In the Matter of Arbitration Between:

United States Department of Labor,
Office of Federal Contract Compliance
Programs

Agency

and

National Council of Field Labor Locals,
AFGE, AFL-CIO

Union

FMCS Case No.: 08-02243

ARBITRATOR'S OPINION AND AWARD

Arbitrator: Michael B. McReynolds, selected by the parties through the procedures of the Federal Mediation and Conciliation Service

Place and dates of hearing: Dallas, Texas
July 17, 2008

Appearances:

For the Agency: Carmen Gaffney, Regional Labor Relations Officer

For the Union: Jeffrey P. Darby, Vice President, NCFLL, AFGE, AFL-CIO; President, AFGE Local 2139

Statement of the Case

The Office of Federal Contract Compliance Programs (OFCCP), the Agency, is one of several programs within the Employment Standards Administration, U.S. Department of Labor. OFCCP administers and enforces three legal authorities that require equal employment opportunity: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Veterans' Readjustment Assistance Act of 1974, as amended, 38 USC 4212. Taken together, these laws ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or

status as a Vietnam era or special disabled veteran. The Agency accomplishes its enforcement mission through investigations usually conducted by teams of two or more Compliance Officers.

The National Council of Field Labor Locals, AFGE, AFL-CIO, the Union, is recognized as the bargaining representative for all employees stationed throughout the Nation in field duty stations of the Department of Labor outside the Washington, D.C., metropolitan area, except non-clerical employees of the Office of Labor-Management Standards and employees serving in temporary appointments of less than one year's duration. Also excluded from the bargaining unit are Management Officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity, and employees engaged in administering the provisions of the Statute (the Federal Service Labor-Management Relations Statute).

The parties are signatory to a collective bargaining agreement, the Contract, in effect from October 1, 2006, through September 30, 2011.

On October 5, 2007, Local 2139 President Jeffrey Darby sent an e-mail to Fred Azua, Jr., OFCCP Regional Director, notifying Mr. Azua that the Union was filing an institutional grievance against the Agency. A copy of the grievance was included as an attachment to the e-mail. The grievance alleged that the Dallas/Denver OFCCP Region had violated the following articles of the Contract: Article 1, Sections 1 D and 1 E; Article 2, Sections 5 and 6; and Article 43, Section 4 C. The nature and facts of the grievance were stated as follows:

> On or about October 1, 2007, the Dallas/Denver (SWARM) OFCCP region began conducting year-end performance reviews with BUEs.[1] Instead of just the supervisor and BUE discussing the BUE's performance, management sometimes had two supervisors with the BUE. This is a change in past practice. OFCCP management did not notify the NCFLL they were going to begin this practice, thus denying the NCFLL an opportunity to negotiate. OFCCP management also did not notify the NCFLL that they were going to hold these formal meetings with BUEs, thus denying the NCFLL an opportunity to have a representative present.
>
> On September 11, 2007, the NCFLL told DRD Joan Ford that the union was opposed to this practice when management did it during mid-year performance reviews in May and June 2007, and warned Ford not to continue this practice for the meetings to discuss ratings of record in October 2007. The NCFLL was represented at the September 11 meeting (held during the LMRC meetings) by Jeff Darby, Mike England, Dyan

[1] Bargaining Unit Employees.

> Hutchins, Cosme Gutierrez, Robby Robertson, and Jim Weber. Ford said OFCCP would have two supervisors present in the performance meetings in the Dallas DO because it worked in other places and was a "good practice." Hutchins told Ford that management is obligated to negotiate appropriate arrangements. The NCFLL believes this practice is potentially intimidating for BUEs and a violation of the BUE's privacy because someone other than his/her own supervisor is present during performance discussions.
> (Joint Exhibit 2.)

The Union sought the following remedy:

1. Cease this practice.
2. Notify the NCFLL of all formal discussions and accept the NCFLL's presence at all formal discussions.
3. Notify the NCFLL of all changes in working conditions and negotiate such changes when the NCFLL requests.

In his e-mail to Mr. Azua, Mr. Darby noted that the Contract gave the parties seven working days to discuss the grievance. He asked that Mr. Azua contact him by October 17, 2007.

On October 26, 2007, Mr. Darby submitted the grievance by e-mail to Carol Qualls, Director, Office of Employee and Labor-Management Relations, Office of the Assistant Secretary for Administration and Management (OASAM), Department of Labor. In this e-mail Mr. Darby informed Ms. Qualls that no one from OFCCP had contacted him to discuss the grievance. Ms. Qualls then referred the grievance to Galen Yoder, another official within OASAM.

On November 2, 2007, Mr. Yoder issued a response to the grievance. Mr. Yoder first stated that the grievance was untimely filed, since management had already used the approach of having both Assistant District Directors (ADDs) present at performance discussions as early as May or June 2007. In addition, Mr. Yoder stated that management had the right to determine who would hold performance discussions. He cited both Article 54, Section 1 b, of the Contract and 5 USC § 7106 (a)(2)(B). Mr. Yoder further stated that performance discussions do not constitute formal discussions, and to invite the Union to sit in on a performance discussion arguably would violate an employee's interest in privacy. On these grounds, Mr. Yoder denied the grievance. (Joint Exhibit 4.)

By letter dated November 13, 2007, the Union invoked arbitration of the grievance under Article 15 of the Contract. The parties were unable to resolve the matter, and these proceedings followed.

The hearing in this case was held on July 17, 2008. The record was closed that same day, after the advocates for each party made their closing statements. This opinion and award is based on my consideration of all the evidence, including the testimony of witnesses, the documents, and the arguments of the parties, including the cases cited in their closing arguments.

Issues

The Agency presented a threshold issue of arbitrability, asserting that the grievance was untimely filed under Article 15 of the Contract. I informed the parties that I would hear evidence on both issues, but would consider the issue of timeliness first. If I determined that the grievance was not arbitrable, I would deny the grievance on that basis and would not consider the merits.

The parties were unable to agree on a statement of the fundamental issue raised by the grievance. The Union would state the issue as follows: Did the Agency violate the contract by having more than one supervisor attend year-end performance appraisal meetings with bargaining unit employees? If so, what shall be the remedy?

The Agency's statement of the issue is: Did the Agency violate the negotiated agreement by assigning two supervisors to conduct performance reviews of bargaining unit employees? If so, what shall be the remedy?

In any contractual or legal dispute, the question to be resolved is usually initiated by a complaint of some kind submitted by the party claiming to be injured. This may be in the form of an indictment, a civil lawsuit, an unfair labor practice charge, a grievance, or some other generally accepted form, depending on the nature of the complaint. If the other party challenges the complaint or questions the basis for the complaint, it is up to this party to respond in the appropriate forum. The response, or defense, may deny the premises for the complaint or it may admit the underlying facts but offer an explanation or acceptable reason for taking the action on which the complaint is based. This response, however, must address the specific matter raised in the complaint. A responding party may not simply re-state the complaint in its own terms or in terms it considers to be more appropriate or more favorable to its position. Unless parties agree on a specific statement of an issue to be decided in the resolution forum, therefore, the decision-maker must look to the initial complaint to determine the nature of the issue.

In this case, the Union's grievance specifically alleged that the Agency had violated certain contract provisions based on the manner in which it conducted "year-end

performance reviews." The Agency's response, issued by Mr. Yoder, challenged the timeliness of the grievance on the basis that the Agency had initiated the disputed practice several months earlier during the "mid-year reviews." This is clearly a viable defense to the grievance, as a party may respond to a complaint (or a charge, or a grievance) on any number of procedural grounds, including timeliness. The response remains just that, however: a defense to the initial submission of the complaining party. Absent agreement of the complaining party, the responding party cannot alter the terms of that submission.

There is no doubt that in this case the terms "year-end performance reviews" and "mid-year reviews" and "performance reviews" have a significant role in each party's approach to the dispute. The terms are not necessarily synonymous, however, as established by the evidence presented at the hearing. Having considered that evidence, I have determined that the issues presented for resolution in this case are as follows:

First: Is the grievance arbitrable, in that it was untimely filed at Step 1 of the grievance procedure?

Second: If the grievance is arbitrable, did the Agency violate the contract by having more than one supervisor attend year-end performance rating discussions with bargaining unit employees? If so, what shall be the remedy?

Relevant Provisions of the Collective Bargaining Agreement

ARTICLE 1
Coverage and Recognition

Section 1 – Recognition

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D. The NCFLL shall be given the opportunity to be present at formal discussions between Management and bargaining unit employees concerning grievances, personnel policies and practices, and other matters affecting general working conditions of the employees in the bargaining unit. The parties agree that if a formal discussion between one or more representatives of the Department and one or more employees within the bargaining unit consists of mere reiteration of existing personnel policies and practices and other matters affecting general working conditions, the NCFLL need not be given the opportunity to be present.

E. The following procedures will be used in providing notice to the NCFLL of a formal discussion and for the NCFLL to provide representation during any formal discussion.

1. The NCFLL will specify a designated representative(s) in each DOL Region of the DOL-NCFLL Agreement, to be notified of a formal discussion initiated by the Department.

2. The Department's notification will state the DOL Agency and component, date, time, location of the formal discussion, and include a brief description of the subject to be discussed.

3. The designated NCFLL Representative(s) in 1. Above will specify an NCFLL Representative (Steward, Regional Official, or National Official) normally from within the commuting area of the meeting site to attend any formal discussion for the purpose of representing the NCFLL and/or affected employee(s).

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ARTICLE 2
Governing Laws and Regulations

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Section 5 – Management Proposals for Change During the Term of the Agreement

A. Management agrees to transmit to the NCFLL proposed changes relating to personnel policies, practices, and matters affecting working conditions of bargaining unit employees, or which impact on them, proposed during the term of this Agreement and not covered by this Agreement, as far in advance as possible.

B. Upon receipt of such a proposed change from Management, the NCFLL may, within 10 working days, request negotiations concerning the proposed change.

C. Upon timely request from the NCFLL, the parties shall meet and confer within 30 calendar days concerning any negotiable aspects of the proposed change and/or its impact on bargaining unit employees.

D. Any changes of regulations or amendments to this Agreement which are negotiated and agreed to pursuant to this Section will be duly executed by the parties and will become an integral part of this Agreement and subject to all terms and conditions of this Agreement.

Section 6 – Past Practices

It is agreed and understood that any prior working conditions and practices and understandings which are not specifically covered by the Agreement or in conflict with it shall not be changed unless mutually agreed to by the parties.

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ARTICLE 15
Grievance Procedure

Section 1 – Purpose

The purpose of this Article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. The parties have a mutual interest in resolving grievances at the lowest level in a timely manner. To promote conflict resolution, supervisors, stewards, and employees should deal with the issue(s) and not personalities.

A. Efforts should be made to resolve disputes informally prior to filing a formal grievance. Education and training in dispute resolution is a means to achieve this interest. Interest-based problem solving should be utilized as much as possible to resolve disputes. Both managers and Union Representatives should become familiar with interest-based problem solving techniques. The parties remain committed to forging new Alternative Dispute Resolution (ADR) procedures. See Article 11.

B. Supervisors and NCFLL Stewards are encouraged to meet periodically to discuss matters of mutual concern. If informal discussions do not resolve the issue(s) and a grievance is filed, a face-to-face meeting at Step 1 may be unnecessary and can be waived by mutual agreement. In reaching the agreement, the parties will consider the complexity of the grievance and travel related costs. At any step of the process, the use of a facilitator may be useful and agreed to mutually.

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Section 7 – General Procedures

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A. Step 1

1. A grievance must be presented in writing on the negotiated grievance form within 30 calendar days of when the bargaining unit employee of NCFLL has learned or may reasonably been expected to have learned of its cause.

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ARTICLE 43
Performance Management System

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Section 4 – Annual Rating of Record

A. Within 30 days after the end of the rating period, each employee shall receive an annual rating of record.

B. Each Agency will ensure regular performance feedback is provided to each employee during the appraisal period. As part of this feedback, a progress review must be held at least once during

during the appraisal period, but no later than 120 days before the end of the rating period. This review will include areas of critical competencies requiring improvement and feedback on sustaining positive performance. At a minimum, during this progress review, employees will be informed orally of their performance relative to the elements and standards in their performance plans. The employee's progress review discussion will reflect the necessary information needed to assess progress toward attaining a career ladder promotion as reflected in Article 20, Section 10. The rating official and the employee will certify on the performance appraisal form that the progress review was held. The Department is committed to recognizing desired performance, and to providing opportunities to correct poor performance.

C. The rating official must confer with the reviewing official and secure the approval of the reviewing official of the tentative rating for the employee before discussing the tentative rating with the employee. The supervisor will discuss the rating of record with the employee to avoid misunderstandings and possible inaccuracies. The rating official will confer with the employee to review accomplishments, problems, and general performance during the appraisal period and will discuss the tentative conclusions regarding the rating with the employee. The employee's performance rating discussion will reflect the necessary information needed to assess progress toward attaining a career ladder promotion as reflected in Article 20, Section 10. The discussion will be face to face to the extent practicable but may be by telephone.

D. The employee will have an opportunity to present his/her assessment of work accomplishments, as well as time to respond in writing to the rating official on the rating. Employees have up to ten working days in which to review, sign, or prepare comments to the rater or reviewing official, as appropriate, on their ratings. Any written comments will be forwarded to the reviewing official(s) along with the tentative rating. After the rating has been reviewed and approved, it will be discussed with the employee by the rating official if any changes have been made in the tentative rating. Such written response is to be considered by the rater or reviewing official, as appropriate, and attached to the performance appraisal and will be maintained in the employee performance file.

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ARTICLE 54
Management Rights

Section 1 – General

A. The Department retains the right to:

1. Determine the mission, budget, organization, number of employees, and internal security practices of the Department.

2. In accordance with applicable laws:

a. to hire, assign, direct, layoff, and retain employees in the Department, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted;

c. with respect to filling positions, to make selections from among properly ranked and certified candidates for promotion or from any other appropriate source; and

d. to take whatever actions may be necessary to carry out the mission of the Department.

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Other Relevant Documents

The Agency has promulgated its own regulations, DOL Personnel Regulations (DPR), which, among other things, address the Agency's Human Resources Management Program. DPR Chapter 430, Performance Management, was introduced into the record as Joint Exhibit 6. Limited portions of this chapter are directly related to the issue in this case, and are set forth below:

DPR CHAPTER 430, PERFORMANCE MANAGEMENT

Introduction. The Department of Labor (DOL) administers its Human Resources Management Program in accordance with [T]itle 5 of the United States Code (USC) and [T]itle 5 of the Code of Federal Regulations (CFR). As specified herein, the Department of Labor adheres to 5 CFR part 430.

SUBCHAPTER 1 – PERFORMANCE APPRAISAL SYSTEM FOR GENERAL SCHEDULE, PREVAILING RATE, AND CERTAIN OTHER EMPLOYEES

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3. **Definitions.** The following definitions, in addition to those contained in 5 CFR 430.203, apply to the terms used in this DPR Chapter:

. . .

h. "Rating official" is an individual designated to establish performance plans for a position and to evaluate the performance of one or more employees. The immediate supervisor of each employee will normally be assigned this responsibility.

i. "Reviewing official" is an individual at a higher level than the rating official, designated to review the performance plans and ratings of record for one or more employees. For this purpose, a deputy is considered to be at a lower organizational level than his/her supervisor.

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7. **Appraisal of Performance**

a. Performance Appraisal Cycle. Except as stated in 6(e) above, the performance appraisal cycle will run from October 1 through September 30 each year.

. . .

d. Progress Reviews. Each Agency will ensure regular performance feedback is provided to each employee during the appraisal period. As part of this feedback, a progress review must be held at least once during the appraisal period, but no later than 120 days before the end of the rating period. This review will include areas of critical competencies requiring improvement and feedback on sustaining positive performance. At a minimum, during this progress review, employees will be informed orally of their performance relative to the elements and standards in their performance plans. The rating official and the employee will certify on the performance appraisal form that the progress review was held. The Department is committed to recognizing desired performance, and to providing opportunities to correct poor performance.

e. Appraisal of Each Element.

(1) General Requirements. The rating official must appraise employees' performance relative to the elements and standards performed. The performance

rating of record must take into consideration factors outside the employee's control impacting the results achieved.

Performance appraisals are due within 30 days after the end of the appraisal cycle. If an employee has not been under a performance plan for the minimum 90-calendar-day appraisal period by the end of the cycle, the rating official will extend the appraisal period and rate the employee after 90 days under the plan.

. . .

h. Communication of Summary Ratings to Employees. A tentative rating will be prepared by the rating official. The rating official must confer with the reviewing official about the performance of the employee and secure the approval of the reviewing official of the tentative rating before discussing the tentative rating with the employee. The rating official will confer with the employee to review accomplishments, problems and general performance during the appraisal period and will discuss the tentative conclusions regarding the rating with the employee. The employee will have an opportunity to present his/her assessment of work accomplishments, and will be allowed up to five work days to respond in writing to the recommended rating. The rating official will forward any written comments from the employee to the reviewing official along with the tentative rating. If no comments are provided within five days, the rating official will proceed with forwarding the appraisal to the higher-level reviewing official. After the reviewing official reviews and approves the summary rating, the rating official will discuss the rating with the employee, if any changes have been made.

. . .

Because the Agency relied on certain provisions of Title 5 of the Federal Service Labor-Management Relations Statute (the Statute) to support its position on the grievance, those portions are stated below:

. . .

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

. . . .

Union's Position

On the threshold issue of timeliness, the Union takes the position that the grievance was filed within 30 days of September 11, 2007, the date when the Union first learned that the Agency planned to use two Assistant District Directors to conduct the year-end performance reviews of certain bargaining unit employees. The topic had surfaced at a labor-management relations meeting between the parties on that date, based on reports that two supervisors had met with the employees when the mid-year performance reviews had been held earlier in the year. At the meeting the Union had specifically requested the Agency not to do this for the year-end evaluations. When, toward the end of September and early October 2007, the Agency had two ADDs present during the year-end performance reviews with employees, the Union filed the grievance. In these circumstances, according to the Union, the grievance was timely under Article 15 of the contract.

As to the merits, it is the Union's position that Article 43 4 C of the contract, as well as the Agency's applicable regulations, provides for a conference between the rating official and the employee to discuss the employee's rating of record. Because both the contract and the regulations refer to the participants of the meeting in the singular, the Union contends that it is a violation of the contract for the Agency to use two ADDs, or other supervisors, to conduct the performance reviews jointly. The Union argues that such an approach can be intimidating to the employee. As to the Agency's explanation that this approach is nothing more than an extension of the team concept used in its investigative processes, the Union contends that the Agency never gave the Union notice that it planned to adopt the practice. Because the language of Article 43 4 C is precise, the Union argues that participation in the year-end performance reviews must be limited to the rating official and the employee. The Union cited an arbitration award in *Social Security Administration and American Federation of Government Employees, Council 220, AFL-CIO*, BW-2007-R-0035 (Smith, 2007), to support its position.

Agency's Position

The Agency takes the position that the grievance is not arbitrable because it was not filed within 30 days of the date the Union first learned or may reasonably been expected to have learned of its cause. The Agency asserts that the practice of having two supervisors present during performance reviews had existed for two years before the Union filed its grievance. In addition, the Agency renewed the position stated in its initial response to the grievance, that the approach of having both ADDs present at performance discussions had been used as early as May or June of 2007. The Agency notes that the Union raised the question of using two supervisors to conduct mid-year reviews at the labor-management meeting on September 11, 2007, thus establishing that the Union was already aware of the practice. Because the grievance was not filed until October 5, 2007, the Agency contends that it is untimely under Article 15 7 A 1 of the contract.

With respect to the merits of the case, the Agency takes the position that it has the right under Article 54 1 b, as well as § 7106 (a)(2)(B) of the Statute, to determine who will hold performance discussions. The Agency argues that the allegation that a past practice existed does not trump the exercise of a reserved management right. As to the Union's assertion that the discussions constituted formal discussions warranting notice to the Union under Articles 1 and 2, the Agency contends that performance discussions are individual counseling sessions, not formal discussions. The Agency further states that it is not uncommon for more than one supervisor to oversee an employee's work during the year. Because an employee may be assigned to different investigative teams under different supervisors, the Agency believes that it is to the employee's benefit to have the feedback from both supervisors during performance reviews. For these reasons, the Agency contends that the practice did not violate the contract. The Agency cited several decisions of the Federal Labor Relations Authority to support its position.

Discussion

Background

Most of the facts underlying the dispute here are undisputed. Like all Federal agencies subject to the Statute, the Agency has established a performance appraisal system as part of its Human Resources Management Program. The Agency's performance appraisal system has been approved by the Office of Personnel

Management, and is described in DPR Chapter 430 (Joint Exhibit 6, excerpted in pertinent part above). Performance plans and periodic performance reviews are an integral part of the appraisal system. These reviews include progress reviews, held at least once during the appraisal period, and the conference at the end of the appraisal period, when the employee receives his or her Rating of Record. Both Article 43 of the Contract and DPR Chapter 430 require progress reviews to be conducted at least once during the appraisal period, and no later than 120 days before the end of the period. The conference at the end of the appraisal period must be conducted in time for the employee to receive the Rating of Record within 30 days of the end of the period.

It is noted that, in this case, the Agency has employed the terms "performance discussion" and "performance reviews" to apply to both the progress review conducted during the appraisal period and the conference at the end of the period. This broader term may be accurate in a literal sense, but it is clear that both the Agency and the Union have employed more specific terms to apply to the two types of reviews. Both the Contract and DPR Chapter 430 use the term "progress review" to mean only those conferences or discussions conducted during the appraisal year. Obviously, the term reflects the purpose of the conference – to discuss the employee's progress toward meeting the goals or standards in his/her performance plan. This is substantially different from the conference held at the end of the appraisal period. At this meeting the rating official does two things: He/she discusses the employee's accomplishments, problems, and general performance throughout the appraisal period; and he/she informs the employee of his/her assessment of the employee's performance. In other words, the progress review tells the employee how he/she is doing, while the performance rating discussion tells him/her how he/she did.

For the purposes of this award, the term "progress review" will be used to identify any meeting conducted during the appraisal period to provide feedback to an employee about his or her performance. Because the parties used the term "performance rating discussion" to identify the meeting conducted at the end of the appraisal period at which the employee's performance is discussed and at least a tentative rating is provided to the employee in the Contract, that term will be used herein to designate that meeting.

The Agency has historically conducted both the progress reviews and the performance rating discussions as one-on-one meetings between the employee and the rating official. This approach changed, at least for certain employees of the Dallas District Office, at some point in 2007. When their progress reviews were conducted in

May or June of that year, instead of the customary one-on-one meetings the two Assistant District Directors participated in the meetings with each employee. There was some testimony that this practice had started even earlier. This testimony, however, is inconsistent with the Agency's position and was disputed by other witnesses.

It is not disputed that the parties held a previously scheduled labor-management relations meeting on September 11, 2007. Dyan Hutchins, who is employed as an Economist for the Bureau of Labor Statistics and is an Executive Vice President of the Union, attended this meeting in her capacity as a regional representative of the Union. Ms. Hutchins testified that at the meeting the question came up about two supervisors meeting with employees at their mid-year reviews instead of only one. The Union said this had been reported to them by some bargaining unit employees. She said that Deputy Regional Director Joan Ford, representing the Agency at the meeting, acknowledged that this had taken place. In the discussion that followed the Union representatives specifically asked that the Agency not continue the practice at the approaching year-end appraisal meetings. According to Ms. Hutchins, Ms. Ford replied that the practice had been instituted somewhere else; that it worked well; and that the Agency considered it to be a good practice. The Union responded that it may have occurred with a different agency under a different contract, but that the Union considered the practice to be a violation of the Contract. Any difference of opinion between the parties about the matter remained unresolved at the meeting.

At several year-end appraisal meetings conducted in the Dallas District Office in September and October 2007 both ADDs participated in the meetings. As noted above, the Union filed a grievance protesting the practice on October 5, 2007.

Arbitrability

The first issue to be addressed is whether the grievance is arbitrable. As noted above, the Agency contends that the grievance is untimely in that it was filed more than 30 days after the Union learned or may reasonably been expected to have learned of its cause. The Agency would fix this date as some time in May or June 2007, when both ADDs participated in the progress reviews of some employees. The Agency referred to these meetings as "mid-year reviews" in its answer to the grievance, but also used the broader terms "performance discussions" and "performance reviews" in referring to both the progress reviews and the year-end performance reviews, or performance rating discussions.

At first glance it would appear that there is little or no difference between the versions of the terms used for the two meetings. The difference is significant, however, in that the Agency views the term "performance reviews" as including all discussions of an employee's performance, while the Union's use of the term "year-end performance appraisal meetings" limits the dispute to the meetings between employees and their rating officials at the end of an appraisal period. It is at these meetings that the employee receives a Performance Appraisal and Rating under the Performance Management Plan for Non-managers and Non-supervisors established under DPR Chapter 430. The Performance Appraisal and Rating is also known as the Annual Rating of Record. The purposes of the meetings, just as the meetings themselves, are substantially different. In addition to the differences discussed above, at page 14, it is significant that neither the Contract nor DPR Chapter 430 states who, or which official or officials, is supposed to conduct the progress review. The only stated requirements for progress reviews are that the meeting be held and that the rating official and the employee certify on the performance appraisal form that the progress review was held. This is not the case with the performance rating discussions, however. Unlike the requirement that the progress review simply take place, both the Contract and DPR Chapter 430 specify that the ***Rating Official*** (emphasis added) confer with the employee for the purpose of reviewing performance during the appraisal period. Throughout both documents this term is used in the singular.

Although the Union apparently learned that both ADDs were present for some progress reviews prior to September 11, 2007, it chose to address the matter informally at the scheduled labor-management meeting. This is one avenue made available under Article 15 1 A of the Contract. It cannot be said that the Union viewed the matter as a grievable issue at that point, especially since the Contract does not specifically identify the Agency representatives who are to conduct progress reviews. At the September 11 meeting, however, the matter was raised and discussed at some length. While the Agency explained its rationale for implementing the practice, the Union made it clear that it opposed the practice. Moreover, the Union specifically requested the Agency not to continue the practice at the performance rating discussions. When the Agency subsequently held performance rating discussions in which both ADDs participated, the Union filed its grievance. It is clear that the grievance was filed within 30 calendar days of both the September 11 meeting and the performance rating discussions themselves.

In view of the foregoing, it must be concluded that the grievance was timely filed. While there may be an argument that holding progress reviews with two ADDs present is a grievable matter, it is clear that the parties have consistently viewed the progress reviews as meetings separate and distinguishable from performance rating discussions. As a result, the time for filing a grievance protesting the practice in a performance rating discussion cannot begin to run on the basis of a practice that occurred in a performance review. Even assuming that both ADDs sat in on some performance rating discussions at the end of 2006, there is no showing that this came to the Union's attention at that time. That individual employees may not have complained of the practice earlier does not constitute evidence that the Union knew of the practice or in any way condoned it. Rather, the evidence reflects that the Union acted to protest the practice when it learned of it. The grievance filed on October 5, 2007, identified a practice that had occurred within the previous 30 days and it specified the Articles, Sections, and Subsections of the Contract alleged to have been violated. The Agency's arguments to the contrary are rejected. Accordingly, it is concluded that the grievance is arbitrable.

The disputed practice

Turning to the principal issue in this matter, there is no doubt that the Agency had both ADDs present for the performance rating discussions conducted with certain bargaining unit employees at the end of the 2006 – 2007 appraisal period. This period ended on September 30, 2007. The Union contends that the practice violated certain specific articles of the Contract. It objects to the practice on those grounds. In addition, the Union asserted, and bargaining unit employees testified, that employees could feel intimidated by the practice.

The Agency does not deny that it used two ADDs to conduct the performance rating discussions. On the contrary, the Agency defends the practice both as a management right under the Contract and the Statute and as an effective management tool. As to this point, Director of Regional Operations Melissa Speer, who served as the Agency's District Director in Dallas, Texas, from July 2003 until October 2007, testified that she had implemented a team concept for conducting investigations during her tenure in Dallas. Ms. Speer explained that she selected the team members for various investigations based on the availability and any specialized skills of Compliance Officers in the office. Each investigative team also included a manager or supervisor, usually one of the ADDs. It was not uncommon for Compliance Officers who were supervised by one

individual to be assigned to an investigative team headed by a different supervisor or manager.

Ms. Speer pointed out that, since the team concept had been implemented, the quality of investigations in the Dallas District improved and the District obtained bigger settlements. In addition, the office was selected for the Office of the Year Award on two occasions during her tenure. She also testified that it was necessary to have supervisors on the team to be responsible for the case; to chair team meetings; and to participate in the on-site investigations for key interviews. A principal role of the supervisor was to provide feedback to the team on various aspects of the investigation. Because each ADD was responsible for teams that included employees who also reported to other supervisors, Ms. Speer testified that it was appropriate for both ADDs to participate in the performance rating discussions at the end of the year. This was so the employees could have the benefit of feedback from everyone who was familiar with their work.

On direct examination Ms. Speer was asked about the term "supervisor of record." She explained that this term was in the system for various reasons, but primarily because the time and attendance system, known as "People-time," allowed for only one supervisor to approve or disapprove employee leave requests. On cross-examination she stated that the term "supervisor of record" was "antiquated," adding that the Agency's administrative systems were not really functional. She also testified that the rating official and the supervisor were the same person. When asked who actually signed the employee's Performance Appraisal and Rating form, Agency Form DL-1-384, which contains the employee's summary rating of record, Ms. Speer testified that the employee, the rating official and the reviewing official signed it. Her response referred to these individuals in the singular. On re-direct examination Ms. Speer made it clear that the rating official and the supervisor could be two different people. She also testified that the rating official was always present during performance discussions. As to who prepared the ratings, she stated that the rating officials prepared them and that other supervisors provided input.

The Agency's defense

The Agency contends that the disputed practice is permitted by both the Contract and the Statute as a protected management right. This right is the right to assign work and to determine the personnel by which agency operations are conducted. The Agency relies on decisions of the FLRA in *National Treasury Employees Union and Department*

of the Treasury, 21 FLRA 1051 (1986); *AFGE National Council of Field Operations Locals (C-220) and U.S. Department of Health and Human Services, Social Security Administration, District Office, Warren,* Ohio, 47 FLRA 1304 (1993), and *AFGE Local 1345 and Department of the Army, Headquarters, Fort Carson, Colorado*, 48 FLRA 168 (1993). All of these cases have been reviewed and considered, as well as relevant cases cited therein.

All of the cases cited by the Agency involved negotiability issues presented to the FLRA for determination. In each case the Union sought to include language in a collective bargaining agreement that would require supervisors to take certain actions. In *Headquarters, Fort Carson, Colorado*, the Authority held that a proposal requiring "the supervisor" to discuss with employees any changes to their position descriptions when the changes are made, is negotiable. In *Department of the Treasury*, however, the FLRA considered a proposal providing that "Immediate supervisors, at least once a year, must provide each employee with an appraisal of their performance." In that case the Authority determined that the disputed language sought to designate a particular individual within the Agency who would evaluate an employee's work performance. In reaching this decision the Authority noted that it has consistently held that "such proposals are inconsistent with the agency's right to assign work under Section 7106(a)(2)(B) of the Statute." *Ibid.*, pp. 3 – 4. The Authority cited several prior decisions, particularly *Department of the Air Force, Keesler Air Force Base, Mississippi*, 16 FLRA 313, 316 (1984).

In *Keesler Air Force Base, Mississippi*, the Authority considered proposals that "Employees shall receive a performance appraisal from a supervisor located at the employees' worksite which shall be accomplished in a fair and objective manner and based on a comparison of employee performance with the standards established for the appraisal period;" that "[t]he supervisor shall discuss the employee's job performance with the employee in private surroundings at least once every three (3) months during the rating period" and that "[t]he supervisor shall discuss the completed appraisal with the employee in private during the month in which the rating is due." In determining that these proposals were non-negotiable, the Authority stated the proposals "...would dictate to the Agency which supervisors would be assigned the function of appraising employees." Citing *Congressional Research Employees Association and the Library of Congress*, 3 FLRA 737 (1980) the Authority held that "a proposal which specified which personnel within an agency would evaluate the work performance of employees directly

interfered with management's right to assign work under Section 7106(a)(2)(B) of the Statute." *Keesler Air Force Base, Mississippi*, *supra*, p. 3.

A common thread in the cases cited by the Agency is that the proposals held to be non-negotiable were proposals that would have designated a particular individual within the Agency to perform specific supervisory or management functions. In situations where the proposal sought only to have an unidentified or unspecified individual take the action, however, the Authority found the proposal to be negotiable. See *Headquarters, Fort Carson, Colorado*, *supra*.

Analysis and conclusions

The disputed practice in this case is clearly inconsistent with the specific terms of Article 43, Section 4 C, of the Contract. It is also inconsistent with DPR Chapter 430, Subchapter 1 7 h. Both of these documents, which are binding on the Agency unless otherwise provided by statute, require the "rating official" to conduct the year-end performance rating discussion. The terms in both instances are used in the singular form. There are other provisions in the contract where an alternate, potentially plural form, is used. Article 43 4 D, set forth above, contains one such example. It follows, then, that if the parties intended to allow more than one supervisor or other Agency representative to participate in the year-end performance rating discussions they would have said so. It is noted that the language in the Contract is remarkably similar to the language of DPR Chapter 430, which was approved by OPM. Although no signed Performance Appraisal and Rating forms were entered into evidence, Ms. Speer's testimony was that only one rating official signs the form. The question, then, is whether either Article 54 of the Contract or § 7106 of the Statute permits the Agency to have more than one supervisor participate in the meetings.

The applicable language of the Contract and DPR Chapter 430 places certain requirements on the "rating official." Although the definition of "rating official" in DPR Chapter 430 contains the statement that "the immediate supervisor of each employee will normally be assigned this responsibility," this language does not create the requirement that this be the case. In any event, it is noted that no such language appears in the Contract. The Agency, therefore, is free to name anyone as an employee's rating official, so long as that person meets the standards established by OPM for such assignments. This provision of the Contract does not place any limitation on the Agency's ability to assign work. The circumstances here are similar to those

considered by the FLRA in *Headquarters, Fort Carson, Colorado*, *supra*, in that the identification of the "rating official" simply assigns the function of conducting the year-end performance rating discussion to someone whom the Agency would designate. For the same reasons that the Authority in *Headquarters, Fort Carson, Colorado*, determined portions of Proposals 1 and 2 in that case to be negotiable, it is concluded that the Agency's reliance here on Article 54 of the Contract and § 7106 of the Statute is misplaced. *Ibid*, pp. 5 – 7. It is further concluded, therefore, that the Agency violated Article 43 of the Contract when it assigned more than one supervisor to conduct the year-end performance rating discussions with bargaining unit employees after the appraisal period ending September 30, 2007.

In addition to its arguments based on Article 43 of the Contract, the Union alleged that the meetings in which more than one supervisor participated constituted formal discussions with bargaining unit employees. Because the Union was not given the opportunity to be present at the discussions, it contended that the Agency had violated Articles 1 and 2 of the Contract. The Agency countered by stating that performance discussions were not formal discussions within the meaning of the Contract.

The Union's argument on this point warrants little discussion. It is clear that the meetings constituted year-end performance rating discussions. The Union did not identify any Article of the Contract that would suggest that the Union has a right to be present at such meetings, or even that an employee may request Union representation at the meetings. To the extent that the Union may have argued that it was not given notice of the Agency's decision to adopt the disputed practice, the award here renders that argument moot. The Union's arguments as to Articles 1 and 2, therefore, are rejected. The Union's requested remedies that it be notified of all formal discussions; that its presence be accepted at such discussions; that it be notified of all changes in working conditions; and that the Agency negotiate such changes upon request are denied as being outside the scope of this grievance.

Having concluded that the Agency violated Article 43 of the Contract by assigning more than one supervisor to conduct year-end performance rating discussions with bargaining unit employees, the grievance will be sustained. Accordingly, the undersigned issues the following:

Award

The grievance is sustained. The Agency will cease and desist from assigning, permitting, or designating more than one person, who must be the employee's rating official, to conduct year-end performance rating discussions with bargaining unit employees. This cease-and-desist order will be effective immediately and will remain in effect until such time as the parties mutually agree on other arrangements for conducting such meetings pursuant to applicable notice and bargaining requirements established by the Contract or the Statute.

Issued at Fort Worth, Texas, August 5, 2008.

Michael B. McReynolds
Arbitrator