BEFORE
ANDREW M. STRONGIN
ARBITRATOR

June 27, 2019

In the Matter of the Arbitration between-	:
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U.S. DEPARTMENT OF COMMERCE/	:
PATENT AND TRADEMARK OFFICE	:
	:
-and-	:
	:
THE PATENT OFFICE PROFESSIONAL	:
ASSOCIATION	:

APPEARANCES:

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This grievance protests the Agency's decision, dated May 17, 2018, to issue a 60-day disciplinary suspension to grievant, [redacted], for allegedly being absent without leave ("AWOL") from his authorized duty station for a total of 381 hours spread over 51 work days between April and September 2016. The Union claims the suspension is not for just and sufficient cause and does not promote the efficiency of the service, and seeks a broad remedial order to make grievant whole for his losses.

BACKGROUND

Grievant began work for the Agency as a Patent Examiner [redacted]. At relevant times, grievant was working in Art Unit [redacted] in Technology Center 2100, reporting to Supervisory Patent Examiner [redacted].

Following passage of the Telework Enhancement Act of 2010, the parties negotiated a program of their own to expand previous opportunities, known as the Patents Telework Program 2013 ("PTP"), which establishes three part-time telework options for covered employees: 10, 20, and 32 hours. By its terms, "PTP permits participants to work at an alternate worksite during paid work hours to conduct their officially assigned duties without diminished employee performance." Generally, participation in PTP is conditioned on a signed Work Agreement, which requires applicants to certify that they have read and will comply with a variety of conditions, including broadly that they will "adhere to the program set forth in the Patents Telework Program 2013." PTP, Part VI.B; PTP Attachment A. Once accepted and teleworking, all participants "will indicate on their timesheets (WebTA) which days and the number of hours that were worked at the alternate worksite in accordance with the instructions given by management." Part VII.B.3.

Specifically regarding the 32 Hour Option Program ("PTP-32"), PTP provides at Part II.C:

> **1. Participants may work at the alternate worksite for up to 32 hours per [80-hour] pay period ….**
>
> **2. To telework on a given day when the participant will not report to the duty station, participants must notify their supervisor prior to teleworking.**

When negotiating PTP, the parties were mindful of the potential for misuse and/or abuse of the program requirements. These matters are addressed specifically in Part IX, "Suspension and Removal from Program," which provides in relevant part:

> **A. Abuse of the program guidelines may result in suspension from the program for no longer than 6 bi-weeks. Notification of suspension will be in writing including the duration. This suspension in and of itself is not a disciplinary action.**
>
> **B. Abuse of the program guidelines requires repetitive violations of the guidelines after being reminded of the specific guideline requirements that are being violated. Participants who are suspended from the program three times in a rolling five year period for abuse of the guidelines will be removed from the program until they no longer have three suspensions within a five year period.**
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> **C. In order to continue in the program, participants must follow the USPTO standards governing ethical behavior, conduct, and confidentiality regardless of where the official duties are performed. A participant may be removed from the program for up to 12 months if the participant has received a disciplinary or adverse action. If management believes the employee should be precluded from participating in the program for longer than this period, the agency will include this decision in the disciplinary/adverse action. On a case-by-case basis, the Agency may temporarily remove a participant being investigated for serious violations of the above standards. Temporary removal will last no longer than 100 days from the date of removal, unless**

> **the issue is referred to the Inspector General or the Department of Justice.**
>
> **D. The USPTO will give participants being suspended or removed from the program two weeks advance notice, unless exigent circumstances exist.**
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> *** * ***

To the extent of any ambiguity arguably to be found within Part IX.A, above, record evidence demonstrates that the parties specifically discussed during their PTP negotiations a shared desire to avoid "conduct" issues, which they recognized as differing from performance-related issues. Thus, as reflected in the Union's testimony and contemporaneous bargaining notes from August 2012, the Agency's Deputy Commissioner proposed that in order to "avoid conduct issues," participants who "don't comply [ ] get taken off program for a time." Subsequently, that intention was expressed in an Agency proposal, dated December 13, 2012, in which the Agency proposed that, "Abuse of the program guidelines may result in removal from the program." The Union's testimony and bargaining notes reflect that the parties discussed the proposal and agreed, instead, that abuse of the program "may result in removal from the program for no longer than 6 bi-weeks." In further discussions on May 28, 2013, the Union's bargaining notes reflect the parties' shared understanding that suspension from the program would be "like letter of counseling rather than letter of reprimand."

Notwithstanding the foregoing, the Agency maintains a Time and Attendance Obligations Policy, Policy No. OHR-202-05-10 (August 2016) ("T&A Policy"), which is separate from the PTP, albeit its provisions recognize that, "The Agency's various schedule and telework programs each have their own specific rules and requirements, [but] all employees are reminded of the requirement to meet basic time and attendance obligations." Part I, Purpose. Thus, in flatly stating that it "will not tolerate time and attendance abuse," the T&A Policy states:

> **Failure to comply with time and attendance obligations, as outlined below, may result in an employee being subject to disciplinary action up to and including removal, charged absent without leave (AWOL) on their WebTA, and held responsible for repaying the USPTO any pay improperly received. The Telework Enhancement Act of 2010 (5 U.S.C. § 6502) also states that an employee may not telework if they have been officially disciplined for being AWOL for more than 5 days in any calendar year.**

Id.

The T&A Policy expresses, among other requirements, the following "Basic Principles":

- **Basic Principle: Employees must accurately record the hours and days for which they are claiming time.**
  - **An employee can only claim work hours actually worked.**
  - **An employee must claim time on WebTA for the date it was actually worked. In other words, an employee cannot claim time in WebTA for Tuesday when the time was actually worked on Monday.**
  - **Meeting or exceeding production goals does not excuse an employee from the requirement to actually work the time claimed in WebTA.**
- **Basic Principle: employees must know and follow the requirements of their work schedule.**
  - **Time claimed must comply with the employee's applicable work schedule.**
- **Basic Principle: Employees must know and follow the requirements of their telework program**
  - **An employee may only telework if authorized to do so.**
  - **Time worked while teleworking must be claimed as telework on WebTA using a telework-specific code.**

- **A non-Hoteling employee (an employee on a part-time telework program) may not telework hours in excess of those authorized by their schedule.**

- **Basic Principle: Work only at authorized locations.**
  - **An employee can only work and be credited for hours worked at an official duty station or approved alternate workstation.**
  - **An employee may work on approved business travel.**
  - **Employees may also claim time when performing tasks at a different location such as a court room, hearing facility, or other locations when that location is appropriate for the activity.**

- **In addition to these basic requirements, employees should consult their specific work schedule, telework agreement and guidelines, and other negotiated agreements for more specific requirements.**

Agency testimony establishes that this T&A Policy was issued in August 2016 as part of the Agency's response to a report by the Inspector General of the Department of Commerce, finding that over a 15-month period, patent examiners were paid for over 288,000 hours of work unsupported by the Agency's electronic records, equating to over $18.3 million in potential waste. The electronic records underlying the Report consisted of badge reader data from Agency campus access points; workstation records showing whether employees had logged into Agency laptops; Virtual Private Network ("VPN") records showing whether an examiner's laptop was connected to Agency servers; and document timestamps showing whether and when files were accessed. This report received considerable attention from Congress and the press, which the Agency describes as "very embarrassing" and "humiliating," and which the Union describes as "undeserved" and "sensationalized."

Agency testimony also establishes that the T&A Policy, albeit newly published in this form, is essentially unchanged from earlier policies in place since at least 1991. The Agency was unable, however, to produce any printed document to establish the terms, including disciplinary terms, of any pre-existing T&A Policy.

Turning now to the facts specific to grievant, grievant signed a Patents Telework Program 2013 Work Agreement on March 30, 2015, and he worked also under the terms of the Agency's "Increased Flexitime Program" ("IFP"), which allowed him to work a flexible schedule provided he meet an 80-hour biweekly requirement, that he track and accurately record his time in WebTA, and that he work subject to certain other conditions not relevant here. Grievant's telework agreement identifies and describes his alternate work site address, i.e., a specific location in his home, and sets forth a total of nine general requirements, only one of which is relevant to this matter: "1. The employee has read and agrees to adhere to the 32 hour option set forth in Patents Telework Program 2013." (Emphasis omitted.) Beyond that, grievant's telework agreement does not address directly either time and attendance reporting requirements or disciplinary consequences for violations of his telework agreement.

Grievant teleworked under his flexitime schedule without any issue raised or identified with respect to his conduct or performance until he appears to have been caught up in the fallout from the OIG's Report, after another Agency employee—charged with improper conduct relating to telework and/or time and attendance violations—alleged during an unrelated disciplinary hearing before the MSPB that grievant had not been investigated for the same misconduct. An internal investigation of grievant ensued and ultimately led to this proceeding.

Employees in practice are required to account for their time and attendance by recording data in an online system, known as WebTA. Employee time is recorded using certain accounting codes, which among other things will indicate

whether the claimed work was performed on-site at the employee's official duty station or via telework from the employee's alternate work station. The employee must affirm upon submission of each report "that the time worked and leave taken as recorded on this form is true and correct to the best of my knowledge."

The Agency compared grievant's WebTA records to his badge-swipe records—which record an employee's physical passage through one or another of the access points on the Agency campus—and found 381 hours included in grievant's 80-hour biweekly WebTA reporting, spread over 51 workdays between April 4 and September 29, 2016, when grievant reported that he was working on campus, but was not on campus. Notwithstanding grievant's proffered defenses to the charge and specifications, to be discussed below, grievant admits that the Agency's records are accurate, that he did not work on campus during the 381 hours in question, and that his WebTA reporting was not accurate with respect to his work location for those 381 hours.

Based on this investigation, on November 28, 2017, the Agency proposed grievant's removal based on a single charge of Improper Conduct, consisting of 51 discreet AWOL specifications relating to each day on which grievant reported on WebTA that he was working on campus, but badge records demonstrated that he was not physically present on the Agency's campus. With three exceptions, the 51 specifications are identical in structure, albeit the number of hours at issue in the specifications differ by the day. By way of illustration:

> **Specification 1**: **On Monday, April 4, 2016, you claimed and received pay for seven (7) regular hours at your USPTO work station. Agency records show that on this day, you did not report to your USPTO work station. Therefore, you were absent without leave (AWOL) for seven (7) hours, and your WebTA will be corrected to reflect seven (7) [hours] of AWOL.**

Two of the noted exceptions are found at Specifications 19 and 33. They relate to days on which grievant claimed a combination of regular time and administrative leave, all of which was charged AWOL, but otherwise the specifications are the same as the others.

The third exception, in which the Agency tacitly acknowledges that the issue respecting grievant's alleged misconduct relates specifically to a reporting-type violation, not to include any claim that he stole time, shirked work, or otherwise malingered or was otherwise derelict in his duty:

> **<u>Specification 36</u>*:* On Friday, July 15, 2016, you claimed and received pay for seven (7) regular hours at your USPTO work station. Agency records show that on this day, you did not report to your USPTO work station. Subtracting the remaining three (3) hours that you were authorized to telework this biweek, you were AWOL for the remaining four (4) hours, and your WebTA will be corrected to reflect four (4) hours of AWOL.**

Grievant opted for an Oral Reply to the Notice of Proposed Removal, presenting his defense on January 16, 2018. Essentially, in addition to raising certain contractual and legal defenses, grievant claimed that notwithstanding his inaccurate reporting in WebTA of his work location for the 381 hours at issue, he in fact worked at home for all of those hours. Among other things, he noted that his work productivity rating averaged 110% for the two quarters in question and 120% for the fiscal year, and he submitted documentation to support his claim that he was working during the 381 hours in question, including through the use of the same kinds of electronic records upon which the Inspector General relied in the August 2016 Report to conclude that employees in fact were working. Grievant also claimed that he was not aware of the seriousness of exceeding his 32-hour biweekly telework limitation, he attributed his conduct to caring for an ill daughter, and he expressed contrition. Consequently, grievant argued, his conduct, at worst, should constitute

unauthorized telework, not AWOL, to be addressed pursuant to the PTP, not the disciplinary provisions of the T&A Policy and Agreement.

By Decision dated May 17, 2018, the Agency sustained the charge and specifications, but reduced the proposed penalty from removal to a 60-day disciplinary suspension and declared him "permanently ineligible to telework" under the Telework Enhancement Act. Consistent with that decision, the Agency also changed grievant's WebTA records to reflect AWOL status for the 381 hours, which automatically generated a bill to grievant from the Agency's payroll administrator to recoup monies paid to grievant for the 381 hours, as presaged by the above-quoted provisions of the T&A Policy. [1]

Of special note, the Deciding Official, Jack Harvey, Deputy Commissioner of Patent Operations, wrote:

> **I note that in reply to the Notice, you contended that you worked all of the hours claimed, albeit from an unauthorized location. Even assuming you were working some or all of the hours in the Notice's specification, you were not authorized to telework these hours, you failed to report to your authorized workstation as required, and you were not on approved leave. While I have considered the work you state that you performed during these hours to be mitigating, you were still absent without leave (AWOL) from your authorized workstation for the specified hours.**

At hearing, and consistent with the verbiage of all the specifications, including Specification 36, Harvey confirmed that he reviewed all of grievant's documentation, specifically including documentation showing "that he was, indeed, working the hours that he was ostensibly in the wrong place," and that he had no

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[1] *Specifically, the Agency sent grievant a Notice of Intent to Begin Salary Offset dated July 13, 2018, indicating that he was "erroneously paid for 381 hours of regular time that should have been 381 hours of AWOL," in an amount totaling $13,851.50, which he could pay directly or via offset.*

reason to doubt grievant's claim in that regard. Harvey also confirmed that the IG Report had a "significant impact" on his thinking about grievant's situation.

The Union invoked arbitration pursuant to Art. 12 of the parties' Agreement, and this proceeding followed. Meanwhile, grievant served his 60-day suspension from May 29, 2018, to July 27, 2018, and the Agency began recouping grievant's pay for the 381 hours charged as AWOL.

At hearing, Acting Director of Human Resources, Ann Mendez, testifies that, to her knowledge, the Agency always responded to telework violations such as grievant's with AWOL charges, albeit she was unable to recall any such charge prior to grievant's alleged violation. Brian Cedar, an Employee Relations Specialist at relevant times, testifies similarly. Cedar identified several telework-related AWOL violations that resulted in discipline, but neither he nor any other Agency witness testified that the Union acquiesced to the propriety of such charges.

THE PARTIES' CONTENTIONS

Initially, the Agency argues that the Arbitrator is required to apply the substantive law that would apply before the MSPB, effectively requiring the Arbitrator to sit in lieu of an MSPB administrative judge and to apply the following standard of review:

1. **Whether the Agency complied with procedural requirements of 5 U.S.C. § 7513;**

2. **Whether the Agency's action is supported by a preponderance of the evidence;**

3. **Whether the penalty promotes the efficiency of the service; and,**

4. **Whether the Agency properly considered the applicable Douglas factors; and,**

5. Whether the selected penalty is within the tolerable bounds of reasonableness.

As to the first, the Agency argues, and it is uncontested by the Union, that it met the requirements of 5 U.S.C. § 7513.

As to the second, the Agency relies on uncontested record evidence to argue that grievant, as charged, was absent without leave from his official duty station for 381 hours when he claimed to be present via his WebTA reporting. The Agency relies on MSPB decisions to the effect that an employee who fails to report to their assigned duty station without leave properly is charged AWOL, notwithstanding whether the employee actually was working elsewhere.

Regarding the third, the Agency claims a legitimate interest in disciplining AWOL employees, again as supported by MSPB decisions confirming an agency's right and responsibility to monitor and control an employee's work location in situations such as this. The Agency argues, too, that it consistently charges employees as AWOL when they violate their telework agreements in a manner such as grievant's violation, in order to protect the legitimacy and utility of telework agreements going forward.

As for the Douglas factors, the Agency argues that the Deciding Official's Decision on Proposed Removal, as supported by his record testimony, evidences satisfactory consideration of all relevant factors, is entitled to deference as a discretionary action entrusted to management, and ought not be disturbed by the Arbitrator.

Finally, the Agency argues that the selected penalty, a 60-day disciplinary suspension, falls within the tolerable bounds of reasonableness. The Agency cites MSPB rulings attesting to the seriousness of AWOL violations,

including cases in which employee removals were upheld for far fewer hours of AWOL than grievant's.

Anticipating the Union's defenses, the Agency argues that grievant cannot defeat a finding of AWOL in light of MSPB precedent. Further, the Agency argues that nothing in the PTP does or lawfully could limit the Agency's right to respond to grievant's AWOLs only through non-disciplinary measures[2]. In this regard, the Agency notes that the PTP itself contemplates the potential for discipline in that it provides for 12-month suspension from the program in the event an employee receives a disciplinary or adverse action. Further, the Agency notes that there are many ways in which an employee's violations of a telework agreement appropriately could be addressed through non-disciplinary means, even while grievant's particular violations warrant formal discipline. Finally, the Agency argues that grievant knew or should have known from the PTP, his telework agreement, and the T&A Policy that he could be disciplined for exceeding allowable telework hours and inaccurately reporting his time on WebTA. Indeed, the Agency argues that grievant purposefully misreported the location from which he was working, indicating that he knew he was engaged in serious misconduct.

For purposes of this case, there is no functional disagreement between the parties regarding the standard of review. The Union argues that the contractual "just cause" standard is the functional equivalent of the "efficiency of the service" standard espoused by the Agency and established by Statute.

On the merits, the Union argues that grievant simply cannot be found AWOL during times he actually was teleworking from his approved alternate worksite, however else his conduct might be characterized. The Union argues that

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[2] The Agency cites 5 U.S.C. § 7106(a)(2)(A) for the proposition that no right provided by the Statute shall interfere with management's right to take disciplinary action against an employee, and argues that any arbitral ruling precluding the Agency from disciplining employees for AWOL violations would constitute "excessive interference with management's rights."

grievant's work at relevant times constitutes "telework" within the meaning of the Telework Enhancement Act of 2010, 5 U.S.C. § 6501(2), and that the Agency's Increased Flextime Program defines teleworking from an approved alternate worksite as being "at work." The Union argues, too, that the Agency's reliance on prior MSPB rulings is misplaced, as the Agency's principal support comes from a case, Rodriguez v. Dep't of Agriculture, 27 M.S.P.R. 79 (1985), that predates the advent of federal teleworking and could not have been intended to cover grievant's conduct. The Union points out that, to date, there have been only two non-precedential decisions by MSPB Administrative Law Judges ("ALJ") to have addressed the question whether a teleworker can be charged AWOL if engaging in unauthorized telework, and they reached opposite conclusions.

Thus, the Union argues that there is no relevant MSPB precedent to require an arbitral finding of AWOL, and that such a finding would be contrary to the parties' PTP, which specifically addresses the manner in which telework violations such as grievant's are to be addressed, i.e., through non-disciplinary means. In this regard, the Union emphasizes that grievant did not violate any rule promulgated as a management prerogative, but rather the terms of the negotiated PTP, which contains specifically negotiated non-disciplinary measures to address violations.

The Union points out the irony that, as the Agency indicates, grievant could have sought full-time telework and/or taken paid leave to care for his daughter as necessary, but instead actually worked, albeit technically in violation of his telework agreement, for which the Agency issued severe discipline and began recouping his salary that he earned while working productively. From that argument, the Union notes that the Agency equates "AWOL" with being in a "non duty status," but that grievant not only was working in a duty status at times for which he was charged AWOL, he in fact was exceeding established productivity

standards. Indeed, the Union emphasizes that the Agency's action in recouping his salary for the hours in question underscores the incongruity in charging grievant AWOL for times he demonstrably was working in excess of the standard, essentially outworking expectations with a zero error rate and an "outstanding" performance appraisal for the year, based on a perfect rating score of 500. By contrast, the Union argues that it is a logical fallacy to characterize grievant as "AWOL" for nearly 40% of the time, when at that same time, grievant exceeded productivity standards with no errors. Essentially, the Union argues that the factual record defeats any finding of AWOL.

Next, the Union argues that grievant lacked notice that he might be disciplined for exceeding his authorized number of telework hours, which requirement is subsumed within the Douglas factors. The Union emphasizes that the PTP does not place employees on notice of the possibility of discipline; the T&A Policy was not issued until after most of grievant's alleged misconduct occurred; and the Agency concedes that there was no written policy in place at relevant times that advised employees that they could be charged AWOL, and be subjected to severe discipline, for exceeding the number of authorized telework hours. The Union emphasizes that in their telework training, employees were told the penalty for "abuse of the program guidelines" is potential suspension from the program for up to six weeks, with no mention of any potential for discipline.

Further, the Union argues that the Agency failed adequately to supervise grievant, as his direct supervisor, [redacted], was rarely in contact with grievant and, had he provided appropriate supervision, presumably would have counseled grievant regarding the limitations of his telework agreement, potential for discipline if it was contemplated, and thereby met the requirements of Art. 12 § 1 of the Agreement, which provides that "the primary emphasis should be placed on preventing situations which may result in disciplinary or adverse actions and that an

employee may be more effectively helped through counseling than through a disciplinary or adverse action." As it happened, Mr. [redacted] provided not such oversight or counseling, and never advised grievant that he might be charged AWOL for exceeding his authorized telework hours.

Finally as to the merits of the case, the Union argues that grievant was not charged with, and did not commit, time card fraud. In this regard, the Union adds that grievant's T&A reporting did not "certify" his work location, only his hours. In any case, the Union contends that time card fraud cannot be proved on this record, as grievant did not act with an intent to receive personal gain when he sought pay for time actually worked. At worst, the Union argues, grievant submitted an inaccurate time card, which does not rise to the level of "falsification."

STANDARD OF REVIEW AND ISSUE STATEMENT

The parties agree that the Arbitrator's role in this proceeding essentially is to serve in lieu of an MSPB Administrative Law Judge in application of applicable substantive law. The parties were not able to reach agreement on a statement of the submitted issue, however, choosing instead to submit their respective proposed issues to the Arbitrator.

Under the Statute, it is well-settled that adverse action may be taken against an employee only for such cause as will promote the efficiency of the service, which as the Union argues is the functional equivalent of a contractual "just cause" standard.

Under the parties' Agreement, and subject to the Statute, the Agency retains the right to suspend and/or remove employees, provided that, "adverse actions for misconduct will be taken for just and sufficient cause and will be in accordance with all applicable regulations and laws." Art. 3 §§ 1, 5.

In light of those statutory and contractual prescriptions, and having considered the record evidence and arguments, and especially the Charge and Specifications issued under the authority of the Statute and Art. 12 of the parties' Agreement, which of course animates this disciplinary proceeding, the Arbitrator defines the issues as follows:

1. Whether the discipline issued to grievant by the Agency is for just and sufficient cause, such as will promote the efficiency of the service; and,

2. If not, what the remedy shall be.

DISCUSSION

Initially, despite the parties' significant disagreement over the proper characterization of and disciplinary response to grievant's underlying conduct, the basic facts relating to grievant's conduct are essentially undisputed and can be distilled to the following:

Grievant worked a flexitime schedule pursuant to a part-time PTP-32 telework agreement, as permitted by the provisions of IFP and PTP, meaning he was permitted to telework any 32 hours within the bounds of each flexible 80-hour biweekly pay period, and was expected to work the remaining 48 hours per pay period at his on-campus official duty station. Further, grievant was required to report his days, hours, and work location accurately in WebTA, using accounting codes that indicate, among other things, whether the work was performed on campus or at his alternate work station.

The Agency discovered that grievant exceeded his authorized number of telework hours on a biweekly basis on 51 calendar days during the period at issue,

for an aggregate of 381 hours between April and September 2016, and that for each of those 381 hours, grievant reported in WebTA that he was working at his official duty station, when he was not. Grievant admits that he was not working at his official duty station during those 381 hours, but presents evidence to show that he nevertheless teleworked those hours from his alternate work location.

As detailed above, there is ample evidence to support a finding that the Agency concedes that grievant worked all of those 381 hours, albeit at his alternate work station and not, as he reported in WebTA, at his official duty station. Concession or no, the Arbitrator finds sufficient, credible evidence on the record to support grievant's claim that he worked the 381 hours in question, based on the same types of data found reliable by the OIG in the 2016 report. Further, Specification 36 represents a tacit admission by the Agency that there is no charge relating to a failure to perform work, as the AWOL charge for that specific day excluded remaining available telework time, and included only those hours that exceeded grievant's 32-hour biweekly allowance. Significantly, there is no charge here of theft of time, malingering, shirking, dereliction, or the like, further demonstrating the lack of any claim by the Agency that grievant was not, in fact, working when he said that he was, even if he was not working where he said that he was.

From these basic facts, the parties present widely divergent positions. Ultimately, for the reasons that follow, the Arbitrator finds the generic charge against grievant of "Improper Conduct," as explained in the supporting specifications, is misplaced and not for just and sufficient cause, and will not promote the efficiency of the service.

Board caselaw establishes that where, as here, an agency levels a "generic" charge of misconduct such as "Improper Conduct," which does not carry a specific legal definition, due process and fundamental fairness requires that the charge "be viewed in light of the accompanying specifications and circumstances,

and should not be technically construed." Otero v. U.S. Postal Service, 73 M.S.P.R. 198, slip op. at 3 (1997) (citations omitted.); Canada v. Dep't of Homeland Security, 113 M.S.P.R. 509 (2010) (quoted in Hollingsworth v. Dep't of the Air Force, 121 M.S.P.R. 397 (2014)). The question, ultimately, is whether the reasons for the adverse action are stated "in sufficient detail to allow the employee to make an informed reply." Id.

To be sure, grievant's underlying conduct arose in the context of a highly complex scheduling regime. Grievant worked pursuant to the IFP, the PTP and specifically the 32-Hour Option, his particular telework agreement, and for at least part of the period in question, the T&A Policy, and before that, some other version of a time and attendance policy, undocumented here, that allegedly required, as does the T&A Policy, employees accurately and honestly to report their time, attendance, and work location. This record, which reasonably demonstrates among other things that grievant did not accurately report his time, attendance, and work location for the 381 hours in question, in that he admittedly reported time worked on campus that he actually worked at his alternate work station, invites a host of potential charges brought pursuant to the Agreement and its associated MOUs and/or policies, including that grievant thereby failed properly and accurately to report his work in WebTA, and/or that he exceeded his authorized number of telework hours. As noted, the Agency also might have charged grievant with claiming time for hours not worked, but it did not.

Under the circumstances, the generic charge of "Improper Conduct" is permissible, but its use in the complex scheme of this case implicates and underscores important due process rights intended to ensure fundamental fairness, and specifically that grievant not be misled about the nature of the charge against him, in order that grievant be able meaningfully to offer a defense.

Thus, in the words of Otero, it is necessary to examine the nature of the charge "in light of the accompanying specifications and circumstances." Here, the sole charge the Agency leveled against grievant, and the only charge placed before the Arbitrator for decision, is that which the Agency described in the 51 supporting specifications: "you were absent without leave (AWOL) ... and your WebTA will be corrected to reflect ... AWOL." See, e.g., Notice of Proposed Removal, Specification 1. At hearing, the Agency's presentation was perfectly consistent with that statement of the charge, in that the Agency stated from the outset that grievant "was charged with being absent without leave, known as AWOL." See, e.g., Tr. I at 14. More specifically, the Agency charged grievant with being AWOL in that "grievant was absent from his duty station and that [ ] absence wasn't authorized." Tr. I at 20.

The Agency augmented its charge and specifications as stated in the Notice of Proposed Removal with a lengthy narrative discussion. That discussion details the basis for the Agency's conclusion that grievant was AWOL on the dates charged; it does not state or suggest an intention to define grievant's misconduct as other than AWOL.

The conclusion that the charge against grievant was limited to one of AWOL, moreover, is fully supported by the Decision on Notice of Proposed Removal, which includes the statement: "The Notice charged you with fifty-one (51) specifications of improper conduct for absence without leave (AWOL)," and observes that grievant's Oral Reply related specifically to that charge: "[Y]ou asserted you were not AWOL[,] rather you were performing unauthorized telework." The Decision documents the reasons why the AWOL specifications were upheld, including through identification of a variety of underlying conduct that might itself have been charged outside of the AWOL charge, but the Agency's Decision did not expand the charge beyond the 51 AWOL specifications.

The Arbitrator is mindful of Otero's admonition that, "Hypertechnical common law pleading is not Board practice, and so an agency is not required to narrowly label its charge with magic words for it to be sustained by the Board," Id., slip op. at 3-4. Yet, the Arbitrator also is mindful of underlying, fundamental due process considerations, which require as a matter of fundamental fairness that an employee be placed on fair notice of the charges against them. Here, it could not be clearer that the Agency meant to charge grievant as AWOL, and nothing else.

At first definitional blush, the charge of AWOL is ill-suited to the facts of the case, and the Arbitrator finds it unsupportable. As stated in Wesley v. U.S. Postal Service, 94 M.S.P.R. 277, 284 (2003): "to sustain an AWOL charge, an agency must show that the employee was absent, and his absence was not authorized or his request for leave was properly denied." As the Union argues, there is substantial basis for concluding that the advent of new administrative flexitime and telework policies has engendered a need for new corresponding disciplinary approaches. Again, the federal system is not intended to require "hypertechnical" pleading, and magic words are not required. Still, where the Agency selects a particular charge, which is defined at law, that is the charge the Agency must prove.

The term, "AWOL," has been a feature of labor relations far longer than has telework, and as the Union suggests, perhaps that historical discord engenders confusion as to whether it is supposed to refer to absence from a location as opposed to absence from an assigned task. In the Arbitrator's experience, the gravamen of an AWOL charge is rooted in the latter. Formerly, before the advent of flexitime and telework, identifying an employee's expected work location was a simple affair, and locating an employee at work was straightforward. Confirmation of an employee's attendance, as opposed to, conversely, an employee's absence, was a straightforward matter of determining whether the employee was physically present in the workplace. If the employee was not, AWOL charges could be expected.

Determination whether the employee actually was working was a separate matter, typically to be addressed not through AWOL charges, but through the different charge of malingering, or shirking, or the like. Further, in those instances where employees claimed to be at work, but were not—such as the phantom clock ring cases—such employees might be charged with both AWOL and with theft of time.

The modern workplace, and particularly the workplace established by the Agency and known to grievant, presents a far more complex picture. Grievant was permitted to work a flexible 80-hour schedule, and he was allowed to work any 32 hours out of any 80-hour biweekly period from his home. Still, these arrangements were established in such a way as to ensure that grievant could be located or, in modern parlance, to ensure that he was virtually present, if not physically present. Thus, PTP required grievant to advise his supervisor the days when he would be teleworking. Further, PTP required grievant while teleworking to access his email and voicemail. There are additional, specific guidelines for communication and responsiveness within PTP, all intended to ensure that an employee's virtual presence would not unduly interfere with the Agency's operations and the employee's work performance and/or efficiency. Critically, there is no charge or even suggestion that grievant failed to meet any of these requirements, and there is no basis in this record for concluding that grievant was other than "virtually present" for all of the 381 hours in question, productively working as already discussed, notwithstanding that he was physically absent from his official duty station those hours.

Based on these considerations, the Arbitrator concludes that grievant was virtually present and productively working for the 381 hours in question, even if his physical absence from his official duty station implicated other potential charges not leveled. The suggestion invited by the Agency that grievant should have requested leave to avoid these AWOL charges, is belied by the fact that there simply

is no form of "leave" identified as available under the parties' Agreement that would excuse grievant's physical presence from his official duty station while still allowing him to work, which is what this case involves. The purpose of leave is to excuse an employee both from physical presence in the workplace and responsibility to perform work. Indeed, had grievant requested and been granted leave, and then teleworked while on leave, that would have created a different type of violation, as employees are not supposed to work while on leave.

The correctness of this conclusion in terms of both logic and equity is confirmed by consideration of the anomalous recoupment action that, according to the Agency, automatically followed the Agency's decision to characterize grievant's alleged misconduct as AWOL: Without any consideration as to whether grievant worked the 381 hours in question, and against a factual record that preponderantly demonstrates that he did work productively at his alternate work station, the AWOL charge led directly and inexorably to a deprivation of pay for that work.

In this workplace, the problem presented by grievant's excessive teleworking (and, again, notwithstanding what might be concluded about his misreporting of his work location on the days in question) principally is not a leave problem, it is a telework problem. As the record shows, the parties specifically negotiated an arrangement for managing telework problems such as this. That arrangement is set forth at Part IX.A of the PTP: "Abuse of the program guidelines may result in suspension from the program for no longer than 6 bi-weeks. Notification of suspension will be in writing including the duration. This suspension in and of itself is not a disciplinary action." As the bargaining history indicates, program violations—in this case, exceeding the allowable number of telework hours—were not intended to give rise to discipline such as the Agency issued here.

As discussed below, the Arbitrator is not persuaded that PTP's provision for non-disciplinary approaches to program abuse is mutually exclusive of

the Agency's retained right to discipline employees for misconduct relating to participation in the telework program, for example time and reporting violations, fraudulent reporting, or theft of time. The Arbitrator does conclude, however, that the parties' provision for non-disciplinary responses to violations of the telework program itself underscores the expectation that conduct violative of the telework program will lead to administrative correction, rather than draconian disciplinary responses—here, a 60-day disciplinary suspension and recoupment action that would render grievant unpaid for 381 hours of work that he actually performed, which in practical effect rendered him a volunteer, which he certainly was not.

In concluding that AWOL charges are not supported by this record, the Arbitrator is mindful that the foregoing offers only an incomplete answer to the complex problem of this case, because it does not address what is perhaps the most serious aspect of grievant's conduct: his reporting via WebTA that he was at work at his official duty station, when he was not. Generally, the Arbitrator does not credit the Union's claim that conduct such as grievant's can only be addressed through Sec. IX of the PTP. To the extent telework contemplates other policies and procedures, including time and attendance reporting requirements that carry their own disciplinary consequences, the Arbitrator finds nothing in PTP or its bargaining history to suggest the Agency intended to cede, if even it lawfully could, its right to discipline employees in appropriate cases for improper time reporting, including for example theft of time or fraudulent reporting.

Regardless of whether one thinks grievant ought to be disciplined for that conduct, however, the Agency chose not to charge him with it. It bears emphasis: the Agency could have leveled such charges against grievant—a number of the case citations provided by the Agency suggest the Agency's knowledge that grievant could have been charged with multi-faceted, overlapping charges of misconduct—but it simply did not, and it is not for this Arbitrator to fabricate

supportable charges to replace unsupportable charges. A charge of "improper conduct" is broad enough to encompass such misconduct, but the Agency did not specify any such misconduct as part of the charge, and therefore grievant never was put in position of defending himself, if only to argue on his own behalf that his misreporting was unknowing and unintentional, or a mistake, but in any case not fraudulent or done with an intention to deceive and therefore unworthy of severe discipline or adverse action.

Notwithstanding the foregoing, the Agency urges the Arbitrator to follow Rodriguez v. Dept of Agriculture, 27 M.S.P.R. 79 (1985), a decision that as the Union argues predates the advent of telework for federal employees. The Agency seizes on the following language from that decision: "[A]n employee cannot choose where to work in derogation of an agency order. If he works in a duty station other than the one to which the agency assigns him, he is properly charged AWOL." Id., 27 M.S.P.R. at 84. To be sure, divorced from its historical and case-specific context, those words can be stretched to suggest that grievant's action in teleworking in excess of authorized hours might be a derogation of an agency order, but consideration of that language in context persuades the Arbitrator that the Agency's logic is stretched too thin to credit.

The AWOL charge in Rodriguez relates to the basic facts that the agency specifically and specially directed Rodriguez to report to a work location in Buffalo, New York, for a specific work-related, operational purpose that required his presence there, or to take leave. Rodriguez chose the proverbial Door No. 3, in that he neither reported to Buffalo nor took leave, but instead chose to continue working at his former work location in Puerto Rico, giving rise to a finding of insubordination, along with the charge of AWOL, relating to his failure to follow instructions.

As can be seen, the facts of Rodriguez bear no real resemblance to grievant's situation. Grievant never specifically was directed to work at his official duty station on any of the hours in question, nor disallowed specifically from working at his alternate work location on any of the hours in question; the Agency has not shown that grievant's failure to work at his official duty station, as opposed to his alternate work location, during the hours in question had any impact on his or the Agency's productivity; the Agency has not shown that there was any specific or operational need for grievant to be on-site during the hours in question apart from the basic goal of remaining within allowable biweekly telework hours; and there are no charges here of insubordination or failure to follow instructions. The analogy between this case and Rodriguez, in the Arbitrator's judgment, is inapt, also, because to place it in a more modern setting, Rodriguez was physically and virtually absent; grievant was physically absent, but virtually present.

Some additional MSPB rulings, precedential and non-precedential, merit some discussion:

Along with Rodriguez, the Agency cites Gallegos v. Dep't of the Air Force, 121 M.S.P.R. 349 (2014), for the proposition that an AWOL charge is proper when an employee refuses to report to a new duty station. The facts of Gallegos, however, bear no resemblance to this case, and further consideration of its applicability would serve only to burden this record.

In Davis v. Veterans Admin., 792 F.2d 1111 (Fed. Cir. 1986), the court wrote that employers are entitled to have employees attend where they are expected, absent a valid excuse. Notably, however, the employee at issue in Davis was charged AWOL on dates for which she requested but was denied leave, and chose to abandon her work responsibilities in favor of embarking on a cruise. Davis does not stand for the proposition that an employee properly is charged AWOL for working from home in excess of allowable teleworking.

In Archie v. Dep't of Labor, 2012 WL 4829858 (M.S.P.B. Aug. 3, 2012) (initial decision; non-precedential), the employee was confirmed AWOL despite his claim that he was working from home during the time in question. Critically, however, the agency in that case did not charge the employee as AWOL for hours it found the employee actually to have worked at home. As to the hours for which the employee was charged AWOL, the ALJ specifically found that the employee "has not presented any evidence to substantiate his claims that he was working when he was not at the office…. Though the [employee] claimed that he always worked the number of hours claimed, he presented no evidence that he was working during the hours he was absent from the office."

Likewise, Chin-Young v. Dep't of Army, 2016 WL 3145763 (M.S.P.B. May 31, 2016) (initial decision; non-precedential), is unhelpful here. Despite involving the claim of an employee that he should not have been charged AWOL because he was performing work at another location, the ALJ found that the employee refused a direct order to work elsewhere, and, critically, "presented nothing to corroborate any claim that he had been ... working on any assigned work," apparently based on the ALJ's crediting of evidence from the employee's supervisor that, "You have no telework agreement and you have no assigned work that you could perform in a telework status." Plainly, Chin-Young is not aligned with the facts of the instant case.

The Agency also relies on two other cases that, it claims, supports its right to charge employees AWOL for telework violations. Neither of those cases persuades the Arbitrator that AWOL charges are appropriate here:

In Phillips v. Dep't of Commerce, 2016 WL 6066211 (M.S.P.B. Oct. 12, 2016) (initial decision; non-precedential), the employee conceded the AWOL charge and the ALJ expressly held that, "the only material issue to be decided in this

appeal to the exclusion of all other issues is whether the agency properly considered the relevant mitigating and aggravating circumstances related to the penalty ….”

In Dignan v. Dep’t of Commerce, 2017 WL 1438346 (M.S.P.B. April 17, 2017) (initial decision; non-precedential), the employee was charged AWOL, among other charges, for absenting himself from his assigned duty station. According to the ALJ, the employee “nowhere alleges, much less attempts to document, that he himself ever performed work at any such locations for any of the dates and times at issue here.” As the ALJ pointed out, that was “just as well, as the notion that he reported to work on a given day, only to spend from 9-12 hours in the parking garage or coffee shop, is simply not worthy of serious consideration.” Dignan is unhelpful here, because it does not support the proposition that an employee can be charged AWOL for actually performing productive work from an approved virtual workspace.

The specific relationship of AWOL charges to telework issues like grievant’s appears to be the subject of only two non-precedential decisions by MSPB ALJs, which have split on the issue, albeit both follow the same basic principle found in Wesley, supra.

In Wong v. Dep’t of Commerce, 2018 WL 702331 (M.S.P.B. Jan. 31, 2018) (initial decision; non-precedential), the ALJ sustained an AWOL charge under circumstances much like grievant’s, citing Rodriguez for the proposition that “AWOL arises under a variety of factual circumstances, including … an appellant’s failure to report to his assigned duty station.”[3] Of particular relevance here, the ALJ upheld a subset of AWOL charges based on his findings that Wong recorded himself in time and attendance records as working onsite at times when he was not, critically

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[3] The ALJ relied also on Savage v. Dep’t of the Army, 122 M.S.P.R. 612 (2015) and Gallegos v. Dep’t of the Air Force, 121 M.S.P.R. 349 (2014), but neither is a telework case and their facts are inapposite here.

on days when he generally was eligible to telework, but did not trigger his right to telework by informing his supervisors in advance that he planned to do so. The ALJ found determinative the fact that Wong effectively was directed, alá Rodriguez, to work at his official duty station unless he properly triggered his right to telework by informing his supervisors in advance, such that teleworking without authorization constituted absence without leave.

The Wong ALJ did not sustain a second subset of the AWOL charge, however, in which Wong was alleged to have been absent from his official duty station without authorization on two days when the Agency was closed due to inclement weather. On those two days, Wong recorded his time as regular work time, rather than telework time, i.e., he misreported his work location on time and attendance records, just as did grievant. The ALJ concluded that the Agency could show that Wong recorded his time improperly, but that such recording, "does not equate to a showing of absence without authorization," and noted further that the Agency did not charge Wong with improperly recording his time.

The Wong ALJ disallowed yet a third subset of the AWOL charge for reasons not relevant here.

Taken together and in relevant part, it appears that when Wong misreported his work location, but the Agency was open for business, the ALJ allowed the AWOL charge regardless of whether Wong performed work that day. Where, however, the Agency was closed on a day on which Wong misreported his location, the ALJ disallowed the AWOL charge on the strength of evidence that Wong in fact worked that day. The Arbitrator finds it difficult to reconcile that divided opinion insofar as it appears to condition the relevance of the actual performance of work on the question whether the Agency is open for business, and not to ground itself in the fundamental question whether the work location itself in fact was authorized at the time the work was performed.

The Arbitrator's difficulty in reconciling the split decision aside, the Wong ALJ proceeded from the conclusion that Wong's conduct constituted AWOL as he understood the charge to be defined in Rodriguez, but did not explain the basis for that presupposition or otherwise specifically address Wong's defense that he was working from home at times he was charged AWOL and, if true, whether such a finding would provide a defense to the AWOL charge. As discussed above, the Arbitrator finds Rodriguez to be inapposite here, and the Agency has ample means through which to regulate and discipline telework violations, without penalizing an employee for being absent from work and consequently docking their pay, when they were working at an otherwise approved worksite and virtually present.

In this Arbitrator's opinion, the decision of another MSPB ALJ is better reasoned and more persuasive than Wong. In Smith v. GSA, 2017 WL 6568678 (M.S.P.B. Dec. 21, 2017) (initial decision; non-precedential), the ALJ upheld Smith's removal, but in so doing, found the included AWOL charge not sustained. Of relevance here, part of the AWOL charge concerned allegations that Smith teleworked (or claimed to have) on three days on which he was not authorized to telework. In disallowing AWOL charges for those dates, the ALJ concluded that notwithstanding technical violation of his telework agreement—in that he was not authorized to telework mid-week and did not seek special authorization to do so—Smith "cannot legitimately be considered AWOL" because "he was working offline at home ... as he claimed." That is, the ALJ addressed the AWOL question in keeping with a fundamental inquiry into whether the employee worked on the day in question, which the ALJ evidently regarded as distinct from the question whether the employee might separately be subject to discipline for violating the telework agreement and/or program. At the same time, in upholding Smith's removal, the ALJ recognized the fundamental precept that an agency has multiple avenues

through which to regulate misconduct, and if an AWOL charge is inapt, that does not preclude an agency from reaching the same result through other charges.

Further, although the Agency argues that it takes a consistent approach to cases such as this, the Agency's alleged consistency is not determinative of its contractual and statutory correctness. The evidence of the Agency's consistency is insufficient to establish the existence of any shared understanding that AWOL charges are an appropriate disciplinary response to conduct such as grievant's, much less Union acquiescence to that position, and the Agency has not presented any precedential decisions to require the Arbitrator to confirm the Agency's approach to this case.

Notwithstanding the foregoing, even if AWOL charges could be supported by the facts of this case, Douglas still would require a finding of fair notice of disciplinary consequences for employee misconduct, lacking here. Critically, as the Union points out, neither the IFP, PTP, or the telework agreement informs grievant that he could face adverse action and be docked pay for teleworking inconsistent with his time and attendance reporting. Telework training materials, as the Union argues, make no mention of any such possibility. Further, to the extent of the testimonial evidence in the record, there is nothing to show that grievant was told that unauthorized telework could lead to severe discipline and/or a recoupment action. Given the gravity and severity of the discipline at issue, the importance of fair notice is underscored: grievant was proposed for removal, which penalty was reduced to a very severe 60-day unpaid suspension and recoupment action for 381 hours' pay that the record shows, without dispute, he actually worked. Although the T&A Policy suggests that AWOL charges could result from violations of that policy, grievant has not been charged under that policy. And, as the Union accurately points out, such policy was not issued until well into the period in question, and could not have provided grievant with any notice of disciplinary consequences for conducting

himself as he did. Although there is evidence that prior iterations of that policy were essentially the same, this fundamental due process element of Douglas is not satisfied by reference to iterations of policy that simply have not been produced, and which therefore do not support a finding of preponderant evidence that grievant knew or should have known that AWOL charges could result from his conduct.

Based on the foregoing, the Arbitrator finds that the AWOL charges are not supported by just and sufficient cause as required by Art. 3 § 5 of the Agreement, and do not promote the efficiency of the service in that they conflict with terms of the Agreement, are not proved by a preponderance of the evidence of record, and do not withstand scrutiny under the Douglas factors. The Agency has not demonstrated that grievant knew or should have known that his particular conduct could or would lead to AWOL charges that could subject him not only to severe adverse action, but also to administrative recoupment action for monies paid him for hours that the Agency has not suggested, much less proved, that he did not work, and a permanent ban him from teleworking.

If dismissal of the AWOL charges seems too lenient, it bears emphasis that adequate supervision of telework is the responsibility of management, and grievant's violation never should have been permitted to balloon from what might have been an issue or two of excessive teleworking for which there may have been no thought of discipline, much less removal, into this adverse action relating to conduct that was the same on each of the 51 days in question, with no evidence that grievant actually was failing to provide valuable work for which he appropriately was paid. If this case is a reflection on grievant's mistake in misreporting his work location, it is also a reflection of management's failure to provide appropriate supervision, itself animated by what the Agency admits was a highly embarrassing OIG report, Congressional oversight, and news reporting, which the Deciding

Official admitted was foremost in his mind in terms of the factors supporting issuance of severe discipline.

By way of remedy for the Agency's unsupported charge, which has not been shown by a preponderance of the evidence to be supported by just and sufficient cause and/or to promote the efficiency of the service insofar as it violates the parties' Agreement and falls short of the due process requirements set forth in Douglas, the Arbitrator grants the grievance and directs that grievant's 60-day suspension for AWOL be rescinded and expunged from his records, that his records be corrected consistent with this Award, and that the Agency cease and reverse its recoupment action insofar as it is based on the AWOL charges.

Further, the Arbitrator finds that grievant is entitled to be made whole for his losses pursuant to and consistent with the Back Pay Act, 5 U.S.C. § 5596, including through the provision of backpay, with interest, for the period of his improper suspension and through restitution of any portion of grievant's pay that has been recouped to date. This element of the remedy is based on the Arbitrator's specific finding, as an "appropriate authority," that grievant was affected by an unjustified and unwarranted personnel action, in that grievant wrongfully was made to serve an unjustified unpaid 60-day disciplinary suspension, causing him a loss of pay and also triggering an automatic recoupment action for 381-hours' worth of pay, all of which deprivation of pay is found to be based on improper and insufficiently substantiated charges that are not supported by a preponderance of the evidence as required by prevailing decisional law, are not supported by just and sufficient cause as required by the Agreement, and have not been shown to promote the efficiency of the service as required by the Statute.

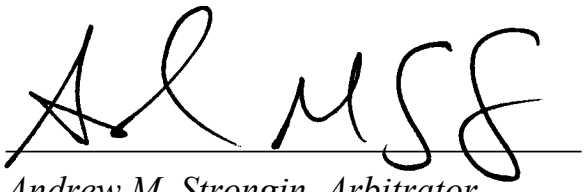
Pursuant to the Union's request, the Arbitrator further orders that grievant's leave records be corrected and his leave restored to the extent it was lost due to the improper discipline. In all other respects, grievant shall be made whole,

including through appropriate credit for his retirement service and Thrift Savings Plan contributions that may have been lost or reduced due to the improper suspension. The Agency also is directed to reconsider grievant's telework ban in light of the provisions of this Award and the passage of time since his telework rights were suspended.

Finally, the Arbitrator retains jurisdiction to resolve any questions that may arise over application or interpretation of the foregoing remedial provisions of this Award, as well as to entertain an application for attorney fees under the Back Pay Act to be submitted (absent settlement) within a reasonable time after the award becomes final and binding.

DECISION

Consistent with the foregoing, the grievance is sustained and the remedy is as stated above.



Andrew M. Strongin, Arbitrator

Takoma Park, Maryland