

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

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. CH-CA-03-0226

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before OCTOBER 3, 2005, and addressed to:

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

RICHARD A. PEARSON
Administrative Law Judge

Dated: August 31, 2005
Washington, DC

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

MEMORANDUM

DATE: August 31, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

Respondent

and

Case No. CH-CA-03-0226

NATIONAL TREASURY EMPLOYEES UNION

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. CH-CA-03-0226

John F. Gallagher, Esquire
For the General Counsel

William P. Lehman, Esquire
For the Respondent

Michael J. McAuley, Esquire
Thomas D. Coates, Esquire
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

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 (2005).

The National Treasury Employees Union (the Charging Party or Union) initiated this case on March 24, 2003, when it filed an unfair labor practice charge against the Department of the Treasury, Internal Revenue Service (the Respondent or IRS). After investigating the charge, the General Counsel of the Federal Labor Relations Authority (General Counsel) issued a complaint on June 30, 2003, against the Respondent. The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute by repudiating a settlement agreement that resolved a previously filed unfair labor practice charge. The

Respondent filed an answer to the complaint, admitting some of the factual allegations but denying that it repudiated the settlement agreement or that it committed an unfair labor practice.

A hearing was held in Chicago, Illinois, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel, Respondent, and the Union subsequently filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

The National Treasury Employees Union, a labor organization within the meaning of 5 U.S.C. § 7103(a)(4), is the exclusive collective bargaining representative of a bargaining unit consisting of employees of the Respondent. At all times material, Donna Mayer was a Revenue Agent assigned to the Respondent's Detroit (Michigan) District. On or about December 4, 1998, NTEU Chapter 24 filed a grievance alleging that Mayer was performing "overgraded duties," in violation of the collective bargaining agreement in effect between the Union and Respondent. G.C. Ex. 2. Specifically, the Union contended that Mayer, who was a GS-12, had been performing the duties of the District Title 31/8300 Programs Coordinator, which Chapter 24 claimed was GS-13 work. As a remedy, the grievance sought back pay at the GS-13 level to "approximately" December 17, 1995, along with interest and appropriate adjustments to benefits.¹ G.C. Ex. 2. The grievance was not resolved and the Union submitted it to the second step of the grievance procedure. At that step, IRS responded that a standard position description did not exist for the Title 31/8300 Programs Coordinator and that the coordinators in various districts were assigned to a number of different position descriptions, had a variety of duties and grades, and were

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According to testimony of its representative Thomas Coates, the Union selected December 17, 1995, as the start date for the back pay computation based on the Union's interpretation of contractual provisions governing temporary promotions for performance of higher-graded duties and the date it was confident it could support as the point at which Mayer began performing GS-13 duties. Coates denied that it selected December 17 because that was the date Mayer completed 52 weeks of service as a GS-12.

located in various areas of the Examination Division. IRS stated that it had requested a desk audit of the duties performed by Mayer and that it would make a determination on the relief sought after that audit was completed. G.C. Ex. 4

By letter dated September 27, 2000, Chapter 24 elevated the grievance to the third step. Tonino Corsetti, Territory Manager of the Small Business/Self-Employed Division, responded on behalf of IRS in a letter dated December 13, 2000, which advised that in order to resolve the grievance, the Respondent had decided to promote Mayer to a GS-13 position for a period of 120 days, effective December 3, 2000. G.C. Ex. 6. Corsetti's letter further stated that IRS was requesting Ina Phillips in LMR (Labor Management Relations) "to compute Ms. Mayer's backpay, interest, etc. for the period of April 2, 1995 (the day she started performing her current duties) through December 2, 2000." *Id.* In the letter, Corsetti also informed the Union that once a new position description and critical elements were drafted, the position would be announced as a GS-13. In testimony at the hearing in this case, Corsetti asserted that he had no authority to waive time-in-grade requirements and did not intend by his letter to waive such requirements.² Rather, he characterized his letter as committing the IRS to pay Mayer at the GS-13 level retroactive to April 2, 1995, only to the extent that she was eligible for a GS-13.

By memorandum dated March 23, 2001, James E. Demeo, another IRS official, informed the Union that Corsetti's response was "issued in error" and that the Respondent was unable to grant the back pay relief requested. G.C. Ex. 7. In his testimony at the hearing in this case, Coates stated that although Demeo did not give a reason in his communication for rescinding Corsetti's response, the Union learned informally that it was because Mayer did not have a position description.

On July 2, 2001, the Union filed an unfair labor practice charge alleging that Respondent's failure to honor Corsetti's settlement proposal constituted a violation of the Statute. The charge was designated as Case No. CH-CA-01-0557. On September 25, 2002, Coates, on behalf of the Union, and William Lehman, on behalf of the Respondent, signed a settlement agreement resolving the charge. In relevant part, the settlement agreement provided:

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For a description of these time-in-grade requirements, see *infra* at p. 9.

The Agency will award back pay with interest, etc., to Donna Mayer for the period of April 2, 1995 through December 3, 2000, consistent with the December 13, 2000, Step 3 grievance response issued by Tonino Corsetti. The Agency will make reasonable efforts to issue the award within 90 days from the date this Agreement is entered into by the Parties.

G.C. Ex. 9.

The only witness who testified at the hearing in this case who participated in drafting the settlement agreement was Coates. Based on Coates' account, there was no discussion of Mayer's time-in-grade during the negotiation of the settlement agreement, and he first learned that IRS saw it as an issue when IRS cited it as a reason that it had not issued payment to Mayer within the 90 days specified by the settlement agreement.³ Coates stated that if he had known the Respondent was not going to provide back pay for the entire period, he would not have signed the settlement agreement.

Eventually, on May 1, 2003, IRS issued a check to Mayer in the amount of \$4,568.83. On June 12, 2003, IRS issued two checks in the amounts of \$32,750.24 and \$20,886.29 to Mayer. These three checks, for a total of \$58,205.36, represented back pay and interest due Mayer for the period of December 24, 1995, through December 3, 2000. IRS did not award Mayer back pay or interest for the period spanning April 2, 1995, through December 23, 1995.

At the hearing in this case, Ina Anderson (formerly Phillips) testified that she was involved in Mayer's grievance throughout the various steps of the procedure but that she had no discussions with Corsetti about waiving the time-in-grade requirements for Mayer.⁴ Anderson stated that on October 2, 2002, she faxed the settlement agreement to IRS's Cincinnati Transactional Process Center (TPC), which was responsible for processing personnel actions. Anderson attributed the delay in processing Mayer's back pay to several factors. First, the TPC determined that Mayer did

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Coates acknowledged that he had a rough idea of when Mayer met the time-in-grade requirements for a GS-13 but asserted that although from management's perspective time-in-grade might be an issue, from the Union's perspective it was not. Coates also asserted that time-in-grade requirements could be waived.

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In fact, Anderson testified that she did not think that time-in-grade requirements could be waived.

not meet time-in-grade requirements for a portion of the period identified in the settlement agreement. According to Anderson, this determination caused uncertainty on the TPC's part as to how to implement the settlement agreement and generated discussions on possible alternative methods, such as an award, for compensating Mayer for the period in question. Other factors cited by Anderson as contributing to the delay were a reorganization at TPC, which shifted responsibility for processing this particular personnel action from the Cincinnati TPC to one located in Ogden, Utah; and absences on the part of the specialist handling the matter because of health problems. Anderson also testified that because the period of back pay in this case exceeded 26 pay periods, many of the computations had to be done manually, further complicating the calculation process.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The issue presented by the complaint in this case is whether Respondent repudiated the September 25, 2002, settlement agreement by failing to (1) provide back pay with interest, etc., to Mayer for the period April 2, 1995, through December 23, 1995; and (2) make the payments encompassed by the settlement agreement within 90 days of the date the agreement was entered into.

The analytical framework that the Authority applies in determining whether a party has repudiated an agreement was articulated in *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858 (1996) (*Scott AFB*). Under that framework, the Authority examines two elements to determine whether repudiation occurred: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?). All parties in this case utilize this framework in presenting their positions.

The Respondent denies that it repudiated the settlement agreement or violated the Statute as alleged. The Respondent contends under time-in-grade requirements to which Mayer was subject pursuant to Office of Personnel Management (OPM) regulations and contractual provisions, she was not eligible for the GS-13 pay level until December 24, 1995. The Respondent maintains that no waiver of the time-in-grade requirements had been made for Mayer. With respect to waiver, the Respondent asserts that because the

settlement agreement expressly incorporated the step 3 grievance response issued by Corsetti, the intent of that response is essential to interpreting the agreement. The Respondent argues that Corsetti did not waive the time-in-grade requirements established by law, nor did he have the authority to do so. Thus, Respondent avers that under the terms of the settlement agreement, it was not obligated to provide Mayer back pay for the period that she was ineligible for a GS-13 and its actions in not awarding back pay for that period did not constitute a breach of the agreement.

The Respondent further argues that although it did not pay Mayer within 90 days of executing the settlement agreement, it did "make reasonable efforts" to pay her within that time frame, as specified in the settlement agreement. The Respondent asserts that it promptly initiated efforts to pay Mayer, but that several unforeseen factors delayed the process involved in effectuating the personnel action. The factors cited by the Respondent are: confusion generated by Mayer's ineligibility for back pay for the period preceding December 24, 1995; health-related absences of the employee responsible for processing the back pay action; transfer of responsibility for processing the action to a different office; and the need for manual adjustments or calculations with respect to the majority of the back pay period involved. The Respondent contends that even assuming that its failure to provide payment to Mayer within 90 days constituted a breach of the settlement agreement, it did not go to the heart of the agreement and, thus, fails to satisfy the Authority's standard for repudiation.

The General Counsel maintains that the Respondent clearly and patently breached the settlement agreement when it failed to provide Mayer back pay and associated compensation for the entire period identified in the settlement agreement. In support, the General Counsel argues that the only reasonable interpretation of the settlement agreement is that the Respondent unequivocally agreed to provide Mayer back pay, interest and associated benefits for the entire period beginning on April 2, 1995. If this were not the understanding of the settlement agreement held by Anderson and Lehman, the General Counsel alleges that they would have immediately directed the Cincinnati TPC to award back pay only for the period beginning in December 1995 when the TPC raised the issue of Mayer's time-in-grade. The General Counsel contends that the terms of the settlement agreement are clear and that the 3rd step grievance resolution offered by Corsetti, as well as Corsetti's explanation of it, are immaterial to

determining the meaning of that agreement. The General Counsel asserts that even assuming the resolution offered by Corsetti is relevant, the evidence establishes that Corsetti intended for Mayer to be compensated for the entire period beginning in April 2, 1995, and placed no limits on payment.

The General Counsel also argues that the breach went to the heart of the agreement. In support of this argument, the General Counsel claims that the primary purpose of the agreement was to resolve the pay dispute that spanned the April 1995 through December 2000 period, and the amount that was not paid is a significant portion of the total owed Mayer for that period. Additionally, the General Counsel asserts that the breach undermines the parties' collective bargaining relationship.

The General Counsel contends that the Respondent's actions in not meeting the 90-day time limit for issuing the payments to Mayer also constituted a clear and patent breach of the agreement. The General Counsel asserts that Respondent did not make reasonable efforts to comply with this time limit. Additionally, the General Counsel argues that this particular breach went to the heart of the agreement. In particular, the General Counsel maintains that the primary purpose of the agreement was that Mayer would receive her award within 90 days and that the delay deprived her of use of the money owed her. Also, the General Counsel avers that the breach undermined the collective bargaining relationship.

With respect to the time-in-grade requirements, the General Counsel states that under 5 C.F.R. § 300.603(b)(7), agencies may waive those requirements to avoid hardship to an agency or inequity to an employee. The General Counsel asserts that Respondent made no claim that Lehman was not authorized to enter into the settlement agreement and that it must be assumed that he acted consistent with regulations when he entered into the agreement. As to Corsetti, the General Counsel reiterates the contention that what he did was irrelevant to the intent of the settlement agreement. Alternatively, the General Counsel implies that waiver of the time-in-grade requirements was a measure available to Corsetti as an authorized 3rd step official in resolving the grievance. To the extent that adherence to time-in-grade restrictions was required by the parties' collective bargaining agreement, the General Counsel asserts that such provisions could be waived by the parties.

As remedy, the General Counsel seeks an order directing Respondent to pay the outstanding back pay to Mayer within 30 days and post a Notice to Employees.

The Charging Party contends that under the settlement agreement, which was clear and unambiguous on its face and executed by an authorized representative of the Respondent, Mayer was to receive back pay with interest for the period April 2, 1995, through December 3, 2000. Characterizing the Respondent's reliance on time-in-grade restrictions to defend its failure to pay Mayer the entire amount owed under the settlement agreement and delay in paying the portion that it did as disingenuous, the Charging Party claims that Respondent was aware of Mayer's time-in-grade status prior to both the 3rd step resolution and the settlement agreement. The Charging Party asserts that by executing the settlement agreement, Respondent waived those requirements.

In addition to the remedial actions sought by the General Counsel, the Charging Party requests that I retain jurisdiction for an application for attorney fees.

Analysis

Under the Authority's repudiation analysis, if a particular term of an agreement is ambiguous or unclear and a party acts in accordance with a reasonable interpretation of that term, such action does not constitute a clear and patent breach of the agreement. *See, e.g., United States Department of Veterans Affairs, Consolidated Mail Outpatient Pharmacy, Leavenworth, Kansas*, 60 FLRA 844, 848 (2005). In addition to the standards set forth in *Scott AFB*, the Authority has found that in order to constitute repudiation of a collective bargaining agreement provision, the provision at issue must be lawful. 60 FLRA at 850. An agreement provision that contravenes a Government-wide regulation is not lawful. *Id.*

In this case, the parties dispute whether the settlement agreement required the Respondent to provide Mayer back pay for the period during which she did not meet time-in-grade requirements for a GS-13. Regulations issued by OPM establish restrictions on how quickly employees may be promoted to competitive service General Schedule positions. 5 C.F.R. §§ 300.601 - 300.606. Among other things, those regulations essentially require that in order for specified employees to advance to a position at GS-12 and above, they must have completed a minimum of 52 weeks in positions at the next lower grade. 5 C.F.R. § 300.604(a). An earlier version of OPM's time-in-grade regulations was determined by the Authority to be Government-wide

regulations within the meaning of section 7117 of the Statute. See *Professional Air Traffic Controllers Organization, AFL-CIO and Department of Transportation, Federal Aviation Administration*, 4 FLRA 232, 233 (1980) (FAA). Although the regulations in force at the time of the FAA decision were revised in 1991, the Authority continued to view the revised regulations as Government-wide regulations.⁵ See *U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Loretta, Pennsylvania and American Federation of Government Employees, Local 3951*, 55 FLRA 339, 343 (1999) (FCI, Loretta). Indeed, all parties in our case agree that the OPM time-in-grade regulations are Government-wide regulations within the meaning of section 7117 of the Statute, and that Mayer did not meet the 52-week requirement until December 1995. Nonetheless, the General Counsel and the Union assert that the Respondent waived the provisions in the OPM time-in-grade regulation that would otherwise prohibit Mayer from being promoted to GS-13 prior to December 1995.

OPM's regulation, at 5 C.F.R. § 300.603(b), does exclude certain specified actions from the time-in-grade requirements of section 300.604. The only such exclusion arguably relevant to our case is set forth in section 300.603(b)(7): "[a]dvancement to avoid hardship to an agency or inequity to an employee in an individual meritorious case but only with the prior approval of the agency head or his or her designee." This is the exclusion that the General Counsel cites in support of its claim that the Respondent waived the 52-week requirement for Mayer.

Section 300.602 of the regulations defines the terms "hardship to an agency" and "inequity to an employee" as follows:

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In 1991, when OPM issued the revised regulations, it characterized the changes as providing additional flexibility and simplifying or clarifying provisions. 56 FR 23001 (May 20, 1991). There is no indication that the revisions altered the nature and scope of the prior regulations in a manner that would affect their status as Government-wide regulations. That is, it appears that the regulation continued to meet the definition of a Government-wide regulation: "rules, regulations, or official declarations of policy that are generally applicable throughout the Federal Government and are binding on the Federal agencies and officials to whom they apply." *National Association of Government Employees, Local R1-109 and Department of Veterans Affairs, Medical Center, Newington, Connecticut*, 53 FLRA 403, 416 (1997).

Hardship to an agency involves serious difficulty in filling a position, including when:

(a) The situation to be redressed results from circumstances beyond the organization's control and otherwise would require extensive corrective action; or

(b) A position at the next lower grade in the normal line of promotion does not exist and the resulting action is not a career ladder promotion; or

(c) There is a shortage of candidates for the position to be filled.

Inequity to an employee involves situations where a position is upgraded without change in the employee's duties or responsibilities, or where discrimination or administrative error prevented an employee from reaching a higher grade.

In issuing the revised regulations in 1991, OPM explained that the definition of "inequity to the employee" was intended to include all situations where an employee's duties remain unchanged but the position is upgraded. 56 FR 23001. As an example, OPM offered: "an air traffic control specialist position might be upgraded when the facility is upgraded as a result of increased air traffic." *Id.*

The definitions of the terms "hardship to an agency" and "inequity to an employee" set forth the limits to an agency head's authority under section 300.603(b)(7) to promote an employee from GS-12 to GS-13 in less than 52 weeks. The definitions in section 300.602 list specific situations to which the terms apply, and the language of 300.602 and 300.603(b)(7) does not permit an agency head to find "hardship to an agency" or "inequity to an employee" in situations beyond those specified in 300.602 itself. This is even more clear when the (b)(7) exclusion is read in context with the exclusion set forth in subsection (b)(8). Specifically, section 300.603(b)(8) permits:

(8) Advancement **when OPM authorizes it** to avoid hardship to an agency or inequity to an employee in individual meritorious situations **not defined, but consistent with the definitions, in § 300.602** of this part. [emphasis added]

In other words, an agency must obtain OPM authorization (in addition to the agency head's approval) before applying a "hardship" or "inequity" beyond the literal scope of the examples listed in the definitions, even when the situation is "consistent" with those definitions. This makes it quite clear that for the agency head alone to approve a promotion under the (b)(7) exclusion (as the General Counsel argues

happened here), the situation must expressly fit within one of the examples contained in the definition in section 300.602.

An additional legal requirement imposed by the OPM regulation is that any action promoting an employee lacking the normal time-in-grade pursuant to section 300.603(b)(7) must be approved in advance by "the agency head or his or her designee." If the circumstances of the personnel action meet either of the criteria of "hardship" or "inequity" set forth in exclusion (b)(7), then the agency head has the authority to exercise discretion to approve the action, but conversely, if the criteria of "hardship" and "inequity" are absent, then the agency head lacks the ability to decide to approve the promotion. *U.S. Department of the Treasury, Internal Revenue Service, Brooklyn District, Brooklyn, New York and National Treasury Employees Union*, 51 FLRA 1487, 1489, 1494 (1996). The General Counsel cited this case in its brief as authority for its view that an agency can waive the normal time-in-grade requirements, but a closer review of the facts and the Authority's holding shows that an agency head has discretion to waive the time limits only when the underlying "hardship" or "inequity" has been satisfied.

The limitations contained in (b)(7) pose insurmountable problems for the claim the General Counsel and Union make that the Respondent waived the law's time-in-grade requirements in order to pay Ms. Mayer at the GS-13 level six months earlier than she would otherwise have been entitled to earn such pay. The evidence of record is insufficient to show that Mayer's situation met the definition set forth in section 300.602 of either a "hardship to an agency" or an "inequity to an employee"; consequently, I do not believe the head of the IRS could have waived the 52-week time-in-grade requirement pursuant to section 300.603(b)(7), even if he or she had wanted to. There is no evidence that the Respondent was encountering "serious difficulty" in filling the position Mayer held. With respect to avoiding inequity to Mayer, the record does not show either that the position Mayer held was upgraded without change in her duties or that discrimination or administrative error prevented her from reaching the higher grade. On the contrary, the evidence reflects that at some point in time (April 2, 1995, according to the desk audit performed by the Respondent and G.C. Ex. 6; perhaps earlier or later, according to the Union and G.C. Ex. 2, 3 and 5), Mayer's duties did change, in that she began performing the duties of Title 31/8300 Programs Coordinator, which the Union believed warranted her promotion to GS-13, notwithstanding her lack of sufficient time-in-grade. The

crux of the Union's grievance, that Mayer was assigned higher-graded work than what she previously had performed, is precisely the type of claim that does **not** fit within the definitions of 300.602. Thus her situation did not meet the criteria for an "inequity to an employee."

Also, from the record, it does not appear, even assuming it could have done so, that the agency waived the time-in-grade requirements. 5 C.F.R. § 300.603(b)(7) permits such waivers to avoid inequity to an employee, "but only with the prior approval of the agency head or his or her designee." This language indicates that an agency's waiver of the time-in-grade restrictions must be a consciously made decision, not merely one that is inferred from circumstances, and that it be explicitly endorsed by the head of the agency or by someone designated for this purpose. The evidence in this case does not support such findings. The General Counsel and Union argue that by entering into a settlement agreement promising back pay to Mayer "for the period of April 2, 1995 through December 3, 2000," the Respondent implicitly waived all legal impediments such as the time-in-grade regulation. They further argue that neither the language of Corsetti's step 3 grievance response (G.C. Ex. 6) nor Corsetti's intent is relevant to interpreting the settlement agreement that was made by different agency officials nearly two years later. I find, however, that paragraph 1 of the settlement agreement specifically links the agreement to the resolution offered earlier by Corsetti by stating that the back pay and other payments were to be consistent with the Corsetti offer. Thus, a reasonable interpretation of the settlement agreement was that the back pay and other amounts due to Mayer were to be coterminous with Corsetti's offer.

Corsetti testified credibly that in responding to the step 3 grievance, it was not his intention to waive time-in-grade requirements and that he did not even think that he had the authority to do so.⁶ The Union acknowledges, and from the evidence it appears, that Corsetti's offer was unilateral in nature as contrasted with the jointly negotiated settlement agreement. Consequently, Corsetti's

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No witness offered conflicting testimony. In fact, Anderson testified that she and Corsetti never discussed waiver of the time-in-grade requirements and didn't think he had the authority to waive them. Even if Corsetti and Anderson were mistaken as to whether the time-in-grade restrictions could be waived, they nonetheless believed the restrictions could not be waived, and this is certainly relevant in determining whether the Respondent made such a waiver.

view of his offer is the only authoritative one available. It is also consistent with a reasonable interpretation of the language of G.C. Ex. 6. In stating that his office had "asked Ina Phillips in LMR to compute Ms. Mayer's backpay, interest, etc. for the period of April 2, 1995 (the day she started performing her current duties) through December 2, 2000", it appears that Corsetti was deferring to the LMR staff to make the mathematical calculations of the amount due as well as to consider any technical issues that might affect Mayer's eligibility for compensation within that time period. I find that neither Corsetti nor any other official of the IRS (much less the head of the agency) made a conscious, advance decision to waive the time-in-grade requirements, as required by section 300.603(b)(7).

Even if I were to ignore the language and intent of the Corsetti grievance response, as the General Counsel urges, I still could not reasonably find that the Respondent's agency head gave prior approval to waiving the time-in-grade restrictions of the OPM regulation. While the IRS signator, Lehman, did not testify at the hearing, the Union signator did. Coates testified that during the negotiation of the settlement agreement there was no discussion of waiving time-in-grade requirements. This does not greatly advance the General Counsel's case. In essence, the General Counsel argues that the Respondent's waiver should be conclusively presumed, simply from the silence of officials below the level of the agency head. Doing so would be inconsistent with OPM's requirement that such waivers be based on "case-by-case assessment that certain specified conditions have been satisfied." Cf. *FCI, Loretta*, 55 FLRA at 342-43 (Authority refused to adopt an approach of inferring a waiver from the fact that an agency allowed an employee to temporarily perform the duties of a higher grade). It is also inconsistent with the Authority's general reluctance to infer waiver. *U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 912-13 (2000); *U.S. Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Connecticut*, 55 FLRA 201, 205 n.10 (1999).

Much of my discussion above of the settlement's compliance with OPM regulations also applies to the question of whether the Respondent clearly and patently breached the settlement agreement. In order to be lawful, the settlement agreement had to be consistent with OPM's time-in-grade regulation. If the Respondent acted in accordance with a reasonable interpretation of a disputed provision of the settlement agreement, it did not unlawfully repudiate the agreement. Given IRS's credible positions that Mayer's situation could not be excluded from the time-in-grade restrictions and that the agency had not waived the time-in-

grade requirements, it was reasonable for the Respondent to pay Mayer only for the time in which she met those requirements. It follows that Respondent did not clearly and patently breach the settlement agreement. In view of this finding, it is unnecessary to address whether the provision at issue went to the heart of the agreement. In sum, I find that Respondent did not repudiate the settlement agreement by refusing to pay Mayer for the period between April 2 and December 23, 1995.

What remains is the question of whether Respondent's delay in paying Mayer for the December 1995 to December 2000 period constituted a repudiation of the agreement. The agreement required the IRS to "make reasonable efforts to issue the award within 90 days" after the September 25, 2002 execution date (i.e., December 24, 2002). In fact, she was issued an initial payment of about \$4,500 on May 1, 2003 (approximately 217 days after the execution) and the remaining \$54,000 or so on June 12, 2003 (approximately 259 days after execution). I am not persuaded that it was reasonable that payment to Mayer should have taken as long as it did. But the issue before me is not focused on how long payment took but on whether the Respondent made reasonable efforts to effectuate payment within 90 days.

The evidence shows that the agency's personnel representative (Anderson) promptly initiated steps with the appropriate office to process the back pay request, by faxing the necessary documents to the TPC nine days after the settlement was executed. The evidence also shows that several factors intervened to delay the processing. The health-related absences of the TPC employee assigned to process the request, the shift of responsibility for processing the payment from one organizational subdivision to another, and the need to perform some of the necessary computations manually may not have been anticipated by or within the control of the IRS representatives who committed to try to have Mayer paid within 90 days. Additionally, the legal uncertainties relating to how the OPM time-in-grade restrictions affected Mayer and the settlement agreement made it difficult for the TPC staff to perform the back pay calculations. Although Anderson could have been more diligent and proactive in following up once she submitted the matter to the TPC for handling, I am not persuaded that her oversight of the payment process was unreasonably lax. Nor do I find that the factors causing the delay represented unreasonable conduct on the part of the Respondent or a failure to comply with its obligation to make reasonable efforts to process the payment within the time limit specified by the settlement agreement.

Accordingly, I conclude that the Respondent did not clearly and patently breach the agreement's requirement to make reasonable efforts to pay Mayer within 90 days. I do not reach the question of whether that particular provision went to the heart of the agreement.

Based on the foregoing, I conclude that Respondent did not repudiate the settlement agreement and did not commit an unfair labor practice as alleged.⁷ I therefore recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, August 31, 2005.

RICHARD A. PEARSON
Administrative Law Judge

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The Union requests that I retain jurisdiction for an application for attorney fees. In view of the fact that I am recommending dismissal of the complaint in this case, I deny the Union's request without passing on whether it would be appropriate for me to retain jurisdiction under other circumstances.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. CH-CA-03-0226, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

John F. Gallagher, Esquire Federal Labor Relations Authority Chicago Regional Office 55 West Monroe, Suite 1150 Chicago, Illinois 60603-9729	7000 1670 0000 1175 6414
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Michael J. McAuley, Esquire National Treasury Employees Union 111 W. Washington Street Chicago, Illinois 60602	7004 2510 0004 2351 5014
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Dated: August 31, 2005

Washington, DC