United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR Complainant, v. PPG INDUSTRIES, INC., Respondent, and INTERNATIONAL CHEMICAL WORKERS UNITED COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1049-C, Authorized Employee Representative.	OSHRC DOCKET No. 14-0258

ORDER

On June 15, 2015, I conducted a telephone conference to address the matter of the objections of the Authorized Employee Representative (Union) to the "Stipulation and Settlement Agreement" (Settlement Agreement) that the Secretary and the Respondent submitted for approval on March 26, 2015.

For the reasons stated below, the Settlement Agreement is not approved because the present record is insufficient to establish that the Union was accorded the opportunity to participate in the settlement process before the Secretary and the Respondent executed the Settlement Agreement.

Background

The Union was granted party status in this matter by order dated November 4, 2014, pursuant to Commission Rule 20(a), 29 C.F.R. § 2200.20(a). About 10 weeks later, on January 15, 2015, the attorney for the Secretary notified my office that the parties had resolved the matter, and accordingly, I cancelled the hearing that had been scheduled to commence on January 29, 2015. The Settlement Agreement was submitted for approval on March 26, 2015. The Union timely filed objections to the Settlement Agreement by an email from a representative of the Union on April 24, 2015, which set forth three enumerated objections.

Substantive Objections to Settlement Agreement

During the telephone conference on June 15, 2015, a representative for the Union acknowledged that none of its three objections challenged the reasonableness of the period of time prescribed for abatement of a violation. The Commission may consider a union's (or affected employee's) substantive objection to a settlement agreement only to the extent that the objection challenges the reasonableness of the period of time that the agreement provides to abate a violation. *Pan Am. World Airways, Inc.*, 11 BNA OSHC 2003 (No. 83-249, 1984); *Marshall v. OCAW (American Cyanamid Co.)*, 647 F.2d 383 (3d Cir. 1981); 29 U.S.C. § 659(c); Commission Rule 100(c), 29 C.F.R. § 2200.100(c). Because none of the Union's substantive objections challenges the reasonableness of any period of abatement, the Commission lacks the authority to address its substantive objections.

Procedural Objection to Settlement Agreement

Prior to the June 15, 2015 telephone conference, a representative for the Union filed a statement of position (by email dated June 4, 2015) stating essentially that the Union had not

been accorded an opportunity to participate in any aspect of the settlement process that had resulted in the Secretary and the Respondent executing the Settlement Agreement.

The Secretary and the Respondent also filed separate statements of position as directed. According to the attorney for the Secretary, the Union had participated in some discovery activities after it had been granted party status on November 4, 2014. However, no information has been presented that demonstrates that the Union was given an opportunity to provide input on any proposed settlement between the time the Union was granted party status on November 4, 2014, and the time that the Secretary and the Respondent executed the Settlement Agreement sometime in late March 2015.

During the telephone conference, I directed the parties' careful attention to the Commission decision in *Boise Cascade Corp.*, 14 BNA OSHC 1993 (No. 89-3087, 1991) (consolidated), wherein the Commission elucidated its decision in *General Electric Co.*, 14 BNA OSHC 1763 (No. 88-2265, 1990). The following from *General Electric* is instructive regarding the Union's procedural rights in the settlement process:

> [W]hen enforcement proceedings have been initiated before the Commission and the Secretary proposes to settle the case, any input offered by the affected employees should be received at some point before a settlement agreement is executed between the Secretary and the employer.
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> Accordingly, we conclude that the Secretary should inform employees or their representatives who have elected party status of settlement negotiations so that the employees may offer input concerning the proposed settlement to the Secretary and, for that matter, to the employer as well. The Secretary and the employer will then have the benefit of the employees' input, which they may consider in determining whether to proceed with the settlement. If the Secretary and the employer agree to a settlement, notwithstanding any contrary views or input on the part of the employees or the union, and present the settlement to the Commission judge for approval, the employees or their representatives are entitled to file objections with the judge, but only as to the reasonableness of the time period prescribed for abatement. While the

> Commission can disapprove a settlement agreement on the basis of an employee objection only if the objection pertains to the reasonableness of the abatement period, we will examine a settlement agreement, submitted for approval by the Commission or a Commission judge, to determine that the employees have had an opportunity to provide input during the formulation of the agreement. In this way, the legitimate interest of employees in being heard on the terms of a proposed settlement can be accommodated in a manner consistent with the limited rights of employees or their representatives to object to a settlement agreement once that agreement has been filed with the Commission or Commission judge.

Id., 14 BNA OSHC at 1766 (emphasis supplied) (footnotes and internal citation omitted).

In *Boise Cascade*, the Commission provided further guidance on this subject as follows:

> [W]hile we cannot order the method and degree by which the Secretary and employer receive the views of employees, we can review the Secretary's actions in this regard to determine whether the Secretary has abused his discretion. We also note that the limited right of employees to object to the reasonableness of the abatement period in a settlement agreement once that agreement has been submitted to the Commission or judge for approval is distinct from the opportunity to provide input on all matters pertaining to the settlement before the agreement is finalized. Therefore, we also reject Boise's contention that during the settlement process, employees may only be heard with respect to the reasonableness of the abatement period.
>
> As we have indicated, the Secretary assured us at oral argument that his policy is and has been to afford employees an opportunity to present their input before he enters into any settlement agreement. In view of the Secretary's latitude to define the method and degree of employee input that he will receive in any particular case, we conclude that it will not be proper for the judge to inquire into the provision of employee input except in unusual or egregious cases where it appears that the Secretary has contravened his stated policy by denying employees an opportunity for input. In such a situation, the absence of an opportunity for employees to offer input would in our view constitute an abuse of discretion on the part of the Secretary. We emphasize that because of the limited authority of the Commission to review settlement agreements, the judge is obligated to avoid any undue interference in the settlement process. We therefore conclude that, except in those rare cases where there clearly appears to be an abuse of discretion by the Secretary, the

> proper role for the judge is to advise the Secretary and employer of any claim that employees have not been given an opportunity for input so that the Secretary and employer may then reconsider their positions in light of the claim.
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> The judge must have discretion to entertain claims that employees have not been heard in the settlement process before the settlement agreement is finalized and executed by the Secretary and employer. In that way, the Secretary and employer can take the employees' claims into consideration, and the Secretary will be better able to fulfill his responsibility to ensure that employees have had an adequate opportunity to be heard.

Id., 14 BNA OSHC at 1997-98 (emphasis supplied) (footnote and internal citation omitted).

Consistent with Commission guidance in *General Electric* and *Boise Cascade*, approval of the tendered Settlement Agreement is inappropriate because the record is not sufficient to support the conclusion that the Union was accorded the opportunity to exercise its procedural right of participation as described in those decisions.[1]

IT IS THEREFORE ORDERED that the time for the parties to submit a fully executed settlement agreement is hereby extended to **July 17, 2015**. In conjunction with the transmittal of an executed settlement agreement, the Secretary should file a verification that the Union has been accorded an opportunity for participation in conformity with applicable Commission precedent. (Such verification could also be set forth within the body of the agreement.) Such a settlement agreement must be served and posted in conformity with Commission Rule 100(c), 29 C.F.R. § 2200.100(c). The Union will again have the opportunity to file within 10 days of service (1) any objections as the reasonableness of any period of time for abatement set forth in a

[1] The Respondent, in its statement of position dated June 12, 2015, indicated that it did not object to acting positively upon certain aspects of the Union's substantive objections to the Settlement Agreement. This position, articulated only after having considered the Union's substantive objections, is perhaps demonstrative of the value to the settlement process of the procedural rights described in *General Electric* and *Boise Cascade*.

newly executed settlement agreement, and (2) an objection asserting that its procedural right of participation in the settlement process remained unsatisfied.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: June 16, 2015