

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration between

NATIONAL COUNCIL OF FIELD LABOR
LOCALS (NCFL), AFGE, AFL-CIO,
Union,

and

FMCS Case No. 040622-06400-7
(ARB-ESA-OO-04-011 (NCFL))
Grievance Subject: WHISARD

UNITED STATES DEPARTMENT OF LABOR,
WAGE AND HOUR DIVISION,
Agency.

Before: Irwin Kaplan, Impartial Arbitrator

APPEARANCES:

For National Council Of Field Labor Locals, AFGE:
Jeffrey P. Darby, NCFL Representative

For United States Department of Labor:
Galen Yoder, Human Resources Specialist

OPINION AND AWARD

STATEMENT OF THE CASE

This arbitration hearing was held at the U.S. Department of Labor (“Agency” or “DOL”) headquarters in Washington, D.C., on January 12 and 13, 2005 and April 5, 2005. NCFL Representative Jeffrey Darby filed the underlying institutional grievance on April 5, 2003. (Joint Exhibit “JT.” EX. 3) There, in essence, it is alleged that the Wage and Hour Division (“WHD”) of the DOL, has engaged in ongoing collective-bargaining agreement (“CBA”, “Contract” or “Agreement” – JT. EX. 1) violations from July 9, 2002 by failing to notify the NCFL of various changes to Wage-Hour

Investigative Support and Reporting Database (“WHISARD”)¹. (Id.) The grievance alleged that by failing to notify the NCFLL of such changes, which changes impacted on the working conditions of bargaining unit employees, the Agency deprived the Union of an opportunity to bargain over said changes in violation of Article 2, Section 5A, Article 3, Section A1(c) and (d) and Article 15, Section 2B of the Contract². On October 15, 2003, the Union invoked the instant arbitration. (JT. EX. 4)

The NCFLL also maintains that each time the Agency makes changes to WHISARD, it runs risk of engaging in an unfair labor practice under 5 USC 7116 (a)(5) by failing to notify the Union. According to the Union, the Agency is obligated to engage in mid-term bargaining, particularly where, as, here, the disputed changes have more than a de minimis impact on the working conditions of bargaining unit employees. (Union’s opening statement)

The Agency denies that it violated any provision of the CBA or the statute. According to the Agency, any of the changes to WHISARD were “de minimis in nature” and not subject to bargaining. (Agency Brief at 13) Further, the Agency maintains that both the underlying grievance and the invocation of arbitration were untimely filed. As such, the agency asserts that the grievance should be dismissed on procedural grounds³. (Opening Statement; Agency Brief at 2)

The parties noted their positions on the record, adduced testimony, cross-examined witnesses and had certain exhibits received in evidence. Post-hearing briefs were timely submitted by the close of business, Friday, May 20, 2005 and received on May 23, 2005, at which time the hearing closed.

¹ As noted in the grievance, the dates of the changes to WHISARD and alleged contract violations are as follows: July 9, 2002, August 20, 2002, September 23, 2002, October 30, 2002, December 5, 2002, December 26, 2002, January 28, 2003, February 26, 2003 and April 2, 2003.

² The contractual provisions relied on by the parties will be set forth in relevant part in a separate section infra.

³ The parties’ positions will be stated in greater detail in a separate section infra.

PRINCIPAL ISSUES

1. Whether the underlying institutional grievance with regard to any of the specified or related changes to WHISARD and the subsequent invocation of arbitration were timely filed.
2. Whether the Agency violated The Federal Service Labor-Management Relations Statute (“the Statute”) and/or the CBA by not providing notice to the NCFLL of certain of its changes to WHISARD, thereby denying the Union the opportunity to engage in mid-term bargaining, as alleged.

BACKGROUND AND SEQUENCE OF EVENTS

The Agency and the NCFFL have long had a collective-bargaining relationship covering DOL employees. The bargaining unit employees involved in the instant case are in the Wage and Hour Division of the DOL and are classified as investigators. There are approximately 1000 employees that comprise the WHD bargaining unit. The most recent CBA that covers the WHD unit, by its terms, is effective July 1, 2002 through June 30, 2006. (JT.EX.1 at 127) For many years and prior to 1998, the WHD investigators, in large part, entered case information on various agency paper forms. Someone else, sometimes a contractor, would type the information into a case tracking system. While in time the early record keeping became more sophisticated, the system essentially remained the same. During the 1990’s, some investigators also made their entries into computer systems known as the Wage Hour Management Information System (WHMS) and/or the Case Tracking Information System. (CTIS)

In or around 1998 the former systems had become outdated and were not “Y2k” compliant and a new case tracking system started to be developed. The new system was entitled, Wage Hour Investigative Support and Reporting Database and commonly referred to by its acronym, as “WHISARD.” While initially, using WHISARD was voluntary, subsequently, in 1999, for the first time, all investigators were required to enter data into the system. Nancy Flynn, Director of Planning, Nancy Flynn noted that WHISARD enabled the Agency to better report its activities to Congress and interested parties. In the agency’s training booklet of 2000, it informed its investigators as follows:

“At its heart, WHISARD is a computer database system. A database is fundamentally a table, or grid, of information. One column in the grid might be the names of employers. The column next to it might contain the street addresses of these employers. Farther over in the grid you might find a column for any minimum wage or overtime liability due to the employer’s workers. Somewhere near that, you might find a column with the names of the workers to whom the money is owed.

. . . . The whole point of having the database is to make better decisions in the work we do. WHISARD enables investigators, managers, and agency leaders, to better understand Wage-Hour activities, and results. The information that WHISARD provides through its reports, enables better decisions about annual planning, resource use and compliance activities.” (JT.EX. 4, Part One at 3)

On June 30, 1999, the DOL and NCFLL executed a Memorandum of Understanding (MOU”) to cover the ongoing implementation of the WHISARD computer system. (JT. EX. 2) There, the parties noted, inter alia, that the MOU was entered into “in the spirit of partnership.” (Id.) It was agreed that in conducting performance evaluations, that management would consider anticipated changes in productivity and downtime. (Id. at par. 3) The parties also agreed that, “all bargaining unit employees will be required to use WHISARD as of September 15, 1999.” (Id. at par. 4) The MOU was negotiated mid-term during the previous CBA, which was effective by its terms from February 1, 1997 through January 31, 2001. (UN.EX. 3) On July 2, 1999, then NCFLL Vice President Paul Tracy wrote to the bargaining unit members advising them, inter alia, of the completed negotiations covering “the ongoing implementation of the WHISARD computer system” in WHD and enclosing therewith a copy of the MOU. (UN. EX. 5)

According to Paul Tracy⁴, currently President of AFGE, Local 948, formal notice of changes to WHISARD by the Agency to NCFLL was not necessary or required during the period governed by the MOU, because the DOL/NCFLL Partnership Council was sufficiently involved in the implementation of the system. The MOU expired when the new and current CBA became effective on July 1, 2002 and was not rolled over into that

⁴ Paul Tracy was one of seven NCFLL vice presidents for a period of approximately 10 years to around 2001 and Chair of the NCFLL negotiating committee that led to the 1999 MOU. Tracy was also qualified at the arbitration hearing as an expert witness on the CBA.

Agreement. Under the Supplemental Agreements provision of the CBA, supplemental agreements, such as the mid-term MOU dealing with WHISARD (JT.EX. 2) expired, at the same time the Contract terminated. (Union "UN." 3, Article 53, Section 1 at.155-156)

Tracy asserted that in the absence of partnership⁵ and that the 1999 MOU did not roll over into the new July 2002 CBA, the notice requirement regarding changes to WHISARD or to other changes affecting working conditions of bargaining unit employees is governed by statute and the outstanding Contract. The Union maintains that in such circumstances, as here, the Agency is required to provide timely notice to the Union of all changes to WHISARD so that it can decide whether to request mid-term bargaining. According to the Agency, it was not required to provide notice to the Union after the MOU terminated either under the statute or the CBA because the disputed changes were all de minimis in terms of impacting on the working conditions of bargaining unit employees. Jerry Lelchook, Deputy Director of Human Resources and DOL's Chief Negotiator during negotiations of the 2002 contract, asserted that the intent of a new Article 50 was to minimize the time spent on technology and was broad enough to obviate the need for mid-term bargaining.

The Union adduced testimony and e-mails from bargaining unit employees complaining about insufficient training, particularly, as revisions were made to WHISARD and the system became more complex. In addition, they complained about various bugs, fatal errors and other problems such as too many screens⁶, that resulted in spending considerably more time recording or entering case data than under the previous systems. Investigator Frederick De Wald noted that it took him from 6 to 8 hours to enter data in WHISARD from an investigation dealing with back wages for 150 to 300 employees in a nursing home. De Wald asserted that essentially the same work under the previous system would take him only 2 to 3 hours. Long-time investigator Kevin O'Brien

⁵ Labor Management Partnerships were established by Executive Order 12871 of October 1, 1993. (UN.EX. 4) This Order was superseded by a new administration Executive Order in 2002.

⁶ A fatal error is data that the system will not accept and until corrected, a case cannot be closed out. When a fatal error appears, the investigator has to go back to one or more screens and the case file to correct the failure to submit the required data. This was not a feature under the previous systems. A bug is the term used when one condition in the system is expected and something else occurs. Union witnesses asserted that employees become frustrated and upset in dealing with such problems..

testified similarly that it takes him 6 to 8 hours to perform work that used to take him 2 hours under the previous system. According to Josephine Nunez, she currently spends approximately 54 hours per case under WHISARD that formerly took 18 hours. Nunez was an original WHISARD trainer.

Bargaining unit employees were almost always notified about updates or revisions to the developing new case management system by e-mail. However, not all revisions, releases, or updates to WHISARD were viewed by bargaining unit employees as having a negative impact on working conditions. For example, as testified by Investigator DE Wald, a WHD e-mail may simply notify investigators that some bug has been fixed and some changes may actually save employees time on cases.

The record is not clear how frequently Agency revisions or updates to WHISARD occur. According to Union official Tracy, changes are made almost weekly, sometimes even multiple changes during a given week. Union witness O'Brien testified that since July 2002, revisions or updates to WHISARD occurred every two months. Union witness Nunez did not know how many changes or releases were made but was certain that there were more than 10 since 2000. Agency witness Newton noted that there have been 19 major releases involving WHISARD in its 6 ½ years of operation. Newton testified about one such release in 2003 that required the hourly rate of employees to be entered into the system. According to Carl Smith, Director Of Information Technology for WHD, there are about 4 changes to WHISARD each year.

It is undisputed that at least some supervisors consider how well employees are working under WHISARD in performance evaluations. In this regard, O'Brien testified that because of the extra time he had to spend on making entries into WHISARD, he may have been denied an "outstanding" evaluation, as told to him by his supervisor. Nunez asserted that the additional work under WHISARD impacted on her overall evaluation. She acknowledged that she had not filed a grievance nor contested the lower evaluation. Agency witness Project Manager Richard Newton (a bargaining unit employee) also noted that some supervisors used WHISARD to evaluate employees.

RELEVANT CONTRACT PROVISIONS

The Agency, relying on certain provisions in the CBA, has raised threshold issues of timeliness of both the underlying grievance and the invocation of arbitration. The Union relying, in part, on some of the same provisions, denies that the grievance was untimely filed. Moreover the Union contends that the Agency failed to comply with Article 15 Section 7.C of the CBA with regard to raising grievability/arbitrability issues. As for the substantive issues dealing with the Agency's notice requirements to NCFLL of changes to WHISARD, the Union relies on Article 2, Section 5 A and Article 3, Sections 3A1(c) and (d). The Agency relies largely on Article 50 for asserting that it need not provide notice of changes to WHISARD. In dispute is also whether the Agency committed an unfair labor practice within the meaning of 5 USC 7116(a)(5). The threshold provisions relied on by the parties, in relevant part, are noted first below:

Contract Provisions Dealing with Timeliness

Article 15

Grievance Procedure

Section 2-Coverage and Scope

B. NCFLL (Union) Grievance

.... In the case of a union grievance, the parties will waive Steps 1 and 2 of this negotiated procedure; however, the parties will make an informal effort to resolve the grievance at the level of the dispute. If within seven workdays the matter cannot be resolved, it will be transmitted to the Labor-Management Relations Center (LMRC) in Washington D.C. The LMRC will issue a written decision within ten workdays. Upon receipt of the reply, The NCFLL, may, within 20 workdays, invoke arbitration as provided in Article 16 of this Agreement, with the Director, Labor-Management Relations Center. If no timely reply is issued, The NCFLL may, within 20 workdays from the date the decision was due, invoke arbitration.

Section 6—Standard Form for Grievance

.... The filing of grievances . . . at a minimum shall contain:

- (1) date filed

Section 7—Procedures, Employee Grievance

A. Step 1

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

C. Statement of Grievability

Management agrees to furnish NCFLL a final written statement of grievability/arbitrability of a grievance at the earliest Step Possible but no later than 45 calendar days before the hearing.

Section 8—Failure to Meet Requirements

B. Failure on the part of NCFLL to prosecute a grievance, filed in its own behalf within the stated time periods at any Step of this procedure will have the effect of nullifying the grievance unless the parties mutually agree otherwise.

Contract Provisions Dealing with the Merits and Notice Requirements

Article 2

Governing Laws and Regulations

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

A. Management agrees to transmit to the NCFLL proposed changes 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.

Section 6—Past Practice

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.

Article 3

Labor-Management Relations Committees and Midterm Negotiations

Section 3—Midterm Bargaining Procedures

A. National Bargaining

1. Notice of Change and Request to Bargain

(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 this 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.

(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 50

Technology

Technology is dramatically impacting work processes throughout business and Government nationwide. While innovations in technology are occurring so rapidly it is

impossible to anticipate them, the Department and the NCFLL embrace the opportunities created to improve work processes and employees skills. The parties recognize that to take advantage of the opportunities technology presents, new ways must be found to work together to ensure that employees understand new technologies and that they are provided the necessary equipment, training, and systems to carry out their duties and responsibilities. To that end, the parties are committed to exploring ways to share information about new technology, while respecting each other's statutory rights.

Section 1—Information Technology Committee

A. The NCFLL and the Department recognize that it is mutually beneficial for employees to understand management plans for introducing new technology and to have a forum for the NCFLL to discuss issues related to technology. To that end the parties establish a joint Information technology Committee where broad Department-wide or cross-Agency Technology issues can be discussed.

Section 3—Training on New Technology

B As the Department introduces new technology, appropriate training (e.g. on-line instruction, desk-aids, "help lines," mentors, and/or classroom sessions) will be made available to employees affected by the introduction of new procedures and technology. Additional training will be provided for employees who demonstrate difficulty. If individual employees cannot adjust to the changes caused by the introduction of new technology or if the introduction results of the abolishment of some positions and the establishment of others, the Department of Labor, consistent with applicable regulations, will make every effort to utilize the skills and abilities of those employees adversely affected by the changes.

Section 4— Pilot Program

A. An Agency and NCFLL may, by mutual agreement, establish a joint information technology (IT) Task Group comprised of three Union and Management Representatives. The IT Task group will provide a forum for management to share anticipated technology changes and the Union to share and discuss concerns and interests of bargaining unit employees related to these changes. Each IT Task Group will meet as mutually agreed to by the parties. While face-to-face meetings may be appropriate in some instances, it is expected that the Task Group will maximize use of the telephone and other electric communication to minimize travel costs.

C. By agreeing to participate in a pilot Task Group, the NCFLL agrees that it will address its impact and implementation concerns and will not request formal bargaining.

Unfair Labor Practice Allegation (5 USC 7116(a)(5))

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.

PRINCIPAL CONTENTIONS OF THE PARTIES

UNION'S CONTENTIONS

1. Threshold Issues--Timeliness:

The Union maintains that the 10 changes to WHISARD from July 9, 2002 to April 2, 2003, that are identified in the underlying grievance are not time-barred because, inter alia, the Agency had failed to provide certain relevant information until April 22, 2003. In other words the Union did not have sufficient knowledge of the alleged violations to file a grievance until it received the information on April 22, 2003. The Union also asserted, as reflected in the grievance, that the Agency violations since July 9, 2002, are "ongoing." In this connection the Union argues that it is impractical and serves little purpose to file a new grievance every time a disputed change to the system occurs. According to the Union, it acted in a prompt and timely fashion when it filed the instant grievance on April 29, 2003, only seven calendar days after it acquired sufficient knowledge of the violations. (Union ("UN") Brief at unnumbered p.3)

Moreover, the Union noted that it filed an institutional grievance under Article 15, Section 2B of the CBA and, contrary to the Agency, the Union maintains that under Article 15, such a grievance does not have a 30-day time limit. In support thereof, the Union cited an opinion written by Arbitrator David P. Twomey in FMCS Case Number 040322-53149-A indicating that there are no time limits for the filing of institutional grievances (as filed in the instant case.). (Id.)

In any event, the Union contends that the Agency failed to comply with Article 15, Section 7C of the CBA, which was necessary in order to challenge the grievability/arbitrability of the instant grievance. That provision requires management to furnish the Union a written statement of such threshold issues no less than 45 days before the hearing. Here, by e-mail on October 26, 2004, counsel for the Agency merely notified the Union that it reserves the option to raise such threshold issues at the hearing that opened on January 12, 2005. Arbitration had been invoked on October 15, 2004. The Union maintains that the language noted in the e-mail does not comprise a final written

statement within the meaning of Article 15 7C. As such, the Union urges that these threshold issues should be rejected. (UN. Brief, at unnumbered p. 2)

2. Notice Requirements of Mid-Term Changes to WHISARD Under the CBA and the Statute

The Union noted that the 1999 MOU concerning the implementation of WHISARD expired on June 30, 2002, because it did not roll over into the current CBA, effective July 1, 2002. According to the Union, in such circumstances, the notice requirements to WHISARD affecting the terms and conditions of employment of bargaining unit employees revert to Article 2, Section 5A and Article 3, Section 3A1 of the CBA and the Statute, 5 USC, 7116(a)(5). In this connection, the Union contends that there have been several updates and revisions to WHISARD since July 1, 2002 that have impacted on the working conditions of WHD bargaining unit employees but that the Agency failed to provide proper notice of said changes and also failed to engage in mid-term bargaining when requested by the NCFLL. (UN. Brief at unnumbered p. 5)

According to the Union, even those changes to WHISARD that have a de minimis impact require notice, as has been the parties' past practice and as provided under Article 2, Section 6 of the CBA. (UN. Brief at unnumbered p. 18-19) Here however, the Union maintains that the changes to WHISARD are more than a de minimis because they have a cumulative impact on WHD bargaining unit employees. (Id at 19, citations omitted)

THE AGENCY'S CONTENTIONS

1. Threshold Issues--Timeliness

The Agency contends that both the filing of the underlying grievance and subsequent invocation of arbitration were both untimely. As for the filing of a grievance, whether employee or institutional, under Article 15 of the CBA, the time limits begin from the time the employee or the Union became aware or should have known of the alleged violation. Under Article 15 Section 7(A) Step 1 (1), "A grievance must be presented in writing on the negotiated printed form within 30 calendar of when the bargaining unit **employee or NCFLL** has learned or may have reasonably expected to have learned of its

cause.” (Agency Brief at 7, emphasis as in Brief) According to the Agency, the language is clear in Article 15 that the 30-day timeframe applies to both employee and, as here, institutional grievances “since it expressly identifies both the employee and the NCFLL.” (Id.)

Further, in contending that there are time limits for the filing of institutional grievance and not open-ended as contended by the Union, the Agency also noted that Section 8B specifically provides that “Failure on the part of the NCFLL to prosecute a grievance within the stated time periods **at any Step of this procedure** will have the effect of nullifying the grievance unless the parties agree otherwise.” (Id., emphasis added) Here the Union alleged that they first learned of the facts giving rise to the grievance on April 22, 2003. However, the Agency maintains that the record established that the Union knew about changes to WHISARD as early as May 22, 2002, as reflected in an e-mail from Union Representative Jeff Darby to Scot Wilkerson, about the possible impact of a color coding change on the performance ratings of bargaining unit employees. (Agency Brief at 8, citing UN. EX. 6 at 1)

According to the Agency, based on the contract language, it is clear that the Union knew or should have known that the timely 30-day filing of the instant grievance, at least arguably, would have been as early as May 22, 2002, but in no event later than August 19, 2002. The latter date pertains to an e-mail from John Lehman to Darby also about updates to WHISARD. (Agency Brief at 8, citing UN. EX 1, page1) In such circumstances, the Agency contends that as the Union sat on its rights for a period of at least eight months before it finally filed the instant institutional grievance, the grievance should be dismissed on procedural grounds.

Assuming arguendo, it is determined that Article 15 does not contain the Agency limits for the filing of institutional grievances, the Agency still maintains that grievances must be filed with reasonable promptness. According to the Agency, the fact that the contract expresses specific time limits for taking grievances to the various steps of the process is reflective of the parties’ intent that a grievance be filed with reasonable promptness. The Agency argues that even if it is determined that the time limits are open-

ended with regard to filing a grievance, “the arbitrator may make the grievance adjustment retroactive only to the date on which the grievance was filed or some other date short of retroactivity.” (Agency Brief at 9)

With regard to the invocation of arbitration, the Agency maintains that the Union failed to comply with Article 15, Section 2.B of the CBA. The Union filed the instant grievance on April 22, 2003. When no reply was forthcoming, the Union requested a response within 20 workdays (by May 27, 2003) as specified in that section of the contract. The Union could have invoked arbitration within 20 workdays from the day management’s decision was due or by June 24, 2003 but failed to do so. Arbitration was not invoked until October 15, 2003. The Union provided no extenuating circumstances for the unreasonable delay in taking this action. As with the filing of institutional grievances, the Agency maintains that the grievance procedure is not open ended when it comes to invoking arbitration. Accordingly, the Agency urges that the grievances be dismissed for failure to invoke arbitration, in accordance with article 15, Section 2.B of the CBA. (Agency Brief at 10)

2.The Merits—The Agency did not Violate the CBA or the Statute over Updates to WHISARD

The Agency relying on rulings by the Federal Labor Relations Authority (“Authority”), noted that the substance of a decision by an agency to exercise a reserved management right and change unit employees’ conditions of employment, is not itself subject to negotiation. The Agency acknowledges that it has an obligation to bargain over the procedures to implement that decision, if the resulting change has more than a de minimis effect on the conditions of employment. (Agency Brief at 11) In applying the de minimis doctrine, the Authority, inter alia, looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees’ conditions of employment. (*Id.*, citation omitted) In the instant case the parties discussed such matters when the MOU on WHISARD was negotiated and executed in June 1999.

The 1999 MOU provided, inter alia, that management “take into consideration changes of productivity and downtime due to WHISARD technological limitations and

system changes (updates) . . . and that performance standards and job descriptions will be updated to reflect use of WHISARD as an integral part of the job.” The MOU did not call for bargaining on future updates. The MOU did not rollover into the new CBA when it became effective on July 1, 2002. Instead a new Article 50 governed matters related to technology that included the WHISARD system. (Agency Brief at 12) According to the Agency, bargaining on the implementation of the WHISARD system was completed when the MOU was executed back on July 2, 1999. The routine updates that followed represented a reserved management right to assign work. Data entry to the WHISARD database is an assignment of work. (Agency Brief at 13-14, citation omitted)

The Agency contends that the Union’s continuing violation theory is not tenable. According to the Agency, the Union’s contention that the revisions by themselves may not have an impact but that the cumulative effect of those revisions do, is illogical. In this regard, the Agency challenges the Union’s logic “where the significant point of impact would be reached after a number of changes had been implemented.” This would lead to the anomalous condition where earlier changes are de minimis only to later conclude that there is a violation. (Agency Brief at 13) Although the Union also alleges that the increased data requirements impacts employees’ performance ratings, this assertion was not supported by specific evidence. (Agency Brief at 15) In any event, the employee had the option to pursue the matter in an individual performance appraisal grievance. (Id. at 16)

In disputing that the revisions requiring increased data adversely impacted on bargaining unit employees’ working conditions, the Agency also noted that the changes in question did not cause employees to work overtime or alter their forty hour week in any way. The e-mail complaints from bargaining unit employees about updates and revisions are covered by Article 50. The Article, inter alia, called for a point of contact phone number to address problems.

In the total circumstances of this case, the Agency denies that it violated any provisions of the CBA or Statute, as alleged. Accordingly, it maintains that the grievance should be dismissed on the merits.

DISCUSSION AND CONCLUSIONS

1. Timeliness—Whether the Filing of the Institutional Grievance and Invocation of Arbitration, Timely?

The Agency has raised the threshold issue of timeliness with regard to both the filing of the instant grievance and the subsequent invocation of arbitration. According to the Union, the Agency's position on timeliness failed to comport with the required language set forth in Article 15, Section 7C of the CBA for raising of grievability/arbitrability matters and should be rejected. Moreover, the Union contends that in the circumstances of this case both the filing of the grievance and invocation of arbitration were timely.

The filing of employee and Union grievances are governed in large part by Article 15, Section 2, A and B respectively. In essence, under Article 15 Section 7 entitled "Procedures, Employee Grievance," at Section A Step1 (1), a grievance, whether from the bargaining unit employee or NCFLL, must be presented in writing within 30 calendar days of when the bargaining unit employee or NCFLL has learned or may reasonably be expected to have learned of its cause. According to the Agency, the language is clear that "the 30 day timeframe applies to both employee and institutional grievances since it expressly identifies both employee and the NCFLL." (Agency Brief at 7))

On the other hand, the Union represented that it had not become aware of the 10 updates or revisions to WHISARD identified in the underlying grievance until the Agency gave NCFLL Representative Jeffrey Darby certain information on April 22, 2003. Darby filed the instant grievance on April 29, 2003. There, Darby noted that the Union learned about the disputed revisions to WHISARD "during the quarterly LMR meetings on April 22, 2003." (JT. EX. 3, under Nature and Facts of Grievance) While the Union maintains that the grievance was filed within 30 days of when it acquired sufficient knowledge of the alleged violations, it also contends that under Article 15 Section 2B, institutional grievances, as in the instant case, does not have time limits for filing such grievances. In this connection, the Union noted that Arbitrator David Twomey, in FMCS Case Number 040322-53149-A, which issued on September 16,

2004, had come to the same conclusion that Article 15 does not provide for time limits for institutional grievances.

With regard to the timeliness of the Union's invocation of arbitration, the Agency contends that in accordance with Article 15 Section 2B, the Union could have exercised its right to invoke arbitration by June 24, 2003 but delayed doing so until October 15, 2003. The Agency maintains that the time to invoke arbitration is not open-ended and delaying such action for over 3 and ½ months does not rise to the level of "reasonable promptness," a standard used by many arbitrators where the contract is silent on specific time limits⁷. (Agency Brief at 9-10) The Agency first raised the specter of timeliness as threshold issues by e-mail on October 26, 2004 stating as follows:

This concerns the arbitration about WHISARD which is scheduled [for hearing] for Wednesday and Thursday, January 12 and 13, 2005.

Management reserves the option to raise the following threshold issues at arbitration:

1. Whether the institutional grievance was timely filed.
2. Whether the invocation of arbitration was timely. (Agency. EX. 3)

As noted previously, the Union contends that the Agency failed to raise the grievability/arbitrability issue in conformity with Article 15 Section 7C. I am persuaded that the Union's position has merit. Article 15 section 7C provides as follows:

Management agrees to furnish the NCFLL a final written statement of grievability/arbitrability of a grievance at the earliest Step possible but no later than 45 calendar days before the hearing. (Underscoring added)

In the case at hand, the Agency by merely reserving an "option" of raising threshold matters of timeliness falls short of providing "a final written statement" as required under Article 15 Section 7C. Rather, such language, as used by the Agency, appears to manifest more of a conditional position leaving the other party, here the Union, in limbo, as to whether it will have to address threshold procedural issues at the hearing. Thus, I am persuaded that in order for the plain meaning of the phrase "final written statement" to be

⁷ The Agency cited Elkouri & Elkouri: How Arbitration Works, Fifth Edition, at 275-76.

satisfied, the Agency was required to advise the Union in categorical terms that timeliness was in issue (no later than 45 days before the hearing). This was not done. Accordingly, I reject the Agency's position on grievability/arbitrability of the instant grievance and will discuss the case on its merits below⁸.

2. The Merits—Whether the Agency was Required to Provide Notice to the Union of Updates to WHISARD and Bargain upon Request?

The NCFLL alleged that since “July 9 2002 and ongoing,” the Agency made updates or revisions to its data entry system known as WHISARD, without notice to the Union and denying it an opportunity to bargain mid-term in connection therewith, thereby violating Article 2, Section 5A, Article 3A1 (c) and (d), Article 15, Section 2B of the CBA and 5 USC 7116(a)(5). While the underlying grievance specifically identifies 10 such updates, the Union contends that the Agency actually made more changes but argues that it would be impractical to file a grievance every time a change to WHISARD occurs. The Union also acknowledged that not every change to WHISARD, when considered separately, impacts on bargaining unit employees' working conditions but maintains that taken in totality and cumulatively they do.

The Agency maintains that it fulfilled any bargaining obligation it had with the NCFLL over WHISARD when the parties negotiated and executed the 1999 MOU. That MOU expired when it did not roll over into the new and current CBA, effective by its terms July 1, 2002 through June 30, 2006. According to the Agency, it has complied with a new Article 50 in the July 2002 CBA that deals broadly with the subject of technology, including WHISARD. Moreover, the Agency contends that the routine edits or updates to the system represented a reserved management right to assign work within the meaning of the Statute. In this case, as the disputed changes to WHISARD are de minimis in nature, they are not subject to bargaining. In this latter regard, the Agency noted an

⁸ While Arbitrator Twomey's ruling in FMCS Case No. 040322-53149-A that Article 15 does not provide time limits for filing an institutional grievance is not dispositive of the same issue in this case, I agree with his conclusion. Similarly, I agree with Arbitrator Twomey's view that under Article 15, such a grievance must be filed with reasonable promptness. (*Id.* at 11-12) However, given my determination that the Agency failed to satisfy Article 15, Section 7 C, I find it unnecessary to determine whether the filing of the grievance and invocation of arbitration were otherwise made timely.

absence of any record evidence tending to show that any of the changes in issue caused employees to work overtime or altered their forty-hour workweek.

According to the Union, in July 2002, when the MOU did not roll over into the new Contract, the Agency's bargaining responsibilities reverted to the mid-term bargaining provisions in the new CBA and past practice. This, the NCFLL maintains require the Agency to provide timely notice to the Union of changes to WHISARD in order for the Union to determine the impact on working conditions of bargaining unit employees and whether to request mid-term bargaining.

The record disclosed that the WHISARD data entry system began to be developed in 1997 and 1998. At first, WHD investigators made their entries into the new system on a voluntary basis. The decision to make the use of the system mandatory for all bargaining unit employees occurred in 1999. It is undisputed that the Agency fulfilled its bargaining obligation that then existed that led to the June 30, 1999 MOU. It was then understood and anticipated that updates or revisions to WHISARD would occur. Partnership principles under the Executive Order that then existed as well as joint management-labor committees revealed that Union officials were informed and consulted about updates or changes to the system. However, the 1999 MOU expired when it did not roll over into the new JULY 2002 CBA. It is undisputed that there was no impact and implementation ("I&F") bargaining since July 1, 2002, the effective date of the new Contract.

The Authority has long held that when an agency changes unit employees' conditions of employment by exercising a reserved management right, the substance of the decision is not itself subject to negotiation. See Dep't of HHS, SSA FLRA, 24 FLRA 403, 407-08 (1986) The Agency maintains that the entry to the WHISARD database is an assignment of work and, as such, a reserved management right. In this connection, the Agency argues that the right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to who or what positions will be assigned. However, the Agency also maintains that that it has no obligation to engage in I & I bargaining - - that it fulfilled any such bargaining when the 1999 MOU was signed. (Agency Brief at 13) According to the Agency, the subsequent routine

updates represented a reserved management right to assign work, as defined in the statute, and because they are de minimis in nature, they are not subject to bargaining. (Id.) For reasons noted below, I am persuaded that the cumulative impact of the changes on bargaining unit employees were more than de minimis and obligated the Agency to impact and implementation bargaining, upon the Union's request for the Agency to do so.

First, I am not persuaded, as contended by the Agency, that notice or bargaining requirements over all changes to WHISARD had been fulfilled by executing the 1999 MOU and, in any event, are now covered by the new Article 50⁹. Thus, I do not discern any compelling language in said Article establishing that NCFLL intended to waive mid-term I & I bargaining requirements set forth in Article 2, Section 5A and Article 3, Section 3A1 (c) and (d) of the CBA. In this connection, it is noted that the record is far from clear to what extent the parties intended to implement Article 50. For example there is no showing that a joint Information Technology Committee had been established so that the parties could discuss broad Department-wide or cross-Agency Technology issues.

The Authority has instructed that whether or not the decision to make a change in employees' working condition involves a reserved management right, an agency still has an obligation to bargain over the procedures to implement that decision for unit employees affected, if the resulting change has more than a de minimis effect on conditions of employment. See SSA and Administrative Law Judges International Federation of Professional and Technical Engineers, AFL-CIO, 59 FLRA 646, 654 (2004). In the instant case, the record supports the conclusion that the totality of the ongoing updates to WHISARD since July 2002 have adversely impacted on the working conditions of bargaining unit employees.

The record revealed that that while employees have not been required to work overtime as a result of the updates, as maintained by the Agency, the record also

⁹ The record disclosed that the Agency, at least since September 11, 2002, in response to the Union's requests for information, made it known that it no longer had any duty to engage in mid-term bargaining over matters involving WHISARD and that it would not bargain over any Union request to do so. (UN. EX's 7 and 8)

disclosed that that the changes to WHISARD accompanied by various bugs and fatal errors, have required some employees to spend far more time on each case than they had under the former tracking systems. For example, Investigator De Wald testified, without contradiction, that it took him 6 to 8 hours to make entries in a case involving back pay for 150 to 300 employees in a nursing home; whereas, the same work under the previous system took from 2 to 3 hours. Similarly, Investigator O'Brien testified that it takes 6 to 8 hours to perform work under the current tracking system that previously took him approximately 2 hours to accomplish. Investigator Nunez testified, without contradiction, that WHISARD has tripled the amount of time to complete a case than the former tracking systems.

It is significant that at least in some instances, supervisors have considered the additional time taken to complete cases as a result of using WHISARD, as a negative factor in evaluating employees performance (testimony of O'Brien, Nunez and Newton). See U.S. Department of Justice Immigration and Naturalization Service and National Border Patrol Council, AFGE, Local 1613, AFL-CIO 35 FLRA 1639, 1048 (1990) (15 percent of the time was spent on new duties which could have affected promotions and rating potential) In view of the foregoing and the total circumstances of this case, I am persuaded that the updates cumulatively had more than a de minimis adverse impact on unit employees' conditions of employment.

THE AWARD

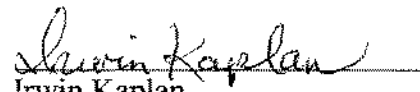
The Grievance is principally sustained and denied to the extent noted below:

Having found that not every Agency update to WHISARD has more than a de minimis impact on bargaining unit employees' working conditions, the Agency is not directed to provide notice to the Union in every such instances of affording it the opportunity to bargain over the impact and implementation (I and I) of such change. However, the Agency faces a risk that when it makes unilateral updates without due notice to the Union, and fails, upon request, to afford it the opportunity for I and I bargaining over updates to WHISARD that singly or cumulatively do impact on

bargaining unit employees' working conditions (as in the instant case), that it (the Agency), is in violation of Article 2, Section 5A and Article 3, Section 3A1(c) and (d) of the collective-bargaining agreement, as well as Section 7116 (a) (1) and (5) of the Federal Service Labor-Management Relations Statute. Accordingly, in the instant case, the Agency is directed to provide sufficient notice the NCFLL and, upon request, to bargain with the NCFLL over the impact and implementation of updates to WHISARD that adversely impact on the working conditions of bargaining unit employees.

The Arbitrator herein retains jurisdiction for a period of ninety (90) days for the purpose of resolving any differences between the parties having to do with the directed remedy. The ninety (90) day period may be extended, upon written request of either party for good cause shown, for purposes of effectuating the Award.

Dated: July 23, 2005


Irwin Kaplan
Impartial Arbitrator