BEFORE THE FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration	)	
Between	)	
National Council of Field Labor Locals	)	FMCS Case Number 060303-02386-A
And	)	
United States Department of Labor	)	David Havrilla – Grievant Transfer Reimbursement
Before	)	
Charles E. Donegan Arbitrator	)	

DECISION OF THE ARBITRATOR

I

JURISDICTION

The Arbitrator was selected by the parties, through the Federal Mediation and Conciliation Service (FMCS), in accordance with the agreement between the parties.

The hearing was held on July 11, 2006, at 200 Constitution Avenue, N.W., Washington, D.C. 20006. Parties made closing arguments and agreed not to file briefs.

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II

APPEARANCES

Appearances for the parties were as follows:

For National Council of Field Labor Locals (Union)

Hugh Smith, Treasurer, AFGE

Richard Coon, Vice President, NCFLL

David D. Havrilla, Wage Hour Investigator (Grievant)

For United States Department of Labor (Manaement)

Debbie De Pompeo, Labor Relations Officer, U.S. Department of Labor

Galen Yoder, Labor Relations Specialist

Jerry Lelchook, U.S. Department of Labor, Deputy Director of Human Resources

III

ISSUES

UNION FORMULATION

Did the Department of Labor wrongly deny reimbursement of travel expenses, $574.89, incurred by David Havrilla when he was acting as the designated representative for an Appellant at a deposition conducted by the Department? The deposition involved an appeal to the Merit Systems Protection Board.

MANAGEMENT FORMULATION

Whether David Havrilla's travel expenses on August 4-5, 2005 in relation to his representation in a deposition in connection with an MSPB Appeal is considered reimbursable as a third-party proceeding as delineated in Article 8, Section 2 A 2?

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IV

APPLICABLE CONTRACT PROVISIONS

ARTICLE 11

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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B. Nothing in this Section shall preclude the Department and NCFLL from negotiating:

(1) at the election of the Department, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) the procedures which management Officials of the Department will observe in exercising any authority under this Section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this Section by such Management Officials.

Section 2 – Applications

The requirements of this Article shall apply to all supplemental agreements between the NCFLL and the Department.

ARTICLE 12

Performance Based Actions

Section 1 – General

A. This Article pertains to reduction in grade and removal based on unacceptable performance.

B. The Department will administer actions based solely on unacceptable performance in accordance with law, applicable Government-wide and DOL regulation, and this Article.

Section 2 – Initial Procedure

A. At any time during the performance appraisal cycle that an employee's performance becomes unacceptable in one or more critical elements, Management shall inform the employee as provided in Article 43 of this Agreement. Management should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, as defined in 5 CFR 432, the employee may be reduced in grade or removed.

B. The employee will be afforded a reasonable opportunity to demonstrate acceptable performance in accordance with Article 43 of this Agreement.

Section 3 – Notice of Proposed Action

An employee will be given written notice of a proposed reduction in grade or removal based on unacceptable performance at least 30 calendar days in advance of the action. The employee has a right to representation and will be given the opportunity to respond orally and/or in writing to the proposed action prior to a decision.

Section 4 – Notice of Decision

Management shall make its final decision within 30 days after expiration of the advance notice period and shall issue written notice of the decision to the employee.

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An employee against whom the action is taken will be informed of any applicable appeal rights.

ARTICLE 3

Labor-Management Relations Committees and Midterm Negotiations

Section 1 – Purpose and Function

The Union and Management, as evidenced in the Statement of Purpose to this Agreement, recognize that the participation of bargaining unit employees in the formulation and implementation of personnel policies and practices affects their well being and efficient administration of the Government. To this end, Union and Management mutually recognize and endorse the involvement of affected employees and their representatives as early as possible in the development of Departmental and Agency programs, policies, and practices. The parties further recognize that the entrance into a formal collective bargaining agreement with each other is but one act leading toward a constructive labor-management relationship and that the success of a labor-management relationship is further assured if a forum is available and used to communicate with each other. They, therefore, agree to establish a National Labor-Management Relations Committee, and also Regional Labor-Management Relations Committees for the purpose of exchanging information and for discussing matters of mutual concern or interest to each of them in the broad area of personnel policy and practices and other matters affecting working conditions. It is also agreed that midterm negotiations, requested in accordance with Article 2, Section 4 or Section 5 of the Agreement, may be conducted during Labor-Management Relations Committee

meetings. In the event that circumstances dictate that midterm negotiations be conducted other than at meetings of the Labor-Management Relations Committees, the provisions of Sections 3A.4(b) and 3B.4.(b) of this Article with regard to travel expenses and official time are applicable.

As used in this Section, "midterm negotiations" include all aspects of negotiations from preliminary meetings on ground rules, if any, through mediation and impasse resolution processes when needed.

Section 2 – Labor-Management Relations Committee Meetings

A. Frequency of LMR Committee Meetings

1. **National Committee.** The National Labor-Management Relations Committee meetings shall be held quarterly.

2. **Regional Committees.** The Regional Labor-Management Relations Committee meetings shall be held three times a year.

3. **Committee Meetings.** National and Regional Labor-Management Relations Committee meetings may be held more frequently or deferred by mutual consent of the parties.

B. Regional Meetings

1. The NCFLL will designate in each DOL Region a Union Regional Collective Bargaining Committee (RCBC). The NCFLL will designate from among the members of the RCBC a Regional Chair for each of its ten RCBCs. The Department will recognize and communicate all Regional notices and

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obligations to the Regional Chair of the RCBC. The maximum number of representatives designated may be up to the number depicted in column (A) of the following table. The number in column (A) is the maximum number of persons who may be entitled to official time and travel expenses for midterm bargaining initiated by Management.

2. In those instances where Agencies have consolidated from two or more Regions into one Agency Region, the NCFLL will designate one NCFLL Regional Chair as the single point of contact for management for that consolidated Agency. The Department will recognize and communicate notices and obligations to the designated NCFLL Regional Chair with copies to the other affected NCFLL Regional Chairs.

3. In addition to the RCBC, additional persons may be designated by the Union and are entitled to official time and travel expenses to attend Regional meetings. The number of such persons is depicted in column (B) of the following table. During the Regional meetings, when an agenda item(s) pertains to a particular DOL Agency only, the Union may designate up to five representatives from among the total number present (as depicted in column [C]) to meet with the representatives from the DOL Agency. The Union may interchange the representatives from one Agency to another as long as no more than five meet with any one Agency.

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4. For those agenda items which are Department-wide in nature and are not limited to a single DOL Agency, the total number of persons (column[C]) may meet with the representatives of the Department.

5. Department-wide agendas as well as individual Agency agendas shall be arranged for and scheduled in advance. The agendas and scheduled meetings should be for the purpose of discussing specific interests and concerns of the parties and for enhancing the labor-management relationship.

6. The NCFLL may have in attendance at a Regional meeting one NCFLL National Official from within the Region. This would be in addition to the number of persons in the following table.

7. For those Agencies which have consolidated, there will be one Regional Agency labor-management meeting in the city in which the Regional Agency Head is located. Management will communicate with the designated NCFLL Regional Chair identified in Subsection 2. above for purposes of these meetings. The RCBCs in the consolidated Regions will be permitted to have representatives travel to these meetings in accordance with the following table. The maximum number of representatives entitled to official time and travel for a meeting is depicted in column (C). The maximum number of trips by representatives entitled to official time and travel for these meetings in a one year period may not exceed three times the number in column (C). The number of NCFLL Representatives sitting in on such an Agency meeting will be limited to the five specified in Subsection B.3. plus one additional

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representative for each additional RCBC involved. The NCFLL will determine the distribution of these representatives from among these RCBCs prior to the meeting.

8. Nothing in Subjection 7. above precludes the parties from mutually agreeing to alternative means (such as teleconferencing) to participate in the regional labor-management meetings.

C. National Meetings

1. . NCFLL membership on the National Labor-Management Relations Committee (NLMRC) shal normally consist of elected officials of the NCFLL, not to exceed a total of 11 persons.

2. The Department recognizes that the NCFLL may request an AFGE, AFL-CIO, National Representative to attend Labor-Management Relations Committee meetings from time to time.

D. Agenda for Labor-Management Relations Committee Meetings

1. With respect to both National and Regional Committee meetings, the parties agree to furnish each other a written agenda, to be received by the other party no less than ten workdays prior to the scheduled date of the meeting.

2. For the National meeting, each party's respective agenda will be coordinated and shared between the NCFLL President (for the Union) and the Labor-Management Relations Center (for the Department).

3. For Regional meetings, each party's respective agenda will be coordinated and shared between the NCFLL Chair of the Regional Collective Bargaining Committee (for the Union) and the Office of the Regional Administrator-OASAM (for the Department). The NCFLL Regional Chair will be responsible for coordinating and submitting the Regional agenda(s). Reasonable official time for this purpose may be granted in accordance with Article 8 of the Agreement.

4. For the consolidated Regional Agency meetings, the agenda will be coordinated and shared between the designated NCFLL Regional Chair (see B.2. above) and the Regional Administrator-OASAM (for the Department) in the location where the Regional Agency Head is located.

E. Meeting Summaries

With respect to Regional Labor-Management Relations Committee meetings, the Department will provide NCFLL Regional Chair of the RCBC a summary of the Regional LMRC meetings. Such summary will list the names and Agencies of attendees and reference conclusions and/or actions to be taken concerning agenda items discussed.

F. Travel Expenses

The Department agrees to pay the travel expenses for employee NCFLL Representatives who attend national and Regional Labor-Management Relations Committee meetings which are held in accordance with this Article. The number of such NCFLL representatives to be reimbursed shall not exceed the number specified in Sections 2B. and 2C. of this Article.

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G. Official Time

Official time for NCFLL representatives participating in Labor-Management Relations Committee meetings is provided for in Article 8 of this Agreement.

Section 3 – Midterm Bargaining Procedures

A. National Bargaining

1. Notice of Change and Request to Bargain

(a) Midterm collective bargaining between the Department of Labor and the National Council of field Labor Locals (NCFLL) is governed, in part, by the provisions of Article 2 of the DOL-NCFLL Agreement.

(b) Section 4 of Article 2 provides that the Department agrees to issue no regulation which alters the Agreement without being mandated by a change in law, Executive Order, Government-wide rules or regulations, judicial decision by a court of appropriate jurisdiction, or other high authority.

(c) Amendments to this Agreement or Departmental and/or Agency regulations may be required by mandated changes after the original effective date of the master labor Agreement. In Article 2, Section 5, the Department agrees to transmit to the NCFLL changes proposed during the term of the Agreement but not specifically covered by the Agreement which relate to conditions of employment of employees in the bargaining unit and/or which may adversely affect such conditions.

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(d) In the circumstances described above, the parties agree that the NCFLL has 15 workdays from receipt of notice of a change in which to request bargaining concerning the proposed changes in the conditions of employment not specifically covered by the Agreement.

ARTICLE 8

Official Time and Travel Expenses for Representational Activity

Section 1 – General

A. Management recognizes that official time and travel expenses spent by bargaining unit employees in the conduct of labor-management business is spent as much in the interest of Management as that of the NCFLL and bargaining unit employees.

B. Official duty time and travel expenses shall not be allowed for internal Union business.

C. Official time and travel expenses for the conduct of labor-management relations business will be granted to NCFLL Stewards and Officials, and to affected employees as specified in this Article. Official time and travel expenses will be granted to NCFLL Stewards and Officials in accordance with their designation in Articles 6 and 7 of this Agreement.

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Section 2 – Official Time for Stewards and NCFLL Officials

A. Grievances and Appeal

1. An NCFLL Steward or Regional NCFLL Official may utilize a reasonable amount of official time to confer with an affected bargaining unit employee(s) with respect to any matters for which remedial relief may be sought pursuant to the terms and conditions of this Agreement or pursuant to a statutory appeals procedure or labor-management relations appeals procedure, provided that only one representative at a time may be entitled to official time in connection with a given representational matter. An NCFLL Steward or Regional NCFLL Official may utilize a reasonable amount of official time to communicate with other Stewards or Officials in connection with a representational matter.

2. Subsection 1. above includes time to counsel a bargaining unit employee(s), to investigate a potential grievance, and to prepare and present a grievance at the Steps of the grievance procedure specified in Article 15, Grievance Procedure, of this Agreement. Also included is time to investigate, prepare, and present a reply to a notice of proposed adverse action or performance based action an adverse action, performance based action, or RIF appeal; an EEO discrimination complaint a request for reconsideration or an appeal of an acceptable level of competence determination; and a classification appeal. In addition, Subsection 1. above includes time to investigate, prepare, and, if required, participate in an FLRA (ULP or Unit Clarification), FSIP, or OWCP proceeding.

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B. Meetings with Management

An NCFLL Steward or Regional NCFLL Official may utilize a reasonable amount of official time to prepare for and be present at meetings with Management, including Safety and Health Committee meetings, Labor-Management Relations Committee meetings, etc., concerning personnel policies, practices, and other matters affecting working conditions of employees in the bargaining unit. Such meetings may be initiated by either the Union or Management. An NCFLL Steward or Regional NCFLL Official may utilize a reasonable amount of official time to communicate with other Stewards or Officials in connection with such meetings.

The Department and the NCFLL encourage informal meetings to resolve potential problems at the work site and preclude, if at all possible, the need for formal dispute procedures to be initiated.

C. Preparing LM Forms

Union Officials (one per Local) may utilize up to four hours of official time annually to prepare the annual financial report which must be filed with the Department of Labor pursuant to 5 U.S.C. 7120, Standards of Conduct for Labor Organizations.

D. Formal Discussions

The NCFLL shall be given the opportunity an official time to be represented at any formal discussion, as prescribed in Article 1, Section 1D.

E. Midterm Bargaining

Union Representatives will be on official time for all midterm bargaining initiated by Management.

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Section 3 – Official Time for Bargaining Unit Employees

A. Grievances and Appeals

A bargaining unit employee(s) may utilize a reasonable amount of official time to confer with a Steward, Regional NCFLL Official, or National NCFLL Official.

B. Meetings with Management and Third Party Proceedings

A bargaining unit employee(s) may utilize a reasonable amount of official time to attend meetings with Management and third party proceedings when he/she is the affected employee or a witness in a grievance or statutory appeal proceeding. If the parties cannot agree on necessary witnesses, the determination shall be made by the third party.

C. Representation of Multiple Grievants

If two or more bargaining unit employees file a group grievance, the following number of those employees will be granted official time to discuss the matter(s) with an NCFLL Steward or Official, and to attend grievance meetings pursuant to Article 15, Grievance Procedure.

Number of Grievants	Number of Grievants Entitled to Official Time
2–10	2
11–20	4
more than 20	6

This section does not apply to persons who are no longer employed by the Department.

Section 4 – Definition of "Reasonable Amount of Time"

A. The determination of what constitutes a "reasonable amount of time" under this Article is a matter requiring mutual agreement between employee and his/her

supervisor prior to the employee's release under Section 5 of this Article, taking into account the need to balance the effective conduct of the Department's business with the rights of employees to be represented in matters relating to their employment.

B. A factor to be considered by the parties in determining what constitutes a "reasonable amount of time" is the amount of time that is necessary to accomplish the specific task for which time is requested.

C. If, during the transition period prescribed in Section 6 of this Article, there is a dispute between a newly elected or appointed National NCFLL Official and his/her supervisor concerning what constitutes a "reasonable amount of time," the matter will be referred to the Department's Labor-Management Relations Center and the NCFLL President for resolution.

Section 5 – Use of Official Time: Check-Out, Check-In

A. A bargaining unit employee(s) or the designated Union Representative who desires to use official time under this Article may be authorized a "reasonable amount of time" as follows:

(1) A designated Union Representative or employee(s) who wishes to use official time under this Article will request permission of his/her immediate supervisor. Such request should be made as early as possible, i.e., generally as soon as the need for the official time is known.

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(2) A Union Representative or employee(s) who wishes to use official time under this Article in an organizational unit not under the direction of his/her own supervisor will request permission of the supervisor of the organizational unit involved before engaging in such activity.

(3) Permission as described in Subsections (1) and (2) above will be granted unless compelling reasons require the presence of the Union Representative or employee(s) at Agency tasks which he/she is then performing. If such permission is denied, the manager or supervisor refusing such permission will give the reasons for refusal in writing, upon request, to the representative or employee(s) who was so denied.

(4) The Union Representative or employee(s) will report his/her return to work to his/her immediate supervisor upon conclusion of use of official time under this Article.

B. A designated Union Representative who is not an employee of the Department will follow the check-out and check-in procedures in this Section.

Section 6 – NCFLL National Officials

Due to the responsibilities of the NCFLL National Officials, they (not to exceed 11) will be on 100% official time. When employees are newly elected or appointed to national Office, the NCFLL will notify the Department and there will be a 90-day transition period from the date of receipt of such notice before the employee begins utilizing 100% official time. When an NCFLL National Official leaves office, he/she will

normally have a right to return to the position of record. In any case, the Official will normally have a right to return to a position in the commuting area.

Section 7 – Travel Expenses

The Department and the NCFLL have a mutual commitment to contain travel expenses in connection with representation. Therefore, the parties agree to the following provisions.

A. Union Representatives

1. The Department and the NCFLL agree that, ordinarily, representation of employees or the Union on official time will be performed by Union Representatives from within the commuting area and, to the extent practicable, from within the same DOL Agency or in accordance with the Steward designations pursuant to Article 6.

2. If there is no Union Representative in the commuting area, the Department will pay appropriate travel expenses of the nearest representative. This includes representation at Steps 1 and 2 of the grievance procedure and for institutional grievances.

3. If the Union designates a representative from outside the commuting area when one exists within, the Department will have no obligation for the representative's travel expenses. Where there is no representative in the commuting area and the Union does not designate the nearest representative, the Department will pay constructive or comparable cost travel

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expenses. This includes representation at Steps 1 and 2 of the grievance procedure and for institutional grievances.

4. Exceptions to Subsections 2. and 3. above:

   (a) The Department will pay travel expenses for the NCFLL Representative at an arbitration proceeding.

   (b) The Department will pay travel expenses for the NCFLL Representative within a Region at other third party proceedings (as delineated in Section 2A.2. of this Article) when an employee has designated a Union Steward or Official as his/her personal representative.

   (c) If any question arises over travel expenses concerning representation in connection with third party proceedings, it shall be referred to the NCFLL President and DOL Director of Labor-Management Relations Center for resolution.

5. The Department will pay travel expenses for NCFLL Representatives for midterm bargaining initiated by Management.

6. The Department will pay for travel to Labor-Management Relations Committee meetings.

B. Bargaining Unit Employees

Bargaining unit employees will be reimbursed for travel expenses in connection with meetings with Management, face-to-fact oral responses to proposed disciplinary

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suspensions or adverse actions, or participation in grievances or arbitrations or other third party proceedings (as delineated in Section 2A.2. of this Article).

ARTICLE 9

Use of Official Facilities

Section 1 – Bulleting Boards

A. The Department agrees that the NCFLL will have the use of bulletin boards in DOL space.

B. Notices placed by the NCFLL on bulleting boards or distributed as provided in Section 2 of this Article may not contain material which would appear to identify it as the Department's material or that it is sponsored or endorsed by the Department; nor contain any scurrilous or libelous material.

Section 2 – Distribution

A. The NCFLL may distribute material on the Department's premises in work areas to individual employees before and after scheduled working hours subject to internal security requirements, or in the non-work areas during scheduled work hours, provided that both the employee distributing and the employee receiving such material are on their own time.

V

EXHIBITS

JOINT EXHIBITS

J – 1 Grievance Package consisting of:

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a) Travel Voucher for David Havrilla
b) August 23, 2006 note to Lucy [Buzzone] from Dave [Havrilla]
c) Certificate of Service from MSPB appeal of Joan C. Buchannan
d) Electronic mail exchange between David Havrilla and Robert D. Lotz dated March 15, 2006
e) DOL/NCFLL Grievance Form filed by David Havrilla
f) September 6, 2005 letter from james Weyrauch, NCFLL Representative, to Corlis Sellers, RA-WH, transmitting grievance filed by David Havrilla
g) Step 2 grievance response dated October 3, 2005 from George Ference, Deputy RA-WH
h) Invocation of arbitration dated October 6, 2005 from Richard W. Coon, Chair, NCFLL Arbitration Committee

J – 2 October 1, 1991 DOL/NCFLL Collective Bargaining Agreement [Article 8 and the signatory page]

J – 3 Joint Bargaining History for Article 8 of the October 1, 1991 DOL/NCFLL Collective Bargaining Agreement

UNION EXHIBITS

U – 1 Travel voucher of Richard W. Coon in the amount of $460.59 for travel from February 12, 1998 to February 13, 1998 for purpose of DOL solicitor deposition of Federico Solveda MSPB appeal.

MANAGEMENT EXHIBITS

M – 1 Memo from Lucy Buzzone to David Havrilla dated August 4, 2005 stating that the Agency was not obligated to reimburse Havrilla for his travel expense because a deposition was not considered an initial administrative proceeding.

M – 2 Memo from Lucy Buzzone – OASAM to David I. Havrilla – ESA concerning the summary from the verbal response presented on April 21, 2005. ms. Buchannan presented a verbal response to the march 4, 2005 letter of proposed removal she received for failing to perform her claims examiner duties.

M – 3 Copy of arbitration decision by Joseph C. Barry, Esq. in the case of U.S. Department of Labor and the National Council of Field Labor Local AFGE, AFL-CIO dated May 27, 1994.

VI

BACKGROUND

The Grievant, David Havrilla, represented an employee at a deposition in Norfolk, Virginia. The Grievant's claim for travel reimbursement was denied. The Union filed a grievance.

The Arbitrator, Charles E. Donegan, conducted a hearing on July 11, 2006. The parties, according to their custom, did not take a transcript of the hearing or file briefs.

VII

POSITION OF THE NATIONAL COUNCIL OF FIELD LABOR LOCALS (UNION)

The Union believes the language worked out in 1991 covers depositions and appeals to the Merit System Protection Board (MSPB). The reason was that the cases were very complicated and legalistic. The Union wanted certainty from the time the appeal was first filed until case was heard.

Would the Union enter into an agreement that limits it in representing a party in a third-party proceeding? The Union intends to represent the worker at all stages up to and including the appeal. Looking at the agreement itself it is not likely the Union would give up travel expense.

Management used J-3 to prove that the Union gave up the right to travel expenses for a third-party proceeding. Management did not contend that the Grievant did not have the right to time off. Article 8 of the CBA carved out exceptions for third-party proceedings. A deposition is a part of a third-party proceeding. Management contends that the Grievant did not need to be at the hearing. Furthermore, management stated the grievant knew he would not be reimbursed for his travel

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expense. The Union contends that the grievant did not know he would not be reimbursed for his travel expense. The Grievant was not informed he would not be reimbursed travel expense until after the hearing. The Grievant needed to be at the hearing to provide assistance to the worker.

Section A2 in the CBA deals with investigators which had to include the MSPB.

The Barry Arbitration decision (M-4) was an informal filing which does not apply to the instant case. The instant case deals with a third-party proceeding which is formal.

In 1998 Mr. Coon represented a person in a deposition in Albuquerque, New Mexico and got paid for travel expenses. Under U – 1 the U.S. DOL has paid for travel expenses as it did in the Coon case. The parties have carved out exceptions to Article 8, Section 7 A4 (Closest Steward Rule). The intent of the parties was to pay travel expenses for all third-party proceedings.

UNION REBUTTAL

Management's statement that the language in the CBA was drafted by the Union is not true. Mr. Coon and Mr. Lelchook drafted the language. The drafted language was brought back to the entire 22 member bargaining team. This was the interest based bargaining procedure.

VIII

POSITION OF UNITED STATES DEPARTMENT OF LABOR (MANAGEMENT)

Federal employees who have adverse actions against him/her can appeal their case to the Merit System Protection Board. The evidence in this case shows an

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adverse action was taken against an employee. David Havrilla was the personal representative of the worker in Norfolk, Virginia. Mr. Havrilla was entitled to Official time but was not entitled to travel reimbursement. The negotiated agreement put limits on travel regarding third party proceedings. The parties had defined the term third party proceedings. Management properly applied the regulations and had no duty to reimburse Mr. Havrilla for travel expenses. The Arbitrator must determine if management properly applied the regulations in deciding that Mr. Havrilla was not entitled to travel reimbursement in this case. The Union has the burden of proof and the grievance should be denied. This is not a case of importance where the Grievant appears at a deposition hearing. Management is not trying to hamper the Union's ability to represent employees. The Department does not agree to pay travel expenses of the Union. The testimony and evidence in the record show that the Union has not met its burden of proof. In 1991 the parties bifurcated Union official time from Union travel time. The parties negotiated a clear and unambiguous CBA. The parties mutually agreed to contain travel expenses. The Union has construed deposition to fall in the ambit of third-party proceeding.

The initial administrative proceeding is excluded from third-party proceeding. Discovery is a process apart from the hearing. Depositions are Discovery and separate from the MSPB proceeding. The hearing was before a MSPB Administrative Law Judge. The Union is trying to gain through arbitration what it could not gain through collective bargaining. The Union drafted the original language therefore the contract should be construed against the Union

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(See Elkouri and Elkouri). The Grievant did not obtain Management approval prior to the travel. The Union has not met its burden of proof.

MANAGEMENT REBUTTAL

Management did not say the Union drafted the language but that the Union initiated the language.

IX

DISCUSSION

The Arbitrator has carefully read and studied all the documents admitted at the hearing and his own handwritten notes at the hearing. The above was supplemented by additional research and study.

First, the Arbitrator finds that the grievance in this case is arbitrable because he has been given the right under Article 16 of the contract between the Employer and the Union. The issues involve the interpretation and application of the contract.

Second, the Arbitrator finds that the Employer has acted in violation of the collective bargaining agreement.

The Arbitrator is cognizant that the burden of proof in this arbitration rests upon the Union to establish that the Employer has violated the CBA. Based on a careful review and study of the entire record, the Arbitrator finds that the Union has met that burden. The Employer did not meet its burden of proving no violation.

The Arbitrator does not find it useful to cite all the specific evidence in the record. Like in most arbitrations, there was considerable conflicting evidence in the instant

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case. The preponderance of the credible, pertinent and relevant evidence was presented by the Union.

Third, the Arbitrator finds that it would be beneficial to review various standards for contract interpretation, and related matters, which are discussed below (*See* How Arbitration Works, Elkouri and Elkouri, Sixth Edition 2003). Generally and pp 428, 433-437, 439-442, 447-451, 453,454, 461-464, 477, 478, 481, 482, 624-627, 1277, 1280, 1281.

Probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The great bulk of arbitration cases involve disputes over "rights" under such agreements. In these cases, the agreement itself is the point of concentration, and the function of the arbitrator is to interpret and apply its provisions.

1. DISPUTES OVER THE MEANING OF CONTRACT TERMS

A. Misunderstanding and the "Mutual Assent" or "Meeting of the Minds" Concept

When the parties attach conflicting meanings to an essential term of their putative contract, is there then no "meeting of the minds" so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.

iii. Other Factors

It is important for advocates to understand that under either the "objective" or the "subjective" theory, a party's "mental processes" are irrelevant; what a party may have privately intended the words that are the subject of dispute to mean plays no role in the interpretive process if the intended meaning has not been communicated.

2. AMBIGUITY AND THE EXCLUSION OF EXTRINSIC EVIDENCE

A. The "Plain Meaning" Rule

A contract term is said to be ambiguous if it is susceptible of more than one meaning, that is, if "plausible contentions may be made for conflicting interpretations."

Under one view, the existence of an ambiguity must be determined from the "four corners of the instrument" without resort to extrinsic evidence of any kind. This is the so-called "plain meaning rule," which states that if the words are plain and clear, conveying a distinct idea, there is not occasion to resort interpretation, and their meaning is to be derived entirely from the nature of the language used.

One arbitrator expressed a commonly held view when he stated that an arbitrator cannot "ignore clear-cut contractual language" and "may not legislate new language, since to do so would usurp the role of the labor organization and employer." Even when both parties declare a provision to be ambiguous, the arbitrator may not find it so.

i. Criticisms

The "plain meaning rule," although still dominant, has been uniformly criticized and rejected in the academic literature by both "objectivist" and "subjectivist"

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commentators, by jurists in more recent court decisions, and by a growing number of arbitrators.

It is a rare contract that needs no interpretation. It has been wisely observed that there is not "lawyer's Paradise [where] all words have a fixed, precisely ascertained meaning,...and where, if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text, and answer all questions without raising his eyes." As Holmes cautioned "a word is not a crystal, transparent and unchanged." It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

So, for example, one arbitrator acknowledged that "the clear language of the Hours provision of the contract, if taken by itself without relation to any other facts, would indicate that it was the intention of the negotiators...that the secretaries would be paid for lunch...." However, despite what appeared to be clear and unambiguous language, the arbitrator looked to extrinsic evidence "to determine the true inte of the parties." In light of the undisputed evidence that there was no agreement with respect to this issue, coupled with the past practice of not paying secretaries for a lunch period, the arbitrator concluded that "it was the intent of the parties that at no time would the lunch period be included."

ii. Exceptions

Arbitrators who subscribe to the "plain meaning" doctrine nevertheless recognize an exception to this rule in the case of a mutual mistake. "A mutual mistake exists when both parties sign off [on] contract language that does not correspond with their actual agreement. In this limited circumstance, an arbitrator may reform the contract to reflect

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the true intent of the parties." In order to nullify the clear language of the collective bargaining agreement, however, those arbitrators require that themistake must be *mutual*. A unilateral mistake by one party does not provide a sufficient basis for contract reformation.

C. Causes of Ambiguity and Misunderstandings

The language of mathematics is precise. The English language is not. Even when the greatest care is employed, ambiguity of meaning can result. Moreover, the parties or their representatives may not be skilled in draftsmanship and may employ terms in their contract that are inherently vague. For example, the contract may provide that one or both parties must act on a certain matter "with reasonable promptness." Even more common is what has been called the "ambiguity of Syntax" error involving misplaced modifiers, inadequate punctuation, or the use of shorthand expressions.

Another source of ambiguity arises from the inclusion of inconsistent provisions in a contract or conflicting language within a particular term. Still another kind of common ambiguity arises from the failure to foresee the problem that arises from the application of a term to an unexpected situation.

Most persons experienced in collective bargaining recognize the collective bargaining agreement as a comprehensive, but necessarily flexible, instrument that governs the relations between the parties. The very vact that almost all such agreements provide for arbitration of grievances concerning agreement interpretation suggests that the parties recognize the impossibility of foreseeing and providing for every question that may arise during the life of the agreement.

Finally, worthy of mention is the deliberate ambiguity caused by parties who are unable to agree on terms and, in effect, require the arbitrator to serve as an undesignated "interest" arbitrator.

Advocating the exercise of judgment by arbitrators, one commentator pointed to what he viewed as the "inescapable truth":

> [T]he ultimate responsibility of an arbitrator in the interpretive process is to rely on his or her background of experience or expertise in the collective bargaining process, the due regard to the relationship of the given parties and their presentations so as to provide as practical and realistic an interpretation as is possible under the given agreement.

Rejecting what he deemed the "myths" of contract interpretation, the commentator gave Shakespearean advice to future arbitrators: "'And this above all, to thine own self be true and it must follow as the night the day that thou canst not then be false to any man.'"

Despite such "activist" attitudes, most arbitrators view the scope of their authority as limited to the extent described by another arbitrator:

> [The arbitrator's] function is not to rewrite that Agreement and certainly it is not to suggest, imply nor to inform the Parties of what changes should be effected, renegotiated or changed even if his sense of justice and fairness so dictate, or even if he believes the Agreement contains inequities. Nor can the Arbitrator allow the economic consequences of an Award [to] influence him in his ultimate decision. The Arbitrator's Award...must derive its essence from the Agreement, and...tell the Parties what they can or cannot do inside of that Agreement.

A. Rules to Aid Interpretation

While the "overarching principle of contract interpretation" requires ascertainment of meaning in light of "all the relevant circumstances surrounding the transaction,"

> [c]ourts start with the assumption that the parties have used the language in the way that reasonable persons ordinarily do....The process of interpretation therefore turns in good part on what the courts regards as normal habits in the use of language, habits that would be expected of reasonable persons in the

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> circumstances of the parties....Some of the assumptions that courts make as to normal habits in the use of language are so widely shared and so frequently articulated that they have come to be regarded as rules of contract interpretation. Some of these rules had been encapsulated in Latin maxims that have a special ring of authority, albeit sometimes a hollow one. None of these rules, however, has a validity beyond that of its underlying assumptions.

The rules so formulated are used both in determining what meanings are reasonably possible and in choosing among possible meaning. Sometimes two or more of the rules of interpretation conflict in a given case. Where this is so, the arbitrator is free to apply whichever rule seems to produce the most reasonable result. Sometimes, however, a combination of two or more of the standards may be applied consistently in construing an ambiguous word or clause. The statement of Mr. Justice Holmes, that "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before," appears to express the attitude of many arbitrators who strive to determine what the parties were driving at and to effectuate their intent.

i. Giving Words Their Normal or Technical Meaning

Arbitrators give words their ordinary and popularly accepted meaning in the absence of a variant contract definition, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special colloquial meaning. Consequently, in the absence of such evidence when each of the parties has a different understanding of what is intended by certain contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail.

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Arbitrators often apply their understanding of words or phrases in the contract without citing any authority.

Many arbitrators apply a "reasonable man standard" in interpreting words or phrases in collective bargaining agreements. For instance, the word "may" was "reasonably" given its ordinary "permissive" meaning in the absence of strong evidence that a mandatory meaning was intended. In another case, the word "day" or "workday" was "reasonably" interpreted as calendar day, from midnight to midnight.

b. Use of Dictionary Definitions

Arbitrators often have ruled that, in the absence of showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms ad defined by a reliable dictionary should govern. The use of dictionary definitions in arbitral opinions provide a neutral interpretation of a word or phrase that carries the air of authority. If the parties have defined a word or phrase in their agreement, hoever, an arbitrator should not look outside the agreement for a definition. An examination of the entire agreement and its application to the subject matter under consideration may result in the interpretation of words not in the general dictionary sense, but in a mutually agreed sense. In any event, dictionary definitions may be considered simply "as an aid" to the arbitrator in the search for meaning.

When parties have changed the language of their agreement, arbitrators presume that they intended a changed meaning. By the same token, continued use of certain key terms in successive agreements justified a party's assumption that no change in meaning was intended by the other party that had failed to state otherwise in negotiations.

ii. Precontract Negotiations and Bargaining History

Precontract negotiations frequently offer a valuable aid in the interpretation of ambiguous provisions. Where the meaning of a term is in dispute, it will be deemed, if there is no evidence to the contrary, that the parties intended it to have the same meaning as that given it during the negotiations leading up to the agreement. Indeed, even evidence of subsequent negotiations may establish the prior understanding of the parties.

vii. Interpretation in Light of Purpose

Judicial doctrine recorded in the *Restatement (Second) of Contracts* holds that when the principal purpose that the parties intended to be served by a provision can be ascertained, the purpose is to be given great weight in interpreting the words of the provision. Arbitrators agree that an interpretation in tune with the purpose of a provision is to be favored over one that conflicts with it.

viii. The Contract as a Whole

The *Restatement (Second) of Contracts* comments:

> Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph...Where the whole can be read to give significance to each part, that reading is preferred....

In the arbitral domain, numerous decisions have invoked this interpretive principle. One of the earliest stated:

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and in relation to all other parts or provisions.

In the years that followed, the concept that the disputed portions "must be read in light of the entire agreement" has received widespread acceptance.

a. Giving Effect to All Clauses and Words

If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination is to choose the interpretation that would give effect to all provisions. In the words of one arbitrator:

> It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.

The principle extends not only to entire clauses, but also to individual words. Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement. It is only when no reasonable meaning can be given to a word or clause, either from the context in which it is used or by examining the whole agreement, that it may be treated as surplusage and declared to be inoperative.

ii. Interpretation Against Party Selecting the Language

The "contra profeerentem" (against the proponent) principle states that "if language supplied by one party is reasonably susceptible to two interpretations…the one that is less favorable to the party that supplied the language is preferred." The rule

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promotes careful drafting of language and accurate disclosure of what the language is intended to mean by penalizing the proponent who is “at fault” for negligently drafting the text. Arbitrators have applied this principle to provisions involving management rights and seniority.

iii. Duty of Good Faith and Fair Dealing

Standard contract jurisprudence holds that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” The duty has both prohibitory and mandatory components. “A party may thus be under a duty not only to refrain from hindering or preventing the occurrence of conditions of the party’s own duty or the performance of the other party’s duty, but also to take affirmative steps to cooperate in achieving these goals.”

The implied covenant of “good faith and fair dealing” is similar to the principle of reason and equity, and is deemed to be an inherent part of every collective bargaining agreement. Indeed, this implied covenant is sometimes referred to as the docgtrine of reasonableness. The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, and it applies equally to management and labor. The covenant does not arise out of agreement of the parties, but rather out of the operation of the laws.

v. Reason and Equity

It is widely recognized that if a contract “is clear and unambiguous it must be applied in accordance with its terms despite the equities that may be present on either

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side." Arbitrators strive where possible to give *ambiguous* language a construction that is reasonable and equitable to both parties rather than one that would give one party an unfair and unreasonable advantage. The arbitrator, it has been said, should "look at the language in the light of experience and choose that course which does the least violence to the judgment of a reasonable man."

In addition to reviewing various indicia of the intentions of the parties such as past practice and even arbitral precedent, one arbitrator noted that he could not "overlook the equity aspects surrounding [the] grievance...which serves to guide him in making for a proper and fair interpretation of the language embodied in [the contract]."

Considerations of fairness enter into the equation where the contract allows for the exercise of discretion on the part of the employer, however, the employer's actions may not be arbitrary, capricious, discriminatory, or unreasonable.

"Equity" may also be a factor in the formulation of a remedy. One arbitrator apportioned a back-pay award based on the 25 percent equity he found favoring the grievant:

> In cases where the remedy can be divisible, such as back-pay or seniority as compared to reinstatement or reprimand, and where the merits are somewhat split, an all-or-nothing solution does not seem to be equitable or effective. Thus, in this case, the arbitrator concludes that the balance weighs partially – approximately one quarter – in favor of [grievant].

vi. Avoidance of a Forfeiture

it is a familiar maxim that the law abhors a forfeiture. If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture.

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8. ROLE OF CUSTOM AND PRACTICE IN INTERPRETATION OF AMBIGUOUS LANGUAGE

The custom or past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language. It is easy to understand why, as the parties' intent is most often manifested in their actions. Accordingly, when faced with ambiguous language, most arbitrators rely exclusively on the parties' manifestation of intent as shown through past practice and custom. Indeed, use of past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary.

The general attitude of arbitrators is illustrated by one arbitrator, who, in noting that the parties had operated under a provision for nearly 3 years before requesting an arbitrator to interpret it, stated that he had a context of practices, usages, and rule-of-thumb interpretations by which the parties themselves had gradually given substance to the disputed term. Nonetheless, in another case the arbitrator cautioned that, "[i]n interpreting a collective agreement probably nothing is more capable of constructive use or susceptible to serous abuse as appeals to custom practice."

Where practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given it by that practice. Thus, as one arbitrator commented:

> There would have to be very strong and compelling reasons for an arbitrator to change the practice by which a contract provision has been interpreted in a plant over a period of several years and several contracts. There would have to be a clear and unambiguous direction in the language used to effect such a change.

The weight to be accorded past practice as an interpretative guide may vary greatly from case to case. In this regard, the degree of mutuality is an important factor. Unilateral interpretations might not bind the other party. However, continued failure of one party to object to the other party's interpretation is sometimes held to constitute acceptance of such interpretation so as, in effect, to make it mutual. Even when there is no direct evidence that one party was aware of the practice, mutuality may be inferred.

As has been noted, to establish a binding past practice as an implied term of the contract, "the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future." Put somewhat differently, "the practice must be of sufficient generality and duration to imply acceptance of it as an authentic construction of the contract." Accordingly, a "single incident" has been held insufficient to establish a "practice."

In contrast, for purposes of interpreting ambiguous language, relatively few past instances have been required to establish a binding practice. This is especially so when the incidents giving rise to the issue rarely occur. However, it is obvious that an asserted past practice provides no guide where the evidence regarding its nature and duration is "highly contradictory." Where such conflict exists, the arbitrator will be inclined to rely entirely on other standards of interpretation. Conversely, where the parties handle issues on an ad hoc basis, depending on the circumstances of the case, at least one arbitrator has ruled that the parties have created an established past practice of determining issues on a case-by-case basis.

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9. CUSTOM AND PRACTICE AT VARIANCE WITH CLEAR CONTRACT LANGUAGE

While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the "plain meaning" principle of contract interpretation will refuse to consider evidence of a past practice that is inconsistent with a provision that is "clear and unambiguous" on its face.

> Plain and unambiguous words are undisputed facts. The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used.

Many arbitrators and federal courts have expressed similar views.

The clear language of the contract ahs been enforced even where the arbitrator believed that, on the basis of equity, past practice should have governed.

B. Merit Systems Protection Board (MSPB)

The CSRA of 1978 gave the MSPB jurisdiction over a broad range of grievance issues involving federal agency actions affecting employees, including discrimination claims that may be combined or mixed with merit systems claims.

The MSPB has authority to review rules and regulations issued by the OPM and to declare any rule or regulation invalid if the rule or regulation or its implementation would violate or lead to violation of any prohibited personnel practice adversely affecting

employees (certain personnel practices are prohibited by statute because they are contrary to merit system principles).

APPLICATION OF ELKOURI PRINCIPLES

The Arbitrator will now attempt to apply some of the principles cited abve in Elkouri and Elkouri to the instant case.

DISPUTES OVER THE MEANING OF CONTRACT TERMS

As stated in Elkouri probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The fact that the parties attach conflicting meanings to an essential term of the contract does not mean there is no meeting of the minds. The instant case is one in which the Arbitrator must interpret the contract.

AMBIGUITY AND THE EXCLUSION OF EXTRINSIC EVIDENCE

A contract term is ambiguous if it is susceptible of more than on meaning, that is, if plausible contentions can be made for conflicting interpretations. The Arbitrator finds that the instant case is ambiguous and must be interpreted.

The Arbitrator finds that there is no mutual mistake in the instant case which would require him to reform the contract to reflect the true intent of the parties.

As stated in Elkouri the language of mathematics is precise. The English language is not. Even when the greatest care is employed, ambiguity of meaning can result. In the instant case such ambiguity has resulted. The collective bargaining agreement is comprehensive but necessarily flexible.

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Finally, sometimes there is deliberate ambiguity caused by the parties who are unable to agree on terms and, in effect, require the Arbitrator to serve as an undesignated "interest" arbitrator. The Arbitrator finds that this is the likely situation in the instant case. The Arbitrator must interpret the contract. If this is not the case the parties should make the contract language more specific in their future collective bargaining negotiations.

RULES TO AID INTERPRETATION

Arbitrators give words their normal or technical meaning in the absence of a variant contract definition, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special colloquial meaning.

This Arbitrator and many other arbitrators apply a reasonable man standard in interpreting words or phrases in collective bargaining agreements.

This Arbitrator and other arbitrators have ruled that in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern. The use of dictionary definitions in arbitral opinions provides a neutral interpretation of a word or phrase that carries the air of authority. Deposition has been defined as follows:

WEBSTER'S NEW COLLEGIATE DICTIONARY

> **Dep´o·si´tion** *n.* **1.** Act of deposing, as a sovereign. **2.** An opinion, example, or statement, laid down or asserted; testimony. **3.** Act or process of depositing. **4.** That which is deposited; sediment. **5.** *Law.* A testifying or testimony under oath, esp. in writing.

BLACK'S LAW DICTIONARY

DEPOSITION. The testimony of a witness taken upon interrogatories, not in open court, but in pursuance of a commission to take testimony issued by a court, or under a general law on the subject, and reduced to writing and duly authenticated, and intended to be used upon the trial of an action in court. It is sometimes used as synonymous with "affidavit" or 'oath," but its technical meaning does not include such terms. State v. Lord, 42 N.M. 638, 84 P.2d 80, 94.

A written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine; or upon written interrogatories. N.S. Sherman machine & Iron Works v. R.D. Cole Mfg. Co., 51 Okl. 353, 151 P. 1181, 1182. it is the giving of notice to the adverse party which especially distinguishes a deposition from an affidavit. Zinner v. Louis Meyers & Son, 181 Misc. 344, 43 N.Y.S.2d 319, 320.

PRECONTRACT NEGOTIATIONS AND BARGAINING HISTORY

As Elkouri states precontract negotiations frequently offer a valuable aid in the interpretation of ambiguous provisions. This aid is not very useful in the instant case because the parties never really agreed on the meaning of the phrase third-party proceeding. It seems the parties did not agree on the meaning and left it to the Arbitrator to decide on a case-by-case basis.

INTERPRETATION IN LIGHT OF PURPOSE

The Arbitrator finds, in the instant case, that the principal purpose the parties intended to be served was for the Union to fully represent an employee in a formal proceeding. The deposition was involved in an appeal to the Merit System Protection Board. Therefore, the employee needed representation. Consequently, the Grievant was entitled to a reimbursement of travel expense in the amount of $574.89.

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THE CONTRACT AS A WHOLE

Elkouri states the concept that the disputed portions of a contract "must be read in light of the entire agreement" has received widespread acceptance. The Arbitrator in the instant case strongly concurs with Elkouri. Looking at the contract as a whole the Arbitrator in the instant case finds that Management has violated the contract in denying the Grievant reimbursement of travel expenses.

INTERPRETATION AGAINST PARTY SELECTING THE LANGUAGE

The against the proponent principle states that "if language supplied by one party is reasonably susceptible to tow interpretations...the one that is less favorable to the party that supplied the language is preferred." This aid to interpretation is not applicable to the instant case because the Union denied that it drafted the language and Management conceded that the Union had merely initiated the language.

DUTY OF GOOD FAITH AND FAIR DEALINGS

Standard Contract jurisprudence holds that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." The Arbitrator finds that both of the parties in the instant case have lived up to their duty of good faith and fair dealing.

REASON AND EQUITY

Elkouri states "Arbitrators strive where possible to give ambiguous language a construction that is reasonable and equitable to both parties rather than one that would give one party an unfair and unreasonable advantage." The Arbitrator, it has been said, should "look at the language in the light of the experience and choose the course which

does the least violence to the judgment of a reasonable man." The Arbitrator in the instant case finds the pertinent language in the CBA is ambiguous and applies the reasonable man standard to award travel reimbursement to the Grievant.

AVOIDANCE OF A FORFEITURE

It is a familiar maxim that the law abhors a forfeiture. If an agreement is susceptible of two constructions, one which would work a forfeiture and one which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture. In the instant case the Arbitrator applies this maxim to award the Grievant travel reimbursement. Not to award travel reimbursement under the facts and circumstances of this case would constitute a forfeiture.

ROLE OF CUSTOM AND PRACTICE IN INTERPRETATION OF AMBIGUOUS LANGUAGE

Elkouri states "the custom or past-practice of the parties is the most widely used standard to interpret ambiguous language." Furthermore, "the practice must be of sufficient generality and duration to imply acceptance of it as an authentic construction of the contract. Accordingly, a single incident has been held insufficient to establish a practice.

The Arbitrator finds in the instant case that neither party has established a past-practice. Consequently, the Arbitrator must rely entirely on other standards of interpretation to decide the instant case.

Fourth, the Arbitrator finds the Department wrongly denied reimbursement of travel expenses in the amount of $574.89, incurred by David Havrilla when he was acting as the designated representative for an Appellant at a deposition conducted by

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the Department. The deposition involved an appeal to the Merit Systems Protection Board.

Fifth, the Arbitrator finds that David Havrilla's travel expenses on August 4-5, 2005 in relation to his representation in a deposition in connection with an MSPB appeal is considered reimbursable as a third-party proceeding as delineated in Article 8, Section 2 A 2.

Sixth, the Arbitrator finds the language worked out between the parties in 1991 covers depositions and appeals to the Merit System Protection Board (MSPB). The reason was that the cases were very complicated and legalistic. It is understandable that the Union wanted certainty and control of the matter from the time the appeal was first filed until the case was heard.

It is not reasonable to believe the Union would enter into an agreement that would limit its ability to represent a party in a third-party proceeding. It is logical and reasonable that the Union intended to represent the worker at all stages up to and including the appeal. It is not likely that the Union would give up travel expense.

A careful reading of J – 3 indicates that the parties agreed that it was in their mutual interest to reduce management travel expenses. Furthermore, it was more important to have stewards and Union officials equipped to represent employees across agency or other organization lines rather than incur travel expenses. However, J – 3 does not prove that the Union gave up the right to travel expenses for a third-party proceeding.

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Seventh, the Arbitrator finds that a deposition is a part of a third-party proceeding. The Arbitrator rejects management's contention that the Grievant did not need to be at the deposition.

The Grievant testified credibly and convincingly that he had previously handled termination cases and the person had been reinstated and made whole. Furthermore, he testified the matter was a complicated adverse action case with technical issues with an extensive history. Grievant had to make repeated requests for extension of time to move the deadlines back. Grievant did not set up the time for the deposition meeting. He had to travel from Monroeville, Pennsylvania to Norfolk, Virginia for the deposition hearing. Grievant was only in Norfolk for the deposition and had no need to stay after the deposition. Grievant was on his own time when the deposition ended. Furthermore, he thought he personally needed to be at the deposition hearing because it was a complicated case and he was the only steward familiar with the case.

Grievant requested reimbursement of travel expense because he was the designated representative. Furthermore, Grievant testified the information obtained from the deposition strongly affected his strategy in representing the worker. For example, it helped him to determine whether he would settle the case.

Eighth, the Arbitrator finds that the Article 8 language was bargained for in 1991 and was rolled over without change in the 1996 negotiations. It was also rolled over in the 2002 bargaining. Richard Coon, Vice President, NCFLL, who had worked for the US DOL for over 31 years, also testified credibly. He has been involved in 4 national negotiations including 1991 which covers this disposition. His testimony in essence was that the Union wanted to be able to fully represent employees in all matters up to

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appeal. The Union also wanted official travel expenses as well as official time. The Union admitted that there was some abuse of travel time. However, the Union testified MSPB cases required more skill than most stewards had. It was important that a steward understood rules of evidence and interrogatories such as the Grievant did in representing an employee. Prior to 1996, cases usually involved local offices and not many cases involved depositions. Mr. Coon also testified that he traveled from Denver, Colorado to Albuquerque, New Mexico to represent an employee at a deposition (U – 1). He was reimbursed for his travel. Therefore, the Grievant in the instant case reasonably believed he would receive travel reimbursement. Under the facts and circumstances of this case the Grievant is excused from not requesting advance travel approval. Finally, Mr. Coon testified that depositions go through a MSPB judge. Why bring in a different representative when Grievant could attend the deposition. It would put the Union at a disadvantage to bring in a different representative who was not familiar with the case. It is a fairness issue. The Union would never give up the right to travel reimbursement. The Union intended to cover this right in the contract.

Ninth, as previously stated above, the Arbitrator finds that the Grievant was entitled to official time and travel reimbursement. The Union required official time and travel reimbursement to fully represent employees in formal matters such as a deposition. The reasonable man standard applies in this case.

Tenth, the Arbitrator finds that the arbitration decision, BARRY, FMCS AND NCFLL, FMCS 93-22948 (May 27, 1994) is not controlling in the instant case. That case can be distinguished from the instant case. That case dealt with an informal EEO investigation which is not a third-party proceeding under the CBA. It is an attempt by

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the party charged to try to find the facts, conciliate or settle the charge if it has merit. The instant case dealt with an adverse action.

Arbitrator Barry found in that case the Union Representative could learn almost nothing from being present because had already represented the Claimant on her grievance in the same matter. The instant case involved a deposition involving technical, legal issues which only the Grievant was familiar with. The case was a formal matter involving an adverse action which can lead to serous discipline up to and including termination.

Eleventh, the Arbitrator disagrees with Management's contention that the parties negotiated a clear and unambiguous bifurcated contract. The contract was ambiguous and required interpretation. In order to lessen the possibility of ambiguity the parties need to negotiate more specific language in their next CBA. The Arbitrator finds that Discovery is not a process apart from the hearing. Depositions are Discovery and are not separate from the MSPB proceedings.

Twelfth, the Arbitrator finds that Management did not prove that the Union drafted the disputed contract language. The Union contradicted Management's contention in rebuttal. Management responded that the Union initiated the language. There is a clear distinction between initiated and drafted.

The Arbitrator concurs with the parties that it is in their mutual interest to reduce travel expenses. Many, if not most, organizations today are experiencing budgetary constraints. Abuse of travel expense should not and cannot be tolerated. However, necessary and essential travel expenses must be reimbursed when needed to fully represent employees.

In conclusion, this decision cannot be cited for the proposition that travel expenses are reimbursable for every minor and informal proceeding. This decision can only be cited for the proposition that travel expenses are reimbursable only when the Union is representing an employee in a formal, technical, legalistic proceeding such as a deposition. Generally, approval of travel expense should be obtained in advance unless there are extenuating circumstances. Furthermore, this decision must be confined to the facts and circumstances of the instant case. If the parties seek to avoid an arbitrator interpreting the contract they should negotiate more specific language in the contract.

It is true that reasonable persons (i.e., arbitrators) could disagree on the merits of the Employer and Union arguments in the instant case. However, the Arbitrator in the instant case finds that the more convincing evidence supports the Union's position. The Employer violated the contract.

Both parties in the instant case were represented by very capable and effective advocates.

X

DECISION AND AWARD

The Arbitrator finds that Management violated the collective bargaining agreement and orders Management to comply with the terms of the collective bargaining agreement by reimbursing the Grievant his travel expenses in the amount of $574.89.

Dated this 15th day of September, 2006.

CHARLES E. DONEGAN
ARBITRATOR

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