

NCFLL Post-Hearing Brief
DOL Case Number: ARB-ESA-00-04-011 (Case Tracking System)
FMCS Case Number: 040622-06400-7
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Introduction

This arbitration hearing was conducted at the Frances Perkins Building in Washington, DC on January 12 and 13, 2005, with rebuttal testimony at the same venue on April 5, 2005. Representing the National Council of Field Labor Locals (NCFLL), AFGE, AFL-CIO was Jeffrey P. Darby. Representing the U. S. Department of Labor (DOL) was Labor Relations Officer Galen Yoder of the Office of Employee and Labor Management Relations (OELMR)/Office of the Assistant Secretary for Administration and Management (OASAM). The arbitrator was Irwin Kaplan.

Due to the length and complexity of the hearing (three complete days), and due to the fact that no court reporter was present, the parties agreed to provide Arbitrator Kaplan their post-hearing briefs by May 20, 2005. This document is the NCFLL's effort to provide the Arbitrator with its arguments throughout this case.

Mr. Darby filed the underlying institutional grievance and supporting documentation (Exhibit J-3) on behalf of all NCFLL bargaining unit employees (BUEs) in the Wage and Hour Division (WHD) of the U. S. Department of Labor on April 29, 2003. Darby faxed the grievance to WHD's Director of Policy and Planning Nancy Flynn the same date. Darby alleged that the cumulative effect of the changes to WHD's Wage Hour Information System And Reporting Database (WHISARD) from July 9, 2002 onward impacted BUE conditions of employment. WHD, through OASAM, is obligated to notify the NCFLL at the national level of changes that impact the BUEs' conditions of employment (Exhibit J-1, Article 2, Section 5A), and meet and bargain with the NCFLL if requested (Exhibit J-1, Article 3, Sections 3A1(c) and (d)). As remedies, Darby asked that DOL and WH will:

1. Engage in bargaining with the NCFLL to the fullest extent possible under law, regulation, and contract regarding these WHISARD changes.
2. Notify the NCFLL of all future changes to WHISARD.
3. If elected by the NCFLL, engage in bargaining with the NCFLL to the fullest extent possible under law, regulation, and contract regarding all future changes to WHISARD.
4. Pay all costs incurred by the NCFLL for disposition of this grievance, including arbitration.

According to Article 15, Section 2B of the Contract, Steps 1 and 2 of the grievance procedure are waived for institutional grievances, and the parties should attempt informal

resolution within seven workdays (in this instance, by May 8, 2003). Having heard nothing from Flynn, Darby faxed the grievance to Sandra Keppley, Director of OELMR on May 12, 2003. Per the same Contract subsection, OELMR had 10 workdays to reply with a decision (in this instance, by May 27, 2003). OELMR never replied to the NCFLL through Darby. The NCFLL, by Arbitration Committee Chair Richard Coon, invoked arbitration on October 15, 2003 and assigned the case to Mr. Darby (Exhibit J-4).

From around October 15, 2003 until around June 15, 2004, Darby tried many times to have OELMR get a list of arbitrators from FMCS. This list was finally sent out June 22, 2004, some eight months after the case was invoked for arbitration. It then took until about August 2004 to settle on an arbitrator. The hearing was then scheduled for January 12 and 13, 2005.

Threshold Issues

Contract Article 15, Section 7C states:

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,” (Exhibit J-1, page 48).

On October 26, 2004, Mr. Yoder e-mailed Mr. Darby a statement (attached to this brief and identical to Exhibit A-3) which said:

“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.”

The NCFLL believes that this statement does not satisfy Article 15, Section 7C. This statement says that management reserves the option to raise these issues at arbitration; however, it is not the Department’s final written statement. Reserving a right and then actually exercising it are two different things. This is akin to the right to vote and actually exercising that right. A registered voter has the right to vote, but this alone does not get him or her to the polls to cast a vote. The voter must take affirmative steps to do so, including traveling to the polling place, identifying himself or herself, getting a ballot, voting for the candidates, and depositing the ballot in the ballot box. Mr. Yoder reserved management’s right to make a statement regarding the NCFLL’s timely filing of the institutional grievance and timely invocation of arbitration, but did not give a final written statement. This October 26 statement should be rejected as inadequate under Article 15, Section 7C.

On January 7, 2005, Mr. Yoder e-mailed Mr. Darby with a copy to Arbitrator Kaplan a “Motion for Dismissal Based on Untimely Invocation of Arbitration” (also attached to this brief). Darby replied to all parties with the union’s countermotion. While Mr. Yoder’s motion states the Department’s position well, it was nevertheless sent only five

calendar days before the hearing. As discussed above, the parties' CBA requires management to send its final written statement of arbitrability 45 calendar days prior to the hearing. Mr. Yoder's January 7 statement should be rejected as untimely.

The NCFLL believes that, notwithstanding Mr. Yoder's statement, the grievance was timely filed. The NCFLL did not become aware of the 10 changes made to WHISARD mentioned in the grievance from July 9, 2002 to April 2, 2003 until the Department gave Darby the information on April 22, 2003. Darby filed the grievance on April 29, 2003, seven calendar days after receiving the information (see last sentence of "Nature and Facts of the Grievance" on the grievance form). Darby filed it to cover violations "July 9, 2002 and ongoing" to cover every change in WHISARD from then until the grievance was settled or arbitrated. This was to avoid having to file grievances every time a change to WHISARD occurred. This would be impractical, as each grievance would have to then be litigated in a "vacuum" away from all other grievances concerning changes to WHISARD. The parties' CBA does not require this, and common sense indicates the same.

Article 15, Section 2B of the parties' CBA does not have a 30-day time limit. Arbitrator David P. Twomey, in FMCS Case Number 040322-53149-A, ruled on September 16, 2004 that institutional grievances under the parties' CBA (such as the one in the instant case) do not have any time limits (decision given to Arbitrator Kaplan at hearing). Arbitrator Kaplan agreed to take judicial notice of Arbitrator Twomey's decision.

For the above reasons, Arbitrator Kaplan should rule that this grievance was timely filed and is arbitrable because management failed to timely reserve its right to object.

Witnesses and Exhibits

The hearing was held on January 12 and 13, 2005, with rebuttal testimony on April 5, 2005. The NCFLL was represented by:

Jeff Darby, Primary Advocate
Fred DeWald, Witness
Paul Tracy, Witness
Kevin O'Brien, Witness
Josephine Nunez, Rebuttal Witness
Richard Coon, Rebuttal Witness

The Department was represented by:

Galen Yoder, Primary Advocate
Nancy Flynn, Witness
Carl Smith, Witness
Jerry Lelchook, Witness and Rebuttal Witness
Richard Newton, Rebuttal Witness

The parties introduced several joint exhibits:

- J-1: DOL/NCFLR Collective Bargaining Agreement, effective July 1, 2002.
- J-2: Memorandum of Understanding on WHISARD implementation, June 30, 1999.
- J-3: Grievance dated April 29, 2003 with supporting documentation.
- J-4: Invocation to arbitration dated October 15, 2003.
- J-5: Handy Reference Guide to the Fair Labor Standards Act.
- J-6: WHISARD Task Book Training for Wage and Hour Staff, December 1998.
- J-7: WHISARD Resource Book, December 1998.
- J-8: Introduction to WHISARD, December 2000.
- J-9: Wage and Hour Field Operations Handbook (FOH) Chapter 54 Table of Contents, dated March 10, 1988 and June 24, 1996.
- J-10: FOH Chapter 54, Revision 650, dated October 8, 2004.

During the course of the hearing, the NCFLR introduced a number of exhibits:

- U-1: E-mails and notes concerning WHISARD (38 total pages).
- U-2: E-mails and notes concerning WHISARD kept by Fred DeWald (43 total pages).
- U-3: DOL/NCFLR Collective Bargaining Agreement, effective February 1, 1997.
- U-4: Executive Order 12871, dated October 1, 1993.
- U-5: Letter dated July 2, 1999 from Paul Tracy concerning WHISARD MOU.
- U-6: E-mails and notes concerning WHISARD (20 total pages).
- U-7: Requests for bargaining and information concerning WHISARD from NCFLR Vice President Jeff Darby to OASAM dated April 16, 2002 through November 13, 2003 (54 pages).
- U-8: OELMR's response dated September 11, 2002 to Darby's August 8, 2002 request for data under 5 USC 7114(b)(4) concerning WHISARD.
- U-9: E-mails and notes concerning WHISARD kept by Josephine Nunez (17 total pages).

The agency's exhibits were:

- A-1: The 2002 DOL/NCFLR CBA Bargaining History.
- A-2: MOU concerning Office of Federal Contract Compliance Programs (OFCCP) Case Management System (CMS) dated June 17, 1999 (for ID only, NCFLR objected as to relevance).
- A-3: Yoder's October 26, 2004 e-mail to Darby on reserving the right to raise threshold issues (discussed above under "Threshold Issues").
- A-4: Yoder's October 26, 2004 e-mail to Darby concerning proposed stipulated issues.
- A-5: E-mail of June 17, 2003 from Nancy Flynn to Linda Ingram regarding the 10 WHISARD releases that were the subject of this grievance.
- A-6: WHISARD nationwide statistics.

Opening Statement – NCFLR

The American Federation of Government Employees (AFGE), AFL-CIO chartered the NCFLL in 1965 to represent DOL BUEs outside the Washington, DC metropolitan area. DOL recognized the NCFLL in November 1965, and the parties signed their first CBA in August 1966. There are about 8000 NCFLL-represented BUEs. The current CBA between the parties was effective July 1, 2002.

The WHD is a component of the U. S. Department of Labor/Employment Standards Administration responsible for enforcing several labor laws, including the Fair Labor Standards Act, Davis-Bacon Act and related acts, McNamara-O'Hara Service Contract Act, Family and Medical Leave Act, Employee Polygraph Protection Act, and Migrant and Seasonal Agricultural Worker Protection Act. WHD has about 1000 NCFLL-represented BUEs.

Around the end of 1998 and beginning of 1999, WHD introduced the WHISARD to replace the Wage Hour Management Information System (WHMIS) and Case Tracking Information System (CTIS). WHISARD was intended to be a comprehensive computer-based database for WHD replacing the others in part because WHISARD was "Y2K" compliant whereas the other were not.

On June 30, 1999, the parties entered into an MOU concerning the implementation of WHISARD. This MOU was not "rolled over" into the current CBA, and so expired on July 1, 2002.

Since July 1, 2002, there have been several updates and revisions to WHISARD. These updates and revisions have impacted the working conditions of WH BUEs. DOL has failed to notify the NCFLL of any of these changes in compliance with Article 2, Section 5A and Article 3, Section 3A1 of the CBA. DOL has failed to bargain any of these changes with the NCFLL when requested as required by Article 2, Section 5C of the CBA. Therefore, the NCFLL filed this institutional grievance on behalf of itself and WHD BUEs.

The NCFLL wants DOL to notify it of future changes to WHISARD that individually or cumulatively impact upon BUE conditions of employment and bargain to the fullest extent possible when requested.

Opening Statement – DOL

DOL stated the grievance was not timely filed and the arbitration was not timely invoked. Management said users get WHISARD update notices, but these users did not notify the NCFLL. DOL also said there was no commission of an unfair labor practice under 5 USC 7116(a)(5) when DOL failed to notify the NCFLL Executive Committee of changes to WHISARD on the dates specified in the grievance. Mr. Yoder continued by saying every WHISARD change does not adversely impact BUE working conditions.

NCFLL Opinion of DOL Opening Statement

OASAM did not give the union a timely written statement concerning the grievability/arbitrability of this issue. The NCFLL agrees that every WHISARD change considered separately does not necessarily impact BUE working conditions (some do, others do not), but taken in totality and cumulatively they do. Therefore, DOL must notify the NCFLL of changes, give the NCFLL an opportunity to request bargaining, and bargain to the fullest extent possible under law.

It is laughable that DOL would attempt to justify its lack of notification to the NCFLL by stating that the users of WHISARD knew of the changes but failed to notify the NCFLL. It is not the obligation of the BUEs to notify the NCFLL of changes in working conditions. This duty belongs to management under the FSLMR Statute and the parties' CBA.

Testimony of Fred DeWald – Direct Examination by Jeff Darby

The NCFLL's first witness was Wage and Hour Investigator (WHI) Fred DeWald of the Albany, New York District Office (DO). Mr. DeWald has a bachelor's degree from Norwich University in Vermont. He has been a WHI for over 25 years, and is a retired Lieutenant Colonel in the United States Army Reserve. He has held various positions in AFGE Local 2519 including shop steward, Regional Collective Bargaining Committee (RCBC) Member, and Executive Vice President.

Mr. DeWald stated that he has used various computer systems in WH (including WHMIS, CTIS, and WHISARD) for approximately 20 years. He has used WHISARD since its inception around the end of 1998. He does not remember exactly how many times WHISARD has changed since inception or since July 1, 2002 but recalls "many". He said that WHISARD has increased the amount of work he has to perform as a WHI. All WHIs must enter varying amounts of data into WHISARD for every compliance action. He insisted that the amount of information WHISARD requires is much more than under WHMIS or CTIS and takes longer to input.

WHMIS was a system in which WHIs would fill out forms; the forms were then sent to a place where someone other than a WHI input the data into the system. Mr. DeWald testified it took him two hours to fill out WHMIS forms in a typical case. DeWald said CTIS was a computer-based system, and that the amount of information it required was much less than WHISARD requires. He said it took him two to three hours to complete cases in CTIS.

Under WHISARD, DeWald testified that the WHI inputs all data into WHISARD including employer information, employee information, back wages due, back wages paid, complainant information, and so forth.

When asked how long it took to input data in the typical case in WHISARD, Mr. DeWald said 8 to 10 hours was typical, but would increase with more employees in a case. He said this major increase in the amount of time to complete a case impacted the working

conditions of other WHIs and him by taking more days to complete a case, more hours on a case, fewer cases per year, and increased WHI frustration.

DeWald said that the training he received for WHISARD consisted of about one week in late 1998 using the manuals that are Exhibits J-6 and J-7. He has never seen Exhibit J-8. He recalled receiving no other formal WHISARD training in the six years since he received the original training. All instructions for updates, revisions, and other changes were communicated to him in e-mails. He felt this was inadequate training. Other than J-6 and J-7, he was unaware of any other manuals or guidebooks to WHISARD.

WHI DeWald also said WHISARD impacted employees differently depending on if work was done in a District Office (DO), Area Office (AO), Field Office (FO), or away from a WH office. He testified that he works in a DO that has the fastest type of modem connection (a T-1 line). AOs have slower connections and FOs the slowest (ISDN lines). When working away from WH offices (such as at home on flexiplace), WHIs must use a dial-up modem that is the slowest connection possible. He said that his dial-up modem will not work at his home now that he has digital telephone service. Connection speed impacts working conditions because the faster the connection, the faster data can be entered into WHISARD. As more information on each case is required to be input into WHISARD, Mr. DeWald believes that employees away from DOs are adversely impacted due to slower WHISARD connectivity. When the old WHMIS system was used, WHIs could prepare the paper forms at the same speed wherever they were. Now that WHISARD is here, data input rates vary based on connectivity. He believes this has impacted and continues to impact employees' conditions of employment.

Darby continued the direct examination by asking Mr. DeWald about the Field Operations Handbook (FOH). DeWald said the FOH is comprised of several binders containing the policies and procedures used by WH. It is supposed to be the resource WHIs use in determining what needs to be done in casework and other WH procedures. Mr. DeWald testified that Chapter 54 of the FOH consists of all forms used in a WH investigation. Darby asked DeWald to review the Table of Contents for FOH Chapter 54 prior to October 8, 2004 (Exhibit J-9). Mr. DeWald said that no WHISARD form appeared in FOH Chapter 54 then. Darby then asked DeWald to look at the new FOH Chapter 54 dated October 8, 2004 (Exhibit J-10). DeWald testified that he had never seen this exhibit, but that WHISARD information did appear in it. He said that it surprised him that it took six years for WHISARD information to appear in the FOH, which is supposedly the ultimate resource guide for WH employees.

DeWald said that WHISARD updates, changes, and revisions are given to the WH employees via e-mails and downloads. It takes varying amounts of time to download and install them, from a few minutes to several hours. He believes this amount of time impacts the WH employees by tying up their computers. Since computer use is so central to WH activities today, not being able to use the computer on cases impacts these employees' conditions of employment. He testified as to several of these in Exhibits U-1 and U-2.

Mr. DeWald also said that these updates, changes, and revisions themselves impact the employees because there are sometimes “bugs” in the software that don’t allow certain required data to be entered. When this happens, the WH national office has to provide “workarounds” so that necessary data can be input. WHI DeWald testified that these workarounds add more time to cases and increase the frustration felt by employees.

Updates, changes, and revisions further impact employee working conditions according to DeWald because more and more data is required for cases seemingly each time WHISARD is changed. He said if a WH employee fails to enter required data, a “fatal error” appears. These fatal errors prohibit a case from being completed and submitted in WHISARD until the required data is input. He gave the perfect example of fatal errors (Pages 30 to 38 of Exhibit U-1) when he testified to the experience of a fellow WHI in the Albany District whose case was originally submitted in WHISARD on September 30, 1999. The case was proposed for litigation, so it stayed in the WHISARD system for several years as it moved through the legal system. It was finally through the legal system and ready for closure in WHISARD on December 14, 2004. In the five plus years the case was in WHISARD, the various changes caused there to be some 95 fatal errors in the case, thus causing more work for the WHI. Mr. DeWald stated that this example shows the cumulative nature of WHISARD updates, changes, and revisions. Taken separately, they may not appear to be changes impacting upon the bargaining unit employees’ conditions of employment or changes of more than *de minimis* impact. However, according to Mr. DeWald, when considered as a group or *in toto*, they definitely rise above *de minimis* and are an adverse impact on the bargaining unit. DeWald believes that management should have notified the NCFLL of these changes per the Contract, thus allowing the NCFLL the opportunity to invoke bargaining.

DeWald said he was familiar with the current Contract and past contracts as he had served in various capacities within Local 2519 over the past 20 years, including shop steward, Executive Vice President, and member of the Regional Collective Bargaining Committee. He testified that, since the June 30, 1999 MOU on WHISARD implementation was not carried over into the current Contract, it was null and void. Without this MOU, DeWald said the Department was obligated to notify the NCFLL Executive Committee of changes to WHISARD thus allowing the union to invoke bargaining. DeWald stated he was unaware of any such notification regarding WHISARD since 1999, and was unaware of any bargaining on WHISARD between the parties since the 1999 MOU.

Mr. DeWald summarized his testimony by stating that WHISARD impacted the working conditions of all WH BUEs including himself in more than a *de minimis* fashion, management failed to notify the union of changes to WHISARD, and that no bargaining between the parties had been done since June 30, 1999.

Testimony of Fred DeWald – Cross Examination by Galen Yoder

Yoder asked DeWald about several passages in the Contract. In answering these questions, DeWald testified that the Contract prevailed over DOL regulations,

Mr. Tracy said Exhibits U-7 and U-8 showed how the NCFLR requested information and bargaining on changes to WHISARD several times, but was turned down each time by OASAM. He said OASAM's opinion appeared to be that since WHISARD was bargained once (June 1999), they did not have to do so again. He said this would be incorrect after the expiration of the MOU on June 30, 2002.

When asked about his personal experience with WHISARD, WHI Tracy said that he did very few cases due to the extent of his union responsibilities. As Local President, he was quite aware of the problems with WHISARD as communicated to him by his members (Exhibit U-6). He stated that bugs, workarounds, connectivity speed, more data requirements, fatal errors, and the tying of WHISARD to performance elements and standards all impacted the BUEs' conditions of employment.

Testimony of Paul Tracy – Cross Examination by Galen Yoder

Under cross-examination, Mr. Tracy said that he only used WHISARD about 5% of his working time. He works all types of cases, plus works a lot as the DO duty officer.

He also repeated that the WHISARD MOU from 1999 was no longer valid as it was not carried over into the 2002 contract. He would have wanted the MOU to be carried over, but it was not. Tracy said the committees created in the MOU worked well together. However, since the demise of Partnership, he believed DOL was moving away from employee involvement on such committees.

When asked about Article 50 under the 2002 Bargaining History (Exhibit A-1), Tracy stated that management did not have to notify the union only if agency pilot committees existed. He did not believe any such pilot committees existed.

Mr. Tracy also testified that the e-mails in Exhibit U-6 were from members of his Local and that he was aware of and agreed with their concerns.

Testimony of Paul Tracy – Redirect by Jeff Darby

WHI Tracy said that no local manager in WH had the authority to bargain changes to WHISARD (Page 1 of Exhibit U-6).

Testimony of Paul Tracy – Recross by Galen Yoder

Mr. Tracy further testified that the absence of Partnership and the MOU required notification by management to the union of changes in conditions of employment, including changes to WHISARD.

Testimony of Kevin O'Brien – Direct Examination by Jeff Darby

Kevin O'Brien is a WHI in the Davenport, Iowa FO under the Des Moines DO. He has a BA in History and Education, and has been a WHI since April 1974. He has been a member of AFGE Local 1748 since he was hired, and has served a shop steward since 1979. He is also Chief Steward of Local 1748.

O'Brien said he uses WHISARD nearly every day. He and the other employees of the Des Moines DO received training in January 1999; this training lasted part of a day. He has received no other WHISARD training.

WHI O'Brien stated that the old WHMIS and CTIS systems took less time for WHIs to use than WHISARD does. The amount of time he spends on cases under WHISARD is far greater than during the use of WHMIS and CTIS.

Mr. O'Brien believes there has been at least six changes, revisions, or updates to WHISARD per year since inception in 1999. He believes these changes occur because management wants more information or to fix problems that arose with previous changes. He said these problems cause workarounds, which add to the time it takes a WHI to complete a case in WHISARD. The ever-increasing amount of information required also causes fatal errors that prohibit a case from being accepted by the system.

Darby asked O'Brien about the FOH. Mr. O'Brien replied that the FOH was supposed to have the procedures and forms used by WHIs. He said WHISARD was not included in the FOH until Revision 650 on October 8, 2004. He testified he had not seen this revision until shown to him during this testimony.

WHI O'Brien said connectivity speed is a problem as he is in a FO and has the lowest-speed connectivity compared to the DO or the Chicago Regional Office. Working in the field on a dial-up modem causes even slower speeds, O'Brien testified.

Added to the above problems, Mr. O'Brien said that all WHISARD users lost all data they had entered into the system on December 20 and 21, 2004 due to a crash of WHISARD. This caused all users to have to reenter the data from those dates.

He also said that some local managers require WHIs to input more information in WHISARD than is required by the system. This adds even more time to complete a case.

O'Brien said all of the matters discussed above show that WHISARD has impacted all WHIs. He said the Department should have notified the union of these changes, giving the union a chance to negotiate. He believes that neither notification nor bargaining has occurred on WHISARD since the June 30, 1999 MOU.

Testimony of Kevin O'Brien – Cross Examination by Galen Yoder

Mr. O'Brien said he works flexiplace occasionally. He does not work "off the clock". O'Brien said he spends 30 to 50% of his time working on WHISARD. He said about 50% of his case time is used working on WHISARD.

Yoder asked O'Brien if management had the right to implement WHISARD. O'Brien said yes, but that management must still comply with the Contract concerning notification to the union and bargaining.

WHI O'Brien said WHISARD has impacted his performance. The amount of work in WHISARD has reduced the amount of cases he does in a performance appraisal period. He said his supervisor told him he would have exceeded a critical element last year, but did not. His supervisor told him, "I could almost justify an exceeds, but you needed a few more cases." Mr. O'Brien believes WHISARD caused this to happen.

Testimony of Kevin O'Brien – Redirect by Jeff Darby

Mr. O'Brien said the average number of compliance actions per WHI last year was 40. He said his supervisor uses this in rating WHIs.

Testimony of Jerry Lechhook – Direct by Galen Yoder

Jerry Lechhook has been the DOL's Deputy Director of Human Resources for over two years. Prior to that, he was the Department's Director of the Office of Employee and Labor Management Relations (OELMR) for 16 years. He was the Co-Chief Negotiator of management's bargaining team for the 1991 and 1996 contract negotiations with the NCFLL and Chief Negotiator during the 2002 contract bargaining.

Mr. Lechhook said the Contract emanates from the Federal Service Labor Management Relations Statute (FSLMRS or Statute) and consists of the procedures negotiable under the Statute.

Lechhook also testified that if an agency wants to implement a new case tracking system, the procedure for notifying the union would be that the agency notifies OELMR who then notifies the NCFLL. The NCFLL could then ask for bargaining. OELMR can choose not to notify the union if not required by the Contract.

MOUs are products of mid-term bargaining, and can be carried over to the next CBA at term bargaining, included in the next CBA, or allowed to lapse. Mr. Lechhook said the parties agreed during the 2002 term bargaining not to carry over the June 30, 1999 WHISARD MOU. He believed there was an MOU on one other case tracking system in DOL, but was not sure.

Mr. Lechhook said that a new Article 50 concerning technology was included in the 2002 contract. He believed it should be broad enough to cover most issues so that mid-term bargaining on technology would not have to be held.

Lechhook testified that union or institutional grievances are covered in Article 15, Section 7 of the CBA. At this, Mr. Darby objected, stating that this contract section discussed

individual grievances and not institutional grievances. Mr. Lelchook said grievances must be filed within 30 days of the violation.

Mr. Yoder asked Mr. Lelchook about Article 15, Section 7C of the Contract concerning statements of grievability/arbitrability, and asked him to see if Exhibits A-3 and A-4 met this requirement. Lelchook said yes. The Arbitrator said it appeared to him that A-3 reserved management's option and A-4 was a proposal to stipulate.

Testimony of Jerry Lelchook – Cross by Jeff Darby

Mr. Darby asked Lelchook about Article 50. Lelchook said that it was an effort to minimize the burden on the Department from having to constantly negotiate technology issues at mid-term bargaining. Darby then asked if there was an ESA or WH technology group. Lelchook answered that he did not know. Without such a group, Darby asked Lelchook, how would changes in technology be communicated to the NCFLL? He said there was no duty to notify the NCFLL of *de minimis* changes in technology.

Lelchook then stated that it did not matter if an MOU was carried over to another CBA or not, it could still apply. Darby said this was a change in the NCFLL's understanding of how the contract worked, and asked Lelchook if the Department was changing its interpretation concerning the force of MOUs. Lelchook shrugged his shoulders.

Darby asked Lelchook about U-8. Lelchook answered that OELMR's position was that no bargaining was necessary because of the June 30, 1999 MOU. Darby asked Lelchook which Contract was in force that date. His answer was that the July 1, 2002 one was. Darby asked if the June 30, 1999 MOU had been carried over to this CBA, and Lelchook said no.

Lelchook said he thought Arbitrator Twomey was incorrect.

NCFLL's Analysis of Lelchook Testimony

The NCFLL believes that Mr. Lelchook's testimony was in error in the following ways:

1. By saying this grievance was not timely because it did not meet a 30-day deadline for individual grievances.
2. By stating that Exhibits A-3 and A-4 were appropriate notifications to the union concerning the grievability/arbitrability of this grievance.
3. By not recognizing that, without agency task groups on technology discussed in Article 50, Section 2, changes in technology must be communicated to the NCFLL thus giving the union an opportunity to invoke bargaining.
4. By stating that MOUs could still apply even when not carried over in the new CBA.

Carl Smith Testimony – Direct by Galen Yoder

Carl Smith has been the Director of Information Technology for WHD since 2001. He trains WH employees on WHISARD and does applications, maintenance, and enhancements to this system.

He said the changes in Exhibit A-5 were for the benefit of WHISARD users. He also said that WHISARD users find out about changes usually between seven and 10 days before they are released.

Carl Smith Testimony – Cross by Jeff Darby

Smith said he is not trained in Labor-Management Relations.

Mr. Smith also testified that there have been eight to 10 additional changes to WHISARD since April 2003. He said fatal errors prohibit a user from proceeding in WHISARD. He also said that connectivity speeds differ and affect the performance in WHISARD.

NCFLA Analysis of Smith Testimony

Mr. Smith is not trained in LMR. He admitted that fatal errors and connectivity speeds affect performance. He also said WHISARD users (and not the union) are notified of changes to WHISARD.

Nancy Flynn Testimony – Direct by Galen Yoder

Nancy Flynn has been the Director of Planning and Analysis for the WHD at their National Office since October 1995.

Ms. Flynn testified that WHISARD was developed to make WH's data collection "Y2K" compliant. The old WHMIS and CTIS systems were not Y2K compliant. She said WH uses WHISARD to report its activities to Congress and the public.

Flynn also said WH has always collected data on cases. When she started in 1970, WHIs entered this information by hand on a form. WHIs did not do data entry.

Nancy Flynn Testimony – Cross by Jeff Darby

Ms. Flynn said that WHMIS started in around 1982. The WHIs entered information on forms. Contract employees then entered this data into a computer. Around 1992 or 1993, one or two WHIs per office entered data into the CTIS system. Starting with WHISARD, all WHIs now enter case data into a computer system.

NCFLA Analysis of Flynn Testimony

WHIs as a rule did not input case data into a computer until WHISARD. This is one more proof that WHISARD has impacted on BUEs and their conditions of employment.

Josephine Nunez Rebuttal Testimony – Direct by Jeff Darby

The parties reconvened in Washington, DC on April 5, 2005 for rebuttal testimony.

Josephine Nunez has been a WHI since 1988 and is stationed at the Albuquerque, New Mexico DO. She has been a member of AFGC Local 2139 for many years, and was a shop steward for a short time.

Nunez has worked with WHISARD since 1998. She was one of the original trainers in the Dallas Region. As such, she was responsible for providing WHISARD training for the employees in the Albuquerque and San Antonio Districts in early 1999. Mrs. Nunez testified that WHISARD in 1999 was a much smaller system than it is now. Many more features and required entries have been added in the subsequent six years. From January 2005 to April 2005 alone, she counted five revisions (Exhibit U-9).

Darby asked her the effect of all changes, revisions, and updates. She said the cumulative effect was to create more work for the WHIs. Nunez added that her working conditions were impacted by this additional work, along with the time necessary to download and install updates, working around bugs and learning “fixes” to the system, and dealing with fatal errors. All of these matters take time to handle. She said WHISARD has tripled the amount of time it takes her to complete a case than the prior systems of WHMIS and CTIS did.

Nunez Rebuttal Testimony – Cross Examination by Galen Yoder

Mrs. Nunez testified she works in the DO five days per week. WHISARD has impacted her performance evaluations. As an example, she said her average hours per case before WHISARD was 18; post-WHISARD it is 54.

Richard Coon Rebuttal Testimony – Direct by Jeff Darby

Mr. Richard Coon has been with DOL, Mine Safety and Health Administration (MSHA) for 30 years as a mine inspector. He has been a Vice President of the NCFLL for 20 years. As such, he has been on the union’s contract bargaining team for the 1991, 1996, and 2002 contracts. He has also been the Chair of the NCFLL Arbitration Committee for nearly 20 years.

Mr. Coon said he has known the Eric Ramirez, Chair of the NCFLL Technology Committee, for over 20 years. They are both stationed in Denver, Colorado, so they talk several times per week. Coon said Ramirez is the union’s lead negotiator on all technology issues. He said Ramirez has never told him of a technology committee within ESA or WH. Coon said without an agency technology committee, the Department must notify the NCFLL per Articles 2 and 3 of any changes in technology and bargain with the union if the union invokes bargaining. Coon also said that the NCFLL has never bargained a computer system for one time only with no provisions for future bargaining

on future additions, revisions, or enhancements. He gave an example of ongoing bargaining on a computer system in his home agency of MSHA.

Coon testified that grievances under Article 15 of the parties' CBA could have starting dates and ongoing violations. Mr. Coon said this means that the violations are continuing even after the grievance is filed.

When asked about MOUs, Coon said that they die unless carried over to the next CBA at term bargaining.

Mr. Coon added that the CBA prevails over Departmental regulations, and that there is no time limit on institutional grievances.

Coon Rebuttal Testimony – Cross Examination by Galen Yoder

Coon reiterated that MOUs must be listed in Article 56 in order to be carried over past the expiration date of the previous contract.

Mr. Coon said that MSHA gives the two other NCFL National Officers from MSHA (Hugh Smith and Bill Henson) and him informal notice when the agency wishes to make a change impacting on employees' working conditions. Even though they have received informal notice and try to resolve matters informally, the NCFL still expects formal notification from OELMR when talks reach a certain point.

Richard Newton Rebuttal Testimony – Direct Examination by Galen Yoder

Richard Newton is an Information Technology Specialist (GS-2210) with the WH National Office and is WHISARD Project Manager. He has been on WH's IT team for nine years. He was previously a WHI in the Sacramento, California DO for about 16 years. He is a member of the AFGE Local 12 bargaining unit at the national office.

Newton said WHISARD was developed beginning in 1997 as the previous system (WHMIS) was obsolete and not Y2K compliant. WHISARD was deployed in the field from October 1998 to March 1999. Development continued in 1999 and 2000 to improve performance. By the end of 2000, WHISARD became "pretty much complete as we know it."

Mr. Newton said WHISARD was available 99.03% of the time in FY 2003, 99.81% of the time in FY 2004, and 94% of the time in FY 2005 to date. These percentages are based on 24 hours per day, seven days per week. He added that the system crashed once this fiscal year, with the loss of all data input in about one day.

"Bugs" according to Newton are when software either does what it should not, or does not do what it should. No WHISARD data is on any particular computer, which means that any WHI can input data into WHISARD from any WH computer.

Newton said there have been 19 major WHISARD releases in 6 ½ years. WHIs sometimes have to do more data entry after each major release.

Yoder asked about one release. Newton said that starting in FY 2004, the hourly wage earned by employees had to be entered into WHISARD.

There are colored icons next to cases showing the number of days the case has been registered in WHISARD: green for 0 to 90 days, yellow for 91 to 180 days, and red for 181 or more days. The icons are for identification only and do not change the program policy, according to Newton.

Yoder asked Newton about Exhibits A-6a and A-6b. Newton claimed overall WH productivity has increased since the advent of WHISARD.

Newton Rebuttal Testimony – Cross Examination by Jeff Darby

Newton does not evaluate WHIs.

WHISARD's availability during working hours may be .1% less than overall availability discussed during direct examination.

Darby asked Newton how much training the WHIs had. Newton said each WHI received about one week's worth of training in late 1998 or early 1999. He also said that there are no other training manuals in existence except for Exhibits J-6, J-7, and J-8. He added that the October 2004 FOH revision and a manager's manual from FY 2000 concerning Civil Money Penalties in WHISARD also exist, but that is it.

Mr. Newton admitted that bugs cause more work for the WHI. He does not know of many "workarounds".

Newton said WHISARD does not evaluate WHIs, but he said some managers use WHISARD statistics to evaluate the WHIs they supervise.

The 19 major releases since July 2002 contained changes such as approval of outreach activities, government contracts withholding, the WH-520, the certificate processing system, violation reasons on FLSA cases, hourly rate of employees, and profile pay period for violations. Newton said the releases sometimes cause more work for the WHIs. The releases sometimes fix bugs. He said the connection speed has very little effect on WHISARD.

Darby asked Newton about Exhibits A-6a and A-6b and how the number of hours per case and the amount of back wages due and collected per case are related to WHISARD. Newton said these numbers have increased since WHISARD's beginning in 1998. Darby said violations and back wages have nothing to do with WHISARD but rather with the facts of the case.

Newton admitted that the average hours on full and limited investigations have increased and the number of full investigations has decreased since WHISARD began. He also said WHISARD is better in child labor investigations because there was a 70% error rate in calculating civil money penalties in these cases before WHISARD. Now there is none.

NCFLC Analysis of Newton Rebuttal

Mr. Newton has not worked with WHISARD as a WHI. He does not evaluate WHIs.

He said that WHIs sometimes have more work to do after WHISARD releases and because of bugs. Newton also said that no WHISARD training materials exist other than Exhibits J-6, J-7, and J-8, and that WHIs have only received one week of training.

Newton claims that WHISARD has caused overall WH productivity to increase. This is naïve. The number of cases worked, number of hours per case, back wages due and collected per case, and average violations per hour are based on the facts of each unique case. These figures have nothing to do with WHISARD. Claiming that WHISARD has caused all of this is like the rooster claiming credit for the sunrise. These things would have happened with or without a reporting system. There is no cause and effect here.

Jerry Lechhook Rebuttal Testimony

Mr. Lechhook believes the 30-day time limit applies for union grievances. He also said the NCFLC should have known about changes to WHISARD through its stewards around the country.

NCFLC Analysis of Lechhook Rebuttal

We continue to disagree that the 30-day time limit for individual grievances applies to union grievances.

We are astounded that he would assert that our stewards should formally notify us of changes in conditions of employment instead of the Department of Labor.

Applicable Case Law

Arbitrator Kaplan asked both sides to research cases in which notification was required, even for changes of *de minimis* impact.

The Department of Labor/OASAM/OELMR has a long-term past practice of notifying the NCFLC at the national level via two procedures: "SWU" (Share With Union) or "FYI" (For Your Information). Before about 2002, these memos were sent via mail, but are now sent via e-mail. SWUs are used when OELMR believes that the changes to BUE conditions of employment are enough to require union notification. FYIs are used in situations in which OELMR believes the impact of the change is *de minimis* or less. Even though OELMR believes the change may be *de minimis*, they still notify the union.

This is a past practice under Article 2, Section 6 of the current CBA. We believe that WH, through OELMR, should notify the national level of the NCFLL of changes they intend to make to WHISARD in order to allow the union the opportunity to decide for itself the level and scope of the changes. Without such notification, the union would operate in the dark and have to learn of changes from the BUEs. This was not Congress's intent when wrote the CSRA.

The Federal Labor Relations Authority, in *HHS, Social Security Administration, Chicago and AFG 3239*, 19 FLRA 827 (August 19, 1985) laid down five criteria for determining *de minimis* impact and therefore no duty to bargain over impact and implementation:

1. The nature of the change.
2. The duration and frequency of repetition of the change.
3. The number of employees affected or foreseeably affected.
4. The size of the bargaining unit.
5. The extent to which the parties may have established, through negotiation or practice, procedures and appropriate arrangements concerning analogous changes in the past.

Let us compare WH BUEs and WHISARD to the five criteria shown above:

1. The nature of the change is permanent. WHISARD is now part of the WHIs' jobs. Almost every change adds to the amount of work to be done by WHIs. Bugs, workarounds, and fatal errors caused by almost every change also add to the amount of work. Connectivity speeds vary; those with slower connectivity are more impacted.
2. Each change is added to previous changes, so each change is permanent. There are about six such changes per year, so the change is quite repetitive.
3. About 800 to 1000 BUEs nationwide are affected and can be foreseeably affected by each change. The number of BUEs affected in the FLRA case above was less than 10.
4. The bargaining unit is 800 to 1000.
5. The parties' CBA, in Articles 2 and 3, has a list of negotiated procedures and appropriate arrangements requiring notification to the union of changes and allowing it to request bargaining.

It is the NCFLL's opinion that the cumulative impact of the changes to WHISARD on WH BUEs is much more than *de minimis*.

Other cases in which seemingly trivial matters were ruled more than *de minimis*:

1. *Dept. of Justice, INS/Border Patrol, El Paso, Texas and AFG, National Border Patrol Council*, 39 FLRA 1325 and 39 FLRA No. 117 (March 22, 1991) – No longer allowing employees to have their patrol cars commercially cleaned had more than a *de minimis* impact.
2. *Dept. of the Air Force, 913th Air Wing, Willow Grove, PA and NAGE, Local R3-32, SEIU, AFL-CIO*, 57 FLRA No. 183 (June 14, 2002) – Increasing by one the number

of employees on a shift was more than *de minimis* impact and required union notification and bargaining if requested.

3. *Dept. of Veterans Affairs, Medical Center, Coatesville, PA and NAGE, Local R3-35, 57 FLRA 663 and 57 FLRA No. 132 (January 8, 2002)* – Changing the employee awards policy without union notification was a violation of the Statute.

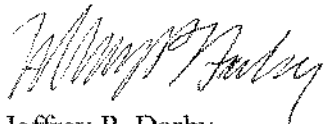
Conclusion and Prayer for Relief

In summary, the NCFLL's position on this matter is:

1. WHISARD itself has changed, and continues to change, the way WHIs perform their work. More hours and days are now required to complete each case, fewer cases can be done per year, and frustration among BUEs is high. Fatal errors, bugs, workarounds, more data entries, and connectivity speeds cause all of this to happen.
2. These changes, updates, and revisions to WHISARD, and their unforeseen bugs and workarounds, impact and can foreseeably impact the conditions of employment for BUEs in the WHD.
3. These changes, updates, and revisions sometimes individually, and always cumulatively over time, rise to a level of more than *de minimis* impact.
4. The June 30, 1999 MOU ceased to exist on June 30, 2002.
5. There is no agency technology committee described in Article 50, Section 2.
6. Without an MOU and technology committee, the WHD, through OELMR, must notify the NCFLL at the national level of each change to WHISARD via either SWU or FYI.
7. The NCFLL has the right ask for bargaining if it determines the change is more than *de minimis* and the right to bargain in good faith.
8. This grievance was timely filed. Another arbitrator has ruled that institutional grievances (such as this one) do not have a time limit.
9. Management failed to give a timely statement questioning the timeliness of the grievance and invocation of the grievance to arbitration.

For the reasons listed above, the NCFLL asks Arbitrator Kaplan to grant this grievance and all remedies contained therein.

Respectfully Submitted,



Jeffrey P. Darby
May 20, 2005

Attachments: October 26, 2004 e-mail from Galen Yoder to Jeff Darby
January 7, 2005 e-mail from Jeff Darby to Galen Yoder