were represented and afforded an opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. The General Counsel, the Charging Party and Respondent filed timely post hearing briefs.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent did not fail to execute an agreement reached in settlement of a grievance and make the following findings of fact, conclusions of law, and recommendations.

## FINDINGS OF FACT

The Social Security Administration is an agency under §7103(a)(3) of the Statute. (G.C. Exs. 1b & 1d). The Association of Administrative Law Judges, International Federation of Professional and Technical Engineers is a labor organization under §7103(a)(4) of the Statute and is the exclusive representative of bargaining unit employees of the Respondent. (G.C. Ex. 1b & G.C. Ex. 7). The Respondent and Union were parties to a National Collective Bargaining Agreement (CBA) that covered the bargaining unit for which the Union held exclusive recognition.[1] (GC Ex. 7). That CBA contained a grievance procedure as well as procedures for the arbitration of grievances that the process failed to resolve. (G.C. Ex. 7).

The Union filed a grievance which subsequently became known as the "Chicago Eight" grievance, regarding the treatment of eight bargaining unit employees by the Hearing Office Chief Administrative Law Judge of the Chicago Office. (Tr. 48-49). While the grievance was pending in the grievance process, discussions about possible settlement were conducted between various Union representatives and Karen Ames who at that time was the Director of the Division of Quality Service in ODAR. (Tr. 18, 146). In describing her role in the settlement efforts, both Ames and Frank Cristaudo who was the Chief Administrative Law Judge for ODAR testified that Ames was not delegated settlement authority, but merely served in the capacity of liaison for Cristaudo who had settlement authority. (Tr. 154-55, 189-92, 197-200.) At one point, when the Union felt it wasn't getting anywhere with Ames, it sent an e-mail directly to Cristaudo expressing its willingness to entertain a settlement proposal from him. (Tr. 18-19, 34-35; Resp. Ex. 8). Cristaudo referred the Union back to Ames. (Tr. 36). Efforts to settle or resolve the grievance were unsuccessful and the Union invoked arbitration in the matter on or about November 25, 2009. (Tr. 18-20, 49-50, 60-66; G.C. Ex. 2).

[1] Although the title page of the collective bargaining agreement identifies the Agency as "Office of Disability Adjudication and Review" references within the body of the collective bargaining agreement are to "Office of Hearings and Appeals." (G.C. Ex. 7). According to undisputed testimony during the hearing, the Office of Hearings and Appeals was subsequently redesignated the Office of Disability Adjudication and Review. (Tr. 16).

An attorney (OGC Attorney) from the Social Security Administration (SSA) Office of General Counsel (OGC) was assigned to represent the Respondent in the arbitration of the "Chicago Eight" grievance.[2] (Tr. 266; G.C. Ex. 2). OGC is an organizational component within SSA separate and distinct from ODAR, that functions as a "full-service law office" for all of SSA and represents various SSA components in arbitrations and other third party proceedings. (Tr. 185-86, 260-62).

The arbitration hearing was scheduled to start on June 28, 2010. (Tr. 99). In the course of discussing stipulations and evidentiary matters the week before the arbitration hearing, the Union's representative Richard Welch, an attorney with the law firm of Mooney, Green, Saindon, Murphy & Welch, P.C., and the OGC Attorney began discussing settlement. (Tr. 101-02). This led to Welch sending the OGC Attorney a settlement proposal. (*Id*.). Donna Calvert who was the Regional Chief Counsel in the Chicago office of OGC and the supervisor of the OGC Attorney, testified that a week or so prior to the arbitration hearing, the OGC attorney advised her there was a potential for settlement of the case. (Tr. 267). Calvert referred the OGC Attorney to Alan Franks, an OGC official located at OGC headquarters. (Tr. 267-68). Calvert testified that the OGC Attorney subsequently informed her that Franks told him discuss the case with Kristen Fredericks, who was someone at ODAR headquarters whom Calvert did not know. (Tr. 268). Calvert contacted Fredericks by telephone and "introduced her to the case." (*Id.*). Subsequent to this telephone conversation, Calvert sent Fredericks an e-mail dated June 24, 2010, with a copy of "our draft settlement recommendation," which was attached to a memorandum addressed to Judge Cristaudo, and requested that the OGC Attorney be authorized to negotiate a settlement consistent with the terms therein. (Resp. Ex. 14).

Fredericks, was a senior advisor to Glen Sklar, the Deputy Commissioner of ODAR, and was responsible for reviewing requests for settlement authority from OGC attorneys handling cases for ODAR and conveying information to and from Sklar, who held settlement authority. (Tr. 221-22). Fredericks testified that at the time of her communications with Calvert she had been in her position only a few months and because she had not encountered a request for settlement authority in anything other than an Equal Employment Opportunity case, she needed to educate herself about the applicable delegations of authority. (Tr. 229-30). Based upon the record, it is clear that Fredericks: (1) sent an e-mail dated June 25, 2010, to Calvert and the OGC Attorney informing them that she could not give them a "green light" on the settlement proposal they had submitted, and needed more time to discuss the matter with local management; and (2) learned that although Sklar had concurrent authority with Cristaudo insofar as settlement of the "Chicago Eight" matter, Sklar was unwilling to exercise his authority and thought the decision to settle the case should be left up to Cristaudo. (Resp. Ex. 14; Tr. 223, 226, 240-41, 258).

[2] A few weeks after the arbitration hearing was held in this case, the OGC Attorney committed suicide. (Tr. 280).

The parties appeared as scheduled for the arbitration hearing on June 28, 2010. (Tr. 102). Representing ODAR, was the OGC Attorney along with a second attorney, Marc Boxerman. Present for the Union were Welch and two other representatives, Judges William Wenzel and John Madden, Jr., along with the eight grievants. (*Id.*). Prior to the start of the hearing, the OGC Attorney informed Welch that he was still going over the settlement proposal Welch sent him and proposed they delay going on the record so they could talk settlement. *Id.* In response to a request from Welch and the OGC Attorney, the arbitrator agreed to delay the start of the hearing so that they could pursue further settlement discussions. (Tr. 52). The OGC Attorney, Boxerman, Welch, and Wenzel spent the day working on a settlement.[3]

According to Welch and Wenzel, the OGC Attorney did most of the talking and made several comments to the effect that he was discussing the settlement efforts with others such as his boss Calvert, Cristaudo, Cristaudo's shop/OCALJ [Office of Chief Administrative Law Judge], and SSA headquarters. (Tr. 54, 71-72, 103, 134). Later in the day, when the parties were close to agreement, Welch specifically asked the OGC Attorney whether he had authority to finalize the settlement under the terms they had reached and he responded he did. (Tr. 104, 110, 140). A settlement was reached; a written document was prepared for the signatures of representatives of the Union and ODAR, along with those of the eight grievants; and the parties assembled before the arbitrator. (G.C. Ex. 4; Tr. 55-56, 107). The arbitrator went on the record and Wenzel signed the agreement on behalf of the Union with seven of the eight grievants also signing at that time.[4] (G.C. Ex. 3). It was stated on the record by the OGC Attorney that Cristaudo would be the signatory for ODAR and that his signature would be obtained the next morning. (*Id.*). The OGC Attorney stipulated on the record that the agreement was "final and binding on all parties and the signatures are just a housekeeping issue that will get done tomorrow." (*Id.* at 5).

At some point after June 28, 2010, Cristaudo heard reports that the "Chicago Eight" case had settled and he began making inquiries into how it had happened without his knowledge or authorization. (Tr. 193-95, 214-17). Upon his inquiry, Calvert began an investigation into the matter. (Tr. 277-79). That investigation revealed that neither Sklar nor Cristaudo had authorized the OGC Attorney to enter into the settlement that he purportedly accepted on behalf of the Respondent. With respect to Sklar, although the OGC Attorney had contacted Fredericks by e-mail and telephone on June 28, in an attempt to get Sklar's signature or approval of a settlement, he was told that Sklar was not going to approve it and was leaving the matter to Cristaudo. (Tr. 230, 234-35, 243; Resp. Exs. 18 & 19). It also came to light that although the OGC Attorney informed Calvert that Cristaudo would be at the arbitration hearing, he never informed Cristaudo that the hearing was scheduled for June 28, nor did he tell Cristaudo that his presence would be required. (Tr. 192-93, 202, 272, 275). Cristaudo testified that he first learned of the arbitration hearing when he received a

[3] During the settlement efforts, Judge Madden worked with the grievants and was not involved in the direct discussions with the OGC Attorney and Boxerman. (Tr. 91-92).

[4] The eighth grievant had departed but was going to sign the next morning. (G.C. Exh. 3).

telephone call the day the arbitration hearing started while in California on a business trip. The call was from Regional Chief Judge Paul Lillios in Chicago, who asked him why he was not in Chicago for the hearing. ( Tr. 192-93, 202-03, 210-14). Cristaudo further testified he never talked to the OGC Attorney or authorized him to settle the case and was unaware of the OGC Attorney's settlement efforts prior to the agreement being reached. (Tr. 193-94, 202, 212-13). Additionally, although the OGC Attorney had represented to Calvert that Judges Lillios, Bede, and McGuire were in agreement with the settlement, her investigation revealed that was incorrect.[5] (Tr. 272, 275; Resp. Ex. 16).

In her testimony, Calvert stated she learned the OGC Attorney had engaged in several misrepresentations to include faking telephone calls and doctoring e-mails to present himself as authorized to settle the case. (Tr. 275-78). According to Calvert, she began investigating the OGC Attorney's other cases and discovered two additional cases that were "as significantly problematic" as the "Chicago Eight" arbitration. (Tr. 277).

At some point after June 28, 2010, Welch began making inquiries about why the settlement agreement had not been signed by the Respondent. (Tr. 108-09). Welch's efforts to reach the OGC Attorney were unsuccessful but he was contacted by a Mr. Skidmore, another attorney in OGC, who informed Welch the OGC Attorney had misunderstood his authority and that someone in the agency was not happy with some provisions in the agreement. (Tr. 109). According to Welch, Skidmore told him the Respondent would nevertheless sign the agreement if one particular provision was removed, but the Charging Party refused to accept removal of the single provision. (Tr. 109, 128). Cristaudo never signed the agreement nor did anyone else do so on behalf of the Respondent. (Tr. 108, 195).

Delegations of authority from the Commissioner of Social Security to ODAR officials pertaining to, among other matters, personnel and labor-management relations are set forth in a document posted on the Respondent's intranet site and available to all employees.[6] (Resp. Ex. 7; Tr. 148). In accordance with those delegations of authority, Chief Judge Cristaudo was the lowest point in the ODAR chain-of-command with authority to approve settlement agreements such as that involved in this case. (Tr. 147-50, 191-92; Resp. Ex. 7). Although authority over such matters could be exercised by Cristaudo's superiors, it could not be exercised by anyone below him. (Tr. 150, 155, 187). Thus, Ames and those acting on behalf of Cristaudo with respect to the "Chicago Eight" case did not hold settlement authority and were serving only as his spokesperson confined to the parameters established by Judge Cristaudo. (Tr. 155-57, 189-92, 197-98).

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[5] Judges Lillios, Bede, and McGuire were functioning or had been part of local management of the Chicago ODAR Office. (Tr.49, 54, 269).

[6] The parties stipulated that Judges Madden, Welch, and Wenzel, as well as Judge Dale Glendening, did not have knowledge of the delegation document or its contents regarding approval of settlement agreements. (Tr. 285).

## DISCUSSION

### Position of the Parties

### A. General Counsel

The General Counsel alleges that Respondent violated §7106(a)(1), (5) and (8) of the Statute by failing to execute a settlement agreement reached between the OGC Attorney and the Charging Party in the "Chicago Eight" case.

The General Counsel contends that when parties negotiate and reach an agreement to settle a grievance that was filed under a CBA they are engaged in collective bargaining under the Statute.[7] In support of this contention, the General Counsel maintains collective bargaining under the Statute is not limited to the negotiation of term collective bargaining agreements, but also encompasses such matters as grievances and the on-going administration of the parties' collective bargaining agreement. In the General Counsel's view, it follows that grievance settlements are collective bargaining agreements, which are binding on the parties and enforceable. Further, the General Counsel notes that the Authority has found failure to comply with an executed settlement agreement that resolved a grievance constitutes a failure to negotiate in good faith in violation of the Statute.

The General Counsel contends the representative of Respondent was authorized and did enter into an agreement to settle the "Chicago Eight" grievance and under §7114(b)(5) of the Statute, so the Respondent was obligated to execute a settlement agreement that reflected the terms of the agreement. The General Counsel argues that under the law of agency, the Respondent was bound by the actions of the OGC Attorney in reaching the settlement agreement. The General Counsel asserts the OGC Attorney served as Respondent's duly appointed representative in the arbitration of the "Chicago Eight" grievance and under the law of agency had actual and apparent authority to settle the grievance. Additionally, the General Counsel maintains the authority of the OCG Attorney was further demonstrated by the fact that several representatives of the Respondent were aware he was engaging in settlement negotiations and none of them notified the Charging Party of any limitations upon the OGC Attorney's authority.

The General Counsel disputes Respondent's claim that the OGC Attorney lacked actual authority to settle the "Chicago Eight" case. The General Counsel notes that Sklar as well as Cristaudo was vested with the necessary settlement authority and in responding to the OGC Attorney's efforts to obtain authority from Sklar, Fredericks' rejected the request citing the need for discussion with local management. The General Counsel contends that by virtue of the OGC Attorney's assertion that he had obtained the approval of three local management

[7] At the start of the hearing in this case, the undersigned requested that the parties address in their post hearing briefs whether negotiations to settle a matter raised under the grievance process constituted collective bargaining. (Tr. 10.)

officials, Judges Lillios, Bede, and McGuire, he satisfied the only contingency Fredericks required for him to have authority to settle the matter, and in view of that fact, the General Counsel argues that it is reasonable to conclude the OGC Attorney had actual authority.

Turning to the question of apparent authority, the General Counsel contends such authority inherently resides in a representative, such as the OGC Attorney in this case, who is appointed to negotiate on a principal's behalf. Additionally, the General Counsel asserts apparent authority was sufficient to bind the Respondent in this case and contends that the circumstances involved here are distinguishable from those in decisions such as *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)(*Merrill*) that hold actual authority is necessary in order to bind the government. One of the features the General Counsel cites as distinguishing this case from *Merrill* is the requirement of §7114(b)(2) of the Statute which mandates that parties send representatives to the bargaining table who are fully authorized to reach collective bargaining agreements, which, in the General Counsel's view, effectively vests agency representatives with authority to negotiate and reach such agreements. The General Counsel also argues that the OGC Attorney's apparent authority derived from the fact he was acting on behalf of the Respondent in negotiating a settlement of the grievance combined with no notice from the Respondent that his authority was limited. With respect to this latter point, the General Counsel avers that the delegation of authority document did not notify the Union of any limitations on the OGC Attorney's authority because it was an internal document that was neither provided to, nor otherwise known, by the Union.

The General Counsel contends the evidence establishes an agreement to resolve the "Chicago Eight" grievance was reached between the designated representative of the Respondent and the Charging Party. The General Counsel argues that although the OGC Attorney took his own life shortly afterwards, the record does not support a conclusion that he lacked capacity to enter into an agreement. Additionally, the General Counsel maintains the Respondent failed to notify the Union of any concerns about the OGC Attorney's ability to serve as its representative in the case.

As a remedy, the General Counsel seeks an order requiring the Respondent to: (1) execute and fully implement the settlement agreement; and (2) post and disseminate by e-mail a notice to employees signed by the Deputy Commissioner of ODAR. With respect to its request for e-mail distribution of the notice to employees, the General Counsel asserts that e-mail is the customary manner by which the Respondent communicates with employees in the bargaining unit.

**B. Respondent**

The Respondent denies a violation of the Statute occurred, contending the settlement discussions involved in this case did not constitute collective bargaining. The Respondent argues that collective bargaining under the Statute applies only to those negotiations arising from the existence of a mutual obligation to bargain. The Respondent maintains that neither

the Statute nor the collective bargaining agreement between the Respondent and Union imposes a "mutual obligation" to engage in settlement discussions to resolve a grievance and terminate litigation of the matter.

The Respondent argues that even assuming the parties were engaged in collective bargaining within the meaning of the Statute, there was no agreement reached by an authorized representative of the Respondent. The Respondent contends that authority to approve settlement agreements was delegated to Cristaudo and Sklar and neither of them approved the agreement or authorized settlement of the "Chicago Eight" grievance. The Respondent asserts that whether the Union had actual knowledge of the delegations of authority is irrelevant and does not diminish the force and effect of the limits imposed by those delegations. The Respondent suggests Welch's description of the OGC Attorney's conduct, specifically that he represented to Welch that he was often conferring with his client or principal, and that Cristaudo had to sign the settlement agreement is inconsistent with the Charging Party's professed belief that the OGC Attorney possessed the requisite authority to settle the grievance without further approval by the client or principal.

The Respondent contends any stipulation to an agreement by the OGC Attorney was insufficient because he lacked the necessary authority to enter into a binding agreement. Citing *Merrill*, the Respondent maintains that the OGC Attorney's acts could not bind the Federal government because he lacked actual authority. Moreover, relying on *U.S. v. Beebe*, 180 U.S. 343, 351 (1901), the Respondent asserts that attorneys, such as the OGC Attorney, representing clients may not agree to accept a compromise on behalf of their client unless authorized by the client. Addressing the question of apparent authority, Respondent avers that as a general rule such authority is created only by representations of the principal to the third party and that an agent cannot alone create apparent authority by his own actions or representations. Applying that principle to this case, the Respondent argues that at no time did Cristaudo hold out the OGC Attorney as someone who could settle the grievance without getting his approval. Instead, according to the Respondent, the only manifestation of the OGC Attorney's authority to settle the case came from his own claims about possessing settlement authority. The Respondent contends the written agreement itself evidences the parties' intent that the document had to be executed by someone with actual settlement authority before it would become binding and this presents yet another reason for finding the OGC Attorney's stipulation insufficient to bind the Agency.

Finally, the Respondent asserts it did not ratify the OGC Attorney's actions, but instead informed the Union that the delegated settlement official would not execute the agreement as long as it contained certain language he found objectionable.

**C. Charging Party**

The Charging Party alleges the Respondent's refusal to sign the settlement agreement constituted bad faith bargaining and was an unfair labor practice.

The Charging Party argues that under the principles of agency law, the OGC Attorney had both actual and apparent authority to bind the Respondent by the settlement agreement he negotiated. According to the Charging Party, the OGC Attorney's actual authority was evidenced by his statements to multiple individuals that he had authority to enter into the settlement agreement and also by Boxerman's failure to contradict the OGC Attorney's assertions. The Charging Party argues that Cristaudo's claim that he knew nothing about the OGC Attorney's settlement negotiations is not credible. As to apparent authority, the Charging Party contends that in view of what it characterizes as multiple manifestations that the OGC Attorney possessed settlement authority, it was reasonable for the Union to believe the OGC Attorney had authority to enter into the settlement agreement. Additionally, the Charging Party maintains that good faith bargaining requires appointment of a representative to negotiate a collective bargaining agreement who has full authority to enter into an agreement. The Charging Party alleges the Respondent appointed the OGC Attorney to be its representative in negotiating a settlement agreement in the "Chicago Eight" case and by doing so created apparent authority in him. The Charging Party points to Boxerman's failure to interpose any contradiction of the OGC Attorney's statements about his authority as confirmation that the OGC Attorney had apparent, as well as actual, authority. The Charging Party cites what it characterizes as the Respondent's failure to give the Union timely notice of the OGC Attorney's lack of authority after learning of the settlement agreement and failure to immediately disavow the settlement agreement as belying the Respondent's subsequent claim that the OGC Attorney lacked authority.

The Charging Party contends that regardless of what type of authority the OGC Attorney possessed, the parties to the "Chicago Eight" case entered into a valid, binding settlement agreement and the Respondent's failure to execute written verification of that agreement violated the Statute. As a remedy, the Charging Party requests the Respondent be ordered to sign the settlement agreement, abide by its terms, post a notice, and pay attorney fees.

## CONCLUSIONS OF LAW

The allegation in this case is that the Respondent failed to comply with §7114(b)(5) of the Statute by not executing an agreement reached between the OGC Attorney and the Union. That section of the Statute imposes on agencies and exclusive representatives as part of the duty to negotiate in good faith the obligation to:

> 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.

It is undisputed that the Respondent refused to sign the agreement reached by the OGC Attorney and the Union at the arbitration hearing conducted in the "Chicago Eight" case and the question presented by this case is whether the Respondent was obligated under the Statute to execute such agreement. More specifically, the issue boils down to whether the OGC Attorney had authority to enter into an agreement that was binding on the Respondent.

Under the Statute, grievance settlements are binding on the parties and enforceable. *See, e.g., U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 407 (2010). The Authority applies the principles of agency law to determine the authority of representatives of a party to enter into an agreement. *See, e.g., U.S. Dep't of Def., Def. Language Institute, Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 744 (2010)(*DLI*); *Am. Fed. of Gov't Employees, Local 2207*, 52 FLRA 1477, 1480-81 (1997)(*AFGE*). *See also U.S. Small Bus. Admin., Wash., D.C.*, 38 FLRA 386, 406-07 (1990)(*SBA*). The authority of an agent to act on behalf of the principal can be either actual or apparent. *DLI*, 64 FLRA at 744. Actual authority is authority that the principal has intentionally conferred on the agent. *Id.* Apparent authority occurs where the principal has held out the agent as having authority to act on behalf of the principal or has permitted the agent to represent that he has such authority. *Id.*

It is undisputed and the record in this case establishes that the OGC Attorney was assigned to represent the Respondent in the arbitration of the "Chicago Eight" case. I find, however, that the OGC Attorney was appointed to litigate the matter and was not given settlement authority by the Agency officials to whom that authority was delegated. It is clear from the delegation of authority evidence made part of the record that Sklar and Cristaudo were the officials with whom the relevant settlement authority rested. The record also establishes that although Sklar and Cristaudo could authorize others to serve as their representative or spokesperson with respect to the exercise of their authority, they could not re-delegate their settlement authority. The evidence in the record shows that although the OGC Attorney sought authorization to engage in settlement discussions and to reach agreement on a settlement, no settlement delegation was requested from Cristaudo by the OGC Attorney and his efforts to obtain such authorization from Sklar were rebuffed by Fredericks on behalf of Sklar. Although the Charging Party argues that Cristaudo's testimony is "simply not credible," there is no evidence in the record that disputes Cristaudo's testimony that he had not authorized the OGC Attorney to settle the "Chicago Eight" case and there was nothing about his testimony that provided reason to question his veracity on this matter. In the absence of evidence establishing that either Cristaudo or Sklar actually authorized the OGC Attorney's settlement of the grievance, I find that the OGC Attorney did not have actual authority to settle the "Chicago Eight" case.

Turning to the question of apparent authority, there is credible and unrebutted evidence that despite not being granted settlement authority by either Sklar or Cristaudo, the OGC Attorney indicated at the hearing that he had settlement authority and proceeded to engage in settlement discussions that resulted in an agreement. However, there is no evidence that either Cristaudo or Sklar did anything to suggested to the Union or the arbitrator that the OGC Attorney was in fact authorized to settle the matter without their review and approval. Rather, all that occurred was the OGC Attorney being assigned to represent the Agency at the arbitration hearing. Although it is not uncommon that attorneys engage in settlement efforts during the course of handling litigation for a client, it has long been recognized that an attorney of record may not settle a client's case without express

authority. *See, e.g., Mid-South Towing Co. v, Har-Win, Inc.*, 733 F.2d 386 (5th Cir. 1984) (*Mid-South Towing*); *Beebe*, 180 U.S. at 351-52; *Holker & Others v. Parker*, 7 Cranch 436, 11 U.S. 436 (1813)(*Holker*). While it is generally accepted that an attorney of record is presumed to have authority to settle litigation on behalf of a client, that presumption is rebuttable by affirmative proof that the attorney had no right to consent to the settlement. *See, e.g., Mid-South Towing,* and *Beebe*. Furthermore, rebuttal of the presumption renders any purported settlement ineffective. *Garabedian v. Allstates Engineering Co.*, 811 F.2d 802 (3rd Cir. 1987).

In this case, any presumption that the OGC Attorney had the authority to settle the grievance without the approval of Cristaudo or Sklar was rebutted by the testimony of Cristaudo and Fredericks that no authority to settle the case was delegated to the OGC Attorney. In fact, it was established at the hearing that such settlement authority could not be further delegated. Thus, the OCG Attorney's role as attorney of record for the Agency provides no basis for presuming that he was delegated authority to settle the case because such a delegation was not authorized by virtue of his being the attorney of record. While I have no doubt that the OGC Attorney told the arbitrator and other parties that he had settlement authority, and that gave them reason to believe and presume that as the attorney of record he had such authority, their presumption was rebutted by testimony of other credible witnesses. While the OGC Attorney was not available to testify about the veracity of his declarations, his improper behavior in other cases, as well as his decision to take his own life, leads me to conclude that it is more probable than not, that he was mendacious in making those declarations and recognized that his deceit would ultimately be discovered.

Another question that arises in determining whether the OGC Attorney had authority to enter into the settlement agreement is whether apparent authority is even applicable when the principal involved is the Federal government. There is a significant body of precedent that holds when the principal is the government; the agent must have actual, rather than apparent, authority in order to bind the government. *See, e.g., H. Landau & Co. v. U.S.*, 886 F.2d 322 (Fed. Cir. 1989)(*Landau*); *Jordan v. U.S.*, 77 Fed. Cl. 565, 569-70 (2007)(*Jordan*); *Jackson v. U.S.*, 573 F.2d 1189, 1197 n.2 (Ct. Cl. 1978)(*Jackson*) ("It is well established that the Government is not bound by the acts of an agent who only has apparent authority.").

In the *SBA* case cited earlier, the Authority appeared to adopt and apply the principle that the Federal government cannot be bound by acts of an agent not clothed with actual authority to enter into an agreement. 38 FLRA at 406-07. In that case, the Authority, citing *Jackson*, stated, "[w]hen 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." *Id.* Thus, the Authority found that a settlement agreement was void and unenforceable because, among other things, the supervisor who executed the settlement agreement lacked actual authority to agree to it.

However, the Authority's reasoning in the more recent *DLI* case suggests that apparent authority on the part of an agent may be sufficient to bind the Federal government. In that decision, the Authority found an agency official who entered into an agreement with the exclusive representative of some of its employees had both actual and apparent authority to do so. 64 FLRA at 744-45. In *DLI*, the Authority relied on its decision in *AFGE* in support of its finding that the management official had apparent authority. 64 FLRA at 745. However, there is a significant distinction between the circumstances involved in *AFGE* from those in this case and for that matter *DLI*. Specifically, the principal whose agent was found to have apparent authority in *AFGE* was a labor union and not the Federal government. Hence, the principle articulated in cases such as *Laudau*, *Jordan*, and *Jackson* that apparent authority is not sufficient to bind the Federal government did not apply in *AFGE*, thus, the Authority's holding in *AFGE* was not contrary to earlier federal court decisions holding that only actual authority will suffice in binding the Federal government.

With respect to the application of the principles of agency law in *DLI*, it is not apparent from the Authority's decision that any party in that case raised the question of whether actual authority of an agent is required in order to bind the Federal government. Moreover, in view of the Authority's finding that the agent acting for the Federal government in that case possessed actual authority, whether he also had apparent authority was not critical to the disposition of the case. Thus, the discussion of apparent authority contained in *DLI* can be characterized as *dicta*. Although *DLI* and *SBA* present some confusion about the Authority's position on the question of whether apparent authority is sufficient for an agent's actions to bind the Federal government, I find the weight of precedent from the Authority and federal courts requires finding that apparent authority is not sufficient to bind the Federal government. Based on the predominant weight of precedent, I find that even if the OGC Attorney vested himself with apparent authority to settle the "Chicago Eight" grievance through his own misrepresentations, such apparent authority was not sufficient to bind the Respondent and any settlement agreement he authorized was void and unenforceable. Similarly, any vesting of apparent authority created by virtue of his being appointed attorney of record without providing notice of his lack of actual authority or other inaction on the part of Respondent's employees was not enough to make a settlement reached by the OGC Attorney binding upon the Respondent on the basis of apparent authority.

In finding that the OGC Attorney's actions did not bind the Respondent, I reject the argument that the requirements of §7114(b)(2) necessitate finding that he had sufficient authority. Regardless of whether or not the OGC Attorney should have been vested with authority to reach agreement, the fact of the matter is that he was not given that authority. Also, the question of whether the OGC Attorney should have been vested with authority to enter into settlement negotiations and reach an agreement under that provision is not one presented by the unfair labor practice allegation set forth in the complaint for this case. Rather, the violation that was alleged and litigated, is whether the Agency unlawfully refused to execute and implement the

settlement agreement the OGC Attorney accepted. The extent to which the collective bargaining requirements of §7114(b)(2) apply to arbitration proceedings and settlement discussions related thereto is an intriguing question that has no readily apparent answer.[8] However, it is not the question before me in this case as the General Counsel's complaint did not allege that the Respondent failed to send a duly authorized representative to collective bargaining negotiations[9] and reaching that question is not required to resolve this present case.

In summary, I find the OGC Attorney lacked the actual authority to enter into a settlement agreement that was binding upon the Respondent, that apparent authority is not sufficient to bind the Respondent to the terms of a settlement agreement, and the Respondent's refusal to execute or implement any settlement agreement reached between the Union and the OCG Attorney did not constitute a failure to comply with the collective bargaining obligations imposed by §7114(b)(5) of the Statute.

## CONCLUSION AND RECOMMENDATION

The General Counsel failed to establish that the Respondent violated §7116 (a)(1), (5) and (8) of the Statute as alleged. Accordingly, I recommend that that Authority issue the following Order:

## ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., December 21, 2011.

CHARLES R. CENTER
Chief Administrative Law Judge

[8] I note that although the National Labor Relations Board found that grievance meetings are integral parts of the collective bargaining process and subject to the requirement of good-faith bargaining under the National Labor Relations Act, in doing so it distinguished grievance meetings from "adversary proceedings such as trials and arbitrations." *See Pennsylvania Telephone Guild*, 227 NLRB 501 (1985), *enf'd* 799 F.2d 84 (3d Cir. 1986).

[9] Such an allegation would concede that the agreement reached was not authorized and thus would not achieve the enforcement and implementation of the purported agreement.