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January 31, 2024

James D. Bilik
Arbitrator and Mediator
Jdbilik@gmail.com
Sent via Electronic Mail

Re: Closing Brief for Contract Violations,
Unfair Labor Practices, Violations of Law
FMCS Case No. 230214-03419

Dear Arbitrator Bilik:

Enclosed please find the Union's closing brief in the above-entitled grievance. Please do not hesitate to reach out to me with any questions.

Thank you for your time and attention in this matter.

Respectfully,

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enclosure

cc: Douglas Massey, AFGE Local 17 President

Federal Mediation and Conciliation Services
Before the Impartial Arbitrator James Bilik

In the Matter of Arbitration Between	)
	)
The American Federation of	)
Government Employees, Local 17,	)
AFL-CIO (AFGE),	)
Union,	)
	)
and	)
	)
U.S. Department of Veterans Affairs,	)
Board of Veterans Appeals,	)
Agency.	)
	)

FMCS Case No. 230214-03419
Date: January 31, 2024

CLOSING BRIEF ON BEHALF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 17

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I. INTRODUCTION

This matter is before Arbitrator James Bilik, Esq., following a grievance filed by the American Federation of Government Employees ("AFGE"), Local 17, AFL-CIO ("the Union") on behalf of a group of over 900 bargaining unit attorneys against the United States Department of Veterans Affairs ("VA" or "Agency"), Board of Veterans' Appeals ("Board"). The Union filed the Grievance in accordance with Article 43 of the Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees (2011) (hereinafter "Master Agreement"). *See* Master Agreement, Article 43, Section 7.

Pursuant to the Master Agreement, the Union grieved the Agency's change in its application of the on-pace standard and newly created waiver scheme to Attorney Advisors' ("AA") performance standards, promotion qualifications, overtime opportunities, within grade increases, and other applicable conditions of employment. The Agency raised numerous procedural arguments, which the Union addresses below. The Union requests that the Arbitrator grant the grievance, find in the Union's favor, and issue the following remedies: 1) order the Agency to cease and desist from applying the "on-pace" and "consistently on-pace" standards as well as rescind and cease requiring/encouraging promotion waivers; 2) order a *status quo ante* remedy addressing any negative impact to any AA who suffered due to the Agency's change in the application of the on-pace standards and implementation of the waivers including but not limited to denial of within grade promotions, denial of grade promotions GS-12 through GS-14, denial overtime opportunities, delay in promotions, loss of overtime opportunities, and rescission of performance improvement plans ("PIPs"); 3) make any AA who lost wages, income, benefits, or award money whole in accordance with the Back Pay Act; 4) require the Agency to bargain the change in working conditions; 5) order the Agency to cease and desist from violating any applicable law, rule, regulation, or Master Agreement provision; and 6) order the Agency to issue a notice and

posting of the Agency's unfair labor practice ("ULP") violation.

II. STATEMENT OF THE ISSUE

The Parties participated in an arbitration, which spanned five days: August 2 and 3, and continuing October 24, 25, and 26, 2023. The parties were unable to agree on a joint statement on the issues. The Union, therefore, presents the following issue:

> Did the Agency violate the law, the Master Agreement, the FY2021 MOU, the 1994 MOU, and/or any past practices, when it made numerous changes constituting a change in conditions of employment and working conditions without notice, and an opportunity to bargain with the Union, which had more than a *de minimis* impact on employees and, if so, what shall be the remedy.

Tr.D.1 at 28.[1] Along with this statement of the issues, the Master Agreement empowers the Arbitrator to determine a remedy should he find any violation of contract, law, rule, or regulation. *See* Jx1 at 247; *see also Soc. Sec. Admin. & AFGE, Local 3428*, 73 F.L.R.A. 78, 79 (2023).

III. SUMMARY OF THE ARGUMENT

The Federal Service Labor-Management Relations Statute ("the Statute") requires federal agencies and the unions that represent their employees to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. § 7114(a)(4). Part of this duty to negotiate in good faith requires agencies to provide advance notice before changing conditions of employment, including performance standards and promotion criteria, allowing unions to elect to bargain over procedures for implementing the change and appropriate arrangements for affected

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[1] This closing brief employes the following citations: Transcript Day #1 August 2, 2023 – Tr.D.1 at ___; Transcript Day #2 at August 3, 2023 – Tr.D.2 at ___; Transcript Day #3 October 24, 2023 – Tr.D.3 at ___; Transcript Day #5 October 25, 2023 – Tr.D.4 at ___; Transcript Day #5 October 26, 2023 – Tr.D.5 at ___; Joint Exhibits – Jx# at ___; Union Exhibits – Ux# at ___; Agency Exhibits – Ax# at ___.

employees. *See* 5 U.S.C. §§ 7106, 7114. Additionally, provisions in the parties' Master Agreement closely align with these statutory notice and bargaining obligations.[2]

Preponderant evidence shows that the Agency violated its statutory and contractual bargaining obligations by changing the productivity standard in the attorney performance plan without notice to the Union. The productivity standard is an objective and unambiguous annual standard in that it speaks only to the number of signed decisions/issues that the Agency requires an attorney to complete within the fiscal year, subject to proration for non-duty time. Jx4. However, the Agency has reinterpreted specific language in the 2021 Memorandum of Understanding ("MOU") as requiring attorneys to meet their annual productivity goals on a *pro rata* basis either at the time of review or for a certain, unknown, number of pay periods during the fiscal year. This novel interpretation, however, remains unclear and arbitrarily applied. It has also resulted in an unlawful interpretation and application of the 1994 MOU concerning promotions.

The disputed language includes the Agency's ability to *track* the number of signed decisions and/or issues within each decision an attorney has produced during the performance year, and that the Agency also "may conduct frequent progress checks to ensure each attorney is on-pace to meet their annual production requirement." Jx4. However, tracking attorneys' productivity during the fiscal year and frequent progress checks to ensure attorneys are on-pace to meet their annual goals does not mean interpreting the productivity standard as requiring attorneys to meet their annual goals on a *pro rata* basis either at the time of a review or for a certain number or percentage of pay periods. Further adding to the confusion, the Agency's new interpretation of "on-pace" and "consistently on-pace" is fluid and continually evolving at the whims of various management officials.

[2] *See generally*, Ux1 at 110, 141, 256, 262-63.

The fatal flaw with the Agency's interpretation is the failure to recognize the difference between "track" and "enforce," which the Federal Labor Relations Authority ("Authority") thoroughly explained in a decision addressing a similar issue at the Agency concerning the implementation of the productivity standard. *U.S. Dep't of Veterans Affairs, Board of Veterans Appeals & AFGE Local 17*, 68 F.L.R.A. 170, 171 (2015) ("*AFGE Local 17*"). In that case, the Authority affirmed an arbitration award, which found that "enforcing" as opposed to "tracking" an attorney's productivity on a weekly basis during the fiscal year was a change in conditions of employment that triggered a bargaining obligation, which the Agency failed to meet. *Id.* at 173. Furthermore, the word "may" suggests that progress checks to determine if an attorney is on-pace are discretionary rather than mandatory; and the phrase "on-pace" is vague and does not include any specific benchmarks the Agency may require an attorney to meet to achieve a fully successful rating during the performance year. Jx4 at 336.

Nevertheless, the Agency began using this new interpretation to arbitrarily place attorneys on PIPs without providing guidance about what constitutes fully successful versus unacceptable performance under the productivity element of the performance standards. The Agency's new interpretation spread and eventually resulted in the Agency arbitrarily denying grade promotions, step increases, and overtime opportunities. In doing so, the Agency violated the Statute, the 2021 MOU, the 1994 MOU, and various provisions of the parties' Master Agreement. Notably, the Master Agreement incorporates the Statute by reference and contains additional notice and bargaining obligations when changing performance standards and promotions criteria. The Agency's defense, i.e., that it did not change how it interpreted the 2021 MOU, faced near-unanimous rejection by a parade of witnesses, including Veterans Law Judge ("VLJ") Sophia Loren, and is undermined by its own data showing a dramatic increase in GS-14 promotions denials in FY 2022 compared with earlier fiscal years. The

Agency was also unable to present a management official at the arbitration who could clearly articulate its position.

The Agency's failure to meet its notice and bargaining obligations was also highlighted by the unannounced waiver scheme, which it made no attempt to defend,[3] as well as the unannounced performance standard the Deputy Vice Chairmen ("DVCs") covertly created during a meeting in early 2023, in which they determined that being three weeks behind the *pro rata* annual goal was considered unacceptable and warranting of a PIP. Tr.D.5 at 198-99. Neither change was communicated to the Union or the attorneys. Tr.D.2 at 21; Tr.D.5 at 198-99.

Based on the overwhelming evidence, the Agency understandably does not want the Arbitrator to decide this Grievance on the merits and is trying to have it dismissed on procedural grounds. The Agency's arbitrability objections on the grounds that the grievance was untimely, and that the doctrine of collateral estoppel precludes the grievance, have no merit. Regardless, the Agency abandoned these objections because it failed to make them in a timely step-3 grievance decision.

For these reasons, the Agency's numerous violations justify remedies, including *status quo ante* relief until the Agency meets all bargaining obligations; a make-whole remedy for all impacted attorneys, including back pay under 5 U.S.C. § 5596; and a cease-and-desist order and a notice posting signed by the Board's Chairman.

IV. STATEMENT OF FACTS

Veterans may seek disability compensation and other benefits from the VA. If the Agency denies the benefit, the veteran may appeal to the Board. *See* 38 U.S.C. § 7101(a). The Board consists of a Chairman, a Vice Chairman, a Senior Deputy Vice Chairman ("SDVC"), three DVCs, approximately 130 VLJs, over 900 attorneys, and several support staff. *Id*. The Agency assigns each VLJ between six

[3] Tr.D.5 at 87.

and nine attorneys who review the record on appeal, conduct legal research, and prepare comprehensive draft decisions or remand orders for consideration by the VLJ. *Id*; Tr.D.5 at 19. The Union represents the attorneys, who range in grade from GS-11 to GS-14. Tr.D.5 at 23-24. By federal mandate, the Board must conduct hearings and issue appellate decisions in a timely fashion. 38 U.S.C. § 7101(a). The Board developed performance standards for Board attorneys involving, in pertinent part, an annual case quota or issue quota, which exists in the productivity element. Jx5 at 338.

A. Attorney performance standards

The attorney performance plan is universal of all attorneys regardless of grade and includes the critical elements: (1) productivity, (2) case management, (3) quality, and (4) customer service and organizational support; and the non-critical element (5) information security. Jx5 at 338. The productivity element is central to the Board's mission. Tr.D.5 at 25-26. For the Agency to consider an attorney fully successful under this critical element, the attorney must produce either 156 signed decisions **or** decisions containing a total of at least 491 issues by the end of the fiscal year.[4] Jx5. The Agency will rate the attorney's performance Fully Successful upon reaching either milestone. *Id*. The Agency prorates the productivity requirement for leave and other non-decision writing activities. Jx4. This is a fully objective and unambiguous annual standard in that it speaks only to the number of signed decisions/issues, subject to proration for non-duty time, that the Agency requires an attorney to complete within the fiscal year. *Id*.

The Memorandum of Understanding signed by the Parties in September 2020 contains the implementation of these performance standards, which has been effective since October 1, 2020.[5] Jx4.

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[4] When an attorney's individualized, prorated goal results in a decimal of 0.01 to 0.49, the goal will be rounded down to the nearest integer. A decimal of 0.50 or above will be rounded up to the next integer. Jx4 at 355.

[5] The MOU is signed by Local 17 President Douglas Massey and former DVC Kimberly Osborne. Jx4 at 337. Nick Keogh, Local 17's Third Vice President, negotiated this MOU on behalf of the Union. Tr.D.3 at 115.

For reference, this brief will denote this document as the "2021 MOU" since FY 2021 spans from October 1, 2020, to September 30, 2021. *Id*. The provisions in the 2021 MOU, most pertinent to this arbitration, include the following:

> Provision 3. The Board will continue to *track the number of signed decisions* an attorney produces during the performance year. In addition, the Board will also track the number of issues an attorney produces within each signed decision. *Id*. at 335 (emphasis added).
>
> . . .
>
> Provision 10. Consistent with performance management, *the Board may conduct frequent progress checks to ensure each attorney is on pace to meet their annual production requirement*. The attorney will receive credit when the decision is signed by a VLJ. Based on a showing of good cause, cases/issues submitted and pending signature may be considered in assessing an attorney's performance, particularly when the unsigned cases/issues will impact the attorney's performance under the Productivity critical element. Management will determine whether good cause has been shown. *Id*. at 336 (emphasis added).

Jx4 at 335, 336.

Additionally, provision 4 of the 2021 MOU states that "[t]he official number of adjudicated issues in a particular case will be determined by the signing VLJ, but attorneys may track their case and issue progress via a voluntary Decision Output Calculator (DOC) or some other tracking tool." *Id*. at 335.

The DOC is the tool used by the Agency to track the production of its attorneys. It is a detailed Excel file with rows corresponding to each of the 26 two-week pay periods in a given fiscal year and a variety of columns where the Agency tracks an attorney's production. Ux29. John Ryan (JR) Cummings testified at length about how the DOC works. Tr.D.2 at 157-174. The columns on the left titled "Annual Leave Hours" through "Case Administrative Action Time" are fillable with numbers corresponding to hours spent away from production, and, thus, prorating down the actual end-of-year production goal. Tr.D.2 at 161-63. The column titled "Cases Goal for Pay Period (Fully Successful)"

reflects the annual production goal for fully successful divided by 26 pay periods, averaging out to 6 cases and/or 18.9 issues per pay period. Tr.D.2 at 165. The column immediately to the right is titled "Case Goal FYTD (Fully Successful)," which is a cumulative count of the biweekly average over the course of the whole fiscal year. *Id.* Both columns, as well as all other columns under the heading "Case Goal Calculation" and "issue Goal Calculation" can be prorated down based on the numbers inputted in the columns on the left, depending on an individual attorney's circumstances. Tr.D.2 at 163. Therefore, each attorney has a unique DOC with individualized annual goals based on the prorations they received over the course of the fiscal year.

The 2021 MOU also discusses proration in which the Agency adjusts an attorney's annual productivity requirement for various kinds of approved leave, including holiday leave, annual leave, sick leave, leave without pay, leave under the Family and Medical Leave Act, jury duty, weather and safety leave, Union official time, and administrative leave. Jx4 at 336. Proration may also be available for other categories.[6] Jx4 at 336-37. Due to the number of different prorations available to attorneys and the increments in which the Agency prorates cases down to the tenth of a decimal, the DOC is highly calibrated.

Vice Chairman Ken Arnold announced the FY 2021 performance standards and the negotiated 2021 MOU to all attorneys and VLJs in a September 29, 2020, email. Ax5. The Vice Chairman's email also attached a blank Form 0750, Performance Appraisal, which included the annual production standard and other elements in the attorney performance plan. *Id.* None of these documents mentions that attorneys are required to produce three decisions per week or six decisions per pay period, although

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[6] Proration categories include: (1) various IT problems; (2) attending mandatory Board-wide trainings and events; (3) up to four hours for actual class time for continuing legal education credits if required to maintain the attorney's bar license; (4) official travel during duty time; (5) up to 4 hours for time spent renewing or replacing a Personal Identity Verification (PIV) card; (6) time spend on administrative actions under compelling circumstances; and (7) other good cause as determined by management. Jx4 at 336-37. The 2021 MOU also states that, as determined by management, the attorney will not be penalized for any delays caused by or due to pending administrative action that was timely requested, or for situations outside of the attorney's control. *Id.* at 337.

the parties recognize that the annual production standard breaks down to an average of three cases per week or six cases per pay period if an attorney is on the case track, and an average of 9.5 issues per week or 19 issues per pay period of the attorney is on the issues track. Jx4; Jx5. Indeed, the Vice Chairman's email announcing the 2021 performance standards noted, "**Bottom line up front, we dropped the minimum individual expectation from the number of decisions signed each year from an average of 3.25 per week to 3 decision per week**." Ax5 (emphasis in the original). This highlighted sentence referred to management's decision to reduce the annual productivity standards from the prior year of FY 2020, and, therefore, the average weekly breakdown of the newly reduced annual standard. A brief discussion of the prior standards is therefore helpful to understanding the issues for the Arbitrator to resolve in this case.

B. Prior performance standards

The prior performance standards for FY 2020, which are no longer in effect, included a higher annual quota of either 169 signed decisions or 566 signed issues. Jx7. The 2020 MOU, which is also no longer in effect, outlines other differences including more categories for proration of the annual goal.[7] *Id*. Therefore, during the negotiation of the 2021 MOU, the Parties agreed to decrease the annual quota, with the Union consenting to the restriction of proration categories by removing the proration categories. Tr.D.3 at 119-22.

Notably, the Parties agreed to remove a provision related to promotions from the current 2021 MOU. Jx4. This former provision in the 2020 MOU, at paragraph 14, stipulated:

[7] These categories, which are not included in the 2021 MOU, include: (1) participating in actual class time for continuing legal educations classes, thereby removing the four-hour cap; (2) traveling if the Board directs a remote teleworker to return to Washington, DC; (3) completing complex cases; (4) taking on additional work-related assignments in furtherance of the Board's mission, including holding hearings and/or adjudicating claims as an Acting VLJ; (5) experiencing significant issues if the Board introduces new technology required to write decisions; (6) spending time on a case which is later referred for administrative action and is not returned to that attorney to draft the decision; and (7) spending time resolving complex administrative or procedural matters related to review of appeals under the Appeals Modernization Act.

> To be eligible for promotion, overtime, special projects, or details, an attorney must be on pace to meet the productivity performance standards for at least one of the required milestones (defined as having a Decision Output equal to the prorated case or issue credit goal as reflected in the Board's Fiscal Year Decision Output Calculator) at the end of the week at the time of review. The Board may conduct monthly progress checks to ensure each attorney is on pace to meet his or her annual production requirement. The Board will provide assistance in accordance with the Master Agreement and applicable laws, rules and regulations. The attorney receives credit when the decision is signed by a VLJ. However, upon any formal performance evaluation under this critical element, any case that has been submitted to a VLJ, but not yet signed, may be credited to the drafting attorney, particularly when the unsigned case(s) will impact the attorney's performance under this critical element. (Emphasis added). Jx7 at 351-52.

In contrast, the current 2021 MOU contains no specific language requiring attorneys to be on-pace at the time of review for promotion, overtime, special projects, or details. Jx4. The MOUs also differ in that the prior 2020 MOU refers to "*monthly*" progress checks whereas the current 2021 MOU refers to "*frequent*" progress checks to ensure that an attorney is on-pace to meet his or her annual productivity requirement. *Compare* Jx7 at 351 *with* Jx4 at 336. Moreover, the last paragraph of the prior 2020 MOU states, "[t]his guidance supersedes pervious guidance on the critical element of Productivity. Previous guidance on the remaining performance elements remain[s] unchanged." Jx7 at 336. The current 2021 MOU contains no such language. Jx4. Nicholas Keogh and Douglas Massey, however, both testified that the 2021 MOU supersedes all prior MOUs, referencing the provisions concerning proration, which the Parties removed and chose not to include in the current 2021 MOU. Tr.D.2 at 31; Tr.D.3 at 136. Lastly, the 2021 MOU does not define "on-pace." Jx4 and 7.

C. Career progression for attorneys at the Board.

The attorneys' full performance is the GS-14 level.[8] Jx9 at 367. The 1994 MOU and Article 23 of the Master Agreement outline attorneys' progression route through the career ladder. Jx9; Jx1 at 110-

[8] It is worth mentioning that in late 2021 the Board downgraded the career ladder to the GS-13 level for all newly hired attorneys. The new career ladder has no impact on the class of attorneys subject to this arbitration. Tr.D.5 at 137.

11. The parties agreed that the 1994 MOU is still in effect despite its implementation some three decades ago. Tr.D.2 at 155. Hence, the career ladder for attorneys is from GS-11 to GS-14. Tr.D.5. at 23. The following criteria pertain to advancing through the career ladder plan from the GS-11 to the GS-13 level:

> i. Staff counsel may not be considered for promotion to the next higher grade until he or she has served in his or her current grade for at least one year. Attainment of at least a fully successful level of performance in each element of the performance plan for the one year period prior to the date the counsel completed the time-in-grade requirement for promotion is required for promotion to the next higher grade.
>
> . . .
>
> ii. In the event that counsel has not achieved the requisite level of performance and the promotion is denied, counsel will be reconsidered for promotion not earlier than three months and not later than six months from the date the promotion was denied. Attainment of at least a fully successful level of performance in each element of the performance plan for the one year period prior to the date the counsel is reconsidered for promotion will be required for promotion to the next higher grade under these circumstances.

Jx9 at 371.

The 1994 MOU outlines a different process and different criteria for promotion to the GS-14 level.

> i. Staff counsel may not be considered for promotion from GS-13 to GS-14 until he or she has served in his or her current grade for at least <u>two years</u>. Attainment of at least a fully successful level of performance in each element of the performance plan for the two year period prior to the date the counsel completed the time-in-grade requirement for promotion is required for promotion to the next higher grade. In addition, because counsel serving in the grade of GS-14 prepare decisions in the most difficult cases considered by the Board, <u>it must also be demonstrated that the counsel being considered for promotion to that grade</u> <u>has adequate experience in successfully dealing with cases involving the resolution of complex issues of law and fact</u>. Therefore, promotion to GS-14 will require the recommendation of the Counsel's supervisor and the approval of the Promotion Review Panel.

> ii. The Promotion Review Panel will consist of the Deputy Vice Chairman or his designee and four members of the Board. The panel will approve promotion only when it has determined that the Counsel has demonstrated adequate experience in successfully dealing with cases involving the resolution of complex issues of law and fact, as is expected at the GS-14 level. If the panel does not approve promotion, a detailed explanation of the reasons for that decision will be provided.
>
> iii. In the event that counsel has not achieved the requisite level of performance and the promotion is denied, counsel will be reconsidered for promotion not earlier than three months and not later than six months from the date the promotion was denied. Attainment of at least a fully successful level of performance in each element of the performance plan for the two year period prior to the date the counsel is reconsidered for promotion will be required for promotion, as well as the recommendation of the Counsel's supervisor and the approval of the Promotion Review Panel will be required for promotion to the next higher grade under these circumstances.

Jx9 at 371-72.

Thus, promotions to the GS-12 and GS-13 levels have a ***one-year*** time-in-grade requirement, during which the attorney must have achieved at least fully successful in each element of the performance plan. Jx9 at 371. The attorney's DVC makes the decision to either grant or deny the promotion. Tr.D.5 at 56. In contrast, promotions to the GS-14 level have a ***two-year*** time-in-grade requirement during which the attorney must have achieved at least fully successful in each element of the performance. Jx9 at 371. Additionally, a GS-14 promotion also requires that the attorney demonstrate his or her ability to successfully handle complex issues of law and fact. *Id.* The decision to grant or deny a GS-14 promotion is rendered by the promotion review panel ("the panel") consisting of the Deputy Vice Chairman or his designee and four members of the Board. Jx9 at 371-72; Tr.D.5 at 53. In other words, the 1994 MOU requires a five-member panel when considering GS-14 promotions.

DVC Robert Scharnberger testified that he became a member of the panel in May 2019. Tr.D.5 at 53. He also explained that, rather than having five members, as required by the 1994 MOU, the current panel has only four members. Jx9 at 371; Tr.D.5 at 212. The panel members include SDVC

Christopher Santoro, DVC Thomas Rodrigues, DVC Tamia Gordon, and DVC Scharnberger. Tr.D.5 at 212. All panel members except DVC Scharnberger are relatively new to the Board: SDVC Santoro started in July 2020; DVC Gordon started in August 2021; and DVC Rodrigues started in September 2021. Tr.D.5 at 213. DVC Scharnberger testified that it was unclear what happened if the panel's vote was split 2-2. Tr.D.5 at 221.

DVC Scharnberger also referenced the parties' Master Agreement when deciding on promotions. Tr.D.5 at 152. Article 23 of the Master Agreement pertains to merit promotion, including the process of moving through career ladder plans. *See generally* Jx1 at 109-26. The article includes the following relevant provisions:

> Section 1 – Purpose and Policy
> The parties agree that the purpose and intent of the provisions contained herein are to ensure that promotions are made *equitably and in a consistent matter*. Jx1 at 109.
> . . .
> Section 3 – Career Ladder Plans
> A. . . . The responsibilities at each level of the career ladder position *will be communicated to employees* through the PD and career ladder plan. *Id.* at 110.
> . . .
> B. . . . The career ladder plan will outline the *objective criteria* for each grade level which an employee must meet in order to be promoted. A copy of the plan will be given to each employee upon entry into the career ladder and when the employee is promoted to a new level of the career ladder. The employee will also be advised of his/her earliest date of promotion eligibility. When career ladder plans are established and/or revised, the Department will provide *notice to the local union* in accordance with Article 49 - Rights and Responsibilities. The *employee will be provided with a copy* of any revised career ladder plan within 30 days of such revision. *Id.*
>
> Section 4 – Career Ladder Advancement . . .
> A.(1) *If an employee is rated as successful and is meeting the promotion criteria in the career ladder plan*, the Department will certify the promotion which will be effective at the beginning of the first pay period after the requirements are met.
> . . .
> (2) If an employee is not meeting the criteria for promotion, the employee will be given a written notice at least 60 days prior to earliest date of

> promotion eligibility. The written notice will state what the employee needs to do to meet the promotion plan criteria. Should a career ladder plan require only a three-month training period, the above notice shall be a reasonable period prior to the earliest date of promotion eligibility.
> . . .
> (3) In the event that the employee met the promotion criteria, but the appropriate Department official failed to initiate the promotion timely, the promotion will be retroactive to the beginning of the first pay period after the pay period in which the requirements were met. *Id.* (emphasis added).

D. The dispute concerning the interpretation of the on-pace language.

In October 2022, the Union began receiving complaints from attorneys asserting that the Agency was denying their promotions based on criteria not outlined in the performance plan, the 1994 MOU, the 2021 MOU, or any other negotiated agreement. Tr.D.2 at 42, 174-75. These new criteria, although unclear, required attorneys to be "on-pace" or "consistently on-pace" for promotions, within-grade increases, overtime opportunities, and to avoid being issued a Performance Improvement Plan (PIP). The Agency was interpreting the on-pace language as a requirement that attorneys meet the *pro rata* annual productivity standard at the time of the review, whereas it created a new consistently on-pace requirement that attorneys meet their *pro rata* annual productivity standard most pay periods, although it was not entirely clear. Tr.D.5 at 154. The Agency refers to being on-pace as in the "green" zone (or being "green") whereas it considers falling behind the "yellow" zone. Tr.D.2 at 52, 116. Mr. Massey and Mr. Cummings testified that, due to the lack of official notice by management regarding this new standard, the Union initially addressed these complaints by filing individual grievances before filing the grievance at issue on December 20, 2022. Tr.D.2 at 19, at 174-75, 201-02.

1. Individual grievances for three attorneys for whom the Agency denied promotions.

The Union filed three individual grievances in October and November 2022 on behalf of three attorneys for whom the Agency denied GS-14 promotions. The Agency granted the grievances, but only on the procedural basis that the Agency failed to provide each attorney with a 60-day notice letter as

required by Article 23 of the Master Agreement. Tr.D.2 at 199. In other words, the Agency granted the grievances solely based on procedural grounds, allowing the Agency to continue its disputed interpretation and application of the productivity standard and promotion criteria. Mr. Cummings testified that he had been involved in all three grievances. Tr.D.2 at 175, 189-200.

The Union filed the first step-3 grievance on behalf of attorney America Ferrera on November 13, 2022. Ax17. Mr. Cummings pointed out in the step-3 grievance that Ms. Ferrera had clearly met the GS-14 promotion criteria in that (i) she had been fully successful in all elements of her performance plan for the requisite two-year period, (ii) she had demonstrated her ability to handle cases involving complex issues of law and fact, and (iii) her supervisor recommended that she be promoted, all of which is evidence that she could perform at the next higher grade. *Id*. Despite meeting these criteria, on July 6, 2022, Ms. Ferrera learned of the panel's recommendation to deny her promotion. *Id*.

Her VLJ briefly relayed to her that the reason was because she was too "yellow" throughout the year, indicating that in too many pay periods leading up to her promotion date, she was not "on-pace." *Id*. Ms. Ferrera received official notice in an email dated August 23, 2022, that the Vice Chairman had denied her promotion; however, the Vice Chairman did not provide an explanation. *Id*. Ms. Ferrera was notified that she could reapply for a promotion review in six months, but no sooner. Ax17 at 14. However, SDVC Santoro granted the step-3 grievance due to the Agency's failure to issue Ms. Ferrera a 60-day notice letter. Tr.D.2 at 199. The step-3 grievance notes that DVC Gordon had previously denied the grievance at step-2. Ax17. Neither SDVC Santoro nor DVC Gordon testified at the arbitration, although SDVC Santoro observed as multiple Union witnesses testified on August 3, 2023.

The Union filed two separate step-3 grievances on November 16, 2022. Mr. Cummings filed the first grievance on behalf of Trevor Noah. Ax16. Again, Mr. Cummings pointed out in the grievance that Mr. Noah had met the GS-14 promotion criteria as outlined in the 1994 MOU in that (i) he had met

time-in-grade requirements, (ii) he had been fully successful in all elements of his performance plan for the requisite two-year period, and (iii) he had demonstrated the ability to handle cases involving complex issues of law and fact, as evidenced by his supervisor's recommendation that he be promoted, all of which is evidence that he could perform at the next higher grade. *Id*. Despite meeting these criteria, on August 22, 2022, Mr. Noah learned of the panel's denial of his promotion. *Id*. As discussed in the step-3 grievance, Mr. Noah's VLJ explained he had been denied his promotion because his DOC was too "yellow" throughout the year, indicating that, in too many pay periods leading up to his promotion date, he was not "on-pace," and that he would be reconsidered on December 17, 2022. Ax16. Mr. Cummings also stated that the Agency had "unilaterally created a new criterion that attorneys be "on-pace" for a certain, ***unidentified portion*** of the year concerning the critical element of Productivity in the performance plan." *Id.* (emphasis added). Fortunately for Mr. Noah, the Agency granted his grievance at step-3 because the Agency failed to issue him the required 60-day notice letter. Tr.D.2 at 199.

Ms. Calanit Kedem and Mr. Cummings filed the other step-3 grievance on behalf of Britt Ekland. Ax15. Ms. Kedem argued that Ms. Ekland clearly met the GS-14 promotion criteria in that (i) she had been fully successful in all elements of her performance plan for the requisite two-year period, (ii) she demonstrated her ability to handle cases involving complex issues of law and fact, and (iii) her supervisor recommended that she be promoted. *Id*. Ms. Kedem also pointed out in the step-3 grievance that the 1994 MOU contains no "on-pace" requirement; no version of the performance standards applicable since the hiring of Ms. Ekland contained any specific "on-pace" requirement. *Id*. Ms. Kedem further noted that, "Nowhere is 'on pace' defined, and the Department never gave the Union notice of its intent to institute a specific 'on pace' requirement for promotions or otherwise." *Id*. It is worth mentioning that the step-3 grievance refers to a step-2 grievance, which DVC Rodrigues denied,

who also observed the proceedings as witnesses testified on days three through five of the arbitration, but never offered testimony himself. *Id*.

2. The Union's December 20, 2022, grievance at issue in this case.

Near the Thanksgiving holiday in 2022, Mr. Massey called a steward meeting to discuss the growing complaints from attorneys for whom the Agency denied grade promotions. Tr.D.2 at 20, 57-58. Mr. Massey testified that the Union was initially unsure if the Agency had created a new on-pace criterion for promotions – in particular, whether the Agency considered on-pace to entail meeting the annual goal on a *pro rata* basis every pay period or a certain percentage of the performance year – because he had not been provided advance written notice as required by the parties' Master Agreement. Tr.D.2 at 20-21. Mr. Massey also testified that he initially believed that the new "on-pace" requirement was being applied sporadically by rogue managers. Tr.D.2 at 20-21.

The Union filed the Step 3 Grievance via email on December 20, 2022, with SDVC Santoro. Jx2; Ux2 at 012. On the following day, SDVC Santoro sent an email to Mr. Massey asking if the Union would like a grievance meeting before he issued his decision. Ux2 at 012. Within three hours Mr. Massey responded that the Union would like to meet and to let him know if he needed an extension due to the holidays. *Id*. at 011. The Parties met on January 4, 2023. Tr.D.2 at 7-8. In a January 11, 2023, email, SDVC Santoro wrote, "Good morning, I had hoped to get this decision out this week. While I'm still aiming to do so, it may slip into next week. I trust that's okay; if not please let me know." Ux2 at 011. Mr. Massey replied, "Hi Chris, That's fine. Thanks for the heads up." *Id*.

Considering the following week ended on January 20, 2023, Mr. Massey's response constituted a deadline extension on the grievance decision until January 20, 2023. However, the Agency failed to issue a decision by January 20, 2023, nor did the Agency provide any further communication from SDVC Santoro or any other management official concerning the grievance by January 20, 2023. Tr.D.2

at 14-15. Therefore, on Monday, January 23, 2023, the Union filed a Notice to Invoke Arbitration to preserve the rights of the over 900 attorneys it represents. Jx3. It was not until January 30, 2023, ten days after the already-extended deadline of January 20th, that SDVC Santoro issued a decision denying the grievance. Ax1.

In his untimely decision, SDVC Santoro referred to a 2018 MOU which contemplates "on-pace" as something measured during a performance year that is based on the *pro-rata* number of decisions the attorney should have drafted at the requisite time of review during the performance year, based on the DOC. Ax1. He then argued that the MOU dated September 28, 2020, which does not explicitly supersede any other MOU, does not define on-pace. *Id.* SDVC Santoro then asserted that "the only operative definition of 'on pace' at the time the September 28, 2020, MOU was negotiated and executed was that found in the 2018 MOU," and that "[t]he negotiators' use of the same 'on pace' phraseology in the 2020 MOU while not modifying the then-accepted definition of 'on pace' indicates that they intended the 2018 definition to remain in effect." *Id.*

Although SDVC Santoro was the deciding official, he did not testify at the arbitration to defend his position and explain his untimely decision, although he was available as apparent from his presence at the arbitration hearing. The Union was therefore unable to ask SDVC Santoro questions about an award issued in September 2019 in which Arbitrator Greenberg rejected SDVC Santoro's interpretation of the 2018 MOU. *U.S. Department of Veterans Affairs and AFGE Local 17*, FMCS Case No. 191119-01663 (Greenberg, September 2019) ("*Greenberg Award*").[9]

[9] *See* Greenberg Award (Attached). That arbitration resulted in the reinstatement and the issuance of backpay for an attorney who was removed for not being "on-pace" before the end of the fiscal year. *See* Greenberg Award at 34. Arbitrator Keith Greenberg rejected the Agency's assertion that the 2018 productivity standard itself included a weekly goal. *Id.* at 31. He then states that the "productivity performance standard, as defined in the Grievant's performance plan for FY 2018, is unambiguously an annual standard; it speaks only to the number of signed decisions, subject to proration for non-duty time, that the decision-writing attorney is expected to complete within the fiscal year. At most, the weekly goal was shown to be a tool for an attorney to use in pacing her progress and for management to use in gauging an attorney's progress." Greenberg Award at 34.

3. Information provided by the Agency concerning GS-14 Promotions since 2017.

SDVC Santoro's untimely grievance decision and the increasing number of GS-14 denials prompted an investigation by the Union. Tr.D.2 at 202. The Union therefore requested information concerning all attorneys who were eligible for GS-14 promotions since 2017. Ux30; Tr.D.2. at 201-02. The data provided by the Agency reveals the following:

- In FY 2017, 20 attorneys were eligible for promotion; the Agency promoted all 20 attorneys (100%).
- In FY 2018, 29 attorneys were eligible for promotion; the Agency promoted all 29 attorneys (100%).
- In FY 2019, 37 attorneys were eligible for promotion; the Agency promoted all 37 attorneys (100%).
  *One employee had her promotion delayed, but the Agency eventually promoted her during a pay period when she hit her *pro-rata* goal. Her DOC showed that she was not consistently on pace throughout most of the year but managed to be one issue ahead of her prorated goal by the end the year. Ux1.
- In FY 2020, 61 attorneys were eligible for promotion; the Agency denied only 1 attorney promotion based on her performance in the critical element of quality and promoted the other 60 attorneys (98% approved and 2% denied).
- In FY 2021, 181 attorneys were eligible for promotion; the Agency denied 7 attorneys' promotions and approved the other 174 attorneys (96% approved and 4% denied).
- In FY 2022, 100 attorneys were eligible for promotion; the Agency denied 17 attorneys' promotions and 9 other attorneys signed waivers to waive their promotion consideration until a later date. The Agency approved 74 attorneys' promotions. (74% approved and 26% denied or waived). Ux30.

4. Waivers

The Union's investigation also revealed that the Agency began a waiver scheme under which attorneys could waive their contractual right for the promotion panel to review them when eligible for GS-14 promotions. Tr.D.2 at 21. The Agency never notified the Union of this new scheme; instead, Union officials first heard about it in July 2022 from attorneys whose VLJs had pressured them to send or sign waivers. Tr.D.2 at 236. Several witnesses explained the waiver process and its purpose. Tr.D.3. at 203 and 262; Tr.D.5 at 140-46. If an attorney's VLJ believed that the attorney's GS-14 promotion would be denied by the panel, the VLJ would encourage the attorney to waive his or her contractual

right to have their promotion considered upon completion of the time-in-grade requirement even if the attorney was fully successful and demonstrated the ability to handle complex cases. Tr.D.5 at 140-46. VLJs informed the attorneys that the delay would be shorter if they agreed to a waiver as opposed to being denied a promotion by the panel. Tr.D.2 at 237-38.

Attorneys Claire Forlani and Mariah Carey both testified that they had submitted such waivers. Tr.D.3. at 203, 262. DVC Scharnberger testified that he did not know when the Agency introduced the waivers or if the Agency negotiated the waiver program with the Union, but he had not personally seen any waivers until 2022. Tr.D.5 at 140-42. This is consistent with information provided by the Agency, i.e., that waivers had not been issued from FY 2017 to FY 2021. Ux30. DVC Scharnberger also explained that the attorney and their VLJ directly negotiated the date for consideration in the waiver, although he was unsure what would happen if the parties disagreed. Tr.D.5 at 145. Waivers then went to the panel to determine reasonableness. *Id.*

5. Witnesses at arbitration

Thirteen witnesses testified over four days, including three Union officers, seven AAs, two VLJs, and a DVC who is also a member of the panel. Eleven of the thirteen witnesses, including a VLJ, testified that no management official notified them of the on-pace or consistently on-pace requirement. The other two witnesses from the Agency testified differently. Three Union officers – Local President Douglas Massey, Sergeant-at-Arms JR Cummings, and Vice President Nicholas Keogh – testified that no Agency official notified them of a requirement that AAs be on-pace or consistently on-pace during the year to qualify for promotions or other personnel actions. Tr.D.2 at 53-54, 175; Tr.D.3 at 140-41.

a.) *Douglas Massey.*

Mr. Massey began his employment with the Board in February 1997 and has been a union advocate for over 10 years. Tr.D.2 at 6-7. Mr. Massey explained that, until recently, grade promotions

and within-grade increase were consistently granted if the attorney was rated at least fully successful in all elements and met the one-year time-in-grade requirement, except that GS-14 promotions had an additional requirement that the attorney had to demonstrate the ability to handle complex cases with a two-year time-in-grade requirement. *Id*. at 17-18. He recalled the Agency denying only one person a GS-14 promotion, until recently when denials suddenly became common. *Id*. at 18. Mr. Massey explained that the Union first noticed that management was defining "on-pace" as requiring attorneys to meet their annual performance requirement on a *pro rata* basis every week or every pay period when the Board began issuing more PIPs than usual in FY 2021. *Id*. at 18-19. This new standard eventually spread to grade promotions, within-grade increases, and eligibility to work overtime. *Id*. at 19. The Union initially responded by filing individual grievances around November 2022, before filing the grievance at issue in this case in December 2022. *Id*.

Mr. Massey opined that the Grievance was timely because the Agency failed to provide proper notice of the new way it began applying the on-pace and consistently on-pace requirements for various personnel actions. *Id*. at 20-22. Instead, the Union learned piecemeal from employees. *Id.* The Agency also provided no notice to the Union about the new waiver scheme. *Id*. at 21. Mr. Massey explained that the Union properly filed the Notice to Invoke Arbitration on Monday, January 23, 2023, because SDVC Santoro failed to provide his decision by the deadline of Friday, January 20, 2023, based on mutual agreement after Mr. Massey granted SDVC Santoro an extension. *Id*. at 14. He also explained that management would dismiss any Union grievance for missing a deadline. *Id*. at 16.

Mr. Massey discussed prior grievances the Union had filed in 2021, which he believed had no bearing on this grievance before the Arbitrator. Tr.D.2 at 25-28. The first grievance, filed on June 15, 2021, took exception with the Agency's policy of assigning credit upon signature by the reviewing VLJ, rather than upon submission. Ax1.F at 25-28. The second grievance, filed on July 17, 2021, pertained

to a letter of counseling that an attorney was issued. Ax1J, at 30. The Parties did not arbitrate either grievance.

Mr. Massey testified that the 2021 MOU superseded all prior MOUs from 2018, 2019, and 2020, and that the 2021 MOU's meaning is derived from the document itself. Tr.D.2 at 31; Jx4. He then stated that the parties fully intended to remove the language contained in the prior 2020 MOU, which previously required attorneys to meet their annual goals on a *pro rata* goal basis at the time of any promotion. Tr.D.2 at 32-33. Mr. Massey stated that the 2021 MOU rolled over into FY 2022 and FY 2023 because the parties were unable to reach an agreement on a new MOU for the past two years. Tr.D.2 at 33.

b.) *Nicholas Keogh.*

Attorney Nicholas Keogh testified that he began his employment as a decision-writing attorney in August 2017 and is the Union's Third Vice President. Tr.D.3 at 111. He explained that he had been on the Union's negotiating team since 2018 and had been involved in negotiating the MOUs associated with the attorney performance standards since FY 2019. Tr.D.3 at 112. Mr. Keogh testified as to differences between the 2021 MOU and prior MOUs, particularly the 2020 MOU. Tr.D.3 at 115-133.

Mr. Keogh testified that one major difference and advantage for attorneys is that the Parties agreed to reduce the annual productivity requirement from 169 to 156 decisions and from 566 to 491 issues when the parties executed the 2021 MOU. Tr.D.3 at 119. Mr. Keogh explained that, in exchange for the reduced productivity requirements, the Union agreed to remove categories for proration in the 2021 MOU because management wanted simplicity. Tr.D.3 at 120-21. Mr. Keogh testified as to the specific categories for proration which are no longer available to attorneys Tr.D.3 at 128-134. The former 2020 MOU also mentioned "monthly" progress checks whereas the current 2021 MOU mentions "frequent" progress checks to determine if an attorney is on-pace. Tr.D.3 at 123. Ms. Keogh also

explained that, unlike the prior MOUs, the 2021 MOU contains no language that attorneys must be on-pace at the time of review for promotions. Tr.D.3 at 125. Mr. Keogh acknowledged that the 2021 MOU did not include language that this MOU superseded all prior MOUs; however, he testified that the parties intended for the 2021 MOU to control, explaining that the language was not included because the Union and management agreed it was redundant in that both parties acknowledged that the 2021 MOU would control. Tr.D.3 at 136. Mr. Keogh also recalled that management indicated they wanted a simplified document – the prior year's MOU contained 20 provisions and the 2021 MOU contains 14 provisions – so the superseding provision was deemed superfluous and was taken out. Tr.D.3 at 137.

Mr. Keogh discussed the September 29, 2020, email in which the Vice Chairman announced the new performance standards for FY 2021 when the Parties agreed to lower the annual production requirement. Tr.D.3 at 140-42. Mr. Keogh believed that the Vice Chairman was not announcing a new weekly production requirement when explaining that the lower annual production goal translated from 3.25 decisions per week to 3.0 decisions per week. *Id*. Mr. Keogh believed it was still an annual standard because the Vice Chairman never indicated that the weekly breakdown was a requirement in his notification, nor was this ever discussed during the bargaining of the 2021 MOU. *Id*.

c.) *JR Cummings.*

Attorney Cummings testified that he began his employment as a decision-writing attorney in August 2017 and is the Union's Sergeant-at-Arms. Tr.D.2 at 151. Mr. Cummings testified that nowhere in the performance standards is there a requirement of six decisions per pay period. Tr.D.2 at 154. Mr. Cummings opined that when he was preparing for his GS-14 promotion in 2021, his understanding was that he needed to be "green" at the time of review and that he had completed the requisite number of complex cases. Tr.D.2 at 154-55. Mr. Cummings testified that he never believed he had to be consistently on-pace, or "green," to achieve promotion to GS-14. Tr.D.2 at 157.

Mr. Cummings testified at length regarding how the DOC works. Tr.D.2 at 157-174. In a live demonstration, Mr. Cummings used a blank DOC and entered hypothetical numbers of a hypothetical employee to illustrate the highly calibrated nature of the DOC. Tr.D.2 at 166-168. Union Counsel set the DOC so that the hypothetical attorney had completed the recommended six cases every pay period except for a one-case deficit during the first pay period of the fiscal year. Tr.D.2 at 166. This one-case deficit resulted in "yellow" for the first pay period and every subsequent pay period throughout the entire fiscal year. Ux29. However, when Union counsel changed the DOC to eliminate the one-case deficit for the first pay period to match the required number in the column listed as "Cases Goal for Pay Period (Fully Successful)," the DOC changed from being all "yellow" to all "green." Tr.D.2 at 167. Union counsel repeated the demonstration by simply adding seven hours of proration in the first pay period. *Id.* Again, this changed the entire column from "yellow" to "green." *Id*. Mr. Cummings opined that the demonstration showed that an alteration as small as a single case or seven hours of proration can change the entire narrative of an attorney's fiscal year if relying solely on the DOC. *Id*.

Mr. Cummings testified that employees began informing him in mid to late 2022 that the Agency was denying them their GS-14 promotions because they were not "consistently on-pace," which was a change from his understanding as recently as 2021. Tr.D.2 at 174-75. Mr. Cummings began filing grievances on behalf of individual employees in the fall of 2022 because he did not know it was an issue that was impacting the entire Agency. Tr.D.2 at 175. Mr. Cummings testified that it struck him as very different criteria compared to the past. Tr.D.2 at 176. Mr. Cummings noted that the Agency was not limiting the on-pace criterion to GS-14 promotions; indeed, he had filed a grievance after the Agency denied an attorney a GS-13 promotion for not being "consistently on-pace." Tr.D.2 at 179-80. Mr. Cummings explained that nowhere in the 1994 MOU does the phrase "on-pace" appear. Tr.D.2 at 180-89.

Mr. Cummings reported that he spoke with SDVC Santoro after filing Attorney Ekland's grievance to discuss how to resolve similar issues going forward. Mr. Cummings recalled that SDVC Santoro preferred individual grievances. Tr.D.2 at 200. Mr. Cummings also testified about a conversation he had with DVC Rodrigues concerning Attorney Noah's grievance. Tr.D.2 at 197. When Mr. Cummings explained to DVC Rodrigues that the panel was focusing almost exclusively on Column U of the DOC ("Case Goal FYTD (Fully Successful)"), and that this constituted a change from prior practice. *Id*. DVC Rodrigues responded that the panel was "maybe" looking at the information a Noah differently than panels before he, SDVC Santoro, and DVC Gordon started at the Agency in 2021. Tr.D.2 at 197-198. Mr. Cummings testified that DVC Rodrigues was adamant that it was particularly important that an attorney demonstrate an ability to be "on-pace," and that he was persuaded but unconvinced by the same DOC illustration of the hypothetical attorney. Tr.D.2 at 198. Mr. Cummings believed his conversation with DVC Rodrigues increased his suspicions of a change in past practice. *Id*.

Mr. Cummings testified that he filed a request for information that resulted in the data for GS-14 promotions since 2017 after fielding complaints from attorneys that the Agency had changed the promotion criteria. Tr.D.2 at 202. Mr. Cummings summarized the data, which included GS-14 promotions, DOCs, waivers, and annual appraisals. Ux30; Tr.D.2 at 205-255; Tr.D.3 at 22-56. Mr. Cummings discussed data pertaining to numerous attorneys, whose names the Agency redacted, to include Employee #62,[10] Employee #87,[11] Employee #14,[12] Employee #8,[13] Employee #16,[14] Employee #20,[15] and Employee #25[16]. Mr. Cummings was surprised that, per that data, there were no GS-14 promotion denials between FY 2017 and FY 2019, one GS-14 promotion denial in FY 2020 due to

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[10] Tr.D.2 at 222-25; Ux1.
[11] Tr.D.2 at 227-29.
[12] Tr.D.2 at 241-44; Ux32.
[13] Tr.D.2 at 249-50; Ux31.
[14] Tr.D.3 at 23-30; Ux33.
[15] Tr.D.3 at 31-37; Ux34.
[16] Tr.D.3 at 38-41; Ux35.

quality issues, seven GS-14 promotion denials in FY 2021, and a noticeable increase of 24 GS-14 promotions denials or delays due to waivers in FY 2022, which he believed illustrated a change. Tr.D.3 at 43.

Mr. Cummings concluded his testimony by reporting that nothing in the productivity standard requires an attorney to submit six cases per pay period. Tr.D.2 at 59-60. He also stated that, in his capacity as a Union officer and decision-writing attorney, he was never notified that producing six cases per pay period was required to be fully successful; that he would be considered unsuccessful if he fell below six cases per pay period; or that grade promotions and within-grade increases could be denied for not producing six cases per pay period. Tr.D.3 at 59-60.

d.) *VLJ Sophia Loren.*

VLJ Loren testified that she had been a decision-writing attorney for eighteen years prior to her appointment as a VLJ. Tr.D.2 at 88. VLJ Loren was Ms. Ekland's supervisor, who recommended promotion to GS-14 for Ms. Ekland. Tr.D.2 at 99. VLJ Loren testified that she "had no doubt that [Ms. Ekland] would succeed," stating, "I had already been working with her for three years plus, and I was very confident that she was ready to become a GS-14, in my experience as a decision-writing attorney and also as a VLJ." Tr.D.2 at 94. VLJ Loren expressed that she was therefore surprised when the panel denied the promotion based on a "consistently on-pace" requirement, about which she was unaware as a supervisor. Tr.D.2 at 108; Ux18.

Initially, VLJ Loren believed the panel denied the promotion because it was uncertain if Ms. Ekland was on-pace at the time of review because there was confusion concerning cases submitted but not signed on time. Tr.D.2 at 94. In the special rating of record dated July 5, 2022, VLJ Loren stated that Ms. Ekland had met her requirement of 94 signed cases by pay period 21, which ended July 2, 2022. Ux17 at 059. However, VLJ Loren was unaware that she had signed some of the cases too late and that

the cases could not count towards Ms. Ekland's prorated total of cases. Tr.D.2 at 100. Nevertheless, VLJ Loren discovered that the delay in signing these cases would not have mattered to the panel because Ms. Ekland had not been consistently on-pace leading up to her promotion consideration. Tr.D.2 at 116. VLJ Loren's understanding is consistent with a September 8, 2022, email in which DVC Rodrigues explained to Ms. Ekland and VLJ Loren:

> A proven track record showing your ability to handle complex cases in both sufficient quality and in a timely manner is an important promotion consideration. Your history of on pace production did not appear to show a ***consistent pattern*** such that demonstrated ability to perform at the next higher grade level is evidence. Ux19 (emphasis added).

VLJ Loren testified that no one from the Agency ever notified her of the consistently on-pace requirement or that submitted cases pending signature would not count for promotion purposes. Tr.D.2 at 122. She stated that, as a supervising VLJ, she received no guidance, written or otherwise, on the GS-14 promotion criteria. *Id.* The only guidance VLJ Loren recalled was verbal guidance from her peers, which was that attorneys needed to be on-pace on the day the VLJ submitted the promotion packet. Tr.D.2 at 123. VLJ Loren outlined her understanding of how the productivity standard impacts promotions in an email she sent on August 23, 2022, to DVC Rodrigues, in which she included the following language in bold font:

> While the attorney standard did not change, the uptick in promotion denials based on unsignificant 'pacing problems' is not consistent with past practices.
>
> Under Supervisory 101, an attorney cannot be expected to achieve a goal if it is not clearly communicated to her. At no time was I aware that Britt Ekland needed to [be] green (and consistently so) from 10/1/21 through 7/2/22 as a pre-requisite to obtaining her promotion. It is not articulated in the GS-14 promotion panel memo from 2019, or in any other written document that I am aware of.
>
> From a practical standpoint, Britt has been denied a $15K+ annual salary increase under circumstances that have not historically been used to deny promotions last year or for years before that.

Ux18 (emphasis removed from the original).

e.) *Jeff Goldblum.*

Mr. Goldblum began his employment as an attorney in April 2019 and had no problem moving through the career ladder until the Agency's promotion panel denied his GS-14 promotion in April 2023. Ux45. His Promotion Panel Package noted that his eligibility date was April 10, 2023, that he met the time-in-grade criteria for promotion, and that VLJ Chris Pratt recommended the promotion. *Id*. Notwithstanding his recommendation, VLJ Pratt sent Mr. Goldblum a memorandum on March 10, 2023, explaining that the Agency may delay his promotion until he demonstrates that he is ready to work at the GS-14 level. Ux47.

The memorandum stated that,

> As an attorney being considered for promotion to GS-14, you must maintain at least Fully Successful performance in all elements of your performance plan and demonstrate your ability to successfully perform GS-14 level work as defined in the attached Position Description, to include: (a) Draft tentative decisions in difficult cases, involving questions of law and mixed questions of law and fact; (b) routinely conduct research on original and novel questions encountered in case review; and (c) give legally sufficient and appropriate written advisory opinions on difficult, complex and controversial problems encountered in appellate review."

Id. In the following section, the memorandum explained, "[t]o consistently sustain your productivity requirement means that you remain on pace for your annual goals, as determined by the decision output calculator, on a consistent basis." *Id.*

The Promotion Panel Packet contains the following recommendation by VLJ Pratt:

> This statement is written in support of Jeff Goldblum's promotion to GS-14 counsel. While his DOC might not always appear green, I find that Jeff has an acceptable-level of performance in productivity via good cause for two reasons. First, in pay periods 4 and 10, Jeff had the requisite cases submitted to be 'green,' but I had yet to sign them. For context, in FY23 I have not returned a case to Jeff for revisions and in FY22 I returned 4 cases (out of 90 signed by me, about 4.4%). Thus, his cases are almost always signable when submitted. In light of this, I do not believe Jeff should be penalized

> for me not sing able to sign his decisions on a few occasions. Notably, Jeff lives in California and often submits cases after I have completed my tour of duty on Fridays leading to unsigned cases. Second, and more importantly, I indicated to Jeff at the end of FY22 that I would challenge him with a deluge of hard cases. For background, in FY 2022, 13 percent of his cases were rated as meets expectations and 87 percent of the attorney's cases were rated as exceeds expectations or higher. He has worked an appropriate number of complex cases (12% hard, 62% moderate) and has handled them correctly and with independence. Thus far in FY23, Jeff's completed work products have been marked as complex at a rate of 29%. I am pleased with how he has responded. Jeff has displayed the ability to handle the complex cases. In this regard, his draft submissions are logical and well organized with hardly ever the need for anything more than minor revisions. In support, out of the 14 hard cases, Jeff produced decisions earning a 5 quality rating in 11 of them, about 79%. I see Jeff's outstanding work on these complex cases to be a valuable asset to the Board. He can be trusted to sort out the intricacies, procedurally and analytically, and to provide a polished work product. This keeps my team moving and supports one aspect of the Board's two-prong mission of provide quality, timely decisions. In short, Jeff is completing an above average number of complex cases for his grade level while maintaining an appropriate level of productivity.
>
> Additionally, in support, Jeff has helped with the Board's internal customer service and organizational support by being a new employee buddy and he received recognition for this via a November 2022 Helping Hand award.
>
> Personally, Jeff is a Veteran himself and he is engaged in the work. He is pleasant and easy to work with over the two years we have been assisting Veterans together. In this regard, he has displayed a positive attitude, to include showing a willingness to take on new issues. He takes feedback well and has exhibited the ability to learn and improve. Additionally, his draft decisions are generally well written and organized and demonstrate good review of the record, to include via his comments and tags in Caseflow.
>
> In sum, I fully support his promotion to GS-14 as I believe he is capable of performing at the higher grade. Ux45.

The panel decision denying Mr. Goldblum's promotion provided the following explanation: "Promotion to GS-14 is denied at this time because the attorney has not demonstrated the ability to consistently do GS-14 level work. Specifically, the attorney has not demonstrated the ability to efficiently draft cases at the appropriate pace. Attorney will meet the panel again on or after 29 June

2023." Mr. Goldblum's DOC shows that he needed two signed decisions for the Agency to consider him "green." The panel noted that it convened on March 29, 2023, and SDVC Santoro electronically signed the decision on April 24, 2023. *Id*. The Promotion Panel Package noted that Mr. Goldblum had requested a waiver, although Mr. Goldblum explained that he had never submitted any such waiver. *Id.*

In April 2023, within weeks of the panel's decision, Mr. Goldblum received a fully successful mid-year review and was issued a within-grade increase. Tr.D.4 at 125. He also testified that he was unaware of a consistently on-pace requirement and said the common phrase he had heard was "make sure you're good with your numbers." Tr.D.4 at 111. Mr. Goldblum testified that, prior to the panel convening on March 29, 2023, DVC Rodrigues had told VLJ Pratt that there was a 50% chance the panel would grant the promotion. Tr.D.4 at 98. DVC Rodrigues, like SDVC Santoro, did not testify at the arbitration, despite his obvious availability as apparent from his presence at the hearing as an observer. Mr. Goldblum was able to obtain his GS-14 promotion through the grievance process after the Union again pointed out procedural defects.

f.) *Claire Forlani.*

Attorney Claire Forlani testified that she began her employment with the Board in September 2018 and was eligible for her GS-14 promotion in September 2022. Tr.D.3 at 197. Ms. Forlani testified that she had no problem progressing through the career ladder from GS-11 to GS-13. Tr.D.3 at 198. She further testified that she had never heard of a consistently on-pace requirement or that she had to complete three cases per week or six cases per pay period for promotions or within-grade increases. Tr.D.3 at 198, 200.

Ms. Forlani stated that the GS-14 promotion process started in July 2022. Tr.D.3 at 198. At about that time, VLJ Emily Blunt explained to Ms. Forlani that her DVC indicated that the panel would deny her promotion based on the DOC. Tr.D.3 at 199. VLJ Blunt then explained that, rather than wait

six months, Ms. Forlani could voluntarily delay the process, which would hopefully result in the Agency re-reviewing her for promotion earlier. Tr.D.3 at 202-03. Ms. Forlani did not recall hearing the word "waiver;" instead, it was referred to as a "voluntary delay." Tr.D.3 at 205. Ms. Forlani and Ms. Blunt memorialized the conversation in a July 21, 2022, email "As we discussed this morning, I am electing to voluntarily delay consideration for promotion to GS14. Please advise if you need anything." Ux13.

The Agency eventually promoted Ms. Forlani to GS-14 on December 29, 2022, rather than on her eligibility date of September 30, 2022. Tr.D.3 at 210. Her VLJ urged her to waive consideration by the panel despite her fully successful annual performance evaluation on September 2, 2022. Ux14; Tr.D.3 at 208. Her performance appraisal noted that she had finished two cases ahead of her annual production requirement, with 118 signed decisions for her prorated goal of 116 decisions. Ux15 at 44. Ms. Forlani testified that the only change was that VLJ Blunt prioritized her cases, meaning VLJ Blunt was signing her cases and therefore crediting her cases more quickly than the VLJ had done previously. Tr.D.3 at 211.

g.) *Mariah Carey.*

Ms. Carey's understanding of the productivity standard is consistent with a March 13, 2019, email from Senior Supervisory Counsel ("SSC") Laura Benanti to Ms. Carey and the other attorneys in her group indicating that mid-year progress evaluations will focus on individual performance under the attorney performance standards during the period from October 1, 2018, through March 31, 2019. Tr.D.3 at 241; Ux37. SSC Benanti explained that "Pursuant to the [MOU], when evaluating whether you are on pace to meet your annual production requirement, I intend to take a *snapshot* of your performance on March 31. Under appropriate circumstances, cases or issues submitted but not yet signed may be credited." (Emphasis added). Ux37. Ms. Benanti's email made no reference to a consistently on-pace requirement.

Approximately three years later, Ms. Carey received a similar, but somewhat different, email from her new supervisor, VLJ Terri Hatcher, on April 11, 2022, about the mid-year evaluation process. Ux38. Ms. Hatcher explained that she planned to conduct mid-year evaluations on May 9, 2022, meaning that "I'll be looking at the DOC as of the pay period ending on May 6, 2022. *Id*. Ms. Hatcher then explained, "In order to be fully successful, you'll need to have cases SIGNED sufficient to meet your production as of that date – cases submitted but not signed don't count toward the mid-year evaluation total." *Id*. This departs from Ms. Benanti's policy in 2019, i.e., that she could consider cases and issues submitted but not yet signed for the purposes of the mid-year review. *Compare* Ux37 *with* Ux38. VLJ Hatcher also stated:

> In looking at the DOC from the pay period ending last week (4/8/22), it looks like you're 5 signed cases behind, with 4 submitted but not signed. In order to be evaluated as fully successful in production as of the mid-year evaluation, you'll need to have signed 1 *additional* case, in addition to the regular 3 per week (not including any proration). I know we spoke about possibly delaying your mid-year to make sure you're caught back up from the holiday; if you find as we get into May that you'd prefer we do that, I'm happy to hold off for an extra week or two; just keep me posted.

Ux38. Ms. Carey's mid-year review on May 19, 2022, was fully successful in all elements. Ux39. Her DOC showed that she was green by pay period 17 (May 8, 2022) but yellow during most of the prior pay periods. Ux42.

During preliminary discussions of her GS-14 promotion in July 2022 – just six weeks after her fully successful mid-year review – VLJ Hatcher recommended that Ms. Carey file a 90-day waiver because her DOC did not reflect that she had been consistently on-pace throughout the year. Tr.D.3 at 249-53. Ms. Carey also testified that SSC Jared Goff had explained to her that this had to do with "trends" at the Board and that management was taking a stricter approach to promotions. Tr.D.3 at 253. Ms. Carey testified that she had asked VLJ Hatcher how many pay periods of being on-pace or green the Agency required her to maintain for the Agency to promote her to GS-14. VLJ Hatcher replied either 90

days or six pay periods. Tr.D.3 at 254-55. VLJ Hatcher also clarified that Ms. Carey's ability to handle complex cases was not an issue. Tr.D.3 at 254. Neither VLJ Hatcher nor SSC Goff testified at the hearing.

VLJ Hatcher explained the waiver process to Ms. Carey in a July 6, 2022, email. Ux40; Tr.D.3 at 257. VLJ Hatcher said that a 90-day waiver made sense, and that the clock starts ticking on the date the attorney submits the waiver rather than her eligibility date of August 19, 2022. *Id.* She also explained that the waiver did not require any particular format, and that it would go to DVC Gordon rather than the entire panel. *Id*. Ms. Carey sent her waiver, backdated to July 1, 2022, to VLJ Hatcher and DVC Gordon, stating that she wished to delay her submission to the panel for her GS-14 promotion and waive promotion consideration for 90 days until October 1, 2022. Ux41. The Agency finally promoted Ms. Carey to GS-14 on October 1, 2022, which delayed her promotion by six weeks. Tr.D.3 at 262.

h.) *Jennifer Lawrence.*

Attorney Jennifer Lawrence began her career with the Board as a GS-11 attorney on September 8, 2021. Tr.D.3 at 162. She was issued a fully successful performance evaluation on September 8, 2022, after completing one year. Ux7; Tr.D.3 at 166. When evaluating her productivity, VLJ Ed Sheeran noted, "Jennifer has been on production since March 2022. Since going on production and through pp 24 of FY22, Jennifer produced 64 signed cases, meeting her adjusted fully successful productivity goal of 64.4 cases." *Id*. VLJ Sheeran then commented that she could keep pace and he had no concern about her ability in this regard. *Id*. SSC Jennifer Hudson emailed Ms. Lawrence's promotion paperwork for promotion from GS-11 to GS-12 for signature to DVC Gordon along with her DOC and case information. Ux8; Tr.D.3 at 166. SSC Burroughs also told Ms. Lawrence that "[y]our

hard work is reflected in the feedback from VLJ Sheeran. I really appreciate how professionally you receive feedback and how collegial you are with your colleagues." Ux8.

DVC Gordon denied the promotion to GS-12, however. Ux9. VLJ Sheeran notified Ms. Lawrence of the unwelcome news in a September 9, 2022, email. *Id.* VLJ Sheeran first gave Ms. Lawrence the good news that the Agency had approved her retention before telling her the unwelcome news that the Agency denied VLJ Sheeran's recommendation for her promotion to GS-12. *Id.* According to Ms. Lawrence's testimony, VLJ Sheeran told her the denial was due to a lack of consistent performance because there were several pay periods when she did not have enough cases in for signature to meet her goal. *Id.* VLJ Sheeran, however, never provided a specific number of pay periods in which she needed "enough" cases. Tr.D.3 at 173-74.

Ms. Lawrence testified that VLJ Sheeran told her that he had never seen a grade promotion denied due to a consistency pattern. Tr.D.3 at 174. She also testified that management offered no guidance about being consistently green or on-pace, and that she was told that a GS-12 promotion was non-competitive and only required that she meet her annual production goal and time-in-grade. Tr.D.3 at 175. She eventually received her GS-12 promotion in August 2023 – a full year after her eligibility date at which time the Agency rated her fully successful. Tr.D.3 at 175.

i.) *Serena Williams.*

Attorney Serena Williams testified that the Agency had promoted her to GS-14 in 2022 despite *not* being consistently on-pace. Tr.D.4 at 8-9. She explained that she had progressed through the career path without incident despite not being consistently on-pace during any fiscal year, including her GS-14 promotion in March 2022. Tr.D.4 at 9-11; Ux24. She testified that her VLJ never mentioned the concept of being consistently "green" for promotion, and that it was her understanding that the DOC was simply a tool to help her stay on track. Tr.D.4 at 12, 15. She believed that she only had to meet her

production requirement at the end of the year. Tr.D.4 at 16. However, she had also been told that she could be issued a PIP for not submitting six cases per pay period (Tr.D.4 at 17-18), although she was never told how many cases behind would warrant an unacceptable rating and the issuance of a PIP. Tr.D.4 at 24. In any event, Ms. Williams always met her annual production goals, and the Agency always rated her as fully successful. Tr.D.4 at 18.

j.) *Angelina Washington.*

Attorney Angelina Washington testified that the Agency denied the ability to work overtime in March 2023 because she was not "green" at the time of her request. Ux10; Tr.D.4 at 78-80. She explained that she fell short by one signed decision, notwithstanding having eight decisions submitted and pending signature by VLJ Mayim Bialik. Tr.D.4 at 80. In an email exchange on March 16, 2023, Ms. Washington asked VLJ Hyland "[a]fter not being 'green' on my DOC for the last pay period, I was wondering if there is anything I can do differently to make your job easier to get decisions out the door." Ux11. VLJ Bialik took full responsibility and told Ms. Washington, "[i]t is more a matter of me not being able to get to all the cases in my queue each week[,] [e]specially with holding hearings, supervisory duties, etc." *Id*. She then suggested to Ms. Washington that she "build a cushion." *Id.*

k.) *Pam Beesly.*

Attorney Pam Beesly was issued a PIP because, as of June 26, 2023 (pay period 20), she had 290 issues submitted but 281 issues signed; hence, she was nine issues behind her *pro rata* goal if considering only signed decisions. Ux52; Tr.D.4 at 39-40. Ms. Beesly explained that nine issues usually represented approximately one case. Tr.D.4 at 39. Despite doing the issues track, VLJ Michael Scott sent Ms. Beesly an email on June 26, 2023, stating that upper management was very concerned because she had only completed 40 cases for the fiscal year. Ux50. Ms. Beesly responded that day expressing frustration and confusion because neither the MOU nor her mid-year review required an

attorney to meet both the case and issue goals. Tr.D.4 at 45. Ms. Beesly testified about a "very confusing" follow-up conversation in which VLJ Scott explained that other attorneys who were counting issues had completed more cases. Tr.D.4 at 45. VLJ Scott then informed Ms. Beesly that her low case count prompted management to review her DOC which revealed too much "yellow." Tr.D.4 at 45. Ms. Beesly stated that she could not control when her VLJ signed her decisions. Tr.D.4 at 45.

The PIP document, dated June 30, 2023, notes that her performance in the critical element of Productivity was unacceptable. Ux52. The PIP lists the standard as requiring "the attorney to produce either 156 signed decision or 491 signed issues in the attorney's signed decisions[,]" and that "[t]he attorney's performance is Fully Successful upon reaching either milestone." *Id*. The standard does not mention that the Agency required attorneys to be consistently on-pace. *See generally id.* The PIP then lists Ms. Beesly's actual performance:

> To be considered Fully Successful in the critical element of Productivity, you must have produced 89 signed decisions or 281 signed issues as of June 17, 2023, after accounting for leave, holidays, and other appropriately approved non-duty time. However, as of June 17, 2023, you have completed only 40 signed decision and 272 signed issues. *Id*.

Thus, according to this document, the Agency deems an attorney's performance unacceptable if not on-pace at any time during the performance year. Yet, Ms. Beesly testified that she had no problem progressing through the career ladder even though she was 10 cases behind at the time the panel reviewed her GS-14 promotion packet in 2021. Tr.D.4 at 34. Ms. Beesly testified that, although she was not consistently on-pace, or even on-pace at the time of review, the Agency approved her promotion to her GS-14 without issue in January 2021. Tr.D.4 at 26. She testified that her understanding was that the GS-14 promotion only required that the most recent review be fully successful, and that the attorney have their VLJ's recommendation. Tr.D.4 at 27.

l.) *DVC Robert Scharnberger.*

In contrast to DVC Gordon's decision to place Ms. Beesly on a PIP for being nine issues behind her *pro rata* goal, DVC Scharnberger testified that he would not be concerned if an attorney was 10 issues behind if the attorney was on the issue track. Tr.D.5 at 198. He stated that last year the DVCs gave guidance to supervisors concerning the "general zone" in which an attorney is trending toward a PIP. Tr.D.5 at 198-99. He later clarified that it was January or February of 2023 when "we sort of put a number on it. Before that it was a more you know it when you see it situation." *Id*. He testified that the general zone was three weeks behind, meaning nine cases or 27 to 28 issues. Tr.D.5 at 198. But he also said it might be eight cases behind for some attorneys and ten cases behind for others. Tr.D.5 at 196. When asked, DVC Scharnberger was unable to recall if management notified the Union of this policy. Tr.D.5 at 199. And when asked how far behind an attorney would have to be to warrant a conversation with a supervisor, DVC Scharnberger said he was not sure if there was a specific number and that "[i]t's more of a you know it when you see it thing." Tr.D.5 at 194-95. He added that, if an attorney fell in the zone that would warrant a PIP, he hoped there would be a conversation – which he referred to as "gentle coaching" – in which the supervisor would ask, "What's going on? How can we help you?" Tr.D.5 at 200-01.

For grade promotions, DVC Scharnberger stated that being fully successful is a baseline and that the attorney must also demonstrate the ability to do higher-graded work. Tr.D.5 at 28. Demonstrating the second element involved the ability to do complex cases at an appropriate pace. Tr.D.5 at 39-40. He then added that "a Noah fluctuation is understandable," and that "there's a lot of 'float' around that." Tr.D.5 at 40. DVC Scharnberger then recommended that attorneys get ahead of their on-pace goal. Tr.D.5 at 42. He testified that he had denied promotions for attorneys who were on-pace but, on the other hand, had granted promotions for other attorneys who were not on-pace. Tr.D.5 at 79, 151. DVC

Scharnberger explained that the on-pace requirement is important for VLJs to get a steady flow of work; however, the Agency did not present any evidence or testimony concerning VLJs' workflow issues due to attorneys not producing enough decisions. Tr.D.5 at 42.

DVC Scharnberger agreed that it is important for employees to know and understand the expectations for promotion. Tr.D.5 at 212. When asked how management communicates to employees what the Agency requires for promotion if he had approved promotions when attorneys were not on-pace but had denied promotions for attorneys who were consistently on-pace, he cited to the Master Agreement without further explanation. Tr.D.5 at 151-52. When shown a copy of the 1994 MOU, DVC Scharnberger did not recognize the document despite being on the panel. Tr.D.5 at 159. When asked whether the panel uses the 1994 MOU when making promotion decisions, DVC Scharnberger replied, "I mean, I don't, I'm not familiar with the contents of the document." Tr.D.5 at 163. When asked if being on-pace for 50% of the fiscal year would be sufficient for the panel to approve a GS-14 promotion, he replied:

> I don't think there's a specific number. I think what you want to see is a number of pay periods in a row or in a short period of time even if there was a gap in the middle there somewhere that demonstrated you could get and stay at that pace. But it could vary from person to person depending on what the non-on-pace portion of the year looked like or what other factors are going on with that particular employee. Tr.D.5 at 153-54.

When asked by Union counsel, "So it's not a percentage, and it's not a particular number of pay periods because it varies from employee to employee, but employees are just expected to know what it means?" DVC Scharnberger replied, "Yes, I think, I think that's reasonable." Tr.D.5 at 153-54. He also agreed that attorneys are supposed to know what "enough" is without having those goals clearly defined. Tr.D.5 at 154.

Union Counsel specifically asked DVC Scharnberger why the Agency had denied Mr. Goldblum's GS-14 promotion. Tr.D.5 at 164-68. When asked if it was due to not being consistently on-

pace based on signed decision in the DOC, DVC Scharnberger never offered a direct answer. *Id*. Rather, he continually repeated it was due to several factors. *Id*. When Union Counsel pointed out that Mr. Goldblum's complexity was good, his quality was great, and the VLJ gave him a glowing recommendation, she asked DVC Scharnberger if the denial was based on the DOC. *Id*. Rather than answer the question, he evasively replied, "We evaluated his overall performance, and that's what we relied upon." Tr.D.5 at 168.

DVC Scharnberger testified about his understanding of his VLJs' knowledge of the "on-pace" and "consistently on-pace" requirements. Specifically, DVC Scharnberger stated that he knew that some VLJs claimed that they were unaware of these new requirements for promotions. Tr.D.5 at 188. While stating that employees should know what the agency requires of them for promotion, DVC Scharnberger testified that he believed the VLJs were lying to him when they claimed that they did not know the Agency required the attorneys to be "on-pace" or "consistently on-pace" for promotion to a higher grade. Tr.D.5 at 188-89. DVC Scharnberger was unable to recall any documents or notifications sent out to VLJs or attorneys notifying them of the "on-pace" or "consistently on-pace" requirements for promotion. *Id.* at 189. DVC Scharnberger testified that, while he had not spoken with attorneys about these requirements, he had heard from VLJs that attorneys were not aware of the "on-pace" and "consistently on-pace" requirements. *Id.* at 189-90.

At the beginning of his testimony, DVC Scharnberger stated that a within-grade increase was automatic if the Agency deemed the attorney's performance as fully successful. Tr.D.5 at 27-28. He later stated that the attorney must also be on-pace at the time of review. Tr.D.5 at 186.

m.) *VLJ Jenna Brant.*

VLJ Jenna Brant was the only other witness for the Agency, which numbered two in total. VLJ Brant testified that she began her employment with the Board as an attorney in September 2013; the

Agency then promoted her to SSC in December 2018 and appointed her as a VLJ in 2021. Tr.D.4 at 151. VLJ Brant asserted that the productivity standard had always been three decisions per week, and that the way in which the Agency evaluated attorneys' progress had not changed since she began in 2013. Tr.D.4 at 152. When asked how management communicated the production standard, she said her supervisor told her when she started. Tr.D.4 at 153. She later testified that she had learned about the on-pace requirement through conversations with DVCs, VLJs, and SSCs, and that it was "common knowledge." Tr.D.4 at 164, 169. She acknowledged that the productivity element in the performance standards does not specifically discuss on-pace; however, she claimed it had always been communicated. Tr.D.4 at 227.

VLJ Brant acknowledged that the 2021 MOU does not refer to promotions; she then stated that information on this topic can be found in a 2013 VA Handbook and "maybe" the parties' Master Agreement. Tr.D.4 at 214. She also acknowledged that the 2021 MOU does not refer to any consequences if an attorney is not on-pace during the year. Tr.D.4 at 210-11. When asked how attorneys become aware of the on-pace requirement, she explained that upper management has told supervisors to have these conversations with attorneys. Tr.D.4 at 218. She claims to have had conversations about this with all twenty-two SSCs when she was an SSC, but she admitted that she had not engaged in such conversations with the other 130 VLJs or the over 900 attorneys. Tr.D.4 at 218-19.

VLJ Brant then referred to the Vice Chairman's September 29, 2020, email in which he announced the new performance standards with the lower annual production requirements. Tr.D.4 at 220. She testified that the reference to three decisions per week was an "expectation" but not a "requirement," referring to it as a "shared expectation." Tr.D.4 at 220. When asked how many cases behind would trigger disciplinary action, she said there was no hard and fast line. Tr.D.4 at 222. She also explained that there was supervisory discretion in determining whether an attorney is on-pace.

Tr.D.4 at 222. When asked if falling behind one case would be an issue, she was unable to offer a clear answer, explaining that it can be based on an employee's performance history, track record, and a variety of factors. Tr.D.4 at 223. She agreed that an attorney can be behind by 10 cases during the year and still meet his or her annual production goal at the end of the year. Tr.D.4 at 227.

VLJ Brant agreed that the standard is 156 cases but, as managers, they have the right to track an attorney's progress towards that goal. Tr.D.4 at 227. She explained that this prevents an attorney from not doing any work all year and then submitted 156 decisions on the last day of the fiscal year. Tr.D.4 at 227. She was unaware of any situation in which an attorney had met his or her annual production goal by the end of the fiscal year but who the Agency had rated less than fully successful in the Productivity element because the attorney was not on-pace during the year. Tr.D.4 at 228.

VLJ Brant believed that a within-grade increase requires the attorney to be fully successful and on-pace at the time of review. Tr.D.4 at 228. For grade promotions other than GS-14 promotions, she said there was no "hard and fast" requirement, and that management considers several factors. Tr.D.4 at 229-230. She asserted that the Agency required attorneys to be fully successful and demonstrate the ability to do harder cases; an attorney may indicate that the attorney is not ready to do more complex work if they are regularly behind. Tr.D.4 at 230. She testified that there was no firm rule when considering grade promotions, but that there might be more scrutiny with GS-14 promotions. Tr.D.4 at 245.

VLJ. Brant discussed one attorney, Employee #62, who she supervised and who the Agency promoted to GS-14 in 2019 despite not being consistently on-pace and receiving a less than fully successful rating during her mid-year review. VLJ Brant explained that the Agency approved the promotion because the attorney had managed to be on-pace at the time of review. Tr.D.4 at 235, Ux1.

VLJ. Brant explained that she had never told attorneys how many pay periods they should be on-pace throughout the year. Tr.D.4 at 239. Instead, she told attorneys that completing three decisions per week meant that they were "good," and, if not, she would reach out to them. *Id.* But when asked how many cases behind would trigger a conversation, she said there was no "hard and fast number." Tr.D.4 at 240. She then added, that was "kind of in my supervisory discretion wheelhouse." *Id.* She testified that, although not on the panel, most supervisory discretion came from the panel when reviewing GS-14 promotions. Tr.D.4 at 245. VLJ Brant was unable to provide a number which would trigger a PIP, although she said it was more than one pay period. Tr.D.4 at 242.

V. LEGAL STANDARD

The Union must prove a violation of the Master Agreement[17] and the law[18] by preponderant evidence. Preponderant evidence is defined as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1205.56(c)(2). Furthermore, when resolving a grievance that alleges a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority Administrative Law Judge (ALJ). *See U.S. Dep't of the Treasury, IRS, Wash., D.C. and NTEU* 64 F.L.R.A. 426 at 431 (2010). Thus, the Union must show that the Agency more likely than not violated the Master Agreement and the law.

VI. ARGUMENT

Regarding the threshold issues raised by the Agency, the Grievance is arbitrable because the Agency failed to properly raise the procedural arbitrability arguments when it failed to file a timely Step

[17] *See, e.g., AFGE Local 1124 and U.S. Dep't of Interior*, 113 LRP 43014 (Gaba 2013).
[18] *See U.S. Dep't of the Treasury, IRS, Wash., D.C. and National Treasury Employees Union*, 64 F.L.R.A. 426, 431 (2010).

3 Grievance Response, as required by the Master Agreement. Assuming, *arguendo*, that the Agency's Grievance Response was timely, which it was not, the Grievance was timely because the Agency failed to provide any notification of the change to the Union and, therefore, the Union's timelines for filing a grievance had not begun running. The Grievance was also timely because it involves a continuing violation. Lastly, the Agency failed to prove that the doctrine of collateral estoppel bars the Grievance because the Union filed the Grievance over a new and unique issue and violation and the question of the Agency's on-pace requirement and application was not, and could not have been, resolved in any other grievance filed by the Union.

Regarding the merits of the Grievance, the Agency violated the law, the Master Agreement, the 1994 MOU, the 2021 MOU, and past practice because it changed the conditions of employment when it created and applied a new interpretation and performance criteria of on-pace and consistently on-pace performance for employment action including grade promotions, step advancements, overtime opportunities, and performance ratings, and implemented the new waiver scheme. When implementing this change, the Agency failed to fulfill its bargaining obligation with the Union and unilaterally implemented the change, which had more than a *de minimis* impact on employees.

A. The Grievance is arbitrable and procedurally proper in accordance with the Master Agreement.

The Agency has failed to prove that the Grievance is procedurally improper because it failed to make these arguments in a timely issued Step 3 Grievance as required by the Master Agreement, the Grievance is timely, and collateral estoppel does not bar the Grievance. Thus, these arguments fail for numerous reasons. First, the Arbitrator should dismiss both the timeliness and collateral estoppel objections because the Agency failed to raise them within the parties' negotiated timeframes. Second, even if the Agency had objected within the requisite timeframe, its timeliness argument fails because the Agency never provided the requisite notice to the Union of the changes to the productivity standard and

promotion criteria. Moreover, the 30-day time limit does not apply to this Grievance because the occurrences or acts in dispute constitute continuing violations rather than a discrete act, thus allowing the Union to file a grievance at any time. And lastly, collateral estoppel does not apply because the Parties never litigated the issues in this case and the issues differ from the issues in the two prior grievances cited by the Agency in support of its assertion. Therefore, the Arbitrator should dismiss the Agency's procedural arguments, and decide the Grievance on the merits.

1. **The Arbitrator should dismiss the Agency's threshold arguments of timeliness and collateral estoppel because the Agency failed to raise such objections within the parties' negotiated timeframes.**

The Agency failed to demonstrate that it raised any procedural arbitrability arguments in a timely issued Step 3 Grievance Decision. The Master Agreement explicitly states, "[t]he Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision." Ux1 at 241. The Agency waived its arguments on procedural arbitrability when it neglected to present any arbitrability objections in a timely manner. The Agency has thus unequivocally relinquished any procedural arbitrability objections through its failure to raise them within the stipulated timeframe mandated by the Master Agreement.

The Union initiated the grievance at step-3 on December 20, 2022, with SDVC Santoro, triggering the application of time limits set forth in step 1.[19] Jx2. As such, the Master Agreement obligated SDVC Santoro, or his designee, to meet with the employee/representative and furnish a written response within 14 calendar days from the grievance's receipt.[20] Consequently, SDVC Santoro's decision was due on January 4, 2023. The Union, however, did not receive any communication from SDVC Santoro regarding the status of his decision until January 11, 2023, a week past the prescribed deadline. In an email to Mr. Massey on January 11, 2023, SDVC Santoro

[19] *See* Jx1 at 244, Note 5.
[20] *Id*. at 242, Step 1

communicated, “I had hoped to get this decision out this week. While I’m still aiming to do so, it may slip into next week.” Ux2. This constituted the Agency’s request for an extension until January 20, 2023, which Mr. Massey granted, as the subsequent workweek ended on Friday, January 20th. *Id*.

However, that week transpired without any further updates from SDVC Santoro or any other management official regarding the grievance. Consequently, when the Agency failed to provide a timely decision by the mutually agreed deadline of the end of the week, the Union filed a Notice to Invoke Arbitration on Monday January 23rd to safeguard the rights of the over 900 attorneys it represents. Jx3. Notably, SDVC Santoro issued a decision on January 30, 2023, a full 10 days after the extended deadline granted by the Union and, more significantly, after the Union filed its Notice to Invoke Arbitration on January 23, 2023. Ax1. By failing to respond within the stipulated deadline for a Step 3 grievance or abide by the agreed to extensions, the Agency waived any objection on this ground.

An arbitrator recently came to this very conclusion under the same Master Agreement. The Authority affirmed the Arbitrator’s decision and held that an agency waives arbitrability objections by failing to assert them in its Step 3 decision. *See U.S. Dep’t of Veterans Affairs & AFGE Council #53*, 73 F.L.R.A. 660, 661 (2023) (*Council #53*). In sustaining the Arbitrator’s rejection of the agency’s argument that the grievance was not arbitrable, the Authority in *Council #53* explained that the arbitrator properly found that the agency had waived its arbitrability objections because Article 43, Section 4 of the parties’ agreement requires the agency to raise such objections within set timeframes. *Id*.

Here, as in *Council #53*, the Agency’s objection to the timeliness of the Union’s grievance was manifestly untimely, rendering any arguments or positions in SDVC Santoro’s belated decision devoid of merit. The Agency waived its arbitrability objections by not asserting them before the Agency’s Step 3 decision, as Article 43, Section 4 requires. As such, the Arbitrator should dismiss the Agency’s threshold arguments on timeliness and arbitrability.

2. The grievance was timely because the Agency failed to provide the Union with any notification of the change to the productivity standard and promotion criteria, which would have triggered the Union's timeline to request bargaining or file a grievance.

The grievance is timely because the law and the Master Agreement require the Agency to provide proper notification to the Union of changes to the productivity standard and the promotion criteria *before* it implements the changes, and it failed to do so, thereby failing to trigger any timeline to file a grievance. Prior to implementing any change in conditions of employment, the law requires that the Agency provide notice to the Union describing the change, which allows the union an opportunity to request bargaining. *See, e.g., U.S. Army Corps of Engineers, Memphis District, Memphis, Tenn.*, 53 F.L.R.A. 79, 81 (1997). This notice of a proposed change then triggers the union's responsibility to request bargaining. *See Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 F.L.R.A. 1532, 1535 (1996). The notice requirement applies even when the Agency exercises a management right, including changing the content of performance standards. *See* 5 U.S.C. § 7106(b),[21] and *AFGE Local 17*, 68 F.L.R.A. at 173. Thereafter, if the Union elects, the law requires the parties "to negotiate in good faith," which requires a sincere resolve to reach agreement and to meet at reasonable and convenient times as frequently as necessary. *See* 5 U.S.C. § 7114(b)(1), (b)(3).[22]

In addition, the Authority has held that an agency's notice of a proposed change in conditions of employment must be sufficiently detailed and definitive to provide the union with a meaningful opportunity to request bargaining. *U.S. Dep't of Def., Commissary Agency, Peterson Air Force Base,*

[21] 5 U.S.C. § 7106(b), states, "Nothing in this section shall preclude any agency and any labor organization from negotiating - . . . (2) procedures which management officials . . . will observe in exercising any F.L.R.A. under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any F.L.R.A. under this section by such management officials."

[22] Integral to discharging this duty in good faith is a commitment to completing bargaining with the union prior to implementing changes in established working conditions. See Dep't of Air Force, Scott AFB and NAGE, Local R7-23, 5 F.L.R.A. 9, 11 (1981).

Colo. Springs, Colo. and AFGE, Local 1876, 61 F.L.R.A. 688, 692 (2006). For example, the notice must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change. *Id.* In this regard, the Authority has stated that "[t]he notice must be sufficient to inform the exclusive representative of what will be lost if it does not request bargaining." *NFFE*, 53 F.L.R.A. at 82.

In addition to the statutory requirements, the Master Agreement imposes notice requirements and bargaining obligations on the Agency when seeking to change condition of employment, including changes to performance standards and promotion criteria. The Master Agreement stipulates that the local union must receive reasonable advance written notice, not less than 15 calendar days, when the Agency intends to change, add, or establish new elements and performance standards. *See* Jx1 at 141. Similarly, the Union must also receive notice before the Agency changes career ladder plans in accordance with Article 49 of the Master Agreement. *See* Jx1 at 110. Article 49 recognizes the statutory bargaining obligations under 5 U.S.C. Chapter 71 and deems these obligations valid.[23] It also requires that the Agency "provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees," and that notifications of all changes be in writing to the appropriate union official. *Id.* at 262-63. The appropriate Union official in this case is Mr. Massey, per the parties' agreement. *See* Jx1 at 256 ("[p]roposed changes in personnel policies, practices, or working conditions affecting the interests of one local union shall require notice to the President of that local").

The Agency did not comply with these statutory and contractual notice requirements. In fact, the Agency failed to offer a single document to indicate proper notice. This is consistent with Mr. Massey's testimony that, as the President of Local 17, he never received any notice that the Agency intended to

[23] *See* Jx1 at 262-63.

change the productivity standard or the promotion criteria, to include a requirement that attorneys meet the *pro rata* annual goal every pay period. Tr.D.2 at 20-22. This is also consistent with the Agency's denial of making such changes to attorneys' conditions of employment. Tr.D.4 at 152. Further, DVC Scharnberger blatantly admitted in his testimony that he did not provide notice to the Union when the Agency began implementing promotion review waivers for employees. Tr.D.5 at 87.

In the absence of meeting its notice obligations, the Agency cannot now claim that the Arbitrator should dismiss the Union's grievance as untimely. Indeed, the Authority has recognized that, at times, a charging party may not learn of an alleged ULP immediately, either due to an Agency's failure to perform a duty owed to the Union, or because of the Agency's concealment of the alleged ULP. *U.S Dep't of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, and AFGE, National Border Patrol Council, Local 1929*, 65 F.L.R.A. 422 (2011).

This principle applies to our case because the Agency failed to perform its statutory and contractual duty to notify the Union before changing the productivity standard and promotion criteria. Dismissing the Union's grievance as untimely under these circumstances would send a dangerous message to the Agency that, if it wants to bypass the Union and avoid bargaining altogether, it can simply make changes without notifying the Union with the hope of getting any resultant grievance dismissed as untimely. It is also worth mentioning that when discussing Attorney Ekland's grievance involving the panel's denial of her GS-14 promotion, SDVC Santoro told Mr. Cummings that he preferred individual grievances over these promotion matters. Tr.D.2 at 200. SDVC Santoro's preference indicates that the Agency never notified the Union or the impacted attorneys that it was changing how it was interpreting and implementing the annual productivity standard and promotion criteria.

At the arbitration, the Agency made a halfhearted suggestion that it had provided notice to the Union. In doing so, the Agency revealed its misunderstanding and misconception about what constitutes proper notice. This misconception is reflected in the Agency's reliance on the Vice Chairman's email to the entire Board as somehow constituting proper notice to the Union that the Agency requires attorneys to produce three signed decision per week, notwithstanding that it is neither in the performance standards nor the 2021 MOU attached to that email. Ax5, Tr.D.4 at 220. However, rather than notifying the Union of a new standard, the Vice Chairman was simply breaking down the annual productivity standard to weekly increments. Ax5. The requirement that the Agency provide notice to the Union *before* the Agency implements proposed changes to conditions of employment further highlights the flaw with the Agency's argument. *See generally* Jx1 at 110, 141, 256, 262-63. In contrast, the Vice Chairman announced the new standards with commentary concerning the average weekly breakdown of the annual productivity standard *after* bargaining had concluded and the parties signed the 2021 MOU. Ax5.

Another striking misconception involving the notice requirement is VLJ Brant's testimony that three decisions per week and six decisions per pay period was properly communicated by management through *conversations* with attorneys. Tr.D.4 at 18, 153. The Statute and the Master Agreement require advance *written* notice to the Union's local president. *See* Jx1 at 262-63. VLJ Brant's recollection of such conversations also faced near-unanimous rejection by witnesses, including her colleague and fellow VLJ, Sophia Loren. Ux18. In any event, VLJ Brant acknowledged in her testimony that the negotiated performance standards do not contain the Vice Chairman's breakdown of the annual productivity standard. Tr.D.4 at 220, 227. Regardless, VLJ Brant's memory is unreliable considering the overwhelming testimony contradicting her own.

It is also worth mentioning that an arbitrator recently held the Agency accountable when it unsuccessfully tried a similar approach, in which DVC Scharnberger was the Agency's chief negotiator. *See Dep't of Veterans Affairs & AFGE Local 17*, FMCS Case No. 220104-02289 (Elliot Shaller, May 2023) (*Shaller Award*).[24] In the *Shaller Award*, the Agency initially provided reasonable advance notice to the Union that it wanted to the change the performance standards for FY 2022 by adding a requirement that attorneys brief hearing cases for presiding VLJs. *Id at*. 12-13. After the parties began bargaining, the Agency withdrew its initial proposals for change and informed the Union that it would no longer be changing the standards and would rollover the current standards, which did not require that attorneys brief hearing cases. *Id*. at 15. When FY 2022 commenced, however, the Agency began requiring attorneys to brief hearing cases while denying that any change had occurred. *Id.* at 16.

The Agency unilaterally implemented changes to attorneys' performance standards without proper notice and an opportunity to bargain, leading to a subsequent finding by the arbitrator that the Agency had breached its duty to bargain in good faith. *Shaller Award* at 38 (holding that the Agency violated the Statute and provisions of their Master Agreement by changing conditions of employment when it added a new duty of briefing hearing cases for VLJs without meeting its bargaining obligation under 5 U.S.C. § 7106(b)(2) and (3), committing a ULP in violation of 5 U.S.C. § 7116(a)(1), (5), and (8); and violating Articles 27 and 47 of the Master Agreement). The similarities in the facts between the *Shaller Award* and the current case underscore the history of the Agency's problematic and underhanded approach to changing conditions of employment without proper notice to, and bargaining with, the Union, as required by the Statute and the Master Agreement. The Agency's underhanded approach is particularly troubling with the unannounced waiver scheme, which the Agency made no attempt to defend. Tr.D.5 at 87.

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[24] Attached hereto as *Shaller Award.*

Therefore, because the Agency never provided the Union with adequate notice and an opportunity to bargain prior to implementing the change, the grievance timeline was never triggered, and the grievance was timely filed by the Union.

3. The grievance was timely because it involved a continuing violation.

Assuming *arguendo* that SDVC Santoro filed his decision timely, which he did not, the Union filed its Grievance in accordance with the Master Agreement because it constituted a continuing violation. The relevant provision in the Master Agreement states that the grievance should be presented to the "…immediate or acting supervisor, in writing, within 30 calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; *or, anytime if the act or occurrence is of a continuing nature* (emphasis added)." Jx1 at 242, Step 1.

The Authority recently upheld the continuing violation doctrine under similar circumstances in *U.S. Dep't of the Army, U.S. Army Garrison, Picatinny Arsenal, New Jersey and International Association of Firefighters, Local F-169*, 73 F.L.R.A. 700 (2023). In that decision, the Authority upheld an arbitration award after finding that an arbitrator properly credited the Union's argument that the Agency's violations were continuing when it closed a fire station and reduced the number of staffed fire-department positions per shift from twelve to nine. *Id*. at 702. In other words, although the fire station's closure was a single act, the harm experienced by the impacted employees was of a continuing or ongoing nature and that "each day that passed created a new timeline for filing under the parties' agreement." *Id.*

Similarly, the Agency's on-pace and consistently on-pace standard is, and has been, a continuing violation rather than a single discrete act because one can safely assume that the Agency will continue to rely on the new standard to deny promotions, within-grade increases, and overtime opportunities, while simultaneously improperly placing attorneys on PIPs during an on-going fiscal year for not being on-

pace or continuously on-pace. Here, every time the Agency relies upon the new standard to impact an employee's conditions of employment, a new violation occurs. Hence, the Union's grievance was timely due to the continuing nature of these violations.

4. The Agency's threshold issue of collateral estoppel fails because the issues are not the same in both cases, the Parties did not fully litigate the on-pace issue in the first cases, and the resolution of the first cases did not require the Parties to address the issue of the on-pace requirement.

The Agency's arbitrability argument under the doctrine of collateral estoppel is also without merit regardless of SDVC Santoro's untimely decision. Collateral estoppel occurs when a party seeks to relitigate, a second time, an issue of fact or law that it has already fully litigated to conclusion in a previous case. *See U.S. Dep't of Energy W. Area Power Admin., Golden Colo. & AFGE Local 3824*, 56 F.L.R.A. 9, 11 (2000). To prove a case of collateral estoppel, an agency must demonstrate that: (1) the same issue was involved in both cases; (2) the issue was litigated in the first case; (3) resolving the issue was necessary to the decision in the first case; (4) the decision in the first case, on the issue to be precluded, was final; and (5) the party attempting to raise the issue in the second case was fully represented in the first case. *Id.*

The Agency simply cannot prove all the elements required to demonstrate collateral estoppel. Here, the Agency referred to two prior grievances with uniquely different issues, neither of which it litigated before a neutral third party. The first grievance, filed on June 15, 2021, challenged the Agency's practice of assigning credit upon signature of the reviewing VLJ rather than upon submission by a drafting attorney. Ax1.F. The second grievance, filed on July 7, 2021, requested that the Agency rescind a letter of counseling issued to an attorney. Ax1.J. In contrast, this grievance, which the Union filed on behalf of all attorneys at the Agency, lists unique and distinct statutory and contractual violations as well as different remedies. Jx2. Specifically, the issue in the case currently before the arbitrator involves the Agency's change in the productivity element by interpreting and applying an "on-

pace" and "consistently on-pace" standard as well as a novel "waiver" option in a new and unique way without fulfilling its bargaining obligations to the Union. Further, the Union is requesting remedies that apply to all affected employees including *status quo ante*, bargaining, back pay, cease and desist, and notice and posting.

In addition to including separate issues, neither grievance was subject to a final decision by an arbitrator or the Authority. The Parties never litigated the issues in the June and July 2021 cases; rather, the Agency simply denied the grievances with its self-serving decisions. Even assuming *arguendo* that the prior grievances included the same issue(s) as this case, neither the Master Agreement nor any other negotiated agreement precludes bringing the same issue in a subsequent grievance. *See generally* Jx1 at 240-47.

Thus, the Agency cannot rely on the doctrine of collateral estoppel to dismiss the grievance. Regardless, as previously discussed, the Arbitrator should reject the Agency's collateral estoppel argument out of hand because it constitutes an arbitrability objection, which the Agency failed to argue in a *timely* step-3 grievance decision. *See Council #53*, 73 F.L.R.A. 660. As such, the Agency cannot avoid having the grievance decided on the merits.

B. The Agency violated the law by changing conditions of employment concerning the productivity standard and promotion criteria by interpreting the on-pace language in a novel way and applying a new waiver scheme, which had more than a *de minimis* impact on employees, without notifying the Union.

The Union has met its burden of demonstrating that the Agency violated the Statute when it changed the performance element of productivity and applied it to personnel actions by implementing a new "on-pace" and/or "consistently on-pace" and/or waiver process without notifying the Union and failed to fulfill its bargaining obligations. As previously discussed, the Statute obligates the Agency to provide the Union with advance notice and a reasonable opportunity to request bargaining when it is

going to exercise a management right that involves changing conditions of employment for bargaining unit employees and the impact or reasonably foreseeable impact is more than *de minimis*. *See* 5 U.S.C. § 7106(b);[25] *AFGE Local 17,* 68 F.L.R.A. 170. The Union has fully addressed the Agency's failure to provide notice above. But even if the Agency had provided proper notice and the Union elected to bargain, the Agency would have an additional requirement of bargaining over procedures for implementing the change and appropriate arrangements for affected employees. *See* 5 U.S.C. § 7106(b)(2) and (3).[26] Failure to do so constitutes a violation of the Statute and the Master Agreement. *See* 5 U.S.C. § 7106(a)(5)[27]; Jx1 at 262-63.

In this case, the Agency breached its bargaining obligation under the Statute and the Master Agreement by changing attorneys' conditions of employment related to the productivity standard and promotion criteria. Specifically, the Agency interpreted and enforced the on-pace language in the 2021 MOU in a novel way, which occurred without the requisite notice and opportunity to bargain and had a more than *de minimis* impact on attorneys. The Agency's defense hinges on its claim of consistently applying the productivity standard and promotion criteria for many years in line with the 2021 MOU, the 1994 MOU, and Article 23 of the Master Agreement. Tr.D.4 at 152. The Agency thus denies that it had any bargaining obligation because it denies making any changes to these conditions of employment. *Id*. However, the Agency's position lacks merit based on the overwhelming evidence of record establishing significant changes to the productivity standard and promotion criteria which are far more than *de minimis*. Indeed, the Agency's changes to conditions of employment led to a loss of income, which is clearly more than *de minimis*.

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[25] 5 U.S.C. § 7106(b), states, "Nothing in this section shall preclude any agency and any labor organization from negotiating - . . . (2) procedures which management officials . . . will observe in exercising any F.L.R.A. under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any F.L.R.A. under this section by such management officials."

[26] *See also U.S. Dep't of Homeland Sec., Customs & Border Prot. and NTEU*, 64 F.L.R.A. 989, 994 (2010)

[27] *See, e.g., U.S. Dep't of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky., and Ronald D. Lewis*, 38 F.L.R.A. 647, 661 (1990)

1. **The Agency's new interpretation and application of an on-pace requirement and implementation of a waiver scheme constitutes a change to attorneys' conditions of employment.**

The Agency violated the Statute because it changed the conditions of employment when it created and applied a new "on-pace" and "consistently on-pace" requirement to attorneys' personnel actions and instituted a new "waiver" option. An agency's change to conditions of employment that is not already covered by a collective bargaining agreement triggers the agency's duty to bargain. *See* 5 U.S.C. § 7116(a)(1) and (5). The Statute defines conditions of employment as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). To determine whether there was a change to conditions of employment, the arbitrator must determine: "(1) whether there was an actual, agency-initiated change to a personnel policy, practice or matter; and (2) whether the change affected working conditions." *See, e.g., U.S. Dep't of Homeland Sec. U.S. Customs and Boarder Protection El Paso, Tex. and AFGE Nat'l Border Patrol Council Local 1929*, 72 F.L.R.A. 7, 9 (2021) (*AFGE Local 1929*). The Union has met both criteria in this case by preponderant evidence.

First, the Agency initiated an actual change in the way it interprets and applies the productivity performance standard. DVC Scharnberger and VLJ Brant acknowledged that the performance standards incorporate an **annual production requirement** of either 156 decisions or decisions containing a total of at least 491 issues. Tr.D.4 at 227, Tr.D.5 at 149-50. This dispute, however, involves language in the 2021 MOU concerning the Agency's ability to *track* the number of signed decisions and number of issues within each decision an attorney has produced during the performance year, and that the Agency also "may conduct frequent progress checks to ensure each attorney is on pace to meet their annual production requirement." Jx4. However, tracking attorneys' productivity during the fiscal year and frequent progress checks to ensure attorneys are on-pace to meet their annual goals does not mean

enforcing the productivity standard by requiring attorneys to meet their annual goals on a *pro rata* basis at the time of a review of for a certain percentage of pay periods. This distorted interpretation is clearly a change to attorneys' conditions of employment.

The evidence reveals that the Agency began denying promotions by improperly merging two separate and distinct critical elements: productivity and case management. The critical element of case management pertains to timeliness, as explained in the performance plan:

> As determined by the supervisor, the attorney supports organizational objectives with efficient preparation and timely submission of decisions in assigned cases. The attorney keeps the supervisor and judges apprised of factors affecting case flow. Decisions are submitted within 30 calendar days of assignment for those cases determined by management to be priority cases that require expeditious processing … and in all other cases within 60 calendar days of assignment. A fully successful rating under this critical element requires that the attorney 'generally meets expectations.'

See Jx5, Jx6, Jx10.

DVC Scharnberger explained the improper merger of the productivity and case management elements when considering promotions, which the Union also highlighted in Ms. Ekland's grievance. Tr.D.5 at 178; Ax15 at 2-3. This convoluted rationale involves a two-step process. First, the Agency now defines on-pace as meeting the annual goal on a *pro rata* basis every pay period. Ux52.[28] And second, as explained by DVC Scharnberger, not being on-pace casts doubt as to whether attorneys meet the promotion criteria while progressing to the GS-13 level, whereas not being *consistently* on-pace cast doubt as to whether attorneys can handle complex cases in a "timely manner" as required to progress to the GS-14 level. Tr.D.5 at 140.

This improper interpretation, which constitutes a change, is illustrated in the panel's denial of Mr. Goldblum's GS-14 promotion, as explained by panel member DVC Scharnberger. Ux45; Tr.D.5 at

[28] In Attorney Beesly's PIP, issued on June 30, 2023, DVC Gordon defined fully successful performance in the productivity standard as being on-pace. Ux50 at 152. Notably, Ms. Beesly's performance in this critical element was rated unacceptable because she was nine issues (one week) behind at the end of the pay period ending on June 17, 2023. Ux52 at 155.

164-68. According to DVC Scharnberger, the panel did not dispute Mr. Goldblum's ability to handle complex cases. Tr.D.5 at 164-68. In fact, the quality of his work was excellent, and his VLJ wrote a glowing recommendation to the panel. *Id.* Instead, the panel questioned Mr. Goldblum's ability to "efficiently draft cases at the appropriate pace." Ux45. However, what DVC Scharnberger and the entire panel failed to understand is that timeliness, regardless of the level of complexity, is addressed in the critical element of case management of the performance plan. Jx5. And no evidence suggests that Mr. Goldblum had any documented performance problems under the critical element of case management.

The same is true of Ms. Forlani, Ms. Carey, and Ms. Lawrence, who had their promotions either denied or delayed for not being consistently on-pace. Ms. Forlani and Ms. Carey signed waivers rather than face rejection by the panel, despite meeting the promotion criteria in the 1994 MOU and Master Agreement, Tr.D.3 at 203 and 262; and Ms. Lawrence's GS-12 promotion was delayed a full year because, although she was on-pace at the time of her promotion review, she did not meet her *pro rata* annual goal during enough pay periods to satisfy DVC Gordon. Ux7; Tr.D.3 at 166. Like Mr. Goldblum, the Agency deemed these attorneys as fully successful in all elements of the performance plan with no documented deficiencies with case management. They also met the remaining respective promotion criteria. The panel also rejected Ms. Ekland's GS-14 promotion under the same flawed logic, notwithstanding her fully successful rating in the critical element of productivity and exceptional rating in the critical element of case management. Ax15. All of these attorneys would have progressed to the next higher grade but for the Agency's unilateral change in its interpretation of the 2021 MOU.

The Agency's position that it did not change how it enforced the productivity standard concerning grade promotions faced near-unanimous rejection from a plethora of witnesses during the arbitration. Testimony from attorneys Mr. Goldblum, Ms. Forlani, Ms. Carey, and Ms. Lawrence

underscored that attorneys were unaware of the consistently on-pace requirement until they became eligible for their grade promotions in 2022 and 2023. Tr.D.4 at 111; Tr.D.3 at 198, 200; Tr.D.3 at 241; Tr.D.3 at 175. Union officers and Agency Attorneys Mr. Massey, Mr. Cummings, and Mr. Keogh also attested to their lack of awareness regarding the new on-pace and consistently on-pace requirements until grievances surfaced in 2022. Tr.D.2 at 18-19, 158; Tr.D.3 at 125.

Even management official VLJ Loren acknowledged that the consistently on-pace requirement signified a recent and substantial change for GS-14 promotion purposes. Ux18; Tr.D.3 at 241. This acknowledgment is particularly persuasive, considering VLJ Loren's extensive career, spanning both decision-writing attorney roles and tenure as a VLJ, during which she had never encountered such a requirement. Tr.D.3 at 88. VLJ Loren clearly documents her anger and frustration stemming from the Agency's changes to conditions of employment without notice in her August 23, 2022, email to DVC Rodrigues: "At no time was I aware that Britt Ekland needed to [be] green (and consistently so) from 10/1/21 through 7/2/22 as a pre-requisite to obtaining her promotion. It is not articulated in the GS-14 promotion panel memo from 2019, or in any other written document that I am aware of." Ux18.

The changes to the productivity standard and promotion criteria are also highlighted by the fact that VLJ Brant successfully recommended an attorney (Employee #62) for a GS-14 promotion in **2019**, several years before the Union began receiving complaints which signified the change, notwithstanding VLJ Brant herself admitting that the attorney was "consistently behind her productivity goal throughout much of the FY" and was in fact only "green" three times in FY 2019. Tr.D.2 at 222-25; Tr.D.4 at 235; Ux1 at 004. In fact, at the end of VLJ Brant's justification for Employee #62's fully successful rating in the critical element of Production for FY 2019, she wrote "Going forward, Ms. [Employee #62] is strongly encouraged to maintain an acceptable level of production more consistently throughout the year" – an encouragement, not a requirement or expectation, and the canary in the coal mine. Ux1 at

004. VLJ Brant could not provide a reasonable explanation of how Employee #62, whom VLJ Brant recommended, was promoted to GS-14 in 2022, despite not being "consistently on-pace" at the time of her review by the panel.

Attorneys Beesly and Williams also testified that they were not consistently on-pace, or even on-pace at the time of review, when they received their promotions to GS-14 in **January 2021** and **March 2022**, respectively. Tr.D.4 at 26; Tr.D.4 at 8-9. Ironically, on June 26, 2023, the Agency placed Attorney Beesly on a PIP for being nine issues behind (about one week) with over three months remaining in the fiscal year. Ux52. In other words, the Agency rewarded Ms. Beesly for the same level of performance in 2019, but deemed her unacceptable in 2023, thereby highlighting the changes in dispute.

Attorney Beesly testified that her VLJ informed her that management was "**starting** to look at whether or not you've bene green consistently through the fiscal year and to get I – basically get on pace." Tr.D.4 at 36. This is consistent with what VLJ Sheeran said to Attorney Lawrence that he had never seen a grade promotion denied due to a lack of a "consistency pattern." Tr.D.3 at 174. Ms. Lawrence's testimony concerning her conversation with VLJ Sheeran is uncontradicted. The Agency chose not to call VLJ Sheeran or provide any other contrary evidence, leading to the fair inference that no such evidence exists, and that VLJ Sheeran would have confirmed Ms. Lawrence's testimony.

The collective testimony thus strongly refutes the Agency's contention that the current interpretation is not a change from established practice, highlighting a pervasive lack of awareness among both rank-and-file attorneys and management personnel. Importantly, VLJ Loren's statements remain uncontroverted despite the presence of DVC Rodrigues, her supervisor, at the arbitration to observe witness testimony. This is consistent with Mr. Cummings' testimony that DVC Rodrigues had admitted to him that the newly-rostered promotion panel was looking at information "differently" than

prior panels. Tr.D.2 at 197-198. Notably, the Agency opted not to call DVC Rodrigues as a witness to challenge or counter any of the testimony provided, even though he was available in the room observing witness testimony. This suggests that DVC Rodrigues could not offer evidence or testimony to the contrary. The absence of refutation lends significant weight to VLJ Loren's assertions and reinforces the notion that the unannounced change in promotion criteria led to substantial practical and financial consequences for affected attorneys.

Additionally, the Agency' own data serves to substantiate that the Agency indeed changed the criteria for GS-14 promotions. The data reveals that no GS-14 promotions were denied in FY 2017, FY 2018, or FY 2019; only one GS-14 promotion was denied in FY 2020 due to quality issues; only 4% of GS-14 promotions were denied in FY 2021; and 26% of GS-14 promotions were either denied or delayed due to attorneys being pressured to sign waivers in 2022. Ux30. This comprehensive data not only aligns with the testimony provided by witnesses but also corresponds with the language in VLJ Loren's email to DVC Rodrigues. Ux18. The pattern of promotion denials, especially the substantial increase in denials or delays beginning in FY 2022, supports the argument that there has been a noteworthy change to the attorneys' conditions of employment, further reinforcing the concerns raised by the Union and witnesses during arbitration.

Moreover, a deeper look into the data provided to the Union in the RFIs shows that the Agency treated attorneys from FY17 to FY20 differently than attorneys from FY21 and FY22, further illustrating the change. Many of the attorneys who the Agency denied GS-14 promotions in FY22 were "on-pace" sporadically throughout the year and, in some instances, only at the time of review. Ux30. Due to the attorneys' oscillating between yellow and green throughout the fiscal year, i.e., lacking "consistently on-pace" performance, when the attorneys were on-pace at their time of review it was often by only a small amount. *Id.* For example, Employee #8 was on-pace only once, at the time for

review, by 0.4 cases (Ux31 at 096), Employee #14 was only on-pace for the final two pay periods at the time of review by 2.6 cases (Ux31 at 098). If you look to submitted cases, Employee #16 (Ms. Ekland) was on-pace only at the time of review and only by 0.1 cases (Ux32 at 100), Employee #20 was on-pace at the time of review by 1.3 cases (Ux33 at 102), and Employee 25 was yellow the entire fiscal year before hitting the final number by 0.2 cases (Ux35 at 103). Based on the above, being on-pace by a small margin at a particular snapshot in time was indicative of many prior pay periods where the Board would interpret the attorney as not "consistently on-pace" and, therefore, not worthy of GS-14 promotion.

However, compare this data provided for FY18 and FY19. Ux30 at 093b-093c. In FY18, Employees 21, 23, 26, 44, 47, and 49 finished the year exactly at goal, while Employees 27, 38, 41, and 42 all finished the year within 1 and 3 cases ahead of goal. Ux30 at 093b. In FY19, Employees 51, 56, 58, 61, 62, 63, 74, 77, and 83 all finished the year slightly ahead of goal. Ux30 at 093c. One can safely assume that, in the case of these attorneys, similar to those from FY22, it is highly likely that they were also not "consistently on-pace" for significant periods of the fiscal year. However, in contrast to the attorneys in FY22, the GS-14 panels in FY18 and FY19 did not consider being "consistently on-pace" as part of their criteria and did not deny a single attorney their GS-14 promotions during this time. This further proves that the criteria for GS-14 promotions changed when the Agency evaluated attorneys, who were performing substantially similar to one another, differently due to the changing makeup of the GS-14 promotion panel.

The procedural errors made by VLJs also illustrate the Board's change in criteria, which resulted in granted grievances for Ms. Ferrera, Mr. Noah, and Ms. Ekland. Mr. Cummings testified that the Agency granted these three grievances in FY22 on procedural grounds due to the Agency's failure to provide a 60-day warning letter. Tr.D.2 at 199. The Master Agreement, Article 23, Section 4.A.2 reads:

“[i]f an employee is not meeting the criteria for promotion, the employee will be given a written notice at least 60 days prior to the earliest date of promotion eligibility. The written notice will state what the employee needs to do to meet the promotion plan criteria.” Jx1 at 110. These became known as the “60-day warning letters.”

In the cases of Ms. Ferrera, Mr. Noah, and Ms. Ekland, the supervising VLJs did not issue their attorneys 60-day warning letters because they had no reason to believe the panel would deny their attorneys their GS-14 promotions based on the established and unambiguously written criteria that had been relied upon by the Agency for years. Ux18 (VLJ Loren informing DVC Rodrigues and SDVC Santoro that “I have spoken with several VLJs who have also been blindsided by this recent deviation from past practice which has resulted in attorney’s promotions being denied at all levels despite the direct supervisor’s recommendation (and expectation) for promotion. This significant change from past practice has not been clearly articulated orally or in writing to VLJs or attorneys.”); Tr.D.2 at 125-26 (VLJ Loren testifying that she inquired with her fellow VLJs who expressed similar ignorance that attorneys’ production throughout the year was being “significantly scrutinized” in promotion determinations by the panel); Tr.D.2 at 199 (Mr. Cummings testifying that SDVC Santoro granted three grievances and backdated the promotions on solely procedural grounds, i.e. due to the lack of, or deficient, 60-day warning letters). This clearly supports the contention that even the supervising VLJs were unaware of the new criteria and the change to the prior procedures.

Additionally, the Agency has not established any form of past practice regarding the application of promotion criteria. In his untimely grievance decision, SDVC Santoro’s reliance on an MOU dating back to 2018 to define “on-pace” and argument against the effectiveness of the 2021 MOU appears to raise some sort of past practice argument. Ax1. This argument is misplaced. Establishing a past practice requires the Agency to demonstrate that the Parties consistently exercised the practice over a

significant period and that the practice was followed by both parties or followed by one party and not challenged by the other. *See U.S. Dep't of Homeland Security, Border and Trans. Dir., Bureau of Customs, and Border Patrol and Border Protection and NTEU*, 59 F.L.R.A. 910 (2004). However, the Authority has held that arbitrators cannot modify a written agreement based on past practice when the agreement is clear and unambiguous. *See U.S. Small Business Admin. & AFGE, Local 3841*, 70 F.L.R.A. 525 (2018).

Here, the negotiated 2021 MOU, which the parties reduced to writing, clearly and unambiguously removed the requirement that, to be eligible for promotion, overtime, special project, and details, attorneys must be on-pace at the time of review. Jx4. The Arbitrator must reject SDVC Santoro's attempt to unilaterally modify the 2021 MOU by selectively incorporating expired provisions from previous MOUs under the guise of past practice. The Board's argument that this provision remains in effect due to the 2021 MOU not explicitly superseding previous guidance is unsupported. The Board's inability to explain why it selectively implements provisions from prior MOUs while disregarding others further weakens its position. Notably, provisions the Board selectively disregards from prior MOUs are favorable to attorneys because they involve additional proration categories. Furthermore, Mr. Keogh's testimony – asserting that the Parties omitted the provision about superseding the previous guidance because the Parties considered it redundant – stands uncontradicted since the Agency failed to call the management official who negotiated and signed the 2021 MOU to testify. Adhering to this illogical explanation would create a dangerous precedent, preventing both parties from negotiating new agreements even if it reduced such modifications to writing. In essence, it would undermine the statutory framework of collective bargaining outlined in the Civil Service Reform Act of 1978.

Furthermore, any past practice analysis favors the Union's position. The Authority held that, in the interpretation of past practice, the arbitrator may use any relevant source, **including a past arbitration award**, to construe the negotiated agreement. *See AFGE, Local 1917 & U.S. Dep't of Justice, Immigration and Naturalization Serv. (INS)*, 33 F.L.R.A. 412 (1988) (*INS*). Here, we have a past arbitration award in which the arbitrator interpreted the 2018 MOU, which was quite different than SDVC Santoro's interpretation. *See Greenberg Award* (September 2019). In that award, Arbitrator Greenberg rejected the Agency's assertion that the 2018 productivity standard included a weekly production requirement. In doing to, he concluded:

> The assertion that the productivity standard itself includes a weekly goal is rejected. The productivity performance standard, as defined in the Grievant's performance plan for FY 2018, is unambiguously an annual standard; it speaks only to the number of signed decisions, subject to proration for non-duty time, that the decision-writing attorney is expected to complete within the fiscal year. At most, the weekly goal was shown to be a tool for an attorney to use in pacing her progress and for management to use in gauging an attorney's progress.

Greenberg Award at 31. Significantly, the Agency did not file any exceptions to the *Greenberg Award.* Although arbitration decisions are not precedential, the thinking of other arbitrators has persuasive value. *See INS*, 33 F.L.R.A. at 412. The Agency once again made a strategic decision not to call SDVC Santoro as a witness to defend his position as the deciding official, even though he observed the Union's witnesses testifying about the Agency's violations during part of the proceedings.

The change to conditions of employment goes beyond grade promotions. The Agency is now arbitrarily misusing its new interpretation of the 2021 MOU, i.e., that it "[m]ay conduct frequent progress checks to ensure each attorney is on-pace to meet their annual production requirement," to rate attorneys as unacceptable in the critical element of productivity followed by the issuance of PIPs.[29] Jx4. This is particularly concerning because failing a PIP can result in an attorney's removal, reduction in

[29] *See* Jx1 at 146-47.

grade, or reassignment.[30] Moreover, if the attorney is deemed unacceptable in the same critical element within a year from the commencement of a PIP, no further opportunity period is required before an attorney's immediate removal, reduction in grade, or reassignment.[31] In short, a PIP represents the beginning of the removal process for a performance-based action.

DVC Gordon's treatment of Attorney Beesly highlights the sad irony of the Agency's position. The Agency promoted Attorney Beesly to GS-14 in January 2021, even though she was neither consistently on-pace, nor on-pace, at the time of review. Tr.D.4 at34, Ux44. Yet approximately 2½ years later, on June 26, 2023, DVC Gordon threatened her retention by issuing Ms. Beesly a PIP for being nine issues behind (less than one week) with over three months remaining in the fiscal year. Ux52. In other words, the performance that the Agency relied upon to promote Ms. Beesly to GS-14 in January 2021, it later relied upon to place Ms. Beesly on a PIP in June 2023. Adding to the confusion, DVC Scharnberger testified that a nine-issue deficit **would not** raise any concerns. Tr.D.5 at 198. What is particularly disturbing is that the PIP itself states that, as of June 17, 2023, to be considered fully successful in the critical element of productivity, Mr. Beesly must have produced 281 signed issues, but she had only produced 272 signed issues. Ux52. It thus appears that DVC Gordon is interpreting the productivity standard as requiring attorneys to always meet their *pro rata* annual goal, each and every pay period, to be considered fully successful and avoid the issuance of a PIP.

Apparently, DVC Gordon did not heed the message at the DVC meeting in early 2023 when, according to DVC Scharnberger's testimony, the Agency provided guidance concerning the "general zone" for unacceptable performance in the productivity standard for the issuance of PIPs. Tr.D.5 at 198-99. This "general zone" announced at that DVC meeting, which the Agency failed to share with the Union or the attorneys, was three weeks behind, meaning nine cases or 27 to 28 issues. Tr.D.5 at 198.

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[30] *See* Jx1 at 147.
[31] *See* Jx1 at 147.

This guidance of a three-week cushion to avoid a PIP is far more generous than DVC Gordon's standard as applied to Ms. Beesly. Thus, Agency officials are continually changing and tweaking the productivity standard without notifying the Union, the impacted attorneys, or each other. This tinkering with the productivity standard is consistent with Ms. Carey's testimony that SSC Goff told her that the consistently on-pace requirement had to do with "trends" at the Agency and management's decision to take a more "strict" approach to promotions. Tr.D.3 at 253. A "trend" is just another word for a change or development in a general direction. Trends, by definition, are not fixed.

The fact remains, however, that the productivity standard is a fully objective and unambiguous annual standard, in that it speaks only to the number of signed decisions/issues that the Agency requires an attorney to complete within the fiscal year. Jx4. Arbitrator Greenberg reached this conclusion when he reinstated an attorney with backpay because the Agency did not permit her to finish the fiscal year before her removal for allegedly deficient performance. *Greenberg Award* at 31 ("[t]here was no evidence that the Grievant, in this case, had any reason to expect that her removal would be proposed for failure to meet the productivity standard before the date on which she was required to have met the standard. . . . The Agency, therefore, removed the Grievant prior to the end of the fiscal year without setting different performance standards."). The only difference is that the 2018 MOU reviewed by Arbitrator Greenberg included "monthly" progress checks, whereas the current 2021 MOU includes "frequent" progress checks. *Compare* Ax1.D *with* Jx4. Significantly, though, "frequent" is not defined and neither MOU includes metrics articulating clear benchmarks for attorneys to meet during the fiscal year as they progress toward their annual goals.[32] *Id.* VLJ Brant also testified that the 2021 MOU does not specifically define "on-pace." Tr.D.4 at 210-211.

[32] *Greer v. Department of the Army*, 79 M.S.P.R. 477, 483 (1998) ("Performance standards must, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria, and must be reasonable, realistic, attainable, and clearly stated in writing," and that performance standards should be "specific enough to provide an employee with a firm benchmark toward which to aim [the employee's] performance.").

The case is also reminiscent of a similar grievance in which the Authority upheld an arbitration award in 2015, finding that the Agency had unlawfully changed attorneys' conditions of employment when it began enforcing production goals on a weekly basis and requiring attorneys to be "green." *See AFGE Local 17*, 68 F.L.R.A. at 171. In that case, and at that time, the Agency was enforcing its productivity standard quarterly. *Id.* at 171. Attorneys also had a buffer zone so that they could be slightly behind their *pro rata* annual goal at the end of each quarter, except for the last quarter which marked the end of the fiscal year. *Id.* The Arbitrator found that the Agency unilaterally changed conditions of employment by *enforcing* rather than *tracking* attorneys' progress every week, and by eliminating the buffer zone. *Id*. The Agency has since done away with quarterly enforcement so that the current performance plan has only an annual productivity standard. Jx4, Jx5. As in *AFGE Local 17*, the Agency is once again attempting to change how it enforces the annual productivity standard by enforcing the standard on a *pro rata* basis, rather than reviewing, and bypassing the Union without bargaining.

Lastly, the waiver scheme introduced in FY 2022 for GS-14 promotions, without proper notification to the Union and lacking evidence of its existence prior to 2022, further highlights the Board's unilateral changes to conditions of employment. Rather than submit an attorney's GS-14 promotion packet to the panel at the requisite time-in-grade eligibility timeframe, VLJs began pressuring some attorneys to waive their contractual right to panel review to avoid the panel denying the promotion and to possibly shorten the delay for promotion reconsideration. As noted, Mr. Massey testified that the Agency failed to notify the Union of the waiver scheme for GS-14 promotions. Tr.D.2 at 21, 50. Additionally, the Agency's own data indicated that waivers were not issued until 2022. Ux30; Tr.D.2 at 237. Lastly, DVC Scharnberger testified that he was unaware of when and how the waiver scheme began, nor was he aware of any notification of the implementation of the waivers by the Agency to the

Union. Tr.D.5 at 87, 140-41. Indeed, the Board offered no evidence that waivers were in place prior to 2022 or that the Agency properly notified the Union of the waivers.

In conclusion, overwhelming evidence shows that the Agency changed conditions of employment by the way it is interpreting the on-pace language in the 2021 MOU. Since the Authority's decision in 2015, the Agency has disregarded the determination that the word "track" denotes the act of monitoring an attorney's progress toward the annual goal, while "enforce" implies compelling an attorney's compliance with an established requirement. *See, e.g*., *AFGE Local 17*, 68 F.L.R.A. at 171. The Agency's change with this new interpretation and application has, and is having, a recognizable negative impact on attorneys.

2. The changes to the productivity standard and promotion criteria are more than *de minimis* because they affected employees' advancement, retention, grade promotions, step increases, performance, and overtime opportunities.

The law requires an agency to bargain over the impact and implementation of a change in unit employees' conditions of employment provided that the change has more than a *de minimis* effect. *See* 5 U.S.C. § 7116 (a)(1) and (5).[33] In assessing whether the effect of a decision on conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect of the change.[34] The *de minimis* test applies to all changes in conditions of employment, whether they are substantively negotiable or result from the exercise of a management right.[35] The United States Court of Appeals for the District of Columbia Circuit recently affirmed the *de minimis* standard in *AFGE v. F.L.R.A.*, 25 F.4th 1 (D.C. Cir. 2022) (effectively reinstating the *de minimis* test and rejecting the "substantial impact" test). The United States Court of

[33] *U.S. Dep't of Defense, Defense Logistics Agency, Defense Distribution Depot, New Cumberland, Pennsylvania and AFGE, Local 2004*, 58 F.L.R.A. 750 (2003); *Social Security Administration, Malden District Office, Malden, Mass*., 54 F.L.R.A. 531 (1998) (*SSA*).
[34] *See Id*.
[35] *See Association of Administrative Law Judges v. F.L.R.A.*, 397 F.3d 957 (D.C. Cir. 2005).

Appeals for the District of Columbia Circuit has interpreted the *de minimis* standard to "imply a narrow exception to the statute's collective bargaining requirement; one that pertained to management decisions that had only a trivial effect on conditions of employment." *AFGE v. FLRA*, 25 F.4th at 3.

Here, the changes made to the production standard and promotion criteria by requiring attorneys to complete their *pro rata* annual goal either at the time of review or for an undefined percentage of pay periods during the fiscal year are more than *de minimis*. Indeed, under a remarkably similar fact pattern in *AFGE Local 17*, the Authority affirmed an Arbitrator's finding that the strict weekly enforcement of the Agency's annual production standards was more than a *de minimis* change to attorneys' conditions of employment. *See AFGE Local 17*, 68 F.L.R.A. at 171.

The changes affecting attorneys' conditions of employment in *AFGE Local 17* were less significant compared to the changes in this case. In *AFGE Local 17*, the disputed change involved increasing pre-disciplinary measures that "may lead to reduced appraisal ratings" and reducing attorneys' autonomy in managing their time. *Id*. In contrast, the changes in the present case are notably more impactful, resulting in reduced appraisal ratings, the issuance of PIPs that pose a threat to employee advancement and retention, and the denial of grade promotions, within-grade increases, and overtime opportunities for attorneys. VLJ Loren underscored the gravity of the situation, emphasizing the injustice to Ms. Ekland, who had been denied a $15,000 salary increase "under circumstances that have not historically been used to deny promotions last year or for years before that." Ux18 at 067. The significant nature and extent of these effects, coupled with their reasonably foreseeable impact, clearly surpass the threshold of being more than *de minimis*.

3. The Agency violated that Statute because it failed to meet its bargaining obligations under 5 U.S.C. § 7106.

While the Statute does provide an agency with certain reserved management rights,[36] an agency must still bargain over the procedures and appropriate arrangements of its exercise of these rights. According to the Statute, "Nothing in this section shall preclude any agency and any labor organization from negotiating - . . . (2) procedures which management officials . . . will observe in exercising any authority under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b). The fact that an agency may have "impact and implementation" bargaining obligations rather than substantive bargaining obligations does not eliminate the requirement that the agency fully engage in bargaining prior to implementing the change. *See, e.g., Fed. Bureau of Prisons and AFGE, Local 3828*, 55 F.L.R.A. 848, 852 (1999*) (BOP).*

The Statute requires the Parties "to negotiate in good faith," which entails: a sincere resolve to reach agreement and to meet at reasonable and convenient times as frequently as necessary. 5 U.S.C. § 7114(b)(1), (b)(3). Integral to discharging this duty in good faith is a commitment to complete bargaining with the union prior to implementing changes in established working conditions. In *Dep't of Air Force, Scott AFB*, 5 F.L.R.A. 9, 11, the Authority held:

> Apart from the literal language and legislative history of section 7114(a)(1) of the Statute, the conclusion that a party must meet its obligation to negotiate prior to making changes in established conditions of employment is supported by the express findings of Congress as stated in section 7101(a) of the Statute, namely, that … 'labor organizations and collective bargaining in the civil service are in the public interest.' Moreover, the requirement for bargaining prior to change of an established condition of employment enables both parties effectively to fulfill their respective obligations under section 7114(b)(3) of the Statute 'to meet at reasonable times … as frequently as may be necessary' for good faith negotiations on conditions of employment of unit employees.

[36] *See* 5 U.S.C. § 7106(1).

Id.; *see also U.S. Dep't of Ag. & AFGE, Nat'l Joint Council of Food Inspection Locals*, 41 F.L.R.A. 654, 659 (1991) ("It is well established that the duty to bargain under the Statute requires that, absent a clear and unmistakable waiver of bargaining rights, parties satisfy their mutual obligation to bargain before implementing changes in conditions of employment affecting unit employees.").

As previously discussed, the Agency wholly failed to notify the Union about changes to the productivity standard and the promotion criteria as well as the newly implemented waiver scheme. Tr.D.2 at 18-19. The Union has effectively debunked the Agency's defense that it had been consistently applying the productivity standard and promotion criteria for many years. For instance, DVC Scharnberger testified that there has been no change in how the Agency has applied the production standard to various personnel actions, testifying that the Agency has consistently ***tracked*** attorneys' weekly progress towards the annual production requirement for the past 20 years. Tr.D.5 at 45. The Authority already rejected this assertion in 2015. *See AFGE Local 17,* 68 F.L.R.A. 170. Indeed, the distinction between "tracking" and "enforcing" was critical in the Authority's decision in *AFGE Local 17*, which occurred during DVC Scharnberger's own tenure at the Agency. That decision drew a distinction between "tracking" and "enforcing" the annual production requirement during the year by explaining:

> In order to address the Agency's argument, it is necessary to recognize the distinction between 'review' (or ***tracking***) of attorneys' productivity performance and 'enforcement' of credit goals. The Arbitrator found that '[t]he Agency has consistently ***tracked*** attorneys' productivity requirements on a weekly basis.' And, in her award, the Arbitrator described the operation of the original chart, including its use of "weekly goal[s].' Thus, the Arbitrator clearly understood that, even before the alleged change at issue here, the Agency ***reviewed*** attorneys' productivity on a weekly basis.
>
> But the Arbitrator found that the Agency changed how frequently it ***enforced*** the productivity element, and that is what is relevant to the Arbitrator's conclusion that the Agency changed attorneys' conditions of employment. At arbitration, the Union argued that 'strict weekly ***enforcement***' of the productivity element was a 'new management

> practice,' whereas the Agency argued that it had 'consistently . . . ***enforced***' attorneys' productivity goals on a weekly basis prior to implementation of the new chart, and that the new chart was "merely a tool for management personnel.' The Arbitrator resolved the parties' dispute by rejecting the Agency's arguments and finding that strict weekly ***enforcement*** of the productivity element using the new chart constituted a change.

AFGE Local 17, 68 F.L.R.A. at 171 (emphasis added).

This arbitration award and the 2015 Authority decision affirming it contradict DVC Scharnberger's testimony concerning the Agency's consistent implementation of the productivity standard when considering promotions and other personnel actions. As noted in *AFGE Local 17*, Arbitrator Blanca Torres found that "having to meet the quota of three credits a week, each and every week . . . took a policy whose application was reasonable into a realm of strict application that had an adverse impact on the employees." *Id.* at 171. The Authority's decision noted that, "[a]t arbitration, the Union argued that this 'strict weekly enforcement' of the productivity element was a 'new management practice.'" *Id*. at 171. The Agency disputed that argument, claiming that it had "consistently . . . enforced" attorneys' productivity goals on a weekly basis prior to implementation of the new chart, and that the new chart was "merely a tool for management personnel." *Id*. The Arbitrator rejected the Board's argument, and the Union prevailed at arbitration as well as before the Authority after the Agency filed exceptions. *Id*.

Further evidence of the change was the 2021 MOU. Although it was not in effect at the time of the 2015 Authority decision, the distinction between "tracking" and "enforcing" still applies. If the Agency wanted to replace the word "track" with the word "enforce," thus changing how it implements the annual productivity standard, it must first meet its statutory and contractual bargaining obligations. The same is true with the new waiver scheme, which the Agency did not even attempt to defend at the arbitration, wholly admitting that it was new, and that no notification was provided to the Union. Tr.D.5 at 140.

In conclusion, the Agency had a duty to bargain the procedures and appropriate arrangements of these changes to conditions of employment under 5 U.S.C. § 7106(b)(2) & (3), which it wholly failed to do.

C. The Agency's failure to meet its bargaining obligations concerning the changes to conditions of employment constituted a ULP under 5 U.S.C. § 7116 (a)(1), (a)(5) and (a)(8).

By violating 5 U.S.C. §§ 7106 and 7114, the Agency committed a ULP under 5 U.S.C. § 7116(a)(1), (5), and (8) when it failed to fulfill its bargaining obligation under the Statute and unilaterally implemented the new application and interpretation of the "on-pace" and "consistently on-pace" standard. Under the Statute, it is an "unfair labor practice for an agency to refuse to consult or negotiate in good faith with a labor organization as required by this chapter." 5 U.S.C. § 7116(a)(5). When an Agency makes changes to bargaining unit employees' conditions of employment that is more than *de minimis*, the Agency has an obligation to bargain. *See, e.g., NFEE*, 53 F.L.R.A. at 81. Additionally, the Agency may not interfere with, restrain, or coerce employees in violation of 5 U.S.C. § 7116(a)(1). It does so when it prohibits an employee from exercising their rights under the Master Agreement or the law. Lastly, any violation of Chapter 71 of Title 5 is a ULP under 5 U.S.C. § 7116(a)(8).

The Statute confers upon an agency certain reserved management rights. *See* 5 U.S.C. § 7106(1). These rights include the determination of the *content* of performance standards. *See U.S. Dep't of Def., Def Contract Mgt. and AFGE, Local 2128*, 59 F.L.R.A. 396 (2003). Nevertheless, an agency must still bargain over the procedures and appropriate arrangements for its exercise of these rights, including those pertaining to the content of performance standards. *See* 5 U.S.C. § 7106(b),[37] and

[37] 5 U.S.C. § 7106(b), states, "Nothing in this section shall preclude any agency and any labor organization from negotiating - . . . (2) procedures which management officials . . . will observe in exercising any F.L.R.A. under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any F.L.R.A. under this section by such management officials."

AFGE Local 17, 68 F.L.R.A. 170. The fact that an agency may only have "impact and implementation" bargaining obligations does not eliminate the requirement that the agency complete its bargaining obligations prior to implementing the change. *See, e.g., BOP*, 55 F.L.R.A. at 852.

Here, the Agency has clearly engaged in ULPs in violation of 5 U.S.C. §§ 7116(a)(1), (5), and (8). The Agency concedes its failure to provide notice because of its unsupported belief that there was no change in the implementation of the annual production standard and promotion criteria. Tr.D.4 at 152; Tr.D.5 at 45. Moreover, the imposition of the waiver scheme constitutes an additional ULP under the Statute because the Agency enacted it without any notice to the Union. Tr.D.2 at 21; Tr.D.5 at 140. This is particularly concerning given that the process involved VLJs negotiating directly with attorneys, attempting to relinquish their contractual right to panel review for their GS-14 promotions. *See Dep't of Treasury, IRS, Kansas City Serv. Ctr., Kansas City, Mo*. & *NTEU & NTEU, Chapter 66*, 57 F.L.R.A. 126 (2001) (an agency fails to bargain in good faith when it bypasses the union and deals directly with employees concerning conditions of employment).

These breaches of the bargaining obligation concerning changes to the production standard and promotion criteria, including the waiver scheme, collectively amount to ULPs under 5 U.S.C. §§ 7116(a)(1) and (5). Furthermore, considering the violations of 5 U.S.C. §§ 7106 and 7114 discussed earlier, both also constitute a violation of 5 U.S.C. § 7116(a)(8). Consequently, the ULPs encompass violations of 5 U.S.C. § 7116(a)(1), (a)(5), and (a)(8).

D. The Agency's unilateral changes to the productivity standard and promotion criteria also violated provisions of the Master Agreement concerning notice to the impacted attorneys.

The Agency's failure to notify the impacted attorneys of its new interpretation and application of the "on-pace" language represents a separate and distinct violation of the Master Agreement. Specifically, Article 27 of the Master Agreement provides, "[t]he rating official will establish and

communicate in writing to employee(s) critical and non-critical elements and performance standards, at the beginning of the appraisal period (normally within 30 days)." Jx1 at 140. This Article also provides that

> [a]t the beginning of each rating period and when changes are made to performance standards, the Department agrees that the supervisory personnel shall meet with their employees to discuss new or revised critical and non-critical elements and standards; however, if the elements have not changed, the supervisor shall communicate to them that the critical and non-critical elements will remain the same for the appraisal period.

Id. at 141-42.

The Master Agreement properly recognizes that performance standards and promotion criteria should not pose as enigmas for employees to decipher. Rather, they must, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria. *Washburn v. Dep't of Veterans Affairs*, 114 LRP 9604 (2014, nonprecedential), *citing Towne v. Dep't of the Air Force*, 120 M.S.P.R. 239 (2013) and 5 U.S.C. § 4302.[38] Performance standards should be specific enough to provide an employee with a firm benchmark toward which to aim her performance. *Id*. They also must be sufficiently precise to invoke a general consensus as to their meaning and content. *Id*. The legislative history of 5 U.S.C. § 4302 underscores the necessity for objective performance criteria, recognizing the potential for inadequacies and arbitrariness in appraisal systems.[39]

The recurring theme of this case is the absence of prior notice to attorneys (and the union and VLJs) concerning the newly introduced "on-pace" and "consistently on-pace" requirements. The fact that no consensus existed among rank-and-file attorneys and management officials concerning the

[38] See attached hereto as "*Washburn Decision*."
[39] The legislative history of § 4302 indicates that its purpose was to require agencies to establish a "single interrelated framework for performance appraisals . . . [which] would be the basis for multiple personnel actions including promotions, pay increases[,] and awards as well as adverse actions." *U.S. Office of Personnel Mgmt. & AFGE Local 32*, 68 F.L.R.A. 1039 (2015); *see also Wells v. Harris*, 1 M.S.P.R. 208, 230 (1979) (quoting the legislative history of § 4302). Because Congress recognized the "inadequacies" and "potential for arbitrariness" in appraisal systems, one way it "sought to protect against those risks [was] by requiring objective performance criteria." *Id.*

implementation of the annual production standard and promotion criteria as required by § 4302(b)(1) underscores this sentiment. For example, DVC Gordon initiated a PIP for Ms. Beesly, relying on her nine-issue deficit well before the conclusion of the fiscal year. Ux52. In contrast, DVC Scharnberger testified that he would not be concerned if an attorney was ten issues behind. Tr.D.5 at 198. This stark inconsistency in the treatment of similar circumstances highlights the arbitrary nature of the Agency's approach to performance evaluations and demonstrates the lack of uniform application of the standards across the organization.

DVC Scharnberger revealed that the DVCs reached a consensus in early 2023 that falling three weeks behind, which is equivalent to nine cases or 27 to 28 issues, would prompt the initiation of a PIP. Tr.D.5 at 198-99. Interestingly, this internal guidance, which DVC Gordon seems to have misconstrued when she placed an attorney who was nine issues behind in a PIP, was not communicated to the impacted attorneys nor the Union representing them. This undisclosed standard within management itself only adds to the ambiguity surrounding performance expectations and the consequences for falling behind.

DVC Scharnberger's testimony also highlighted ambiguity in the promotion criteria, reflecting a lack of consensus and arbitrariness among management officials. Specifically, DVC Scharnberger expressed the view that quantifying the "consistently on-pace" requirement with a specific number or a percentage of pay periods during the fiscal year was not reasonable. Tr.D.5 at 194. When asked about whether being on-pace for 50% of the fiscal year would be adequate for the panel to endorse a GS-14 promotion, his response indicated a further dimension of uncertainty:

> I don't think there's a specific number. I think what you want to see is a number of pay periods in a row or in a short period of time even if there was a gap in the middle there somewhere that demonstrated you could get and stay at that pace. But it could vary from person to person depending on what the non-on-pace portion of the year looked like or what other factors are going on with that particular employee.

Tr.D.5 at 153-54. VLJ Brant's testimony only contributed to the existing ambiguity. She acknowledged that the annual standard is 156 cases but asserted that, as managers, they retain the right to monitor an attorney's progress toward that goal. Tr.D.4 at 222, 240. She then explained that the on-pace requirement, which she defined as three cases per week or six cases per pay period, was communicated to attorneys through discussions with their supervisors. Tr.D.4 at 153, 164, 169. As a supervisor, she informed attorneys that achieving three decisions per week indicated they were "good," and if they were not meeting this standard, she would contact them. Tr.D.4 at 239. But when pressed on how many cases behind would trigger a conversation, she asserted that there was no "hard and fast number," attributing it to her "supervisory discretion wheelhouse." Tr.D.4 at 240. This lack of clear parameters demonstrates the Agency's complete failure to effectively communicate, in writing rather than conversations, the productivity standard and promotion criteria to the impacted attorneys in violation of the Master Agreement.

While DVC Scharnberger and VLJ Brant both testified that all VLJs and attorneys should know of the performance requirements and qualifications for personnel actions, DVC Scharnberger also admitted that he had knowledge that some VLJs' claimed that they were unaware of these new requirements for promotions. Tr.D.5 at 188. While stating that employees should know what the Agency's requires of them for promotion, DVC Scharnberger testified that he believed the VLJs were lying to him when the VLJs claimed that they did not know that the Agency required their attorneys to be "on-pace" or "consistently on-pace" for promotion to a higher grade. Tr.D.5 at 188-89. This undercuts DVC Scharnberger's, and VLJ Brant's, testimony that the "on-pace" and "consistently on-pace" requirements had been in effect for many years and that all employees, VLJs and attorneys, are aware of these requirements.

Further, DVC Scharnberger was unable to provide or even recall any documents or notifications sent out to VLJs or attorneys notifying them of the "on-pace" or "consistently on-pace" requirements for promotion. *Id.* at 189. DVC Scharnberger testified that, while he had not spoken with attorneys about these requirements, he had heard from VLJs who informed him that the attorneys were not aware of the "on-pace" and "consistently on-pace" requirements. *Id.* at 189-90. DVC Scharnberger believed that these VLJs were lying to protect their employees. *Id.*

VLJ Brant referred to the Vice Chairman's September 29, 2020, email, which announced the new performance standards with the lowered annual production requirements amounting to three decisions per week. Tr.D.4 at 220. She testified that the reference to three decisions per week was an "expectation" but not a "requirement." Tr.D.4 at 219-20. When questioned about how many cases behind would trigger disciplinary action, she asserted that there was no "hard and fast line," emphasizing supervisory discretion in determining whether an attorney is on-pace. Tr.D.4 at 174-75, 222. Given the ambiguity surrounding the status of the three decisions per week as an "expectation" rather than a "requirement," and the absence of clear parameters for corrective action, it appears that this email cannot be deemed proper notice as mandated by the Master Agreement.

VLJ Brant asserted that there are no rigid or explicit requirements for promotions, with management considering a range of factors in the evaluation process. According to her testimony, meeting the promotion criteria involves being fully successful and demonstrating the ability to handle increasingly challenging cases. Tr.D.4 at 169. She therefore explained the Agency may interpret an attorney's inability to maintain consistent on-pace performance as an indication that they are not prepared to handle complex cases. While VLJ Brant asserted that there is no strict guideline for grade promotions, she implied that GS-14 promotions undergo more thorough examination. Tr.D.4 at 245-46.

However, the term "scrutiny" in this context appears to be a euphemism for arbitrariness in the decision-making process.

The conflicting and perplexing testimonies provided by DVC Scharnberger and VLJ Brant underscore the "on-pace" and "consistently on-pace" requirements as a mix of shifting and differing opinions within a relatively new leadership team. This situation has led to significant confusion and frustration among both attorneys and management officials. This confusion has prevented the Agency from providing attorneys with the necessary written notice of the disputed changes due to their inherent randomness, arbitrariness, and inconsistent application. Consequently, the changes to attorneys' conditions of employment without the required notice represent clear contractual violations of Article 27, Sections 5.A and 6.E., of the Master Agreement.

E. The Agency violated the 1994 MOU and the Master Agreement concerning grade promotions.

The 1994 MOU clearly states that promotion to the GS-13 level requires at least fully successful performance in all elements during the one-year time-in-grade period, whereas promotion to the GS-14 level requires at least fully successful performance in all elements during the two-year time-in-grade period, with the additional requirement that the attorney demonstrate his or her ability to successfully handle complex cases. Jx9. This aligns with the Master Agreement, which explicitly states, "[i]f an employee is rated as successful and is meeting the promotion criteria in the career ladder plan, the Department will certify the promotion, which will be effective at the beginning of the first pay period after the requirements are met." Jx1 at 110.

The Agency thus violated the 1994 MOU and Article 23 of the Master Agreement by imposing requirements for attorneys to be on-pace at the time of review for GS-13 promotions and consistently on-pace, as variously defined by the Agency, for GS-14 promotions. Nowhere are these requirements

outlined in the 1994 MOU, the Master Agreement, or any other negotiated agreement.[40] Both Mr. Massey and VLJ Loren discussed the historically smooth progression of attorneys through the career path until recent changes prompted this grievance, which aligns with the Agency's own data showing no GS-14 denials for those eligible in FY 2018, FY 2019, and FY 2020. Tr.D.2 at 17-18; Ux18; Ux30. Their testimony is particularly probative given their lengthy service at the Agency.

The Union presented overwhelming evidence that the Agency denied promotions for attorneys who met the promotion criteria in the 1994 MOU and Article 23 of the Master Agreement because of the Agency's new on-pace requirement, which the Agency has arbitrarily applied. The panel denied GS-14 promotions for Attorneys Ferrera, Noah, Ekland, and Goldblum, notwithstanding that they had met the promotion criteria in the 1994 MOU and Article 23 of the Master Agreement. Ax15-17; Ux45. The Agency does not dispute that they were fully successful in all elements of the performance plan for the requisite two-year period and that the employees had adequate experience in successfully dealing with complex cases. The panel, however, denied their promotions because they had not "demonstrated the ability to consistently do GS-14 level work." *See, e.g.*, Ux45. The consistency requirement, which the Agency has arbitrarily and inconsistently applied, is found nowhere in any written negotiated agreement.

DVC Gordon also improperly applied the 1994 MOU and Article 23 of the Master Agreement in denying Attorney Lawrence's GS-12 promotion, who the Agency rated as fully successful in all elements of the performance plan during the requisite one-year time-in-grade period and received a highly favorable recommendation by VLJ Sheeran. Ux7, 9. A promotion to GS-12 does not require that the attorney demonstrate the ability to handle complex cases. Jx9. SSC Burroughs informed Attorney Lawrence that "[y]our hard work is reflected in the feedback form VLJ Sheeran. I really appreciate how professionally you receive feedback and how collegial you are with your colleagues." Ux8. Despite

[40] *See SSA*, 55 F.L.R.A. 374 at 377 (1999) (noting that "basic principles of contract interpretation presume that the parties understood the import of their agreement and that they had the intention which its terms manifest.").

these highly favorable recommendations and her having met the criteria in the 1994 MOU and the Master Agreement for promotion, Attorney Lawrence was told the reason for the denial was "lack of consistent performance." Ux9. Both Attorney Lawrence and VLJ Sheeran were confused by this explanation. *Id*.

DVC Scharnberger further undermined the Agency's position when he testified that he did not recognize the 1994 MOU when shown by Union counsel, page by page, at the arbitration, stating, "I mean, I don't, I'm not familiar with the contents of the document." Tr.D.5 at163. Indeed, his inability to recognize the key document containing the promotion criteria for attorneys is disconcerting, particularly considering his role on the panel. The lack of familiarity with essential documents raises questions about the effectiveness of internal and external communications, the consistency of decision-making, and the overall transparency of the promotion process under the Agency's current leadership.

Moreover, the arbitrariness surrounding promotions undermines the intent of Article 23, designed to ensure *equitable* and *consistent* merit promotions. *See* Jx1 at 109 (emphasis added). Article 23 also specifies that the career ladder plan outlines *objective* criteria for each grade level. Jx1 at 110. However, the new, unnegotiated, promotion criteria lack equity, consistency, and objectivity, to which the parties agreed in Article 23, Section 1 of the Master Agreement. For instance, DVC Scharnberger's testimony revealed uncertainty about the sufficiency of being on-pace 50% of the fiscal year for a GS-14 promotion, stating, "I don't think there's a specific number. . . . It could vary from person to person." Tr.D.5 at 153. VLJ Brant also testified that there was no "hard-and-fast requirement" for promotions. Tr.D.4 at 229-30. The testimonies of DVC Scharnberger and VLJ Brant included terms like "discretion" and "holistic" when evaluating attorneys for promotion purposes; however, these terms are merely unsuccessful attempts to mask the process's arbitrary and random nature. *See, e.g.*, Tr.D.4 at 154, 222,

240, 246 (VLJ Brant testifying that the on-pace standard is a “metric” that includes supervisory discretion).

Uncontroverted evidence thus shows that the Agency violated the 1994 MOU and Article 23 of the Master Agreement by requiring attorneys to meet their annual *pro rata* goals either at the time of review or for a certain number of pay periods for promotion, although the Agency has inconsistently applied these criteria. The Agency thus fails to apply the premise that “an agency’s selection of an employee and the placement of that employee in a career ladder position constitutes the agency’s decision to promote that employee noncompetitively at appropriate stages in the employee’s career up to the full performance level of the position, once the requisite conditions have been met.” *U.S. Dep’t of HHS & NTEU, Chapter 229,* 51 F.L.R.A. 747, 751 (1996) (*HHS),* (*citing Nat’l Assoc. of Government Employees, Local R2-98 & Dep’t of the Army, Watervliet Arsenal, Watervliet, NY*, 29 F.L.R.A. 1303, 1310 (1987)).[41]

The Agency’s failure to promote attorneys who clearly meet the promotion criteria in the 1994 MOU led to a troubling but unavoidable conclusion: the Agency, for unknown reasons, has decided that it does not want to promote attorneys. This amounts to a blatant disregard for the promotion criteria in the 1994 MOU and the Master Agreement. Therefore, the Agency violated both documents when it ignored the promotion criteria and instituted new, and additional, criteria for promotion, without communicating those criteria to the employees or the Union.

[41] *See NTEU and U.S. Customs Service, Pacific Region,* 32 F.L.R.A. 1141, 1148 (1988) (holding that an Arbitrator’s award of career ladder promotions simply “implement[ed] [the] [A]gency’s earlier decision to place employees in a career ladder position with the intention of preparing the employee for successful noncompetitive promotions when the conditions prescribed by agreement or regulation are met”).

F. The Agency violated the 2021 MOU and the Master Agreement by requiring attorneys to meet the annual goal on a *pro rata* basis during the fiscal year.

The Agency "enforcing," as opposed to "tracking," attorney's progress toward meeting their annual production goals violates the 2021 MOU concerning the implementation of the annual production standard and the Master Agreement Article 40. The production standard is unambiguously an annual standard; it speaks only to the number of signed decisions, subject to proration for non-duty time, that the Agency requires the attorney to complete within the fiscal year. Jx5. Nothing in the MOU requires the attorneys to meet the standard on a *pro rata* basis. *See generally* Jx5.

Further, Article 40 of the Master Agreement does not incorporate an on-pace requirement. Instead, it clearly stipulates that a within-grade increase "will be granted as soon as the employee is eligible if he/she has met an acceptable level of competence." Jx1 at 227. The Parties define an acceptable level as currently performing at the fully successful or better level under the performance appraisal system; the Agency documents such performance by a rating of at least fully successful/satisfactory. *Id.* at 226. In essence, the Agency must grant a within-grade increase when the employee meets the time-in-grade requirement, provided their most recent rating of record is at least fully successful. The Agency can only deny a within-grade increase if a special rating of record is prepared to document the employee's current unacceptable performance. *See id.* at 227. Additionally, the Agency shall provide employees with an acceptable level of competence determination as soon as possible after the completion of the required waiting period. *See id.*

Lastly, the Agency violated Article 21 and Article 27 of the Master Agreement by applying the "on-pace" requirement to overtime opportunities. The Master Agreement stipulates that "overtime shall be distributed in a fair and equitable manner" and that the Agency "shall not hold employees accountable for factors which affect performance that are beyond the control of the employee." *See* Jx1 at 104, 145.

Here, the Agency's unilateral decision to add the requirement that attorneys complete their annual goal on a *pro rata* basis either at the time of review or for a specific percentage of pay periods during the fiscal year is not contained within, or communicated by, in the performance standards, nor the 2021 MOU. Rather, the Agency's interpretation is a perversion of the 2021 MOU's language that the Agency will continue to *track* the number of signed decisions and issues an attorney produces during the performance year, and, consistent with performance management, the Agency may conduct *frequent progress checks* to ensure each attorney is *on-pace* to meet their annual production requirement. Jx4 at 335, 336. The Agency does this by using the DOC as a hammer to enforce, as opposed to track, attorneys' productivity towards the annual goal. At most, the DOC was meant to be a tool for an attorney to use in pacing his or her progress and for management to use in gauging an attorney's progress. Tr.D.2 at 117 (VLJ Loren testifying the DOC "is useful for calculating what is necessary to meet [the attorneys'] end-of-year production goals."), 160 (Mr. Cummings testifying that management sends attorneys a copy of their DOC to track the attorney's own progress during the year, but that it is not a requirement to do so); Tr.D.3 at 197 (Ms. Forlani testifying that "the DOC was given to us as a track to make sure that you stay on pace for your yearly goal"); Tr.D.4 at 15 (Ms. Williams testifying that "My understanding was that the DOC is used to make sure we are on track. . . And when I say on track, I mean on track for the end of [the] fiscal [year]."); Tr.D.4 at 46 (Ms. Beesly testifying that "it's never been communicated that pay period to pay period, you have to have all of your issues or all of your cases signed."); Tr.D.4 at 98 (Mr. Goldblum testifying that he only "passively" followed his DOC).

The insights from two previously discussed arbitration awards offer valuable guidance in understanding the current violations by the Agency. As previously discussed, in interpreting the 2018 MOU, which accompanied the performance standards at that time, Arbitrator Greenberg rejected the Agency's claim that the productivity standard itself included a weekly goal, emphasizing that it

pertained solely to the number of signed decisions expected within the fiscal year. *See Greenberg Award.* Similarly, the Authority affirmed Arbitrator Torres' award, recognizing the difference between "tracking" and "enforcing" production goals. *See AFGE Local 17*, 68 F.L.R.A. at 171. As in *AFGE Local 17*, the Union is not challenging the Agency's authority to ***track*** attorneys' progress toward annual production goals, but rather how the Agency ***enforces*** the annual standard during the fiscal year. The Agency's enforcement of the annual productivity standard once again violates the 2021 MOU. *See id.*

Moreover, the Agency interprets and applies the "on-pace" language in the 2021 MOU arbitrarily depending on the specific personnel action under consideration, as well as the whims of various supervisors. The Agency's inconsistent application of the "on-pace" requirement to promotions has already been at great length. An equally troubling and arbitrary application of this language concerns PIPs. As noted, Attorney Beesly's performance that justified a GS-14 promotion in January 2021 later led to the issuance of a PIP in June 2023. Also alarming is DVC Scharnberger's revelation that upper management, in January or February 2023, covertly established an undisclosed performance standard, finding that an attorney being three weeks behind his or her *pro rata* goal – equivalent to 9 cases or 27 to 28 issues – was unacceptable and triggered the initiation of a PIP.[42] Tr.D.5 at 198-99. This undisclosed standard, defining fully successful performance under the productivity standard, is more flexible than the Agency's on-pace requirement for other personnel decisions, such as promotions, within-grade increases, and overtime opportunities; however, it has nonetheless been arbitrarily applied by the Agency, it is new, and it is not found in the 2021 MOU.

The 2021 MOU does not permit the Agency to enforce an attorney's progress toward his or her annual goal arbitrarily and without meeting its statutory and contractual notice and bargaining obligations. Historically, the Agency did have an effective system for enforcing the production standard

[42] *See* Jx1 at 146-47.

on a quarterly basis in which attorneys understood where they had to be during the entire fiscal year. Ux28; Tr.D.2 at 37-41. This former system also had a buffer zone, allowing attorneys to be a certain percentage behind their *pro rata* annual goal during the fiscal year depending on the quarter. *Id*. The existing performance standards and the 2021 MOU prohibit the Agency from placing an attorney on a PIP for being three weeks behind during the performance year without first notifying attorneys of the criteria distinguishing unacceptable from fully successful performance in this critical element. It is important to note that the Agency is still obligated to fulfill all bargaining obligations with the Union before introducing new standards to employees.

The Agency also violated the Master Agreement by applying the on-pace requirement to within-grade increases. VLJ Brant's testimony asserted that eligibility for a within-grade increase requires the attorney to be fully successful and on-pace at the time of review. Tr.D.4 at 191-92, 228-29. However, the Agency cannot impose an on-pace requirement as a basis for denying a within-grade increase. As described above, the Master Agreement states that the Agency will grant within-grade increases when the employee is eligible if the employee has met an acceptable level of competence, i.e., a performance rating of fully successful. Jx1 at 226-27. The Agency applying the on-pace standard to a determination on whether to grant a within-grade increase, i.e., a step increase, for an employee is highly inappropriate and a direct violation of the parties Master Agreement, Article 40.

Lastly, the Agency violated Article 21 and Article 27 by applying the on-pace requirement to those seeking to work overtime. An illustrative case is that of Ms. Washington, who the agency denied overtime for not being "green" at the time of her request. Ux10; Tr.D.4 at 78-80. Despite missing the "green" status by one signed decision, Ms. Washington had eight decisions pending signature by her VLJ. Tr.D.4 at 80. Ms. Washington's VLJ took responsibility and admitted to not being timely in signing Ms. Washington's decisions, none of which did the VLJ return to Ms. Washington for edits.

Ux11. Despite the VLJ's candid acknowledgment, the denial of Ms. Washington's overtime request remains in violation of the Master Agreement because the denial was not fair or equitable and relied on the VLJ's failure to sign Ms. Washington's decisions, which was outside of Ms. Washington's control.

Thus, the Agency violated the 2021 MOU and the Master Agreement by holding attorneys accountable for meeting their annual performance standard in productivity on a *pro rata* basis and applying an "on-pace" and "consistently on-pace" requirement for personnel actions and overtime.

VII. REQUESTED RELIEF

The Agency's numerous statutory and contractual violations warrant the following remedies: (1) return to the *status quo ante* until the Agency has fulfilled its bargaining obligation, (2) a make whole remedy, (3) back pay, and (4) a cease-and-desist order followed by a notice posting signed by the Chairman of the Board. These remedies are appropriate based on the significant impact of the Agency's violations and the Arbitrator's broad authority and latitude afforded to him in fashioning a remedy. *AFGE Local 1138 and Dep't of Def., Def. Commissary Agency*, 49 F.L.R.A. 1211 (1994). Similarly, where the arbitrator finds that a party has committed an ULP, the Authority defers to the arbitrator's judgment and discretion in the determination of the remedy. *See National Treasury Employees Union and U.S. Dep't of the Treasury*, IRS, 64 F.L.R.A. 833, 837-38 (2010) (*NTEU*).[43] The remedial power of the Authority in ULP cases is broad, and, here, the Arbitrator has the power to order these same remedies. *See Fed. Bur. Of Prisons, Washington, D.C. & AFGE Local 171*, 55 F.L.R.A. 1250 (2000); *NTEU & FDIC*, 48 F.L.R.A. 566 (1993).

[43] Unless a specific remedy is required by law, the Authority defers to an arbitrator's award remedying a ULP. *AFGE Council 236 and GSA*, 63 F.L.R.A. 651 (2009).

Further, Arbitrators have full authority to resolve statutory ULP claims that the Union raises in the grievance process. *AFGE L.3529 & Def. Contract Audit Agency*, 57 F.L.R.A. 464 (2001); *NTEU Chapter 168 & U.S. Dep't of the Treasury, Customs Serv.*, 55 F.L.R.A. 237 (1999). A ULP ruling made by an arbitrator has the same force of law as a determination made in a ULP proceeding by an Administrative Law Judge (ALJ) for the Authority. *AFGE Council 236 & Gen. Serv. Admin.*, 63 F.L.R.A. 651, 652 (2009) ("In a grievance proceeding that alleges an unfair labor practice under section 7116 of the Statute, an arbitrator functions as a substitute for an Authority ALJ"). Where a ULP has occurred, the Authority, and therefore an arbitrator, may order an agency to restore to *status quo ante*, cease and desist the practice, renegotiate with retroactive effect, and take any other appropriate action. 5 U.S.C. § 7118(a)(7). Finally, an arbitrator may provide monetary remedies to address the impact of a violation. *CBP & NBPC*, 66 F.L.R.A. 198, 204 (2011).

A. The Arbitrator should order the Agency to return to the *status quo ante* until it has fulfilled its bargaining obligations.

The Arbitrator should grant *status quo ante* relief and require the Agency to return to the pre-implementation conditions of employment related to the productivity standard and promotion criteria. The purpose of a *status quo ante* remedy is to place the parties, including employees, in the position they would have been in had there been no unlawful conduct. *See U.S. Dep't of Veterans Affairs Med. Ctr., Asheville,* 51 F.L.R.A. 1572, 1580 (1996). The Statute envisions broad use of the *status quo ante* remedy to deter failures to bargain and require the Agency to rescind changes in conditions of employment that the Agency unilaterally implemented to ensure that meaningful bargaining occurs. *See*

5 U.S.C. § 7118(a)(7)(D) (providing for any combination of remedy that will carry out the purpose of this chapter).[44]

When an agency breaches its duty to bargain over the impact and implementation of its exercise of a management right, the appropriateness of a *status quo ante* remedy is determined by factors set forth in *Federal Prison System, Correctional Institution, Petersburg, VA, and AFGE, Local 2052*. 8 F.L.R.A. 604 (1982) (*FCI*). These factors include: (1) whether, and when, the agency gave notice concerning the action or change; (2) whether, and when, the union requested impact-and-implementation bargaining regarding the action or change; (3) the willfulness of the agency's conduct in failing to properly bargain under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. *Id.*

A *status quo ante* remedy is justified based on *FCI*'s five factors. Firstly, the Union's brief thoroughly outlines the Agency's failure to provide adequate notice regarding changes to the productivity standard and promotion criteria (*see* Union Brief at 40-46). Secondly, the Board's persistent denial that it changed the productivity standard and promotion criteria would have rendered the Union's bargaining request meaningless. *See Customs and Border Protection*, 64 F.L.R.A. 916 (2010) (a union does not waive its right to bargain when an agency announces a change as a *fait accompli* and a request to bargain will be futile). DVC Schanberger's testimony exemplifies the Agency's allegation that the on-pace component, as interpreted by the Agency, has been part of the attorneys' performance standards for "at least 20 years." Tr.D.5 at 45. Similarly, VLJ Brant testified that the productivity standard had always been three decisions per week, and the evaluation of attorneys'

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[44] When an agency has an obligation to bargain over the substance of a matter, and fails to meet that obligation, the Authority will grant *status quo ante* remedy in the absence of unique circumstances. *See Air Force Logistics Command, Warner Robbins Air Logistics-Ctr., Robbins AFB & AFGE Local 987*, 53 F.L.R.A. 1664, 1671 (1998).

progress had not changed since she began in 2013. Tr.D.4 at 152. However, as detailed above, the overwhelming evidence on the record contradicts these assertions.

Thirdly, there is no dispute that the Agency deliberately evaded its statutory bargaining obligation by neglecting to notify the Union of the changes to attorneys' conditions of employment. The Agency's assertion that it had no bargaining obligation is not credible, given the compelling evidence outlined above. Moreover, any claim that the Agency's violations are due to a good-faith misunderstanding is weakened by the waiver scheme and the Agency's record of violating the Statute through unilateral changes to attorneys' performance standards. A recent example occurred in 2022 when an arbitrator found the Agency guilty of a ULP for not meeting its bargaining obligation before requiring attorneys to brief hearing cases. *See, e.g., Shaller Award* at 38.

Nonetheless, even if the Agency believed in good faith that it had no bargaining obligation, this would not negate a finding of willfulness under *FCI*'s third factor. The Authority has clarified that a determination of willfulness under *FCI*'s third factor is based on whether the Agency acted intentionally, not on whether it held a good faith belief about its obligation to bargain. *See U.S. Dep't of the Army, Lexington Blue-Grass Army Dep't, Lexington, Kentucky*, 38 F.L.R.A. 647, 649 (1990); *see also Dep't of Energy, WAPA & AFGE Local 3824*, 56 F.L.R.A. 9, 13 (2000) ("[a]s there is no assertion that the Respondent's actions were unintentional, the third *FCI* factor also supports a *status quo ante* remedy here."). In short, the Agency's failure to fulfill its bargaining obligation under the Statute was intentional, even if based on an erroneous conclusion that the Statute did not obligate the Agency to bargain over the subject matter.

Fourth, the significant nature and extent of the impact experienced by adversely affected attorneys are well documented. Attorney Beesly highlighted the jeopardy of her federal job due to being nine issues behind during a pay period, an equivalent of less than one week. Ux52; Tr.D.4 at 39-40. In

an email to DVC Rodrigues, VLJ Loren explained the adverse effect on Attorney Ekland, who forfeited an annual pay increase amounting to fifteen thousand dollars ($15,000). Ux18 at 067. Importantly, this $15,000 annual income loss pertains to just one attorney; however, a total of 26 attorneys in FY 2022 had their GS-14 promotions either delayed or denied, which was facilitated, in part, by the unlawful waiver scheme. Ux30. Furthermore, while the Union presented information on the Agency's denial of Ms. Lawrence's grade promotion to GS-12, the Agency has not disclosed the number of non-GS-14 promotions, i.e., promotions to grades 12 and 13, that were delayed or denied due to the Agency's unilateral changes to the productivity standard and promotion criteria. Ux9 at 034; Tr.D.2 at 202-03 (Mr. Cummings describing the data received in the information request pertaining solely to GS-14 promotions). Additionally, Attorney Washington testified about the Agency denying her overtime because she was not "green" at the time of her request based on signed decisions. Ux10; Tr.D.4 at 78-80. It is reasonable to assume that many other attorneys also missed opportunities to earn additional income by working overtime due to the improper application of the productivity standard. In summary, the adverse consequences, including the risk of removal from federal service through a PIP, income loss from improper promotion denials, income loss of the denial of step increases, and the denial of overtime opportunities, are compelling reasons to justify *status quo ante* relief.

Lastly, the Agency offered no *record* evidence that a *status quo ante* remedy would either disrupt or impair the efficiency and effectiveness of the Agency's operations. Notably, the Authority has held that in the absence of *record* evidence establishing that a *status quo ante* remedy is not appropriate, the Authority should restore the *status quo. See U.S. Dep't of the Treasury, IRS and NTEU,* 68 F.L.R.A. 1027, 1033 *(citing U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo*., 61 F.L.R.A. 688, 694 (2006) (*Peterson*)); U.S. *Dep't of Justice, INS, Washington, D.C., and AFGE*

National Border Patrol Council, 56 F.L.R.A. 351 (2000) (In the absence of record evidence establishing that a status quo ante remedy is not appropriate, the Authority should restore the *status quo*).

Here, the Agency offered no such evidence. The Agency has contended that abandoning the way it applies the on-pace language in the 2021 MOU would disrupt the efficiency of the Board. For instance, DVC Scharnberger testified that the on-pace requirement is crucial because VLJs require a steady stream of cases. Tr.D.5 at 42. He also claimed that the policy prevents attorneys from "dumping" too many cases at one time on a VLJ. *Id.* at 44. However, during the arbitration, the Agency failed to present a single document to support any assertion that a *status quo ante* remedy would create a bottleneck of cases. Nor was any testimony provided that, while the Agency holds this concern, it ever actually occurred.[45] This is notable given the Agency's access to the DOCs, which would have disclosed this problem if it had, indeed, existed.

Arbitrator Torres, in a similar context, applied the *FCI* factors and determined that *status quo ante* relief was appropriate. *See AFGE Local 17*, 68 F.L.R.A. at 171. Arbitrator Torres issued this relief because the Union had no opportunity to bargain and, in fact, the Agency demonstrated a willful refusal to do so. *U.S. Department of Veterans Affairs and AFGE Local 17*, FMCS at 13, 16 (November 2013) (*Torres Award*).[46] She also found that weekly enforcement of three credits per week had a significant impact on the adversely affected employees. *Torres Award* at 13, 16. Importantly, the Authority did not disturb this award. *See AFGE Local 17*, 68 F.L.R.A. at 171. For the aforementioned reasons, *status quo ante* relief is justified in this case under the *FCI* factors.

[45] In contrast, numerous employees testified that their VLJs held a significant number of submitted, but not signed, cases in the VLJ's queue for a time after the attorneys' submissions. *See, e.g.,* Tr.D.4 at 80 (Ms. Washington testifying that she was denied overtime for not being on-pace or green at the time she would work the overtime; however, she was only one case behind on her DOC and her VLJ had eight cases submitted by Ms. Washington and unsigned by the VLJ).
[46] Attached hereto as the *Torres Award.*

B. In addition, the Arbitrator should order a make whole remedy.

An order that the Agency make whole the affected employees is also an appropriate remedy in this case. In *NTEU v. F.L.R.A.*, the U.S. Court of Appeals for the D.C. Circuit found that a remedial determination that withholds monetary compensation for deprivations suffered by employees due to unlawful employer action is *rarely* justified. 856 F.2d 293 (D.C. Cir. 1988). In *NETU*, the court explained that,

> [a]n approach to remedies that systemically fails to deter noncompliance, or dilatory compliance, with the Statute's directives is fundamentally at odds with the Authority's responsibilities . . . Employees are left to bear the losses and suffer the detriments of working under conditions ordained by management rather than fixed by bargaining. Thus, retroactive remedies are an indispensable means to vindicate the Statute's central goals.

Id. at 297-99.

Here, undoing the damage caused by the Agency's dereliction of its statutory bargaining obligation requires that it make all affected employees whole for any monetary impact suffered by the Agency's unilateral implementation of the changes in conditions of employment. Monetary relief that may be appropriate includes, but is not limited to, attorneys who would have been entitled to a grade promotion, a within-grade increase, performance bonuses, or the ability to work paid overtime, but for the Agency's changes to the productivity standard and promotion criteria.

C. The Back Pay Act is also appropriate for any remedy awarded by the Arbitrator.

If the Arbitrator finds that the Agency violated the Master Agreement or the Statute, the Arbitrator may rely on the Back Pay Act to make employees whole. The Back Pay Act ("the Act") entitles employees to backpay with interest and benefits when the Agency commits an unwarranted and unjustified personnel action. 5 U.S.C. § 5596. Specifically, when an arbitrator grants a grievance, in whole or in part, and finds that any employee has "been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances,

or differentials of the employee," the employee is entitled to a correction of the personnel action, reimbursement of the pay, allowances, or differentials, and reasonable attorney fees. 5 U.S.C. § 5596(b).[47]

It is well-settled law, and the Authority has specifically found, that "[a] violation of an applicable law, rule, regulation, or provision of a collective bargaining agreement constitutes an 'unjustified or unwarranted personnel action'" under the Act. *See, e.g., U.S. Small Bus. Admin. & AFGE Local 2959*, 70 F.L.R.A. 745, 747 (2018); *GSA & AFGE Local 2431*, 55 F.L.R.A. 493 (1993). The Act is an explicit waiver of sovereign immunity that allows an employee who successfully pursues a grievance to recover back pay. 5 U.S.C. § 5596. Lastly, the Authority has held that an arbitrator is an "appropriate authority" under the Act to issue a decision and order back pay. *Ala. Ass'n of Civilian Technicians & U.S. Dep't of Def., Ala. Nat'l Guard*, 52 F.L.R.A. 1386 (1997).

Here, the Agency committed unjustified and unwarranted personnel actions when it violated the Statute, the 1994 MOU, the 2021 MOU, and various provisions in the Master Agreement by unilaterally changing conditions in employment concerning the productivity standard and promotion criteria. Absent the Agency's improper actions, affected attorneys would not have suffered negative consequences. The denial of grade promotions, within-grade increases, overtime opportunities, loss of performance bonuses, the imposition of PIPs, and any other personnel decisions have resulted in a reduction or withdrawal of all or part of pay, allowances, or differentials. Consequently, such actions warrant an appropriate award under the Act.[48]

The Union therefore requests that the Arbitrator order the Agency to make any affected employees whole under the Act, including any lost pay or leave, with interest, under any of the remedies

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[47] *See Ala. Ass'n of Civilian Technicians & U.S. Dep't of Def., Ala. Nat'l Guard*, 52 F.L.R.A. 1386 (1997) (holding that an arbitrator is an "appropriate authority" under the Act.)

[48] *See Fed. Energy Regulatory Commission & AFGE, Local 421*, 58 F.L.R.A. 596 (2003) (upholding the award of back pay for failing to promote an employee to the GS-14 level).

listed above. Should the Arbitrator sustain the grievance, in whole or in part, the Union requests that the Arbitrator retain jurisdiction for purposes of implementation of the award and for resolving any question of attorney's fees to which the Union may be entitled pursuant to the Act based on the Arbitrator's findings.[49]

D. Additionally, a cease-and-desist order and a notice posting signed by the Chairman are also appropriate remedies.

A cease-and-desist order and a notice posting is appropriate in this case. If the Authority determines that an agency has engaged in a ULP, then the Authority shall issue an order to "cease and desist from any such unfair labor practice in which the agency [] is engaged." 5 U.S.C. § 7118(a)(7)(A). The Authority typically issues cease-and-desist orders accompanied by the posting of a notice to employees as a remedy where it finds violations of the Statute. *F.E. Warren Air Force Base, Cheyenne, Wy. and AFGE Local 2354*, 52 F.L.R.A. 149, 161 (1996) (the Authority orders cease and desist orders and postings in virtually all cases of statutory violations.). Here, the Union has shown by preponderant evidence that the Agency violated the Statute and engaged in ULPs. Therefore, the Arbitrator should order that the Agency cease and desist from its conduct constituting the violations found and post a notice signed by the Chairman of the Agency.[50]

E. Retention of Jurisdiction

The Union respectfully requests that the Arbitrator retain jurisdiction to settle any disputes that may arise concerning the implementation of any awarded remedy. *See, e.g., U.S. Dep't of Veterans Affairs Denver Reg. Off. & Am. Fed'n of Gov't Employees, Local 1557*, 60 F.L.R.A. 235 (2004). The Authority has upheld retention of jurisdiction by an arbitrator for this purpose. *See, e.g., U.S. Dep't of*

[49] If the Union prevails and the Arbitrator grants the grievance in whole or in part, the Union will file a Petition for Attorneys' Fees to support its request for attorney fees more fully. The entirety of the Union's arguments for attorneys' fees are not contained in this brief.
[50] A draft Notice and Posting is included after the conclusion of this brief.

Veterans Affairs Denver Reg. Off. & AFGE, Local 1557, 60 F.L.R.A. 235 (2004). Therefore, the Union requests that the Arbitrator retain jurisdiction over the remedies aspect of this award, in addition to any potential resulting request for reasonable attorneys' fees based on the Arbitrator's findings.

VIII. CONCLUSION

In light of the aforementioned, the Union respectfully requests that the Arbitrator sustain the grievance and grant the requested remedies. The Union grounds this request in the Agency's numerous violations of the Statute, the 2021 MOU, the 1994 MOU, and the Master Agreement. These violations occurred when the Agency failed to fulfill its bargaining obligation before unilaterally changing conditions of employment related to attorneys' productivity standards and promotion criteria. The Union respectfully requests that the Arbitrator issue an Opinion and Award in accordance with the Requested Relief section above. Lastly, the Union requests that the Arbitrator retain jurisdiction and order any other remedy the Arbitrator deems appropriate to effectuate the Statute and deter future violations of the Statute and Master Agreement.

Respectfully Submitted,

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NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF ARBITRATOR JAMES D. BILIK
PURSUANT TO ARBITRATION AWARD

In the Matter of: AFGE Local 17 and
U.S. Department of Veterans Affairs, Board of Veterans Appeals
FMCS Case No. 230214-03419

Arbitrator James D. Bilik found that the Department of Veterans Affairs, Board of Veterans Appeals, violated the Federal Service Labor-Management Relations Statute (the Statute) when it changed the performance element of productivity by requiring attorneys at the Board of Veterans Appeals to meet the productivity element on a *pro rata* basis, created a new “on-pace” and “consistently on-pace” requirement, and imposed a new waiver agreement, all without fulfilling its bargaining obligations, and has ordered the Agency to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the performance element of productivity by requiring attorneys at the Board of Veterans Appeals to meet the productivity element on a *pro rata* basis, apply a new “on-pace” and “consistently on-pace” requirement, or impose a new waiver agreement for Attorney-Advisors at the Board of Veterans Appeals without fulfilling our bargaining obligations with AFGE Local 17.

WE WILL NOT, in any like or related matter, enforce a change in performance standards for employees without fulfilling our bargaining obligations with AFGE Local 17.

____
Chairman, Board of Veterans Appeals

Date: ______________________________ By: ____________________________________
(Signature) (Title)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January 2024, a copy of the document entitled Closing Brief on Behalf of American Federation of Government Employees, Local 17, was delivered in the manner below to the following:

James Bilik
Arbitrator
Jdbilik@gmail.com

Sent via Email

____
April L. Fuller
Union's Representative

I HEREBY CERTIFY that a copy of the document entitled Closing Brief on Behalf of American Federation of Government Employees, Local 17, will be delivered on the 1st of February 2024, in the manner below to the following:

Mark Goldner
Attorney
Mark.Goldner@va.gov

Sent via Email

David Scruggs
Attorney
David.Scruggs@va.gov

Sent via Email

____
April L. Fuller
Union's Representative