FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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U.S. DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL
DETROIT SECTOR, DETROIT, MICHIGAN

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO

CHARGING PARTY

Case No. CH-CA-10-0438

Kenneth Woodberry
For the General Counsel

Katherine M. Ciarrocchi
For the Respondent

Leonard A. Boss
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 (the Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority), Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, National Border Patrol Council (the Union), a Complaint and Notice of Hearing was issued on February 28, 2011, by the Regional Director of the Chicago Regional Office. The original Complaint alleged that the U.S. Department of Homeland

Security, U.S. Customs and Border Protection, U.S. Border Patrol, Detroit Sector, Detroit, Michigan (the Respondent) violated § 7116(a)(1)(5) and (8) of the Statute by refusing to sign a Memorandum of Understanding (MOU) after negotiating and reaching an agreement upon the terms set forth therein in violation of § 7114(b)(5) of the Statute. (G.C. Ex. 1(b)). The Respondent timely filed an Answer in which it denied violating the Statute on March 28, 2011. (G.C. Ex. 1(d)). On April 7, 2011, the General Counsel amended the Complaint, to allege that in the alternative, the Respondent failed to comply with § 7114(b)(2) of the Statute by failing to send a duly authorized representative to negotiations over the MOU. (G.C. Ex. 1(f)). The Respondent filed its First Amended Answer on April 12, 2011, and denied the additional allegation. (G.C. Ex. 1(h)).

A hearing in this matter was held on July 27, 2011, in Detroit, Michigan. All parties were represented and afforded an opportunity to be heard, to produce relevant evidence, and to examine and cross-examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which have been fully considered.

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

Based on the entire record, including my observation of the witnesses and their demeanor, I find that there was neither negotiation nor an agreement reached upon a collective bargaining agreement within the meaning of § 7114(b) of the Statute. Therefore, there was no failure to comply with either subparagraph (b)(2) or (b)(5) of that section, and thus, the Respondent did not violate § 7116(a)(1), (5) and (8) of the Statute. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol, Detroit Sector, Michigan (Respondent/Agency) is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, National Border Patrol Council, AFL-CIO, (Council) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining within the Respondent's Detroit Sector. (G.C. Ex. 1(b), (d) & (h)). The National Border Patrol Council, Local 2499, (Charging Party/Union) is an agent of the Council for the purpose of representing the employees employed within the Respondent's Detroit Sector. (G.C. Ex. 1(b), (d) & (h)).

In March 2003, the U.S. Border Patrol (BP), the U.S. Customs Service (Customs), along with the Animal and Plant Inspection Service of the Department of Agriculture and the inspection function of the U.S. Immigration and Naturalization Service were merged to form the U.S. Customs and Border Protection (CBP), as part of the creation of the U.S. Department of Homeland Security (DHS). (Tr. 177). After the merger, the marine programs that previously existed within Customs and the BP were placed under the Office of Air and Marine, within CBP. (Tr. 179). In approximately January 2006, it was determined that the

legacy Customs marine agents would serve as marine interdiction agents working large bodies of water in coastal areas, while former BP agents with marine training and experience would be assigned to Riverine operations in the newly created position of Border Patrol Agent Marine (BPA-M). (Tr. 180; R. Ex. 1 & 2).

To understand the tapestry of this labor relations crazy quilt, one must follow the one common thread, that being the actions of Eric Sparkman, who, in addition to serving as president of Local 2499 for the Detroit Sector, serves as a vice-president for the Council at the national level. (Tr. 12-13). The Detroit Sector of the U.S. Border Patrol consists of five separate operating stations located in Sandusky Bay, Ohio, and Detroit, Gibralter, Marysville and Sault Sainte Marie, Michigan. (Tr. 14, 176). The geographic area covered by these stations includes the states of Indiana, Illinois, Ohio and Michigan. (Tr. 176).

No Negotiations Were Conducted

On April 22, 2009, David B. Aguilar, Chief of the BP, issued a memorandum to all Chief Patrol Agents and Division Chiefs in which he noted that there was a lack of standardization among sectors in BPA-M assignments, reminded them that the position required a three year assignment, and instructed them to ensure compliance with his directive. (Tr. 179; R. Ex. 1).

In response to the April memorandum from Chief Aguilar, Randolph Gallegos, Chief Patrol Agent (CPA) for the Detroit Sector issued a memorandum to the Patrol Agents In Charge (PAIC) at the Riverine stations within his sector on June 24, 2009, directing them to determine the number of BPA-Ms they needed to conduct operations and to solicit an appropriate number of volunteers for long term details to that position. (R. Ex. 2). He also indicated that the BPA-M positions would serve as Vessel Commanders (VC) on Border Patrol Riverine vessels, and directed them to submit a report to sector headquarters by July 6, 2009, which identified the number of BPA-Ms required and a roster of volunteers. (*Id.*).

Prior to this, boat patrol duties at stations within the Detroit Sector with Riverine operations were assigned on an as needed basis to all Border Patrol Agents (BPAs) who were qualified. The establishment of a permanent marine unit to which a smaller group of BPA-M agents would be assigned for a three year detail changed the way duties were assigned at four of the five stations within the Detroit Sector. (R. Ex. 5). In short, BPA-Ms would no longer perform non-marine related duties during the boating season and regular BPAs would no longer be assigned duties related to marine operations. The length of the boating season varied at each station and when it was not boating season, all agents, whether a BPA-M or a BPA performed regular non-marine duties. (Tr. 71, 243).

Shortly after the July memorandum from CPA Gallegos, Eric Sparkman threaded his needle and began to stitch this tapestry. As a result of the memorandum, Sparkman learned of the plans being developed to establish dedicated marine units when volunteers were solicited and on July 26, 2009, he sent a demand to bargain over the implementation of the marine units in the Detroit Sector. (R. Ex. 5). At that time, Sparkman was informed that the

establishment of marine units was occurring agency wide and that bargaining had to be done at the national level. (*Id.*). Sparkman contended that the changes were unique to each sector and/or individual station and that the Respondent's insistence upon national bargaining over the matter was improper. (*Id.*).

In August 2009, shortly after D'Arcy Rivers reported for duty as the PAIC of the Sault Sainte Marie station, CPA Gallegos informed the PAICs within the Detroit Sector that BPA-Ms would be assigned to dedicated marine units beginning August 31, 2009. (R. Ex. 4). He also provided guidance for selection and management of the personnel assigned to the new marine units and directed the PAICs with Riverine operations to submit a plan for the operation of their marine unit. (*Id.*). The four stations within the Detroit Sector that conducted Riverine operations submitted their plans to the Detroit Sector and three of them were styled as proposals. (R. Ex. 3; G.C. Ex. 2).

On September 29, 2009, Sparkman submitted a request for information to the Detroit Sector pursuant to § 7114(b)(4) of the Statute to which the Respondent did not respond. (R. Ex. 7, 8). In an unfair labor practice (ULP) charge signed by Sparkman on October 9, 2009, and filed with the Chicago Regional Director of the FLRA on October 26, 2009, the Union alleged that the Detroit Sector had unilaterally implemented "Boat Units"[1] and refused to bargain over the change at either the individual station or the Detroit Sector level. (R. Ex. 5).

During a regular union-management meeting at the Sault Sainte Marie station conducted in January 2010, to give the parties an opportunity to discuss and collaborate upon matters of concern raised by the bargaining unit, Union representatives Sparkman and Leonard Boss raised with recently appointed PAIC D'Arcy Rivers issues related to the way the marine unit was implemented and operated at the Sault Sainte Marie station during the prior boating season. (Tr. 233, 244; R. Ex. 6). They also expressed concern about how individual BPAs were selected for training to become BPA-Ms. (*Id.*). In the course of raising their concerns about the way the marine unit was implemented at that station, neither Union representative mentioned the pending ULP charge against the Detroit Sector, over the unilateral implementation of the marine units throughout the sector. (Tr. 218, 234-35, 247).

In response to the concerns raised by the Union, PAIC Rivers instructed Supervisory Agent (SA) Eric Harstvedt to talk with the BPA-Ms assigned to the marine unit for the purpose of developing a Standard Operating Procedure (SOP) he could implement at the Sault Sainte Marie station for the upcoming boating season until further guidance was provided by higher management. (Tr. 245-46; R. Ex. 6). When Sparkman heard from the BPA-Ms assigned to the marine unit that SA Harstvedt was working on such a policy, he requested that the Union be allowed to provide input. (Tr. 15-16). While there was varied testimony at the hearing about who participated in the working group that was established to

[1] Although several witnesses used the term "boat unit" instead of "marine unit", it was clear that all were discussing the same operational program and for clarity within the decision, the term marine unit is used throughout.

assist with this process, how long the meetings lasted and how many meetings were held, the exact details are not important because I find that these working group meetings were not negotiations as contemplated by § 7114(b) of the Statute. They were more akin to a subcommittee flowing from the union-management meetings regularly conducted by the parties where Union concerns were discussed and resolved outside the parameters of formal collective bargaining. It is clear from the record that these working group meetings were never intended to be negotiations and never morphed into such in the mind of anyone other than Sparkman and Boss. Further, based upon the facts before me, I am dubious about their true conviction upon that question. I find that after informally providing input upon a temporary SOP at the Sault Sainte Marie station that resulted in policy provisions they liked, the Union attempted after the fact to turn those provisions into something more than they were or were ever intended to be by trying to treat the intended temporary SOP they assisted in drafting as a permanent Memorandum of Understanding (MOU) that had been negotiated.

I also find that PAIC Rivers, himself a former union president, knew that he could not negotiate a station level agreement with the Union without a delegation of authority from higher headquarters, but believed that he could unilaterally implement temporary policies the Union found acceptable by executing a SOP under his signature as PAIC, and that such an action would not require approval by his supervisors or agency head review. (Tr. 90, 246-50). However, Rivers' plan to circumvent higher headquarters review of his unilateral action was thwarted when Sparkman attempted after the fact to turn the SOP he helped draft and which Rivers intended to implement as an SOP, into a permanent MOU that had been negotiated. (Tr. 250). At that point, Rivers understood that the document would require review and approval by higher headquarters and that he was foreclosed from unilaterally implementing the policies in the form of a temporary SOP signed only by him. (*Id.*). Thus, he had to forward the document to the Detroit Sector for review and approval, not because he had intended to negotiate an MOU, but because the Union was now calling and treating his planned SOP as an MOU that he had no authority to negotiate. (*Id.*).

I conclude that the working group meetings that led to the development of a document containing polices for the marine unit at the Sault Sainte Marie station were not negotiations for several reasons, the first of which is that at the time David Aguilar became Chief of the Border Patrol in August 2004, he implemented a policy that centralized labor relations at the headquarters level and directed all Chief Patrol Agents to obtain authority at the national level before entering any negotiation at a lower level and no such authority to negotiate was sought by or granted for this working group. (Tr. 177). This policy was reiterated by Acting Chief of the U.S. Border Patrol Ronald D. Vitiello in a memorandum issued to all Chief Patrol Agents and Division Chiefs dated May 12, 2010. (R. Ex. 13). Although the GC presented several MOUs that reflect bargaining and agreement at individual Border Patrol stations as proof that the Respondent engages in negotiation at individual stations, it is important to note that all of the agreements predated Chief Aguilar's arrival as head of the Border Patrol. (G.C. Ex. 7, 8, 10).

While the policy established by David Aguilar and continued by the Vitiello memorandum did not forbid negotiation at individual stations, it demonstrates that such negotiations could only legitimately occur with the knowledge and approval of higher headquarters and there is nothing in the record to indicate that management personnel at the Sault Sainte Marie station sought or obtained approval to negotiate over the impact and implementation of a marine unit at that station. I further conclude that the absence of such evidence was not a matter of negligent oversight, inexperience, or management agents going "rogue". The facts of the case lead me to believe that the authority to negotiate at the station level was never sought or obtained because the managers at the Sault Sainte Marie station had no intention of negotiating over the impact and implementation of marine units at their station. (Tr. 217-18, 234-35, 245-48). While the local managers were collaborating with the Union to establish policies in a temporary SOP that made the station and the marine unit operations function better, it was their intent that any operating plan developed as a result of this process would be unilaterally implemented by them as an SOP with the tacit approval of the Union. (*Id.*).

Such understandings that result from open lines of communication between management and union occur in the workplace on a regular basis without being negotiated or bargained. As the Authority has noted, every discussion between union and management over conditions of employment does not constitute collective bargaining. *U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 320 n.8 (1997) (*DOT*). While policies that are implemented as a result of such collaborations could evolve into a past practice when followed and left in place long enough, labor and management working together to find a better way to get the job done for the American people is the crux of Executive Order 13522, issued on December 9, 2009. While neither party contends that the interaction between the Respondent and the Union in this case was conducted pursuant to Executive Order 13522, collaborative discussion upon problems that result in labor and management finding a joint resolution outside of the parameters of impact and implementation bargaining is exactly the type of behavior the Executive Order seeks to encourage and one that is not achievable if every discussion, meeting, or interaction between union and management upon conditions of employment constitutes collective bargaining under the Statute.

Aside from the clear directive to not negotiate at lower levels of the agency without prior coordination and a delegated of authority from Border Patrol headquarters, there are factual matters that lead me to conclude that the meetings were an effort by the Respondent to collaborate with the Union and give them a voice in the development of a SOP that PAIC Rivers planned to unilaterally institute as policy at his station until guidance on marine unit operations was provided by BP headquarters. (Tr. 245-46). The first fact that demonstrates it was understood by all parties that this was an effort at collaboration upon a temporary policy SOP rather than a negotiation of permanent terms in an MOU pursuant to collective bargaining was provided by Sparkman himself. In his testimony, Sparkman described his initial involvement with the marine unit at the Sault Sainte Marie station as asking to have some input after hearing that SA Harstvedt was developing policy guidance for the marine

unit. (Tr. 15). His exact words were as follows: "So he was typing out a policy that we became aware of and went to him and asked if we could have input on it." (Tr. 15-16, 20). It is important to note, that Sparkman, an experienced Union officer did not indicate that he made a demand to bargain with station managers, nor did he seek ground rules or submit proposals or request official time for negotiations, he simply asked that the Union have some input upon the marine unit policies that were being developed. While Sparkman had submitted a demand to bargain the same issue to the Detroit Sector, he did not bother to inform the station managers of his earlier demand, nor did he tell them about the ULP that was already pending over the Detroit Sector's refusal to bargain the matter at anything other than the national level. (Tr. 218, 234-35, 247).

Equally important to the absence of actions that serve as an indication that the parties believed bargaining was to occur is that on January 4, 2010, Sparkman sent an email to SA Harstvedt, in which he acknowledged they would "knock out a S.O.P." for the marine unit with no reference to their getting together for the purpose of bargaining over an MOU. (R. Ex. 6). Of course, unbeknownst to the managers at the Sault Sainte Marie station, Sparkman had already made a demand to bargain over the implementation of marine units with their supervisors at the Detroit Sector and had filed a ULP charge over the Sector's refusal to bargain the issue at the sector or station level. (Tr. 218, 234-35, 247). Thus, Sparkman knew in the fall of 2009, that implementation of the marine units could not be negotiated at individual stations, which explains why he would not make such a demand of the station managers and would instead seize an opportunity to provide Union input upon the development of an SOP.

To facilitate the efforts of the SOP working group, SA Harstvedt provided Sparkman with a copy of the proposal the Sault Sainte Marie station had submitted to the Detroit Sector, which outlined the operating plan for a dedicated marine unit at that station. (Tr. 15-16; G.C. Ex. 2; R. Ex. 3). Although the General Counsel attempted to characterize this document as the bargaining proposal that initiated negotiations, the testimony of Sparkman made it clear that he understood the document was not given to him as a collective bargaining proposal. (Tr. 74). As Emerson observed, foolish consistency is a hobgoblin and the General Counsel's characterization of this document as a bargaining proposal simply because its title included the word proposal and it was given to a Union official by the Respondent was contradicted by the Union official's testimony as well as that of the Respondent witness who provided the document to Sparkman. (Tr. 74, 214).

After receiving a copy of the proposal SA Harstvedt was using as a baseline to draft the SOP that would establish temporary policies for the marine unit, Sparkman used the proposal to not only assist in providing Union input upon the policies to be set forth in the SOP, but as the basis for a second ULP against the Detroit Sector for failing to provide the document in response to the information request he made in September 2009. (R. Ex. 7). As with his first ULP, Sparkman failed to inform PAIC Rivers, APAIC Sean Wilson, or SA Harstvedt about his ULP charge against their superiors in the Detroit Sector and continued upon his merry way of providing Union input upon the SOP SA Harstvedt was drafting for PAIC Rivers to adopt at the Sault Sainte Marie station. (Tr. 218, 234-35, 247).

In addition to his contributions to the SOP working group at the Sault Sainte Marie station in the spring of 2010, Sparkman was busy burning the candle at the National and Sector level. On March 9, 2010, he reached a settlement upon the two ULP charges he previously filed against the Detroit Sector. (R. Ex. 8). As part of that settlement agreement, the parties agreed "to meet and bargain in good faith concerning the impact and implementation of new Boat Unit Policies in the Detroit Sector, consistent with law." (*Id.*). Sparkman negotiated this settlement with Clifton Wilcox, the Labor Relations specialist at the U.S. Customs and Border Protection headquarters in Washington, D.C., who was responsible for handling all labor issues involving air and marine operations, including Riverine operations. (*Id.*; Tr. 149-53).

In the course of reaching settlement, Wilcox and Sparkman had several conversations and the parties reached agreement to settle the pending ULPs when Wilcox agreed to provide the information requested on September 29, 2009, and agreed to negotiate the impact and implementation of the new marine units at the Detroit Sector level rather than the national level with Clifton serving as chief negotiator for the Respondent. (Tr. 152-53; R. Ex. 8). During the course of negotiating this settlement with Wilcox, Sparkman made no mention of the fact that he believed he was already in the process of negotiating the implementation of the new marine unit at the Sault Sainte Marie station, and while one could conclude that he was being deceptive and duplicitous, I give Sparkman the benefit of the doubt and assume that he never mentioned his activity at the Sault Sainte Marie station in March 2010, because he did not believe he was negotiating the terms of a collective bargaining agreement with SA Harstvedt. At that point, he understood that an individual station was prohibited from bargaining on the issue and believed he was only providing input upon a temporary policy that PAIC Rivers would unilaterally implement as an SOP until the Sector level negotiations were concluded and the stations were provided further guidance.

Furthermore, even if a duplicitous Sparkman believed he was in the midst of collective bargaining negotiations at the Sault Sainte Marie station in March 2010, in violation of the restriction the Respondent had notified him of in the fall of 2009, once he agreed that the Union would negotiate the impact and implementation of marine units for the entire Detroit Sector at the sector level, any prior or subsequent negotiations over the same issue at individual stations with other negotiators were rendered moot. Having agreed that it would negotiate the implementation of marine units at the Detroit Sector level, the Union was precluded from negotiating upon those very same issues at individual stations. In this regard, it is important to note that NBPC, Local 2499 bargaining unit consists of the entire Detroit Sector and not an individual station. (G.C. Ex. 1(b)).

The October ULP charge asserted that National level bargaining was not appropriate and contended that notice and bargaining at either the sector or individual station level was required. (R. Ex. 5). However, the settlement agreement signed by Sparkman clearly contemplates only sector level bargaining. Thus, bargaining at individual stations was the *quid pro quo* the Union gave up as part of settlement negotiations to obtain sector level bargaining in the place of national bargaining. (R. Ex. 8). Therefore, accepting for the purposes of argument that a subsequent agreement over implementation of a marine unit was reached at an individual station, any resulting MOU would not be enforceable because the

Union had agreed with Wilcox to bargain that topic at the sector level. Subsequent negotiations at an individual station over the same issue would be inconsistent with the terms the Union accepted as part of the settlement agreement and although Sparkman found negotiations with labor relations specialists more difficult, (Tr. 80-81); that does not give the Union the ability to *sua sponte* find a negotiator for the Respondent it finds more agreeable. (Tr. 85).

In accordance with the settlement agreement negotiated between Wilcox and Sparkman on April 21, 2010, Wilcox provided Sparkman with the information requested in September 2009, and invited him to submit proposals for the sector level negotiations required by the agreement. (Tr. 154; R. Ex. 11-accepted[2]). However, Wilcox received no proposals from Sparkman, nor did Sparkman provide any indication that he believed he was negotiating the implementation of marine units at individual stations within the Detroit Sector. (Tr. 154). On May 18, 2010, Wilcox learned via an email from the regional office of the FLRA who had assisted with the settlement of the prior ULPs that Sparkman was asserting a failure to comply with that settlement because the Detroit Sector would not approve an MOU he had negotiated at an individual station. (Jt. Ex. 1). Sparkman's email to the FLRA was revealing with respect to the sector limitation he agreed to as part of the ULP settlement. His exact words to the FLRA representative were "I did get the information I requested and told them that I could bargain most of this at the station level **if they allowed it**." (*Id.*) (Emphasis added). Not only does this statement indicate that Sparkman understood his negotiating upon the implementation of marine units at an individual station was not allowed under the terms of the agreement he signed, it also demonstrates that any meeting of the minds he thought had occurred at the station level was achieved with negotiators whom he knew were not authorized to negotiate under limits he accepted as part of the earlier settlement. As discussed below, there are legitimate reasons to conclude that no meeting of the minds occurred with respect to the policies that were developed by the Sault Sainte Marie working group once Sparkman presented them as an MOU rather than an SOP, but if there was a meeting of the minds, the agreement was not with any agent of the Respondent who had actual authority to bind the Respondent and Sparkman knew the managers at the individual station had no such authority. (Tr. 103).

When Wilcox discovered that Sparkman was trying to negotiate the subject matter of the March settlement agreement at an individual station, he sent an email directly to Sparkman reminding him that the Respondent had requested proposals on April 21, 2010, and that he was the chief negotiator for the issues covered by the settlement agreement. (Jt. Ex. 1). He then advised Sparkman that upon receipt of his proposals, Wilcox would determine who would represent the Respondent in formal negotiations over them. (*Id.*). Sparkman replied on the same day, informing Wilcox that he had reached an agreement in

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[2] The record contains two documents labeled Respondent Exhibit 11. The document that is included with the other Respondent Exhibits was accepted into evidence. The document labeled Respondent Exhibit 11 that is the lone document in a record folder was not admitted or considered in making this decision. Respondent Exhibit 11 was originally a two page document; however, the first page was rejected while the second was admitted. (Tr. 96-98).

principle with management at the Sault Sainte Marie station and would share the MOU as an example of what the Union was looking for in the implementation of marine units in the Detroit Sector. (*Id.*). Sparkman went on to indicate that if Wilcox would rather bargain the issue at the sector level and have the individual stations conform to one policy, then he could work with that. (*Id.*). Of course, that offer only restated the terms of the settlement agreement he had already signed and was but a second commitment that Sparkman ultimately refused to honor.

On June 14, 2010, PAIC Rivers informed Sparkman that the proposed MOU Rivers forwarded to the Detroit Sector would not be approved and that he would not be signing it because local agreements were not permitted. (Tr. 101-03). When Sparkman was asked at the hearing if he inquired of PAIC Rivers about who was not allowing him to sign the MOU, he testified, "I already know who -- I told him that he wouldn't be able to when he wanted to bargain it, . . ." (Tr. 103).

Despite telling Wilcox on May 18, 2010, that he was willing to engage in bargaining at the sector level in accordance with the settlement agreement he signed, apparently Sparkman decided that the policies garnered as a result of his involvement with the working group at the Sault Sainte Marie station were favorable enough that he could not just idly sit by and watch them pass into that goodnight. In fact, Wilcox told Sparkman that the proposed MOU Sparkman drafted would not pass agency head review and tried to negotiate changes that would modify the proposed MOU into one containing terms with which the Respondent could agree. (Tr. 156-57). However, those negotiations were unsuccessful and Sparkman ultimately concluded he would try to have the terms of his proposed MOU enforced as an agreed upon product of collective bargaining. (Tr. 157). So that June, Sparkman filed this ULP charge asserting that the Detroit Sector's failure to sign or to allow PAIC Rivers to sign the document he presented as an MOU negotiated with station management violated the Statute because an agreement was reached. (G.C. Ex. 1(a)).

The Union Knew it was not Meeting with Authorized Representatives

Assuming in the alternative that the meetings between Sault Sainte Marie station management and the Union were an attempt to engage in collective bargaining, the record demonstrates that the Union knew the station managers who participated in the meetings were not duly authorized representatives of the Respondent and that they had no authority to reach an agreement on the implementation of marine details at the Sault Sainte Marie station.

Although Boss and Sparkman, the Union officials who participated in at least some of the meetings testified that the PAIC Rivers, SA Harstvedt and APAIC Wilson asserted that they were authorized to negotiate and were in fact engaged in collective bargaining with the Union, those assertions were squarely contradicted by the testimony of the managers in question. (Tr. 218, 234-35, 247). Furthermore, the GC presented no documentary evidence generated over the entire course of the supposed negotiations that one would expect to exist when parties are authorized to engage in collective bargaining. There were no ground rules, no proposals, no counter proposals, and no requests for official time to negotiate, not even a single email sent for the purpose of scheduling the next negotiating session. While there are

now widely divergent views about what the parties were doing in the working group meetings conducted in the spring of 2010, the absence of documents or other indicia of collective bargaining leads me to conclude that at the time they occurred, neither side believed they were negotiating the terms of an MOU.

The strongest evidence present in the record regarding these meetings is an email from Sparkman to SA Harstvedt in which Sparkman indicates that the purpose of a future meeting would be the development of an SOP. (R. Ex. 6). While Sparkman testified that there was no difference between an SOP and an MOU, his qualification to that statement was that there was no difference because "[he] would ask for a standard operating procedure to be reduced to an MOU." (Tr. 79). This qualification is consistent with and supports the testimony of PAIC Rivers who testified that an SOP was a document he could issue under his signature alone to provide guidance upon marine operations while awaiting further guidance from higher headquarters, whereas, an MOU would have to be negotiated with the Union. (Tr. 245-46).

As discussed above, established Border Patrol policy required that station managers seek permission for and obtain delegated authority to engage in negotiations at the station level. Although Sparkman testified that he did not know about the policy (Tr. 102), he also testified that he told PAIC Rivers that the Detroit Sector was refusing to bargain the matter at the sector and station level and that Rivers could not bargain over the issue either. (Tr. 20, 103). While Sparkman offered this testimony as proof that Rivers had agreed to negotiate despite knowing about and apparently in contravention of the prohibition imposed by his supervisors, what it really proves is that even if Rivers did agree with terms that were negotiated, Sparkman knew that as a PAIC, Rivers had no authority to negotiate or agree upon this subject. (*Id.*). In fact, Sparkman went so far as to tell PAIC Rivers that he would not be allowed to sign it, even if they reached agreement. (*Id.*). While I conclude that PAIC Rivers and the other members of management were more credible upon this issue given Sparkman's email about knocking out an SOP, and that no member of management offered or agreed to engage in bargaining an MOU with the Union, assuming for the purpose of argument that they did, Sparkman knew that PAIC Rivers and his subordinates were not duly authorized to negotiate because the Detroit Sector had told Sparkman in the fall of 2009, that the implementation of marine units could not be bargained at the sector or station level and had to be bargained nationally. As Sparkman acknowledges that he knew the Detroit Sector had declared that they did not have authority to bargain the impact and implementation of the marine units, it is inconceivable that Sparkman, an experienced Union official could reasonably believe that PAIC Rivers, a subordinate within that sector possessed an authority not accorded to his supervisors. Therefore, I find the claims of Sparkman and Boss that the management of the Sault Sainte Marie station held themselves out as authorized negotiators ready, willing and able to engage in collective bargaining are not credible, nor are their claims that all involved in the working group meetings understood from the beginning that they were negotiating a permanent MOU for the marine unit.

There was No Agreement or Meeting of the Minds

Perhaps the saddest piece of this sad and besmirched tapestry is the fact that all of it flows from the misinterpretation of a single sentence email message between two of Respondent's sector level managers. On May 5, 2010, Sparkman sent an email to PAIC Rivers and SA Harstvedt informing them that he had a rough draft of an MOU for the marine unit asking if they agreed with it and if not, to "ink it up" and he would make changes. (G.C. Ex. 4). He went on to indicate that he would like to send a copy of the "rough draft" to Mr. Belotti at the Detroit Sector, as an example of what he would like to see the individual stations within the sector "knock out in lieu of a sector policy".[3] (*Id.*).

Once PAIC Rivers saw that Sparkman was now characterizing the operations policies that he planned to unilaterally implement as an SOP as a negotiated MOU, he had little choice but to submit it to the Detroit Sector for review and approval since he had not obtained prior authority to negotiate an MOU. (Tr. 250). After contemplating his predicament, PAIC Rivers forwarded the draft MOU to Paul McGinley at the Detroit Sector the morning of May 6, 2010. (G.C. Ex. 4). McGinley was an Assistant Patrol Agent in Charge (APAIC) at the Detroit Sector who had previously been responsible for labor and employee relations within the Detroit Sector. (Tr. 202-03). However, in May 2010 he was on a detail to another assignment. (*Id.*). Thus, he did not see Rivers' email until May 18, 2010. (*Id.* at 208). In his email to APAIC McGinley, Rivers indicated that the document was "something" they had been "working on" for a bit, and that he was "agreeable to it". (G.C. Ex. 4). I note that he did not call it an MOU they had negotiated, nor did he indicate that he had already agreed to it with the Union. He specifically used the word "agreeable", an adjective reflecting a willingness to agree with a future course of action as opposed to a past tense verb reflecting a fait accompli.

As a result of his detail, McGinley was no longer responsible for labor relations within the sector, so he told APAIC Carlos Aguilar, the agent now responsible for labor relations about the proposed MOU, and Aguilar informed him of the May 12, 2010, policy memorandum issued by Acting Chief Vitiello, that required the sector to consult with the field servicing LER specialist at Border Patrol headquarters about bargaining issues at the station level. (Tr. 208-09). McGinley then forwarded Rivers' email to Aguilar with a courtesy copy to Rivers, expressing a desire to "give the new system a try." (G.C. Ex. 4). While the "new system" that McGinley referred to was the process set forth in May 12, 2010, memorandum from Vitiello, it appears that PAIC Rivers interpreted "new system" as the Detroit Sector's agreement with the new marine unit policies set forth in the potential MOU he had forwarded. (G.C. Ex. 4; Tr. 208-09). McGinley's email to Aguilar and Rivers with the let's give the new system a try comment was sent at 12:28 p.m. on May 18, 2010, and at 12:34 p.m., that same day, Rivers sent an email to Sparkman containing but two sentences:

[3] This email was sent almost two months after Sparkman had agreed that the implementation of marine units in the Detroit Sector would be negotiated at the sector level, which gives reason to question the Union's good faith in negotiating that earlier settlement agreement as well as their compliance with it.

"It appears we have a green light. Any issues we should address that resulted from the Union meeting?" (G.C. Ex. 4).

Suffice it to say, McGinley's email to APAIC Aguilar indicating that he thought the potential MOU should be forwarded to the LER specialist at BP headquarters for review and approval was not a "green light" for anything other than sending it to BP headquarters for further review as required by the Vitiello memorandum. The LER specialist to whom the MOU was to be forwarded was Clifton Wilcox, the same duly appointed representative with whom Sparkman had agreed to negotiate the issue for the entire Detroit Sector, including the Sault Sainte Marie station. Thus, Sparkman's attempt to back door an MOU by claiming that he had negotiated an agreement with an individual station in contradiction of the settlement agreement he signed was going to fail, but that did not deter him from claiming he had succeeded, even if the claim was the product of a misinterpreted comment made in an email that was not sent to him.

While PAIC Rivers testified at the hearing that he understood McGinley's email to be nothing more than an agreement to forward the document up the chain of command for further review and approval, that claim is not credible, given the speed with which he acted and the lack of qualification he offered to Sparkman only moments after getting the McGinley email. At the hearing, Sparkman testified that it was the receipt of this "green light" email from PAIC Rivers that led him to conclude for the first time that an agreement had been reached. (Tr. 121-22). Thus, there was never an agreement or meeting of the minds upon the MOU by anyone with the actual authority to negotiate or approve it. While Rivers may have mistakenly given Sparkman the impression that the Detroit Sector had agreed to the terms of the MOU, that assumption on the part of Sparkman is not borne out by the facts. The "let's give the new system a try", which PAIC Rivers interpreted as an agreement with the MOU, was, in reality, nothing more than a reflection of the Detroit Sector's willingness to forward the MOU to the Clifton Wilcox for review and approval, and not an acquiescence to the terms set forth in the proposed MOU.

Therefore, Sparkman's charge that the Respondent improperly refused to execute an agreement that was reached through collective bargaining must fail under the facts. To the extent that Sparkman believed the "green light" comment evidenced agreement by someone with actual authority in the Detroit Sector, that belief was proven inaccurate. To the extent that Sparkman believed he had an agreement with local management, that belief is belied by his own email to PAIC Rivers which clearly indicated that the proposed MOU was not yet a final document and his own admission that he did not think there was an agreement until he received the "green light" email. To the extent the General Counsel argues that Sparkman had an agreement with PAIC Rivers because Rivers forwarded it to the sector for review and approval with an indication that he was "agreeable to it", that argument is betrayed by several facts. First, the word agreeable does not reflect a present agreement; second, Rivers being agreeable was not communicated to Sparkman; third, Sparkman knew that individual station managers had no authority to negotiate or agree upon the implementation of marine units; and fourth, Sparkman had already agreed to negotiate the implementation of marine units within

the Detroit Sector at the sector level recognized for bargaining. In summary, even if the working group meetings between Union and management conducted in the spring of 2010 were collective bargaining sessions, such negotiations never produced an agreement between parties with actual authority to reach agreement upon the implementation of marine units within the Detroit Sector.

POSITIONS OF THE PARTIES

The Section 7114(b)(5) Allegation

General Counsel

The General Counsel asserts that the Respondent engaged in collective bargaining with the Union. The GC contends that PAIC Rivers appointed management employees to serve on his negotiating team and that they held multiple negotiating sessions with Sparkman and Boss. In support of its argument, the GC claims that the culmination of these bargaining sessions was a document drafted by Sparkman and that when he declared it to be an MOU, the local managers did not rebuff or reject his characterization, and instead advanced the document to supervisory staff at the Detroit Sector. (G.C. Br. at 8). The General Counsel submits that the email communication between PAIC Rivers and APAICs McKinley and Aguilar evidenced an agreement with the terms set forth in the MOU and that when Rivers told Sparkman that "It appears we have a green light" acceptance and agreement with the terms was established and the Union was told there was an agreement with the terms. (*Id.*).

The General Counsel also contends that the station managers who were engaged in negotiations had the authority to negotiate and reach agreement. (*Id.* at 9). The GC submits that the station managers had actual and apparent authority and in support of that position, the GC points to the deliberate actions undertaken by PAIC Rivers to designate SA Harstvedt as his "point man", that Rivers reviewed the MOU and stated that he agreed with it, and forwarded the agreed upon MOU to his superiors. (*Id.* at 11). While the GC argues that these actions demonstrate that PAIC Rivers had actual authority, the GC also argues that the Authority recognizes apparently authority and that PAIC Rivers appointment of SA Harstvedt established the existence of apparent authority because Rivers appointed him after indicating that he had authority to sign off when agreement was reached. (*Id.* at 15). The GC states that the Respondent's claim that Clifton Wilcox was its designated representative for negotiations is misplaced because Wilcox was "designated agency representative on a series of unrelated labor matters including unfair labor practice (ULP) charges, information requests and settlement agreements related to those ULPs" and that "Wilcox was the designated representative on the issue of Marine Boat Policy at the National Level." (*Id.* at 10). The GC alleges that the Union did not know Wilcox was the Respondent's designated representative at the local level until Sparkman received an email from Clifton on May 28, 2010. The GC also asserts that the Respondent gave the Union no notice of PAIC River's lack of authority to negotiate and argues that the Union should not be required to be clairvoyant or need to conduct an investigation into the authority of the agents a Respondent sends to deal with the Union. (*Id.* at 11, 17).

The General Counsel also submits that under the totality of the evidence an agreement was reached upon the MOU in question as reflected by PAIC River's own words indicating that he was in agreement with the terms of the MOU. (*Id.* at 18).

Respondent

The Respondent contends that there was no mutual good faith bargaining or negotiation between the Union and the Respondent over the impact and implementation of marine units at the Sault Sainte Marie station. (R. Br. 15). In support of this position the Respondent points out that the managers never indicated to the Union that they were bargaining upon the matter nor did they give the Union bargaining proposals because they believed they were working on a temporary SOP to be promulgated by the PAIC. (*Id.* at 16). To the extent that the GC argues that the document given to Sparkman by SA Harstvedt was an initial bargaining proposal, the Respondent submits that while it was styled as a proposal, it was not a proposal for the Union, but a proposal submitted to superiors at the Detroit Sector and the Union understood that when the document was proffered. (*id.*). Further, the Respondent asserts that the Union never told the managers with whom it was meeting at the station that the Union thought they were bargaining over the implementation of the station's marine unit but did confirm that they were working on the development of an SOP, and that no demand to bargain was ever made by the Union, no ground rules were negotiated, and no Union proposals were provided to the managers at the Sault Sainte Marie station. (*Id.* at 15-18). The Respondent also argues that Sparkman knew there were no negotiations cognizable under § 7114(b) of the Statute taking place at an individual station because he had already been informed that negotiations could not take place at that level and had agreed to negotiate the implementation of marine units for the entire Detroit Sector at the sector level which was the recognized appropriate bargaining unit. (*Id.* at 19-21).

The Respondent also avers that no agreement was ever reached upon any cognizable negotiations, thus, there was no obligation to reduce such agreement to a written document signed by the parties. (*Id.* at 21). In support, the Respondent contends that the Union knew that PAIC Rivers did not have the authority to enter into an agreement over the implementation of a marine unit at the Sault Sainte Marie station, that the Union knew any agreement had to be reviewed and approved at higher levels within the agency and that no agreement was ever expressed by PAIC Rivers or any other authorized agent of the Respondent. (*Id.* at 21-26). The Respondent alleges that as a result of settling prior ULPs, the Union fully understood that Clifton Wilcox was the person authorized to negotiate the implementation of marine units within the Detroit Sector and knew that PAIC Rivers had neither the actual or apparent authority to engage in such negotiations. (*Id.* at 19-26). The Respondent further asserts that while PAIC Rivers was never cloaked with the vestments of apparent authority, that even if he had been, the Union could not establish the existence of an enforceable agreement if the terms were negotiated by an agent of the federal government who possessed only apparent authority because an agent of the government must have actual authority. (*Id.* at 23-24).

The Section 7114(b)(2) Allegation

General Counsel

The General Counsel argues in the alternative, if the Respondent did not violate the Statute by refusing to sign an agreement produced by collective bargaining between authorized representatives, the Respondent violated the Statute by failing to send duly authorized representatives to the negotiations. (G.C. Br. at 19).

Respondent

While it acknowledged the alleged violation of § 7114(b)(2) as an issue within its brief, the Respondent provided no discussion of this allegation in the arguments presented therein. (R. Br. at 3, 15-26). However, if, as outlined above, no negotiations were conducted because the Respondent did not think it was engaged in collective bargaining and was merely developing an SOP for the operation of a marine unit at a level that was below the recognized appropriate unit, there would be no need to send duly authorized representatives to the meetings as they were not negotiations for the purpose of reaching a collective bargaining agreement.

DISCUSSION AND CONCLUSION OF LAW

In proving the unfair labor practice allegations set forth in a complaint, the burden of proof is on the General Counsel to demonstrate by a preponderance of the evidence that a respondent committed the violations alleged. 5 C.F.R. § 2423.32.

Section 7103(a)(12) of the Statute defines collective bargaining as follows:

> "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees **in an appropriate unit** in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.] (*Emphasis added*).

The mutual obligation to bargain as articulated in the Statute exists only at the level of exclusive recognition. While the Authority established this principle in the course of determining that bargaining at the local office level was no longer required when local offices were consolidated into a single appropriate unit, it goes without saying that if consolidation extinguishes bargaining obligations that previously existed, the obligation cannot be imposed where they never existed. *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah,* 39 FLRA 1409, 1417-18 (1991) (*Hill AFB*); *DHHS, Soc. Sec. Admin.*, 6 FLRA 202, 203

(1981). Thus, the statutory mutual obligation to bargain in this case exists only between the Respondent and the exclusive representative of the appropriate unit, which is NPBC, Local 2499, acting as an agent of the AFGE National Border Patrol Council on behalf of employees within Respondent's Detroit Sector. (G.C. Ex. 1(b)). Therefore, there was no statutory collective bargaining obligation for the Respondent to negotiate the implementation of marine units at individual stations within the Detroit Sector.

While the General Counsel correctly argues that the parties to a collective bargaining agreement can agree to bargaining at a level that is lower than the recognized appropriate unit and proved that the Respondent has permitted station level bargaining upon other matters in the past, it failed to prove that bargaining at the station level was authorized by anyone with the authority to delegate such over the issue of implementation of a marine unit at individual stations within the Detroit Sector. *Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 39 FLRA 1381 (1991); *Hill AFB*, 39 FLRA at 1417.

Every meeting or discussion between an agency representative and an exclusive representative does not constitute collective bargaining. *DOT*, 53 FLRA 312. The *DOT* case presented some facts similar to the case before me, in that it involved a local union official's demand to bargain locally over the design and layout of a new facility to be constructed at one of the many airports where the Federal Aviation Administration (FAA) provides services. In response to the demand, the agency's local manager advised the union that he did not have the authority to negotiate the matter. After the union filed a ULP over the refusal to negotiate, the agency informed the Union that the local manager was prepared to negotiate. However, when the union approached the manager, he again told the union that he did not have the authority to negotiate, but proposed that they establish a planning committee consisting of two union and two agency representatives that would have the authority to make decisions on the planning of the new facility. After attending the planning meetings for a month, the union president again asked to bargain the issue and the manager's superiors assured the union that the manager had the authority to negotiate. As a result, the union withdrew its ULP and continued to participate in the planning meetings. The union and local managers met for eight months during which time the union made proposals and the parties reached an agreement on the inclusion of a multipurpose room in the floor plan. However, when the union requested that the local manager reduce their agreements to an MOU, he refused, explaining that he did not have the authority to negotiate and informed the union that the multipurpose room was not approved by higher headquarters.

Based upon the facts in the *DOT* case, the Authority determined that a ULP was committed. While *DOT* shares some factual elements similar to those in the case at bar in that they both involve local managers claiming they were only working with the union in either partnership or collaboration, it is the differences in the two cases that requires finding no ULP in this case. First, the *DOT* case involved a change that was only being made at one local facility within the FAA. It was not a change being implemented nationwide at every location with a particular operational mission. Second, the local manager's supervisors assured the union that the local manager had authority and was prepared to negotiate in the *DOT* case and the manager indicated that the planning committee had the authority to make decisions. In this case, the very opposite is true as Sparkman was originally told by PAIC

Rivers' superiors that the implementation of marine units had to be conducted at the national level, and he ultimately agreed that they would be conducted at the sector level for the Detroit Sector. Although Clifton Wilcox indicated that he might have let local officials negotiate the issue after seeing the Union's proposals, never did he tell the Union that PAIC Rivers or his staff had the authority to negotiate the marine unit issue, let alone offer the multiple assurances the agency gave the union about the local manager in *DOT*. (Jt. Ex. 1; Tr. 152-57, 159, 164, 167-68). Third, the planning meetings in *DOT* actually involved an exchange of proposals, a fact not present as part of the working committee meetings conducted at the Sault Sainte Marie station. Fourth, the union in *DOT* filed a demand to bargain and brought a ULP charge over the failure to negotiate at the local facility, whereas this case involves a demand made upon the Detroit Sector, a charge brought against the Detroit Sector and a settlement that agreed to bargain the matter at the sector level. While this case has in common the existence of meetings between union and management, that is where the similarity ends and the facts here demonstrate that the parties were not engaged in negotiations or collective bargaining as defined by the Statute. As the Authority observed in footnote 8 of the *DOT* decision, all discussions between union and management do not constitute collective bargaining and whether a discussion is or is not collective bargaining it is a determination made upon a totality of the circumstances. However, when such discussions take place between parties at a level below that of exclusive recognition, such discussions cannot constitute bargaining under the Statute absent a clear mutual agreement by the authorized parties that they are engaged in collective bargaining within the meaning of the Statute.

Although the General Counsel also contends that the parties agreed to station level bargaining as a contractual right rather than one granted by the Statute, such agreement is not expressed by the plain language of the collective bargaining agreement. While Article 3A of the parties' collective bargaining agreement contemplates negotiations at the National, Regional and Sector level, it contains no mention of station level bargaining. (G.C. Ex. 10). Furthermore, the language covering Sector level bargaining in Article 3A specifically identifies the Chief Patrol Agent as the party who would sign any memorandum of understanding and not a station level Patrol Agent in Charge. Chief Patrol Agent is the position description for the management official responsible for an entire Border Patrol sector, which corresponds to the level at which exclusive recognition was granted for the Detroit Sector. As the record contains no credible evidence that Respondent agreed to bargain the implementation of marine units at any level below the sector level, the assertion that a negotiation occurred and an agreement was reached at the individual Sault Sainte Marie station is without merit.

Aside from the failure to demonstrate that negotiations were conducted, the General Counsel also failed to demonstrate that an agreement was reached. The essential condition to the obligation imposed by § 7114(b)(5) of the Statute requiring parties engaged in negotiation to execute a written document containing the terms agreed upon is the existence of an agreement. Agreement is the *sine qua non* of that provision and it is only the existence of an agreement that gives either party the right to request that the other execute a written record

thereof. In this case, no such agreement was ever reached even if the parties' SOP working group meetings constituted collective bargaining. Thus, the Respondent had no obligation to execute the draft MOU Sparkman provided to PAIC Rivers. An agreement, for purposes of § 7114(b)(5) of the Statute, "is one in which authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining." (*DOT*, 53 FLRA at 317).

Finally, and in the alternative, even if negotiations occurred and an agreement was reached, it was done by an individual with no authority to bind the Respondent. Although Sparkman testified that the first time he believed the Union had an agreement with the Respondent was when PAIC Rivers sent him an email indicating that they had received a "green light", it is clear from the facts set forth above that his interpretation of that email was incorrect as the green light was for further processing as opposed to a green light upon the terms of the MOU. Furthermore, Sparkman knew PAIC Rivers had no authority to negotiate or agree to an MOU covering the implementation of marine units in the Detroit Sector. An agreement between an agency and a union is void and unenforceable if the government agent with whom the agreement was reached lacked the actual authority to bind the agency. (*Id.* at 317); *U.S. Small Business Admin., Wash., D.C.*, 38 FLRA 386, 406 (1990) (*SBA*).

The General Counsel attempts to distinguish this case on the basis that the behavior of the government agent in *SBA* involved an agreement with preposterous and unenforceable terms, arguing that this case does not involve the same kind of egregious facts and ludicrous terms present in *SBA*. However, the precedent of *SBA* did not turn upon the terms under which the agreement made. The essential holding of *SBA* was that the government agent did not have the actual authority to enter into any agreement, regardless of the terms, and that same lack of authority is present in the case at hand. Furthermore, while the terms of the proposed MOU in this case were not egregious, the fact that the proposed MOU was allegedly negotiated by a Union official who had agreed to bargain the very same issue at the Detroit Sector level involves its own form of egregious conduct.

To the extent that the General Counsel contends that the Authority recognizes apparent as well as actual authority when assessing the behavior of government agents, it should be noted that the Authority recognized the validity of apparent authority when assessing the actions of an agent acting on behalf of a union and not one acting on behalf of the federal government. *AFGE, Local 2207*, 52 FLRA 1477, 1480-81 (1997). However, when assessing the actions of a government agent in *SBA*, the Authority held that it was well settled that the United States is not bound by the unauthorized acts or representations of its agents, citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947), and went on to state that 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, citing *Jackson v. United States*, 573 F.2d 1189, 1197 (Ct. Cl. 1978). *SBA*, 38 FLRA at 406-07.

Based upon the testimony provided by Clifton Wilcox and the other members of management assigned to the Detroit Sector, it is clear that no one at either the sector or individual station level was given the authority to negotiate and reach agreement upon the implementation of marine units in the Detroit Sector. Thus, the only person with the actual authority to express agreement with the terms set forth in the proposed MOU was Clifton Wilcox, the Respondent's designated chief negotiator with whom Sparkman negotiated the earlier ULP settlement agreement. As Sparkman was specifically told by Wilcox that the proposed MOU was not acceptable, there was no agreement by any government agent with actual authority to enter into such an agreement. (Tr. 155-57, 160).

As there was no obligation to bargain the implementation of marine units at any level below the Detroit Sector, the Respondent had no obligation to send duly authorized representatives to bargain with the Union at the Sault Sainte Marie station. The Union was asked by the Respondent's duly authorized representative with whom it agreed to negotiate to submit its proposals for the implementation of marine units in the Detroit Sector in April 2010. That the Union now claims to have negotiated with others whom the Union knew had no authority to negotiate and were not duly authorized representatives does not give the Union the right to now claim foul over the lack of qualifications possessed by those individuals. The Union was fully aware and had agreed to negotiate the implementation of marine units at the Detroit Sector level and it was the Union that failed to negotiate with the Respondent's duly authorized representative.

The Respondent told Sparkman in the fall of 2009 that bargaining over the implementation of marine units had to take place at the national level and when he filed a ULP challenging that position, the parties agreed in the spring of 2010 that bargaining would be conducted at the Detroit Sector level, which is consistent with the recognized bargaining unit Local 2499 represents and for whom Sparkman is Union president.

Sparkman's contention that "negotiating" with station level managers was authorized by the contract is without merit and his claim that he believed it was authorized because PAIC Rivers assured him that he could negotiate the matter is not credible. Sparkman worked with former union president Rivers because he thought his input would result in the adoption of an SOP containing policies he favored. When proven correct, he tried to turn that SOP into an MOU that was negotiated, knowing full well that he had already agreed that negotiation over the implementation of marine units in the Detroit Sector had to occur at the sector level and that individual station managers had no authority to negotiate upon that issue. Therefore, it was not the Respondent who failed to send a duly authorized representative to bargain, it was the Union who tried to avoid negotiating with the Respondent's duly appointed representative and instead tried to work a deal with someone more agreeable who was not authorized to negotiate and who lacked actual authority to reach an agreement.

CONCLUSION

I find that 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 the Authority issue the following Order:

ORDER

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

Issued, Washington, D.C., May 2, 2013

CHARLES R. CENTER
Chief Administrative Law Judge