UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
ARBITRATION BEFORE
IRWIN KAPLAN

National Council of Field Labor Locals, American Federation of Government Employees, Grievant	
V.	FMCS Case No.040622-06400-7 (ARB-ESA-00-04-011(NCFLL)
U.S. Department of Labor Agency	

AGENCY'S BRIEF

INTRODUCTION

This case involves an institutional grievance filed by the National Council of Field Labor Locals , American Federation of Government Employees (hereinafter "the Union or NCFLL) on behalf of NCFLL (Grievant), against the Employment Standards Administration (ESA), Wage Hour Division (WHD), U.S. Department of Labor (DOL), (hereinafter "the agency"), alleging that the agency committed an unfair labor practice under 5 USC 7116(a)(5) by not notifying the NCFLL Executive Council of changes to Wage-Hour Investigative Support and Reporting Database (WHISARD) on July 9, 2002; August 20, 2002; September 9, 2002; September 23, 2002; October 30, 2002; December 5, 2002; December 26, 2002; January 28, 2003; February 26, 2003; and April 2, 2003.

The Union maintained that the agency violated Article 2, Section 5A, Article 3, Section 3, A1(c) and (d) and Article 15 Section 2B of the Collective Bargaining Agreement (CBA) dated

July 1, 2002 (J. Exhibit 1) by not notifying the NCFLL Executive Council of changes to WHISARD on the above-referenced dates. Management asserts that the agency has neither violated Articles 2, 3 or 15 of the CBA nor the statute. Management further asserts that the instant institutional grievance should be dismissed procedurally for not only being untimely filed but also untimely invoked to arbitration.

STATEMENT OF FACT

On or about December, 1998, a revised WHISARD Training Manual was developed for Wage Hour Investigators (J. Exhibit 6)

On or about December, 1998, a WHISARD Resource Book was released for Wage Hour Investigators (J. Exhibit 7)

On or about December, 2000 another Introduction to WHISARD Training Manual for Wage Hour Investigators was developed (J. Exhibit 8)

On October 8, 2004, a Revision No. 650 to the Wage Hour Field Operation Handbook was distributed (J. Exhibit 10) which replaced the previous Chapter 54 of the Field Operations Handbook issued on June 24, 1996 (J. Exhibit 9)

On June 30, 1999, a Memorandum of Understanding (MOU) was entered into between the Union and the Department concerning WHISARD (J. Exhibit 2).

On July 1, 2002, a new collective bargaining agreement between the Department and the NCFLL became effective (J. Exhibit 1).

System changes (updates) were made to the WHISARD system on the following dates: (J. Exhibit 3 Attachment)

On July 9, 2002, update 3.3.1.0 to fix bugs in Release 3.30

On August 20, 2002, update 3.4.0 on Certificates

On September 9, 2002 update 3.4.1.0 on housing fix

On September 23, 2002 update 3.4.2.0 move to dbcengry

On October 30, 2002 update 3.4.3.0 on staff languages

On December 5, 2002 update 3.4.4.0 on WHISARD Offline

On December 26, 2002 update 3.4.5.0 on XP compatibility

On January 28, 2003 update 3.5.0.0 on GS Withholding

On February 26, 2003 update 3.5.1.0 on Bulk edit

On April 2, 2003 update 3.5.2.0 on MSPA Pre-occupancy Housing inspection

On May 22, 2002, Jeff Darby sent an e-mail to union representative Scott Wilkinson and other union representatives raising the possibility of a WHISARD change impacting bargaining unit members (U. Exhibit 6 at 1)

On August 19, 2002, the union became aware of WHISARD 3.40 updates by e-mail from John Lehman to union representative Jeff Darby (U. Exhibit 1, page 1)

On April 29, 2003 the union filed an institutional grievance on the WHISARD data base system with WH Management official Nancy Flynn requesting a reply by May 8 (J. Exhibit 3, page 3).

On May 12, 2003, the union notified the Office of Employee and Labor Management Relations (OELMR) that the agency did not reply to the attached institutional grievance (J. Exhibit 3, page 1)

On October 15, 2003, the Union invoked the grievance to Arbitration (J. Exhibit 4).

On October 26, 2004 management advised the union by e-mail of two threshold issues

which it intended to raise at the hearing (A. Exhibit 3)

On October 26, 2004, management proposed to the union by e-mail to stipulate to five issues (A. Exhibit 4).

On January 12-13, 2005, a hearing was held on the instant grievance. It was continued on April 5, 2005.

ISSUES

Management Issues:

A. Whether the institutional grievance was timely filed with respect to each of the ten discrete events cited in the grievance, i.e., July 9, 2002; August 20, 2002; September 9, 2002; September 23, 2002; October 30, 2002; December 5, 2002; December 26, 2002; January 28, 2003; February 26, 2003; and April 2, 2003.

B. Whether the arbitration was timely invoked pursuant to Article 15, Section 2.B which states, in relevant part, the following: "If no timely reply is issued, the NCFLL may, within 20 workdays from the date the decision was due, invoke arbitration."

C. Whether management committed an unfair labor practice [5 USC 7116(a)(5)] by not notifying the NCFLL Executive Council of changes to WHISARD on July 9, 2002; August 20, 2002; September 9, 2002; September 23, 2002; October 30, 2002; December 5, 2002; December 26, 2002; January 28, 2003; February 26, 2003; and April 2, 2003.

Union Issue:

Whether the agency violated Article 2, Section 5A, Article 3, Section 3A1(c) and (d)

and Article 15 Section 2B of the Collective Bargaining Agreement (CBA) dated July 1, 2002 (J. Exhibit 1) from July 9, 2002 and ongoing by not notifying the NCFLL Executive Council of changes to WHISARD on July 9, 2002; August 20, 2002; September 9, 2002; September 23, 2002; October 30, 2002; December 5, 2002; December 26, 2002; January 28, 2003; February 26, 2003; and April 2, 2003 (J. Exhibit 3, page 2).

ARGUMENT

Threshold Issue I. Article 15 - Contract Interpretation – Was the Institutional Grievance timely filed

A. The Union failed to meet its burden of proof.

In accordance with Article 15, Section 7.C, management notified the Union on October 26, 2004 of the non-grievability of the instant grievance. Specifically, management contends that nine of the ten discrete events fall outside the 30 day period for filing the grievance and therefore the grievance should be dismissed as being untimely filed, for the time period specified by the grievance, namely, July 9, 2002 and on-going (A. Exhibit 4). It is the Union's position that the CBA does not provide for time limits for filing an institutional grievance; therefore as a matter of contract interpretation of Article 15 of the CBA, the grievance as presented, is timely filed.

The FLRA has held that in interpreting an agreement, the "focus" must remain "on [the] interpretation of the express terms of [the] collective bargaining agreement." *IRS,* 47 FLRA at 1110 (quoting *United States Dep't of HHS v. FLRA*, 976 F.2d 229, 235 (4th Cir. 1992)). Nevertheless, the meaning of the agreement must "[u]ltimately . . . depend[] on the intent of the contracting parties." Local Union 1395, IBEW [v. National Labor Relations Board], 797 F.2d at

1034 (quoting Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974)). The parties' intent must be given controlling weight, "whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence." Id. at 1036.

Management rejects the Union's argument that there is no time limit for filing institutional grievances. Article 15, Section 6 of CBA contains the negotiated NCFLL grievance form which is used for filing all NCFLL grievances. This form requires the inclusion of a date of the alleged violation as well as a signature and filing date (J. Exhibit 1, at 46).

The language of Article 15 Section 2.B of the CBA does, however, provide how the negotiated grievance process timeframes will differ when an institutional rather than an employee grievance is filed. In relevant part it states that "…. *In the case of a union grievance, the parties will waive Steps 1 and 2 of this negotiated procedures process; however, the parties will make an informal effort to resolve the grievance at the level of dispute. If within seven workdays the matter cannot be resolved it will be transmitted to the Department's Labor-Management Center (LMRC) in Washington, D.C. The LMRC will issue a written decision within 10 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*" (Id., at 41).

The institutional grievance allows for an expedited process for prompt resolution of the grievance, whereas an employee grievance must follow the applicable rules and regulations related to employee due process rights, e.g., timeframes related to employment based adverse actions. This difference in no way changes when a grievance, whether employee or institutional,

is considered timely filed.

Management contends that the time limits for filing a grievance, whether employee or institutional under Article 15 of the CBA, begins from the time the employee or the Union reasonable knew or became aware of the alleged violation. Article 15 Section 7(A) Step I (1) of the CBA states that *"A grievance must be presented in writing on the negotiated grievance form within 30 calendar days of when the bargaining unit* ***employee or NCFLL (emphasis added)*** *has learned or may have reasonably expected to have learned of its cause"* (Id., at 47). The plain language of the section of the CBA is clear -- the 30 day timeframe applies to both employee and institutional grievances since it expressly identifies both the employee and the NCFLL.

Management maintains that Article 15 Section 2.B cannot be read in isolation but must be read within the context of the negotiated grievance procedure prescribed in Article 15 Section 6 of the CBA. The language contained in Article 15 Section 2.B specifically refers back to that negotiated grievance process described in Article 15 Section 6. Further, Article 15 Section 8B specifically provides that *"Failure on the part of the NCFLL to prosecute a grievance filed on its own behalf within the stated time periods* ***at any Step of this procedure (emphasis added)*** *will have the effect of nullifying the grievance unless the parties mutually agree otherwise"* (Id., at 49).

The intent of the parties is not vague or ambiguous. It is clear that time limits for filing a grievance are not considered open-ended by the parties, and that there would be an initial filing date, with specific timeframe differences within the negotiated grievance process, based on the type of grievance filed. In the case of an institutional grievance, in lieu of Step 1 and Step 2 of the negotiated grievance process which are waived, the parties are provided 7 days for informal

resolution prior to it being forwarded to the Office of Employee and Labor Management Relations (OELMR) (formerly LMRC) for a decision (Id. at 41).

In this case, the Union alleged that they first learned of the updates to WHISARD on April 22, 2003 at a Labor Management Relations (LMR) meeting. (J. Exhibit 3 at 2). After the requisite 7 days had passed for informal resolution provided under Article 15 Section 2.B, the Union filed a grievance with Nancy Flynn, an ESA management official on April 29, 2003. The Union requested a response from the agency by May 8, 2003. Once that period had passed, the union proceeded to the next step of the process and forwarded it to LMRC on May 12, 2003 requesting a response by May 27, 2003, the 10 day timeframe specified under Article 15, Section 2.B of the CBA. The Union has characterized this grievance as a continuing violation starting from July 9, 2002 and ongoing, by alleging that they first learned of WHISARD changes on April 22, 2003. The record clearly reflects that this was not the case. As early as May 22, 2002, in an e-mail from Jeff Darby to Scott Wilkinson, which was copied to other union representatives, there was discussion among NCFLL union representatives about the possible impact of a WHISARD change—color coding-- on the performance ratings of bargaining unit employees (U. Exhibit 6 at 1). The Union also put forth evidence that it was actually put on notice of WHISARD 3.40 updates on August 19, 2002, in an e-mail from John Lehman to union representative Jeff Darby (U. Exhibit 1, page 1).

Based on the contract language, the timely filing of the instant grievance would be 30 days from when the union knew or should have known of an alleged contract violation, in this case arguably as early as May 22, 2002, but certainly by August 19, 2002. The union sat on its rights for a period of at least eight months prior to filing this institutional grievance on April 29,

2003, and as a result, management asserts that the grievance be dismissed as a continuing violation on procedural grounds. There is only one discrete event contained in the instant grievance that could be considered timely under Article 15 Section 2.B. That specific event is the WHISARD 3.5.2.0 update of April 2, 2003 related to MSBA Pre-occupancy Housing Inspection (J. Exhibit 3 at 3). Further, to the extent that any of these changes impacted a WHISARD user in the bargaining unit, it is highly improbably that the user would not have brought this to the attention of the NCFLL through an office steward.

Assuming arguendo, that the arbitrator would find the contract language of Article 15 does not provide time limits for filing an institutional grievance, the agency cites that in *Elkouri*[1], many arbitrators have ruled that where the contract states no time limit for filing grievances but does state specific time limits for taking grievances to the various steps of the procedure once they have been filed, the evident intent of the contract is that grievances must be filed with reasonable promptness. Article 15 Section 7 of the CBA provides specific time frames for each step of the grievance process. (J. Exhibit 1, at 46-48). Further, the agency points to *Elkouri* in support of its position. If the absence of strict time limits results in the acceptance of grievances notwithstanding delayed filing, the arbitrator may make the grievance adjustment retroactive only to the date on which the grievance was filed or to some other date short of full retroactivity.

Threshold Issue 2. Article 15 - Contract Interpretation – Was the Institutional Grievance timely invoked

A. The Union failed to meet its burden of proof.

Article 15 Section 2.B of the CBA provides that a formal grievance can be filed 7 days

1 Elkouri and Elkouri, "How Arbitration Works", Bureau of National Affairs, Washington, D. C., Fifth Edition. 1999, page 275-276ff

after the initiation of informal resolution efforts has failed (Id., at 41). The Union initially filed this grievance on April 29, 2003 with Nancy Flynn, an ESA management official, requesting a response by May 8, 2003 (J. Exhibit 3 at 11). When no reply was received from the agency, the union forwarded the grievance with the OELMR on May 12, 2003 requesting a response by May 27, 2003 (Id., at 1) in accordance with Article 15 Section 2.B of the CBA. As Management did not provide a response within 20 workdays as specified by that section of the contract, Article 15 Section 2.B of the CBA provides that "*...If no timely reply is issued, the NCFLL, may, within 20 workdays from the date the decision was due, invoke arbitration*" (J. Exhibit 1 at 41). The union could have exercised its right to invoke arbitration by June 24, 2003 but failed to do so. In this case, invocation was not invoked until October 15, 2003. Management contends that the time to invoke arbitration is not open-ended. There is an expectation that the time limits specified in the negotiated grievance process would be adhered to. Management contends that the invocation of arbitration should have occurred in June, yet it did not occur until October, and the number of months that passed before arbitration was invoked does not rise to the level of reasonable promptness as suggested in *Elkouri*. Further, the Union presented no evidence of extenuating circumstances to have caused the delay. Even if the specified timeframe is ignored for purposes of argument, since the union sat on its rights for an extended period of time, the grievance should be dismissed on procedural grounds as untimely for failure to invoke arbitration, in accordance with Article 15, Section 2.B of the CBA.

Merits Issue. Management did not commit an unfair labor practice as defined by 5 USC 7116(a) (5). [1]

In *SSA, Office of Hearings and Appeals, Charleston, South Carolina and Association of Administrative Law Judges International Federal of Professional and Technical Engineers, AFL-CIO,* 59 FLRA 646, 650 (2004), the Authority restated its position that when an agency changes unit employees' condition of employment by exercising a reserved management right, the substance of the decision is not itself subject to negotiation. Nonetheless, the agency has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by the decision, if the resulting change has more than a *de minimus* effect on the conditions of employment. See *Dep't of HHS, SSA,* 24 FLRA 403, 407-08 (1986).

In *PBGC and NAGE, Local R3-77*, 59 FLRA 48, 51 (2003), the Authority stated that in applying the *de minimis* doctrine, the Authority 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 *United States Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000) (*IRS*). In determining whether the reasonably foreseeable effects of a change are greater than *de minimis*, the Authority addresses what a respondent knew, or should have known, at the time of the change. *See VA Med. Ctr., Phoenix, Ariz.*, 47 FLRA 419, 423 (1993) (citation omitted).

Evidence put forward by the parties established that the WHISARD database had been in existence as early as 1998 (J. Exhibit 8). The record also reflects that a MOU on WHISARD was signed between the parties on June, 1999, which represented the culmination of bargaining on the implementation of the system between the parties (J. Exhibit 2). The parties agreed that

its use would be mandatory for all Wage Hour Investigators on September 15, 1999 (Id., Part 4). Relevant provisions of the MOU called for the Union and management to collaborate on resolving telecommunication software, equipment and system performance problems over a sixty day period following the signing of the MOU. (Id., Part 2). It also provided that management take into consideration changes of productivity and downtime due to WHISARDS 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". (Id., Part 3). The MOU does not call for bargaining on future updates.

This MOU was not rolled over into the new CBA that was signed on July 1, 2002. (J. Exhibit 1, Article 56, at 126). Rather, a new Article 50 on Technology was added to the CBA that would subsequently govern matters related to technology as of that date (Id., at 119-120).

Mr. Jerry Lelchook, Deputy Director of the Office of Human Resources, and previously Director, Office of Employment and Labor Management Relations, testified as to what the new Article 50 does to address technology. Mr. Lelchook testified that Article 50, Section 2, provides that *"Where available, the Department will provide online access to electronic documentation, such as manuals and procedures for the equipment, hardware, and software that employees are required to utilize. A point of contact phone number and e-mail address will be provided to employees by their respective Agencies to answer questions and trouble shoot computer problems* (Id., at 119). Mr. Lelchook also testified that the Bargaining History related to Article 50 states that *"the parties discussed the Union's interest in minimizing employees' requirement to enter data (information) into agency systems more than one time, e.g. case file number, address, etc. Agencies are encouraged to utilize linking capabilities to prevent redundancy"* (A.

Exhibit 1, Article 50, paragraph 5).

In support of the its continuing violation theory, the Union contends that it is the cumulative effect of these ten discrete effects which had a more than a *de minimus* impact on bargaining unit employees. As a result, Management was required to bargain on that cumulative impact. The fault in that logic is that the point in time where the significant point of impact would be reached would be after a number of changes had been implemented. It would then be illogical to be found to have been in violation for those earlier changes, e.g., changes 1, 2, and 3, etc.

The parties anticipated some technical limitations and system changes with the WHISARD and that is reflected in the parties signed on September 11, 1999. Article 50 on Technology in the CBA signed by the parties on July 1, 2002, addresses this reality. The technology article mutes the need to make a cumulative assessment of impact because it addresses impact issues prospectively rather than after the fact as the NCFLL seeks to do.

It is Management's position that bargaining on the impact on the implementation of the WHISARD system on bargaining unit employees was completed when the MOU was signed on July 2, 1999. The subsequent routine edits related to data entry or program updates to the system represented a reserved management right to assign work as defined under the statute. Because they are *de minimus* in nature, they are not subject to bargaining.

In *United States Food and Drug Administration Detroit District and National Treasury Employees Union Chapter 230,*, 59 FLRA 679, 681 (2004), the FLRA stated that according to Authority precedent 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. *United States Dep't. of Health and Human Servs., Health Care Financing Admin.*, 57 FLRA 462, 463 (2001) (HHS) (citing AFGE, Local 3529, 56 FLRA 1049, 1050 (2001).

Data entry to the WHISARD database is an assignment of work. It is a reserved management right to determine how much time will be spent on particular aspects of the job, be it data entry, training, travel, or enforcement activities to support the mission of the agency. As such, the amount of time that management requires an employee to perform specific aspects of the job is not subject to negotiation.

Data bases are routinely updated to improve or fix operational problems that arise and the MOU signed by the parties recognized that reality. The MOU provided that "...management take into consideration changes of productivity and downtime due to WHISARD technological limitations and system changes (updates) ..." (J. Exhibit 2, Part 2).

Mr. Richard Newton, the Project Manager for WHISARD testified about the WHIZARD updates that have occurred since the implementation of the WHIZARD system. He testified that these changes were designed to improve operational effectiveness or to capture required program performance data.

This system is used to capture vital statistics which measures the agency's effectiveness in enforcing the Wage and Hour laws authorized by Congress. The WHISARD database has remained essentially unchanged since the MOU was entered into on July 2, 1999. However, updates were made to the system to correct problems that were identified, and capture two additional program data elements, in this case, the percent of workers employed in violations or to capture the number and percent of low-wage workers that are helped each year to highlight the agency achievements (U. Exhibit I, page 6).

Since the implementation of WHISARD database, the agency has been able to demonstrate the effectiveness of its enforcement activities in the increased collection of back wages and increases in average violations per case from 1998 to 2003 (A. Exhibit 6a). Accurate data entry has contributed significantly to accounting for the effectiveness of the Wage and Hour enforcement activities. The record reflects that when last validated, 22 of the 27 data elements in WHISARD were at least 90 percent accurate (U. Exhibit 1, page 6)

The Union contends that changes to WHISARD are bargainable because they represent more than *de minimus* changes to conditions of employment which impact bargaining unit employees. The evidence put forth by the Union in for the form of e-mails from several bargaining unit employees, attempts to show that the updates have more than a *de minimus* impact employees by increasing the amount of time that an employee must spend performing data entry requirements (U. Exhibits 2 and 3). Although the union also alleges that the increased data entry requirements also impacts employees' performance ratings, no specific evidence was presented to support this claim (U. Exhibits 6). Further, the appropriate avenue to challenge such an instance would be through an individual employee grievance,

Many of the e-mails report problems with the system that require fixes, such as the ones identified in Union Exhibit 9. E-mails contained in Union Exhibit 2 reflect the fact that WHISARD crashed on December 20, 2003 thereby requiring data entered that day to be reentered. These e-mails reflect the reality of what occurs in every computer based work environment. It is foreseeable that technical software problems will arise and there will be an ongoing requirement to maintain any computer database. The updates have had a *de minimus*

impact on bargaining unit employees. The requirement to enter performance data into the system to account for the agency's achievements remains unchanged. The Union presented no evidence to show that these changes caused employees to work overtime or altered their regular forty hour work week in any way, such that more than a *de minimus* impact could be construed. Article 50 Section 2 which went into effect on July 1, 2002 governs impact as of that date.

However, what the e-mails do demonstrate is that subsequent to the signing of the new collective bargaining agreement on July 1, 2002, the agency adhered to the language of the Article 50 on Technology. The Article called for a point of contact phone number and e-mail address be provided as well as manuals and procedures to be put on online where feasible (J. Exhibit 1, at 119). For the WHISARD database, an e-mail address was established (WHD-TheWiz-ESA) as well as point of contacts to address problems. All employees were notified of updates, provided data entry instructions as appropriate, and instructions were made accessible online on the agency's intranet (U. Exhibits 2 and 3).

The e-mails contained in Union Exhibit 6 questioned whether any of the program edit changes could affect employee performance ratings. However, no evidence was presented to indicate this was the case. In fact the performance data presented in A. Exhibit 6a, strongly suggests strong improvements in enforcement activity. Moreover, the MOU signed on July 2, 1999, acknowledged that any technical limitations to the WHIZARD database would be taken into consideration in conducting performance evaluations, (J. Exhibit 2). Regardless, to the extent it was believed that a performance appraisal was affected in a given year, the employee had to option to pursue the matter in an individual performance appraisal grievance.

Therefore, the agency maintains that no violation of Article 2, Section 5A, Article 3

Section 3A1(c) and (d), Article 15 Section 2B of the CBA or the statute has occurred. The provisions of the contract neither add nor subtract from the statute. Article 2 acknowledges that the contract will be interpreted consistent with the statute. Therefore the grievance should be denied on the merits.

CONCLUSION

Based on the above, the Union did not meet its burden of proof in showing that there are no time limits required for the filing of an institutional grievance under Article 15. Moreover, the Union cannot demonstrate why this complaint should not be dismissed on procedural grounds. The Union was notified of the changes to the WHISARD as early as August 19, 2002 and failed to act on that notice. The Union also failed to exercise it right to invoke arbitration in accordance with the timeframes provided in Article 15 Section 7 of the CBA. Since the Union failed to exercise its rights appropriately under Article 15 of the CBA, the grievance should be denied.

The grievance also fails on the merits. The WHIZARD system was negotiated with the Union and culminated with the signing of a MOU on July 2, 1999, fulfilling Management's duty to bargain. The subsequent updates to the WHISARD database system were *de minimus* in nature, therefore Management was under no obligation to bargain. What remains unchanged is that all employees are required to enter data into the WHISARD data base as an assignment of work. The Union has failed to show that these changes in anyway affected the conditions of employment in other than a *de minimus* way, such that a contract violation has occurred under . Article 2, Section 5A, Article 3 Section 3A1(c) and (d), Article 15 Section 2.B of the CBA

dated July 1, 2002 or the statute. Regardless, their concerns were covered by Article 50, Section 2 with respect to all of the ten specific dates cited in the grievance.

Respectfully Submitted

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Certificate of Service

I certify that a copy of the foregoing Agency Brief was given on the 20th day of May, 2005 to:

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APPENDIX

1. *IRS and NTEU,* 47 FLRA 1091, 1110 (1993) (quoting *United States Dep't of HHS v. FLRA*, 976 F.2d 229, 235 (4th Cir. 1992)).

2. *SSA, Office of Hearings and Appeals, Charleston, South Carolina and Association of Administrative Law Judges International Federal of Professional and Technical Engineers, AFL-CIO,* 59 FLRA 646, 650 (2004)

3. *PBGC and NAGE, Local R3-77,* 59 FLRA 48, 51 (2003)

4. *United States Food and Drug Administration Detroit District and National Treasury Employees Union Chapter 230,* 59 FLRA 679, 681 (2004),

5. Elkouri and Elkouri, "How Arbitration Works", Bureau of National Affairs, Washington, D. C., Fifth Edition. 1999, page 275-276ff