FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 17,

Union,

and

DEPARTMENT OF VETERANS AFFAIRS, BOARD OF VETERANS APPEALS,

Employer.

FMCS Case No. 230214-03419
(Performance Standards)

DECISION & AWARD

BEFORE: James D. Bilik, Esq., Arbitrator

APPEARANCES:

For the Union

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INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees ("Master Agreement, "collective bargaining agreement," or "CBA") and the procedures of the Federal Mediation and Conciliation Service, the undersigned was selected as arbitrator in this matter.

The grievance dated December 20, 2022 challenged the actions of the Board of Veterans' Appeals, a branch of the Department of Veterans Affairs, regarding the evaluation of the performance of approximately 900 bargaining unit attorneys serving in the title of Attorney Advisor.

Attorney Advisors review the evidentiary records from appeals challenging the Department of Veterans Affairs' denial of VA compensation, and pension and other benefits for veterans and their families and prepare draft decisions for review by Veterans Law Judges ("VLJs") who also work for the Board. The grievance alleges that the Employer violated the Master Agreement and the Federal Service Labor-Management Relations Statute in connection with the application of annual requirements for Attorney Advisors' production of decisions. Specifically, the Union cites the Agency's allegedly novel reliance on Attorney Advisors' having been "on pace" consistently throughout the year toward reaching the annual case productivity quota, in denying promotions and in other personnel actions.

The grievance was denied by the Employer at all pre-arbitration stages, and the Union timely invoked arbitration pursuant to Article 44 of the Master Agreement.

The arbitration took place on August 2 and 3, and on October 24, 25, and 26, 2023 remotely via the Zoom platform. The parties were afforded a full and fair opportunity to present witnesses and evidence in support of their respective positions. Eleven Union witnesses and two Employer witnesses testified. Also received in evidence were the following: Joint Exhibits 1-10; Union Exhibits 1, 2, 7, 8, 9-11, 13-19, 24-48 and 50-54; and Agency Exhibits 1-7, 10, 11, 12, and 15-18. A stenographic record was made of the proceedings. The parties submitted written post-arbitration briefs on January 31, 2024, at which time the record was closed.

STATEMENT OF THE ISSUES[1]

1. Did the Agency make changes in conditions of employment having more than *de minimus* effect without notice to the Union and without affording the Union an opportunity to bargain, in violation of the law, the Master Agreement, any Memoranda of Understanding, and/or Past Practice?

2. If the Grievance is sustained on one or more of the bases set forth above, what shall be the remedy?

RELEVANT PROVISIONS IN THE MASTER AGREEMENT

ARTICLE 2 – GOVERNING LAWS AND REGULATIONS

Section 1

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes.

ARTICLE 27 – PERFORMANCE APPRAISAL

Section 1 – Overview

G. An annual rating of "fully successful" assures employees of eligibility for award consideration, promotion consideration, and within grade increases

[1] The parties were not able to agree on a joint statement of the issues before me, so I have determined this statement after review of the record and of the issues proposed by the parties, pursuant to Article 44, Section 2(F) of the Master Agreement. The Agency's initially proposed issues addressing timeliness and whether the grievance is precluded by prior grievance filings were not pursued in the Agency's brief and are not before me.

and serves as a positive, tangible assertion that the employee is meeting his/her job requirements.

Section 2 – Definitions

C. Critical Element

A work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable. Such elements shall be used to measure performance only at the individual level. Performance plans must contain at least one critical element that must be used in deriving a summary rating.

D. Non-Critical Element

A dimension or aspect of individual, team, or organizational performance, exclusive of a critical element, that is used in assigning a summary level. Such elements may include, but are not limited to, objectives, goals, programs plans, work plans, and other means of expressing expected performance. Performance plans must contain at least one non-critical element that must be used in deriving a summary rating.

G. Performance Plan

All written or otherwise recorded, performance elements that set forth expected performance. A plan must include all critical and non-critical elements and their performance standards.

I . Performance Standard

The management-approved expression of the performance threshold(s), requirement(s), or expectation(s) that must be met to be appraised at a particular level of performance. A performance standard may include quality, quantity, timeliness, and manner of performance. Performance standards can be written for more than one level of achievement where appropriate. However, performance standards must be written at least at the fully successful achievement level .

Section 5 - Performance Standards

A . Objective criteria will be used to the maximum extent feasible in establishing and applying performance standards and elements. The 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). After initial issuance of critical and non-critical elements and performance standards,

the elements and standards will be provided annually, thereafter. All aspects of the performance plan, including numerical standards, measurement indicators, priorities, and weightings, if applicable, will be communicated in writing to the affected employees at the time the employees receive his/her performance elements and standards. The local union may provide input into any changes to performance standards and/or establishment of new performance standards.

E . The local union shall be given reasonable written advance notice (no less than 15 calendar days) when the Department changes, adds to, or establishes new elements and performance standards. Prior to implementation of the above changes to performance standards, the Department shall meet all bargaining obligations.

F . To the maximum extent feasible, performance standards shall be defined in terms of objective criteria. In addition, they shall be defined in the terms of criteria that are observable, measurable, fair and job-related . Performance measures in terms of quality, quantity or timeliness, must provide a clear means of assessing whether objectives have been met.

I . When the Department mandates national performance standards, all bargaining obligations with the Union shall be met at the national level .

Section 7 - Uses of the Performance Appraisal Process

A . The performance appraisal process is used for making a basic determination that an employee is meeting their job requirements. It is also the basis for making certain personnel-related decisions .

B . Within-Grade Increase - An employee who has attained a rating of “Fully Successful” and has achieved an “acceptable level of competence” will be entitled to appropriate within-grade increases .

C . A rating of “Fully Successful” will be used as the initial factor in determining basic eligibility for consideration of awards, promotions, and other personnel actions.

Section 10 - Performance Improvement Plan (PIP)

A. If the supervisor determines that the employee is not meeting the standards of his/her critical element(s), the supervisor shall identify the specific, performance-related problem(s). After this determination, the supervisor shall develop in consultation with the employee and local union representative, a written PIP. The PIP will identify the employee’s specific performance deficiencies, the successful level of performance, the action(s) that must be taken by the employee to improve to the successful

level of performance, the methods that will be employed to measure the improvement, and any provisions for counseling, training, or other appropriate assistance. . .

B. The PIP will afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problem(s). The PIP period may be extended.

ARTICLE 40 – WITHIN-GRADE INCREASES AND PERIODIC STEP INCREASES

B. Definitions

1. Acceptable Level of Competence - An employee will be considered to have attained an acceptable level of competence when he/she is currently performing at the fully successful or better level under the performance appraisal system, and such performance is documented by a rating of at least fully successful/satisfactory.

3 . Within-Grade Increase - The term WIGI means a periodic increase in an employee's rate of basic pay from one step of the grade of his/her position to the next higher step.

C . Within-Grade Increases

1. The determination to grant or withhold a WIGI will be based on the employee's appraisal of record and his/her current performance under a performance plan for 90 days or more .

2. The WIGI will be granted as soon as the employee is eligible if he/she has met an acceptable level of competence.

ARTICLE 47 - MID-TERM BARGAINING

Section 4 - Local

B. Proposed changes in personnel policies, practices, or working conditions affecting the interests of one local union shall require notice to the President of that local. . .

ARTICLE 49 – RIGHTS AND RESPONSIBILITIES

Section 2 – Rights and Responsibilities of the Parties

A. In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the obligations imposed by 5 USC Chapter 71 . . .

Section 4 - Notification of Changes in Conditions of Employment

All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain.

RELEVANT FACTS

Some of the facts in this case are not in dispute. To the extent that the testimony of witnesses differed, I make these findings of fact based on my assessment of all the evidence.

The bargaining unit represented by the Union and subject to the Master Agreement includes approximately 900 Attorney Advisors ("attorneys") who work in the Board of Veterans' Appeals, a unit of the Department of Veterans Affairs (collectively referred to herein as the "Agency"). The primary duty of the attorneys is to draft decisions in appeals brought by veterans or their families challenging determinations of the Agency regarding compensation and pension and other benefits. The draft decisions are submitted by the attorneys to a Veterans Law Judge ("VLJ") for review and approval.

For the most part, the draft decisions are not returned to the attorneys for revisions, so their work with regard to a particular case usually ends with submission of the draft to the VLJ. Some cases are more difficult than others and therefore take longer for attorneys to render drafts in, and the speed with which VLSs process draft decisions to completion varies according to caseloads and other factors.

The work of the attorneys had been partially remote but became fully remote with the onset of the COVID 19 pandemic in March 2020.

6-10 attorneys are each assigned to each of the approximately 130 VLJs. Up until 2021, Senior Supervisory Counsel were the first line supervisors of the attorneys,

but that year, VLJs were given that role, except for probationary attorneys, for whom the Senior Supervisory Counsel remained first line supervisor for the duration of the one-year probationary period.

The VLJs report to three Deputy Vice Chairs ("DVCs"). The DVCs also serve as second line supervisors to the attorneys.

Article 27 of the Master Agreement, which covers the entire bargaining unit including the Attorney Advisors, contains a number of provisions relating to the evaluation of employee performance. Article 27 calls for regular appraisal of employee performance by reference to a performance plan. Performance plans consist of the elements reflecting expected performance as well as the relevant performance standards.

"Performance standard" is defined in Article 27(2)(I) in part as "[t]he management-approved expression of the performance threshold(s), requirement(s), or expectation(s) that must be met to be appraised at a particular level of performance." The Master Agreement further states that each element in an employee's performance plan is to be rated either as Exceptional, Fully Successful, or Less than Fully Successful.

As relevant here, the Performance Standards for Attorney Advisors, which are devised by the Agency, are comprised of the "critical elements" of Productivity (this is the element with which this case is concerned), Case Management, Quality, and Customer Service and Organizational Support; as well as the sole non-critical element of Information Security.

The attorneys' Performance Standard for productivity which was established for Fiscal Year 2021 and is still in effect, states that in order to be rated as Fully Successful, the attorney will produce "either 156 signed decisions or 491 issues in the attorney's signed decisions," prorated for the amount of approved leave. Because the Standard recognizes only "signed decisions," decisions that have been drafted and submitted by the attorney to the VLJ but not yet signed by the VLJ do not count for purposes of attaining the annual quota.

According to Article 27(1)(G), an annual rating of Fully Successful is a prerequisite for eligibility to receive within-grade salary increases ("WIGIs") and promotions to the next higher GS salary grade. Further, Article 27(10) provides that if a supervisor determines that an employee is not meeting the standards of an element or elements in the performance plan that are identified in the plan as "critical elements," the employee is placed on a Performance Improvement Plan ("PIP") in consultation with the employee and the Union. In addition, a finding that an employee's performance on a critical element is unacceptable in the context of the employee's summary rating results in a determination that the employee's overall performance is unacceptable.

At all relevant times, the Agency has used a Decision Output Calculator ("DOC") to reflect an attorney's progress towards the annual quota of case decisions or decided issues, and for attorneys to use to confirm that any appropriate prorations were in fact being made for leave time taken, and for other factors that the parties have agreed to in Memoranda of Understanding.

The DOC contains three columns under "Case Goal Calculation" that are relevant here. One column entitled "Attributable Cases Signed (DAS) FYTD"[2] lists the number of cases that have been signed by the attorney's VLJ after submission.

Another column, entitled "Cases Goal for Pay Period (Fully Successful)," lists the prorated number of signed decisions that would be needed each pay period so that the total at the end of the fiscal year would be 156, the annual quota. With 26 pay periods per year, the number of signed decisions needed each two-week pay period is 6 reduced according to the proration guidelines. The third relevant column is entitled "Case Goal FYTD (Fully Successful"). That column tracks the attorney's per-pay-period progress towards the annual quota.

A corresponding series of columns appear under "Issue Goal Calculation" for attorneys who elect to have their productivity performance measured by issues rather than cases decided, i.e., "Attributable Issues Signed FYTD," "Issue Goal for Pay Period (Fully Successful)," and "Issue Goal FYTD (Fully Successful)."

The DOC uses color coding, so that pay periods during which an attorney is meeting the pay period goal or the FYTD goal are highlighted in green and pay periods during which the attorney is not meeting the pay period or FYTD goal are highlighted in yellow. There was conflicting testimony regarding how often the Agency emails the DOCs to attorneys, but it is undisputed that attorneys can view their DOC at any time.

The Agency conducts performance evaluations of each attorney at the midpoint and end of each fiscal year. The record is clear that for many years, the Agency has

[2] Fiscal year to date.

considered attorneys who fail to be on pace toward meeting the annual quota at the time of performance evaluation to be less than fully successful.

1. Memoranda of Understanding Relating to the Productivity Performance Standard

Starting in at least 1994 and at all times relevant to the Grievance, the parties have bargained over application of the attorney productivity performance standards and have entered into memoranda of understanding reflecting their agreements. In the 1994 MOU (Joint Exhibit 9), the element of "Timeliness of tentative decisions and other work assignments" was identified as a critical element. To be Fully Successful on this element, "[w]ork products are almost always prepared promptly and submitted in a timely manner, as determined by the supervisor." The 1994 MOU went on to state that "[d]elays in the submission of work products which are beyond the control of the [Attorney Advisor] will be excluded."

Starting in around 2002, the Agency began using a specific annual productivity quota for attorneys. The last MOU entered into by the parties regarding productivity performance standards was the FY 2021 MOU, which was effective October 1, 2020 and is still in effect.

The FY 2021 MOU, in language very similar to that contained in the FY 2019 and FY 2020 MOUs, states that the Agency "will continue to track the number of signed decisions an attorney produces during the performance year" as well as "the number of issues an attorney produces within each signed decision."

Since the MOU for FY 2018, the MOU on productivity standards has included reference to attorneys being "on pace" toward achieving the annual quota of cases (or issues) decided.

Paragraphs 17 and 19 of the FY 2018 MOU stated as follows:

> In order to be eligible for certain occurrences such as promotion to the next higher GS level, overtime, special projects, or details, an attorney must be on pace for meeting productivity standards (defined as having a Decision Output equal to the prorated case 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 their annual production requirement.
> When contemplating an adverse action to include demotion, reassignment, and/or removal a non-probationary employee based upon deficient productivity, management will provide notice of the performance issue and an adequate time to remediate under the Master Agreement subject to the VA Accountability and Whistleblower Protection Act of 2017 or other binding legal authority.

Somewhat different language was agreed to for the FY 2019 and 2020 MOUs, which stated:

> To be eligible for promotion, overtime, special projects, or details, an attorney must be on pace to meet the productivity performance standard 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 FY 2019 and 2020 MOUs contained language that was substantially similar to the language regarding "adverse actions" based on deficient productivity in paragraph 19 of the FY 2018 MOU. However, the FY 2021 MOU did not include a provision discussing the effect of being on pace on eligibility for promotion, overtime, special projects, or details. Nor did the FY 2021 contain a reference to attorneys' rights to remediate in the context of adverse actions based on deficient productivity.[3]

[3] Unlike the two MOUs that preceded it, the FY 2021 MOU included no provision expressly superseding prior guidance. However, the Union takes the position that the parties' intent was that this MOU superseded prior MOUs regarding the productivity performance standard, and that nothing from past agreements survives that is not explicitly identified in the FY 2021 MOU as surviving.

The language on management progress checks of attorneys' productivity changed in the FY 2021 MOU (at Paragraph 10), which states, "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 change to "frequent progress checks" was meant to provide management with flexibility.

The phrase "consistent with performance management" was meant to reference Article 27, Section 4 of the Master Agreement (entitled "Performance Management Responsibilities) which requires Agency officials to provide "supervision and feedback to employees on an ongoing basis with the goal of improving employee performance." The Union negotiator testified that this was meant to reflect management's responsibility "to make sure employees are heading in the right direction to be fully successful at the end of the fiscal year, and if there was some issue, if employees were falling significantly behind, then management can step in and provide assistance as required by Article 27, training, coaching, that kind of thing."

Also, since 2018, the MOUs have made reference to tracking of progress by the attorneys themselves. The 2018 MOU stated that the Agency would provide attorneys with "current progress toward" the annual productivity goal on a periodic basis. The FY 2019 and 2020 MOUs stated that attorneys may track their cases and issue credit progress via a voluntary Case Complexity spreadsheet or other tracking tool. The 2021 MOU states that attorneys may track their case and issue progress "via a voluntary Decision Output Calculator (DOC) or some other tracking tool."[4]

[4] See discussion of DOCs below.

Also in FY 2021, the number of signed decisions needed for an attorney to be rated as Fully Successful was reduced from previous quotas, from 169 to 156, and the number of decided issues was reduced proportionately, from 566 to 491. In addition, proration factors were reduced at management's request as part of an effort to simplify the MOU in light of the fact that there were many new VLJs with no supervisory experience, and that management wished to have the VLJs act in the capacity of first level supervisors of the Attorney Advisors.

On September 29, 2020, one day after the FY 2021 was signed by the parties, Agency Vice Chair Kenneth Arnold sent an email to all staff including attorneys and VLJs congratulating them on the issuance of over 100,000 decisions in FY 2020 despite challenges caused by the onset of the COVID pandemic, and also noting that the number of hearings would be increasing in FY 2021. This increase would "require our judges and many counsel to shift some of their time to supporting our hearing docket." Vice Chair Arnold went on to state as follows in the email:

> In recognition of [the larger hearing docket], we chose to lower the goals and associated performance standards related to decision-writing. Bottom line up front, we dropped the minimum individual expectations for the number of decisions signed each year from an average of 3.25 per week to 3 decisions per week.

2. Attorney Advisor Merit Promotion

Most Attorney Advisors are hired at the GS-11 level. After one year of Fully Successful (or Exceptional) service at each grade level they are eligible (at the anniversary date) for career ladder promotion to the next level; this is the process through GS-13. If the attorney does not meet the Fully Successful threshold and promotion is denied, the attorney will be reconsidered for promotion between 3 and 6

months after denial. Promotion upon such reconsideration will be denied if the attorney has failed to maintain a level of performance of at least Fully Successful for one year prior to the date of reconsideration. Being Fully Successful on the performance evaluation is necessary but not sufficient by itself to bring about a promotion. Management also looks at whether the attorney has demonstrated the ability to do the work of the next higher salary grade.

When an attorney's promotion date falls on a day in between the midyear rating and the annual rating, the attorney receives a special rating of record.

The process for promotion from GS-13 to GS-14, addressed at length in the 1994 MOU, is different. To be eligible for promotion to GS-14, an Attorney Advisor must have had two years of Fully Successful service at the GS-13 level, submit an application, be recommended for promotion by their supervisor, demonstrate adequate experience in successfully dealing with cases involving he resolution of complex issues of law and fact, and be approved for promotion by a promotion review panel made up of the three Deputy Vice Chairs and the Senior Deputy Vice Chair. The 1994 MOA also includes provisions for "early" promotion to GS-14, i.e., prior to completing two years as a GS-13.

At some point in the recent past, the process has been standardized so that the package before the review panel contains a recommendation from the VLJ, the DOC, breakdown of hard, medium and easy cases completed, and ratings from 1 to 5 of the quality of attorney-drafted decisions as determined by the VLJ.

As in the case of denial of promotions to the lower salary grades, denial of a promotion to GS-14 will be reconsidered between at least 90 and not more than 180 days after denial.

As of the time of the hearing, the three DVCs on the review panel for promotion to GS-14 were Robert Scharnberger, Thomas Rodrigues, and Tamia Gordon, and Christopher Santoro was Senior DVC. DVC Scharnberger joined the review panel when first promoted to DVC in May 2019, DVC Rodrigues joined the panel in or about August 2021, DVC Gordon joined the panel in or about February 2022, and Senior DVC Santoro joined it in or about July 2020.

3. Alleged Change in Promotional and Other Decisions

The cadre of attorneys grew quickly starting in 2013, with approximately 100 new attorneys hired that summer, 250-300 more hired in the winter of 2016-17, and an additional several hundred hired during the year leading up to the arbitration in October 2023. These concentrated hirings have resulted in concentrated waves of promotions as each class of attorneys reaches their anniversary date.

Data received in evidence regarding promotion to GS-14 showed that there were 20 attorneys up for promotion in FY 2017, and none were denied promotion. In FY 2018, there were 29 up for promotion and all were granted promotions to GS-14. In FY 2019, there were 37 attorneys up for promotion to GS-14 with none denied. One of these attorneys had been behind in their YTD productivity goals for most of the fiscal year but was recommended for promotion by VLJ Jenna Brant and received their promotion on time.

In FY 2020, there appear to have been 61 promotions to GS-14, and one denial. The denial was based on lack of success in the critical elements of both Quality and Productivity. That attorney was off pace with respect to progress toward the annual quota at the time of consideration for promotion, and no reference was made to any

issue of having been consistently off pace during the fiscal year leading up to the time of consideration for promotion.

However, starting in FY 2021 coinciding with the wave of hiring that started in FY 2017, the number of people up for promotion to GS-14, as well as the percentage of that total that were denied, began to increase, with 174 up for promotion and 7 denials in FY 2021 (4%). In two of the seven cases denials, failure to have been consistently on pace throughout the fiscal year leading up to the time of consideration was cited as a reason, in March and April 2021, respectively. One of the other denials identified lack of success in Quality as well as in Productivity as the reason.

In FY 2022, 100 attorneys were considered for promotion to GS-14. There were 17 denials (17%). In some instances, attorneys were told by management that their promotions were denied or were in danger of denial because they had not been consistently on pace, meaning that there were too few pay periods in which the attorney met the year-to-date target on the DOC.

The record also reflects that some attorneys were told that their application for promotion would likely be rejected by the reviewing panel, and that they could sign a waiver that would delay the decision and avoid a rejection of their application. Nine agreed to waive consideration for a period of time in this way in FY 2022. Thus, 26 applicants (26%) in FY 2022 were not promoted to GS-14 upon their initial eligibility.

At no time did the Agency notify the Union that any changes were occurring or being proposed in any performance standards or their implementation. Until FY 2021 and FY 2022, the Union president could recall only one occasion during his 26 years of service with the Board when a unit member was denied a promotion in grade. Neither

the Union president (26 years' service as an Attorney Advisor), the Union's third vice president Nicholas Keogh (hired in 2017 as an Attorney Advisor), nor the Union's segreant at arms John Ryan Cummings (also hired in 2017) had ever heard, prior to the 2021-22 time period, that the Agency required attorneys to have been consistently on pace on a year to date basis, throughout the fiscal year.

Nicholas Keogh, who was on the Union's negotiating team for the FY 2019 - FY 2021 MOUs, testified that the per week or per pay period goals were to be used in making sure that attorneys were "generally be moving in the right direction to making" the annual goal, and that there was never an intent by the parties to the MOUs to make completion of 3 signed decisions per week or 6 per pay period a requirement for attorneys. He testified further, without contradiction by the Agency witnesses, that during negotiation of the FY 2021 MOU, there was no discussion of an attorney's failure to consistently produce a minimum of 3 signed decisions per week resulting in denial of a career ladder promotion, or denial of a within-grade increase.

VLJ [redacted] testified at the Union's request. She holds hearings and reviews and signs decisions drafted by her team of 7-10 Attorney Advisors. She supervises the attorneys' work and conducts their midyear and end-of-year performance reviews. Judge [redacted] was an Attorney Advisor and unit member for 18 years prior to becoming a VLJ in about [redacted]

VLJ [redacted] understanding of the annual productivity quotas from discussions with her fellow VLJs was that in order to be rated as fully successful, the attorney had to be on pace as of the time of the performance appraisal, meaning either at the time of a mid-year or end of year evaluation, or at the time of a "special rating of record" which is

conducted when eligibility for promotion takes place at a time other than mid- or end-of-year. She was never aware of any requirement that an attorney have been on pace consistently throughout the fiscal year in order to be rated as fully successful for promotion or any other purpose.

Agency witness Robert Scharnberger began his career with the Agency in December 1999 as an attorney, served as such for about seven years, became Special Assistant to the Vice Chair (the Vice Chair is the chief operating officer of the Agency) for a year starting in 2006, was Executive Assistant to the Chairman for three years, and then served as a VLJ from June 2010 until May 2019 including three years serving in the now-discontinued position of Chief VLJ. He was promoted to Deputy Vice Chair in May 2019.

As one of the three DVCs, Mr. Scharnberger supervises 44 VLJs (one third of the Agency's VLJs) and is second line supervisor for all of the Attorney Advisors assigned to those VLJs. He also supervises Supervisory Senior Counsel, and is part of the Board's executive team, which is responsible for strategic planning. Since 2006 he has been intimately involved with tracking attorney productivity.

DVC Scharnberger attributed the increase in denied promotions to GS-14 starting in FY 2021 to learning curve issues that arose from the switch from partially remote work to completely remote work in March 2020 amid the COVID pandemic. He asserted that there has been no change in the criteria used by the promotion panel to make promotion decisions to GS-14. According to him, attorneys have known about the importance of being consistently on pace since early in the 2000s. At that time, production was calculated, and attorneys advised of the calculation every week, and

supervisors would have discussions with attorneys who were not keeping up with expected goals. As a supervisor of attorneys, he would have similar discussions with those who were not on pace. If they did not improve, which was rare, he would give them a formal counseling or have them placed on a PIP or other opportunity to improve.

With regard to promotion, DVC Scharnberger, whose familiarity with the promotion process was limited until he became a first line supervisor in 2016, being on pace throughout the year was a factor, though not determinative in and of itself, in his decisions whether to promote from GS-11 through GS-13.[5] He described how being ready for promotion involved more than being Fully Successful in one's current grade, as promotion implicates ability to do higher grade work. He noted that attorneys have been promoted to GS-12-14 despite not being consistently on pace throughout the fiscal year to date. He knew of no rule that attorneys need to be in the "green" in the Case Goal FYTD column at least 50% of the time, or for the six pay periods prior to their promotion date.

DVC Scharnberger did not know when or how the waivers of consideration for promotion began. He stated that it was not a policy of the Agency to tell the employee that if they voluntarily delayed consideration, the delay prior to reconsideration would be less than if they go ahead without a waiver and are denied by the panel.

DVC Scharnberger testified that although both being on pace at the time of evaluation and having been consistently on pace during the fiscal year were considered in Agency decisions at promotion time, only the former (on pace at the time of

[5] Currently the DVCs have ultimate decision-making authority with regard to promotions from GS-11 to 12, and GS-12 to 13, although VLJs make the initial decision. Previously, front line supervisors (VLJs or Senior Supervisory Counsel) had exclusive authority over these promotions. As noted, the process for promotion to GS-14 is different.

consideration) applied to granting within grade increases, and to midyear and end-of-year performance evaluations. The fact that an attorney has submitted a number of cases to be signed but the VLJ has not signed them yet, can be factored in at the time of consideration for promotion at any grade, as it can be in the context of midyear and end of year evaluation. In both cases it is a matter of managerial discretion, subject to the relevant language in the current MOA.

He also admitted that some VLJs have told him that they were unaware that attorneys had to be consistently on pace for purposes of promotion, but he believes that they are not being truthful, out of loyalty to their attorneys. He acknowledged, however, that no memo was sent to VLJs telling them of such a standard.

Agency witness VLJ Jenna Brant was an Attorney Adviser from September 2013 to December 2018, at which time she was promoted to Supervisory Senior Counsel, serving as such until her promotion to VLJ in July 2022.

VLJ Brant testified that her understanding was that consistently on pace has been applied broadly by the Agency including by promotion panels. She based this belief on conversations with Deputy Vice Chairs and other leadership, as well as fellow SSCs and VLJs.

When she was first hired as an attorney, VLJ Brant's supervisor told her that there was an on-pace requirement and that "we expect you to do three decisions a week," and that being on-pace impacts promotion and applying for details, overtime, "and everything else." However, she testified that she has never seen an instance where an attorney who met the annual quota but was not consistently on pace was denied a Fully Successful rating in the area of productivity.

Since becoming a supervisor in December 2018, VLJ Brant has always conveyed the above expectation to the attorneys she supervised. As a Supervisory Senior Counsel, she supervised 40-50 attorneys (and supported their 4-5 VLJs) at a time; at the time of the hearing she supervised approximately 5 attorneys. VLJ Brant testified further that she told her attorneys that they needed to be on pace "throughout the year and especially" at the time of consideration for promotion. She stated regarding promotion to GS-14 that she told her attorneys that in order to put their best foot forward, they must be on pace consistently. However, being consistently on pace, and productivity in general, is just one of several factors informing the decision whether to promote an attorney or not.

VLJ Brant testified that she has delayed many promotions due to attorneys not being on pace at the time of eligibility for promotion, and that there have been occasions when she has recommended against promotion based on the attorney's failure to have been consistently on pace.

However, in FY 2019, she recommended promotion to GS-14, for an attorney who had not been on pace regularly throughout the year, even receiving a mid-year review of "Needs Improvement to be Fully Successful" in April 2019 because she was not on pace at the time, but "managed to get on pace right before" VLJ Brant was to submit the promotion paperwork. That promotion was approved by the panel. There may have been other such instances after that case, but VLJ Brant could not think of any.

In around 2022, VLJ Brant made a decision approving retention (passing probation) of an attorney who had periods of time during which they were off pace by

one to two cases, achieved on pace by the time of VLJ's recommendation, but was behind pace again by the time the DVC approved retaining the attorney.

4. Specific Applications of "On Pace"- the Union's Evidence

In March and April of FY 2021, two attorneys (Attorneys 2 and 4 in the Union's summary – Union Exhibit 30 - of documents provided by the Agency) who were denied promotion to GS-14, were told that they had failed to meet criteria for promotion, and that they "must consistently sustain your productivity requirement, remaining on pace for your annual goal, as determined by the DOC, on a consistent basis."

As already noted, the 1994 MOA states that if promotion to GS-14 is denied due to failure to achieve the requisite level of performance, "counsel will be reconsidered for promotion not earlier than three months and not later than six months from the date the promotion was denied." According to the Union's uncontradicted analysis of data furnished by the Agency in response to the Union's request, there were 9 instances in FY 2022 in which unit members up for promotion to GS-14 waived their right to receive a decision at their date of first eligibility.

In two of the waivers in FY 2022 ([redacted] and [redacted], both discussed at length below), the attorneys agreed to a waiver after being told that they would be denied if no waiver took place, based on not being consistently "green" in the Case Goal FYTD column. While the Union claimed there were "about three" unit members who reported signing a waiver in the same circumstances that Ms. [redacted] and Ms. [redacted] were in but the record does not indicate who the third one was.

The record reflects that no waivers occurred prior to FY 2022.

Attorneys [redacted], [redacted], and [redacted] were all denied promotion to GS-14 in the Summer of 2022 and were all told that the decision had been made at least in part because they had failed to be consistently on pace throughout the fiscal year. The Union grieved all three denials, and the grievances were sustained by the Agency on procedural grounds, based on the failure to comply with warning notice requirements. Ms. [redacted] circumstances are discussed in greater detail below.

Employee 8, one of the attorneys denied promotion to GS-14 in FY 2022 was an attorney who was on pace as of the time of consideration but was denied at least in part because they had been in the "green" in the Case Goal FYTD column for only 10 out of the 18 pay periods at issue that fiscal year.

Employee 14 was "green" in the Case Goal FYTD column as of the pay period ending July 2, 2022 which was the time of consideration for promotion, and had been "green" the prior pay period. He also had met the per-pay period goal more than half the time but had been "yellow" in the Case Goal FYTD column at all times that fiscal year until the pay period ending June 16, 2022. The Agency denied promotion to GS-14 citing lack of sustained effort to stay on pace, and determined to reconsider the packet in four months' time, as "Panel believes 4 months of sustained performance should generate the evidence needed to re-assess his promotion."

Employee 16 was in the "green" in the Case Goal for Pay Period column for 8 of the 20 pay periods, but was never "green" in the Case Goal FYTD column. The panel denied promotion, citing the latter fact and concluding that the attorney's "history of on pace production did not appear to show a consistent pattern such that demonstrated ability to perform at the next higher level is evident." The denial also stated that while

an attorney need not be "on pace at *all* times in order to be promoted, the evidence must support a consistent pattern and capacity relative to production."[6]

Employee 20 was in the "green" in the Cases Goal for Pay Period column for 12 out of the 21 pay periods in the fiscal year as well as at the time of consideration for promotion to GS-14 in late July 2022, but "green" in the Case Goal FYTD column for only 3 pay periods. In the pay periods where this attorney was "yellow" in the FYTD column, they were usually very close to "green," i.e., within a signed case or two. Employee 20 was denied promotion because the DOC, "the barometer of demonstrated ability to perform at the next higher grade," did not show "sustained timely production."

Employee 25 was in the "green" in the Case Goal for Pay Period column for 11 out of the 26 relevant pay periods and at the time of consideration for promotion to GS-14 in early October 2022, but "green" in the FYTD column only in the final pay period. Employee 25 was denied promotion. The record contains no reasons for the denial.[7]

[redacted], who testified at the arbitration, began service as an Attorney Advisor at the Agency in August 2018 at GS-11. Prior to 2022, she had bever been told that she needed to be consistently on pace in order to be promoted to the next grade level.

Ms. [redacted] was promoted to GS-12 and then to GS-13 on or around her first and second anniversary dates. Consideration of Ms. [redacted] for promotion to GS-14 would have taken place in August 2022. She was rated overall as "Fully Successful" in her

[6] Emphasis in original.

[7] It is not clear from the record whether any of the attorneys identified only by number were among the individuals who were identified *by name* either in their own testimony or in the testimony of witness. Hence, I do not determine the actual number of attorneys whose promotions were denied based on failure to be consistently on pace. Nor do I assume that any attorneys who were denied promotion but who were not identified by name or number in the record were denied because of failure to be consistently on pace.

midyear evaluation which was signed in May 2022 by the VLJ to whom she was assigned, [redacted], and in her end-of-year evaluation for the FY 2022 which ended September 30, 2022, which VLJ [redacted] signed on November 15, 2022. At both times, she was on pace with respect to the annual productivity goal, but her DOC reflected that she was not green in the Case Goal FYTD column about half of the time. When she asked her VLJ at the time of the midyear evaluation whether there was anything she needed to do in connection with promotion to GS-14, the answer was no.

However, in July 2022, Ms. [redacted] was informed by VLJ [redacted] that in light of a trend by management toward taking a stricter approach to promotions, the fact that Ms. [redacted] DOC reflected that she was not consistently on pace, that she had too much "yellow" in the Case Goal FYTD column, meant that if her application for promotion to GS-14 were submitted to the promotion review panel in July, it would likely not be approved.

Ms. [redacted] confirmed this information with her second-line supervisor, Supervisory Senior Counsel [redacted]. She agreed to delay submission of her packet for 90 days, until October 1, 2022 so that she could be "green on my tracker consistently" ahead of the new date.

VLJ [redacted] provided a draft of what could be used to request a delay by Ms. [redacted] Using that draft, Ms. [redacted] sent an email reflecting her waiver of consideration for promotion for 90 days. Ms. [redacted] was in the green for the six pay periods prior to October 1, 2022 and her application for promotion to GS-14 was approved.[8]

[8] Ms. [redacted] attributed her failure to be in the green for much of the fiscal year to delays in her VLJ signing her draft decisions, and her success in being in the green during the three months before her delayed application for promotion was submitted, to her VLJ signing her draft decisions promptly.

VLJ [redacted] testified about issues that arose with her submission of promotion documents on behalf of [redacted], one of the attorneys assigned to VLJ [redacted] Ms. [redacted] began working at the Agency in late 2018 or early 2019, and was up for promotion to GS-14 in late July 2022.

This was VLJ [redacted] first time submitting a promotional packet for promotion to GS-14, as that task had just been transferred to VLJs from Supervisory Senior Counsel. After VLJ [redacted] believed that [redacted] reached "green" status on her DOC, the packet was submitted on July 6, 2022. All other criteria for promotion to GS-14 were present with regard to quality of work and ability to handle complex cases.

DVC Rodrigues told VLJ [redacted] that the promotion was denied because of the attorney's failure to have a consistent pattern of on pace production, referring to the number of pay periods she was in the "yellow" on her DOC in the Case Goal FYTD column. VLJ [redacted] pushed back on this rationale, asserting that "consistently on pace" had not been the practice.

Attorney [redacted], who did not testify, was up for promotion to GS-14 in April 2023 and was denied essentially because she was in the "green" in the Case Goal FYTD productivity column in only one pay period in each of the fiscals years 2022 and 2023. She had been in the "green" in the cases goal per pay period column in 8 of the 13 pay periods in 2023.

[redacted] is an Attorney Advisor who began work with the Agency on September 12, 2021 as a GS-11. She testified at the arbitration. Until September 2022, she had never been told of any requirement that she be consistently on pace throughout the year in order to be considered Fully Successful under the applicable

performance standards. She was told that she should be "in the green," i.e., on pace as to the annual quota, both at the time of midterm evaluation in around April, and at the time of end-of-year evaluation, i.e., as of the last business day in September. From conversations with VLJ [redacted], to whom Ms. [redacted] was assigned during her first year of service, she learned that while it would be in her best interest to submit 3 cases per week, it was also understood that that there would be weeks where she would submit less than three as well as weeks when she would submit 3 or more.

Ms. [redacted] first anniversary date fell in mid-September 2022, so the performance appraisal for her promotion from GS-11 to GS-12 was a special rating of record. She met the Case Goal FYTD as of the time of the rating, and the box for "Fully Successful" was checked for the element of productivity in the "Actual Achievement" section of the performance appraisal. In the "Justification" section under Actual Achievement, VLJ [redacted] found that Ms. [redacted] is "able to keep pace, and he has no concerns about her ability in this regard." Her overall performance rating was Fully Successful.

However, on September 9, 2022, her VLJ informed her that her promotion to GS-12 was disapproved because of "lack of consistent performance." He elaborated saying that "there were a number of pay periods where you did not have enough cases in for signature to meet your goal. It is important to make sure you submit enough cases for signature each pay period. We will work on this throughout the next year." He had never expressed to her prior to this, that she could be denied promotion on such basis.

In a discussion soon after Ms. [redacted] promotion to GS-12 was denied in September 2022, VLJ [redacted] explained to her that she there were too many pay

periods where she was yellow and not green on the DOC, meaning the Case Goal FYTD column. He told her during the summer of 2023 that he has had attorneys who were green 70% of the time be denied for promotion, and attorneys who were green 80% of the time be approved for promotion, so he assumed in the absence of any clear guidance to him, that 80% was the threshold.

Reconsideration of Ms. [redacted] promotion was delayed for a time because, as VLJ [redacted] explained, her DOC was not in the green for at least three months. She was eventually promoted in August 2023.

[redacted], who testified at the hearing, was hired as an Attorney Advisor on September 30, 2018 at GS-11. She was promoted to GS-12 a year later, and to GS-13 in approximately September 2020. The process for promotion to GS-14 began in July 2022. Prior to July 2022, her understanding was the DOC was a tracker to make sure that attorneys "stay on pace for your yearly goal," and the Agency had never told her that being consistently on pace throughout the year mattered for purposes of promotion to GS-12 or GS-13, or to GS-14.

Since at least early 2019, [redacted] had a supervisory role with regard to Ms. [redacted] performance appraisals and her promotions, first as SSC and later as VLJ. Ms. [redacted] never advised Ms. [redacted] that being consistently on pace to meet annual productivity goals throughout the year was necessary in order to be promoted. Nor did anyone ever tell Ms. [redacted] that failing to be consistently on pace or failing to have 6 signed decisions each pay period would adversely affect her ability to receive a within-grade increase, or would subject her to being placed on a PIP.

At some point in July 2022, Ms. [redacted] was informed by VLJ [redacted] who had prepared her GS-14 promotion packet for the review panel including her recommendation in favor of Ms. [redacted] promotion, that Deputy Board Chair Tamia Gordon told the VLJ that she would not be promoted because she had not been consistently "green", i.e., in the Case Goal FYTD column.

On or about July 21, 2022, the VLJ told Ms. [redacted] that HR said there was an option of voluntarily delaying submission of the packet to the review panel. This would mean a shorter delay in consideration of her packet, i.e., consideration could occur in about three months, at the end of September 2022, if she voluntarily delayed submitting her packet while she worked to be consistently green, versus a six month delay in consideration of her packet until January 2023 if she were to submit her packet in July and be denied promotion by the review panel. She was also told that the time from consideration to the effective date of promotion if she is successful, would be three months, which would be December 29, 2022.

Ms. [redacted] agreed to voluntarily delay consideration for her promotion. Her judge stated that she would "start prioritizing" Ms. [redacted] cases "meaning she would make sure they got signed quickly," so that Ms. [redacted] would be sufficiently "green" in time for review. In fact this did occur: Without any change in the pace with which Ms. [redacted] submitted draft decisions, her VLJ prioritized Ms. [redacted] decisions, resulting in Ms. [redacted] being "green" for most pay periods leading up to the time her packet was considered by the review panel in September. She was promoted as a result of that review to GS-14 effective December 29, 2022.

[redacted] also testified for the Union. She commenced service in September 2018 as a GS-11. She was at GS-14 as of the time of the arbitration. When she applied for early promotion to GS-14 in the Summer of 2022, she was denied early promotion because she was not meeting the on pace requirement on a consistent basis. She had never heard of such a policy prior to that. She was promoted on time to GS-14 in September 2022.

For overtime work, i.e., being given additional cases to work on, Ms. [redacted] would respond to her supervisor's request for volunteers, and would be told thereafter whether she had been approved or not. She was denied overtime in March 2023 because she was "yellow" on the Case Goal FYTD column for the most recent pay period, though she had been "green" in that column for 10 out of that year's 12 pay periods to date and had 8 decisions submitted to but not yet signed by her VLJ.

Ms. [redacted] testimony was unclear as to when she first understood that she had to be consistently on pace as of the time of a request for overtime (Tr. at Day 4, pp. 87-88), and that testimony provides no basis for any finding that there was a change in conditions of employment with respect to obtaining overtime work.

[redacted], another Union witness, began service with the Agency as a GS-11 in April 2019. He was promoted to GS-12 and GS-13 at his second and third anniversary dates, respectively. On or about March 6, 2023, his VLJ submitted the paperwork for Mr. [redacted] promotion to GS-14, never indicating that the amount of time Mr. [redacted] had been "yellow" during the 2023 fiscal year would be a problem. As of the most recent pay period, [redacted] was 2.3 cases off pace in the Case Goal FYTD column. His VLJ stated in the promotion packet that some of the

times the attorney was not in the "green" were attributable to the VLJ's delay in signing cases and that the attorney had the ability to handle complex cases and his work quality was excellent. His eligibility date was April 10, 2023.

Mr. [redacted] VLJ told him that DVC Tom Rodriguez advised that his DOC did not have "enough green" so there was a 50% chance he would not be approved for promotion. He had never before heard of a requirement that he be on pace on a consistent basis.

A written notice to Mr. [redacted] stated that his promotion "may be delayed," and that if he agreed to postpone consideration for at least 60 days, one factor that would be looked at is whether he stays on pace for annual productivity goals as reflected on his DOC "on a consistent" basis. Mr. [redacted] declined the offer to postpone, and the review panel disapproved his promotion on or about April 24, 2023, for the stated reason that he "has not demonstrated the ability to efficiently draft cases at the appropriate pace." The Panel stated that it would review the promotion again on or after June 29, 2023. He was re-reviewed and the Agency ultimately granted him his promotion in May 2023.[9] ,

5. Specific Applications of "On Pace" – the Agency's Evidence

Employee 46, a GS-12, was rated as Unacceptable in a Special Rating of Record dated February 9, 2021 issued by SSC [redacted], presumably in connection with eligibility for promotion to GS-13. The justification for the Unacceptable rating in the element of productivity stated that as of January 30, 2021, the attorney had 31 signed

[9] Based on a grievance he filed challenging the denial of promotion, Mr. [redacted] promotion to GS-14 was back-dated to his earliest consideration date because of the delay between submission of paperwork by his VLJ and the Agency's response to that paperwork.

decisions and 67 issues, short of the on pace target of 46 decisions or 144 issues. The attorney's performance was also rated as Unacceptable in the critical element of Customer Service and Organizational Support. The justification for this included the statement that throughout the fiscal year, the attorney had "never been either on pace or ahead of her productivity requirement." The rating was approved by then-DVC Kimberly Osborne.

Employee 57, a GS-12, was rated as Unacceptable in a Special Rating of Record dated February 17, 2021 issued by VLJ [redacted] ahead of the dates of eligibility for promotion and for a within-grade increase. The justification stated that the attorney's performance in the element of productivity had been Unacceptable during the period covered by the special rating in that as of February 13, 2021, the attorney had 26 signed decisions and 71 issues, short of the on pace goal of 48 decisions or 113 issues. The VLJ concluded that "at this time she is not qualified for career-ladder promotion to the GS-13 level or for her within-grade increase." DVC Scharnberger approved the rating. No mention was made of whether or not the attorney had been consistently on pace.

Employee 43, a GS-12, was rated as Unacceptable in a Special Rating of Record dated February 17, 2021 issued by SSC [redacted] ahead of the date of eligibility for promotion. The justification stated that the attorney's performance in the element of productivity had been Unacceptable during the period covered by the special rating. It cited the fact that as of February 1, the attorney had 26 signed decisions and 76 issues, short of the on pace target of 42 decisions or 113 issues, but no mention was made of failure to have been consistently on pace. The rating was approved by DVC

Scharnberger. A letter to this same attorney dated February 11, 2021 from SSC Ware stated that the attorney's promotion to GS-13 would be delayed, with reconsideration to take place 90 days later. No mention was made in this letter of whether or not the attorney had been consistently on pace.

Employee 23 was notified by his SSC on March 8, 2021 that the attorney's promotion from GS-12 to GS-13 would be delayed because of the attorney's unacceptable performance in the critical element of productivity. The letter cited the fact that as of March 1, 2021, the attorney had produced only 26 decisions and 40 issues, while on-pace would have been 51 decisions or 161 signed issues. It made no reference to whether or not the employee had been consistently on pace throughout the year.

Employee 51, a GS-12, was rated as Unacceptable in a Special Rating of Record dated April 28, 2021 issued by SSC [redacted], apparently ahead of the date of eligibility for promotion. The justification stated that the attorney's performance in the element of productivity had been rated as Unacceptable because the attorney had 37 signed decisions, short of the on pace goal of 72 decisions as of the close of pay period 15. No mention was made of whether or not the attorney had been consistently on pace.

Employee 2 was placed on a PIP by SSC [redacted] on June 17, 2021. The letter cited the fact that as of June 5, the attorney had produced only 51 decisions and 143 issues, while on-pace would have been 87 decisions or 273 signed issues. It made no reference to whether or not the employee had been consistently on pace.

Employee 3 was placed on a PIP by SSC [redacted] on June 17, 2021. The letter cited the fact that as of June 5, 2021, the attorney had only 66 decisions and 214 issues, short of the on pace target of 86 decisions or 270 issues. No mention was made to whether the employee had been consistently on pace.

Employee 50, a GS-13, was informed by letter dated July 14, 2021 from SSC [redacted] that [redacted] was recommending that the attorney's promotion to GS-14 be delayed so that the attorney could improve in the area of staying on pace. The letter stated that the attorney had "been unable to consistently meet production requirements," noting that the attorney had 75 decisions and 186 issues, short of the goal of 96 decisions or 303 issues to be on pace.

Employee 4, a GS-13, was rated as Unacceptable in a Special Rating of Record dated January 27, 2022 from VLJ [redacted] in connection with upcoming eligibility for promotion. The justification was that as of January 15, the attorney had 25 decisions and 62 issues, short of the on pace target of 37 decisions or 116 issues. No reference was made to whether the employee had been consistently on pace.

Employee 10, a GS-12, was rated as Unacceptable in a Special Rating of Record dated June 14, 2022 issued by VLJ [redacted] ahead of the date of eligibility for promotion to GS-13. The justification included the statement that the attorney "throughout the course of FY 22 to date, has been unable to meet her production goals for the vast majority of the biweekly pay periods."

Employee 41 was placed on a PIP by VLJ [redacted] on June 28, 2023. The letter cited the fact that as of June 28, the attorney had only 76 decisions and 185 issues, short of the on pace target of 85 decisions or 267 issues. The letter stated that

the attorney must maintain a pace of drafting 3 cases and/or 9.45 issues a week during the 94 day period of the PIP. No mention was made of whether the employee had been consistently on pace up to the time of the letter.

6. Effect on PIPs and Within-Grade Increases

After PIPs first became part of the performance evaluation process in late 2020, VLJ Brant has placed four or five attorneys on PIPs "for not being on pace during the performance year." She did not specify dates that this occurred. In these instances, the attorney was "way more" than one pay period off pace. According to DVC Scharnberger, guidance was given to supervisors early in 2023 that if an attorney was three weeks in the "yellow" in the Case Goal FYTD column, consideration should be given to placing the attorney on a PIP. Such guidance was not shared with the attorneys or the Union.

Attorney [redacted], who testified for the Union, had never been told that being consistently "green" was a requirement in general or that it could lead to being placed on a PIP. In fact, she had been promoted to GS-14 at her first eligibility in January 2021, despite that fact that she had never been "yellow" in the Case Goal FYTD column that fiscal year (or at the time she was considered for promotion).

On June 26, 2023, Ms. [redacted] VLJ, who had been her VLJ throughout her service with the Agency, informed her that she has not been on pace, and that management was very concerned. At the time, Ms. [redacted] was using the number of issues (not cases) decided as her annual goal.

On pace as of the most recent pay period (June 4-17, 2023) would have meant 281 signed issues, and she had 272. At the time, Ms. [redacted] also had nine issues that

had been submitted to the VLJ but not yet signed. Further, Ms. [redacted] FY 2023 DOC reflects that she had never been on pace in the Issue Goal FYTD column that year, with the number of decided issues usually falling short by 6 to 20 issues.

On June 30, 2023, Ms. [redacted] was placed on a PIP. The memo from her VLJ advising her of this stated that her performance in the element of productivity was unacceptable, and the reason given was that she was not on pace as of the end of the 6/4-6/17/23 pay period. While the memo describing the PIP made no reference to being consistently "green" or consistently on pace, Ms. [redacted] testified without contradiction that her VLJ told her that she was placed on PIP because she had not been consistently "green" during the 2023 fiscal year.[10]

According to VLJ Brant, within-grade increases can be denied if the attorney is not performing at a Fully Successful level, including not being on pace with regard to the annual quota at the time of the increase. However, her understanding is that increases should not be denied based on failure to be consistently on pace throughout the year. Consistent with this testimony, attorney [redacted] received a within-grade increase in April 2023 despite his failure to be "green" in the Case Goal FYTD column for any pay period after the first one that fiscal year.[11]

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Agency changed the conditions of employment related to the productivity standard for Attorney Advisors by creating a new performance

[10] [redacted], another attorney who testified at the hearing, recalled being told by her VLJ that if she did not consistently *submit 6 draft decisions* per pay period, she would likely be placed on a PIP.
[11] He was also rated as Fully Successful in his mid-year evaluation that same month.

criterion involving “on pace” and applying it to affect grade promotions, within grade step promotions, overtime opportunities, and performance ratings, and by implementing a new “waiver” scheme available to certain unit members who have been adversely affected by the new criteria.

By taking these actions without notice to the Union of a proposed change in conditions of employment and without bargaining with the Union, the Agency committed a ULP by violating the duty to bargain codified in the Statute (because the impact or reasonably foreseeable impact of the changes was more than *de minimus*), and also violated the Master Agreement, the 1994 MOU, the FY 2021 MOU, and past practice.

The Union cites settled law that if the employer exercises a management right under Section 7106 of the Statute, including the right to determine the content of performance standards, such exercise, if it changes conditions of employment and the impact or reasonably foreseeable impact is more than *de minimus*, must be accompanied by advance notice to the union of the change and a reasonable opportunity to request bargaining. Further, the law requires the employer to bargain over the procedures to be observed in management’s exercise of such rights, as well as over appropriate arrangements for employees adversely affected by the exercise of management rights.

The Union cites *AFGE Local 17*, 68 F.L.R.A. 170, 173 (2015), in which the Agency was deemed to have triggered a right to advance notice and an obligation to bargain when it commenced strict weekly enforcement of the annual production standards.

Further, here as in *AFGE Local 17*, the Agency's history of *tracking* attorneys' progress on a weekly basis is not the same as *enforcing* the annual standard during the fiscal year. The Agency did not even argue here that the use of waivers to delay promotional decisions in instances where an attorney was deemed noncompliant with the on pace requirement was anything other than a new practice.

Also, the fact that the negotiation of waivers that delayed promotion panel review of attorneys' GS-14 promotions was conducted between individual VLJs and the attorneys they supervised, constituted the separate ULP of direct dealing bypassing the Union, on conditions of employment in violation of Sections 7106 and 7114.

The changes in the productivity standard at issue in the instant case were more than *de minimus* as the new on pace requirements affected employees' advancement, retention, grade promotions, step increases, performance standards, and overtime opportunities.

With regard to the Master Agreement, the Agency violated Article 27, Sections 5(A) and 6(E), which require communication of the critical and non-critical elements and performance standards at the beginning of the appraisal period, as well as communication of any changes in performance standards at the time of such changes. That such communication did not occur is demonstrated in discrepancies in application of the on pace factor by different VLJs in the context of PIPs and promotions, as well as the fact that not all VLJs were aware of how the factor was to be applied.

Also, the Agency violated the 1994 MOU and Article 23 of the Master Agreement, by imposing new on pace requirements, specifically, that employees have shown "consistently on pace performance" for some unspecified number of pay periods as of

the time of review for promotions to the GS-13 and GS-14 levels. The Agency also violated the 2021 MOU by applying new on pace requirements, and also by doing so in an inconsistent and arbitrary fashion as to different employees with regard to the same type of personnel decision, and as among the various types of personnel decisions.

Further, the Agency violated the 2021 MOU and Article 40 (within-grade increases) by adding new on pace requirements for WIGIs, and violated Article 21 (Hours of Work and Overtime) and 27 by applying the new on pace requirement to accessing overtime opportunities.

Finally, the Agency violated notice and bargaining obligations set forth in the Master Agreement, including Article 27, Section 5(E); Article 47, Section 4; and Article 49, Section 4.

As to remedy, the Union requests that the Arbitrator order a return to the *status quo ante* until the Agency fulfills its bargaining obligation, a make whole remedy and back pay for unit members affected with regard to grade promotion, within-grade increases, performance bonuses, and lost overtime, and a cease-and-desist order and notice posting signed by the Chairman of the Board of Veterans Appeals.

Agency's Position

The Agency disputes that the on pace factor is a performance standard or a change in performance standards. Rather, according to the Agency, on pace is merely a metric it uses to measure and evaluate employees against the pre-established performance standards in a discretionary manner in accordance with the Agency's statutory right to assign work and direct employees. That right would be hindered if the Agency were compelled to negotiate over the determination of the most appropriate

methods for evaluating employees. Hence, there was no duty to notify unit members or the Union prior to using on pace the way the Agency used it, and no duty to afford the Union an opportunity to bargain with regard to on pace.

Separate from the statutory authorization for the Agency's actions, on pace was expressly part of provisions about eligibility for promotion, overtime and other personnel matters in the FY 2019 and 2020 MOUs. Moreover, the 2021 MOU, which is still in effect, contained no language stating it superseded prior agreements. Rather, it required the continuation of tracking of attorneys' progress toward the annual goals during the year, including the Agency's right to conduct "frequent" checks to ensure that attorneys are "on pace" to meet those goals.

Also, despite changes in the paragraph in the FY 2021 MOU discussing progress checks by the Agency to ensure that attorneys are on pace (¶ 10) as compared with the corresponding paragraph in the FY 2020 MOU (¶ 14), in order to give all of the language in the FY 2021 MOU meaning, it must be interpreted to mean that the Agency can continue to use on pace in the same way it was expressly permitted to do in the FY 2020 MOU.

In addition, on pace requirements are addressed in the MOUs in a manner that reflects the parties' agreement to treat them as distinct from the performance standards. On pace also falls within the category of "additional information regarding performance expectations" within the meaning of Article 27, Section 5.B of the Master Agreement, and the use of such "additional information" should be seen as distinct from the performance standards themselves, and does not give rise to any obligations to bargain.

The Union's argument that the Agency has changed the way it uses on pace to assess attorneys' performance including for purposes of making personnel decisions such as promotions, within-grade increases, and imposition of PIPs, should be rejected because the Agency has been using on pace in essentially the same manner for at least 20 years. Indeed, the Agency's use of on pace constitutes a past practice that has been known to and acquiesced in by the Union. The Agency cites the testimony of VLJ Brant and Deputy Vice Chair Scharnberger, as well as a September 29, 2020 email to staff from Agency Vice Chair Kenneth Arnold. In addition, the DOC, which has been in use since at least FY 2019, reflects an understanding that personnel decisions can be implicated by failure to be on pace on a regular basis.

The Agency's use of the on pace metric of three cases per week allows the Agency to assess the productivity of attorney's throughout the year, and it provides attorneys with information on how their performance compares to productivity expectations as well as puts attorneys on notice of unacceptable performance and an opportunity to improve their performance. As such, on pace has been used by the Agency to meet its obligations under the Master Agreement to provide ongoing performance feedback to attorneys. Further, "On pace" is also an indicator of attorneys' ability to timely complete complex cases, a factor in decisions whether to promote attorneys to the next higher grade.

Further, the on pace metric is vital to the Agency's fundamental aim of managing its caseload of veterans' appeals in a manner that maximizes efficiency and averts inordinate delays in adjudications, which are already slow due to the immense volume of appeals. Also, on pace facilitates a steady stream of decisions presented to VLJs

rather than an ebb-and-flow situation that could erode quality when VLJs have an inordinate number of decisions to review in a short time.

Finally, the Union's evidence regarding purported increases in the number of attorneys denied promotion to GS-14, and the relationship between the Agency's use of on pace and such increases, should be given no weight. In all, according to the Agency, the Union failed to meet its burden of proof.

DISCUSSION AND DECISION[12]

1. Statutory Claims

The Union's statutory claims arise from the Agency's obligations under the Federal Service Labor-Management Relations Statute ("Statute") to consult or negotiate with the Union in good faith with respect to conditions of employment.[13] Refusal to consult or negotiate in good faith with the Union regarding conditions of employment as required by the Statute is an Unfair Labor Practice pursuant to Section 7116(a)(5) of the Statute. In grievances like this one that involve an alleged ULP, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence.[14]

Absent a waiver of bargaining rights, agencies are obliged to satisfy bargaining duties before implementing changes in conditions of employment."[15] This includes a requirement that prior to implementing such changes, the employer must provide notice

[12] As used here, to be "consistently on pace" means that from the Agency's perspective, the number of pay periods in which the Attorney Advisor has been on pace with respect to the annual goal for decisions or issues, or in the "green" on the Decision Output Calculator in the "Case Goal FYTD (Fully Successful)" or "Issue Goal FYTD (Fully Successful)" column, is sufficient for purposes of a particular personnel action such as being promoted or avoiding being placed on a PIP.
[13] See 5 USC §§ 7102(2) and 7114(a). "Conditions of employment" is defined in Section 7103(14) as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," excluding certain matters not relevant here.
[14] *NTEU*, 64 FLRA 833, 837 (2010).
[15] Federal *Bureau of Prisons & AFGE Local 3828*, 55 FLRA 848, 852 (1999).

to the union, describing the change and allowing the union the opportunity to request bargaining.[16] Failure to provide adequate notice prior to implantation of a change with more than de minimus effect constitutes a violation of sections 7116(a)(1) and (5).[17]

It is settled law that management's right to establish or change performance standards, which fall within the category of conditions of employment, is nonnegotiable.[18] However, an agency must still bargain over the procedures and appropriate arrangements in connection with its exercise of management rights over conditions of employment.[19] As the D.C. Circuit has stated, "Where the substance of the decision [to change a condition of employment] is not itself to subject to negotiation, the agency is nonetheless obligated to bargain over the impact and implementation of that decision if the resulting changes have a more than *de minimis* effect on conditions of employment."[20]

To meet its burden of proving a change in working conditions in this case, the Union must first show "an actual agency-initiated change to a personnel policy, practice or matter" and that the change "affected working conditions" to a more than *de minimus* extent.[21]

I find that the Union has proven by preponderant evidence that starting in FY 2021, the Agency changed the way the productivity performance standard is applied.

As the Agency correctly points out, the DOC was already in use by FY 2021, and already included color coding that reflected whether an attorney is meeting the Case

[16] *US Army Corps of Engineers, Memphis District, v. VFFE Local 259*, 53 FLRA 79, 81 (1997).
[17] *Federal Bureau of Prisons*, *supra*, at 852.
[18] *E.g.*, *NTEU v. FLRA*, 943 F.3d 486 (D.C. Cir. 2019), cited by the Agency.
[19] *See*, Section 7106(b)(2) and (3).
[20] *Federal Bureau of Prisons & AFGE Local 3828*, *supra*, 55 FLRA 848, 852 (1999).
[21] *Dep't of Homeland Security and AFGE Local 1929*, 72 FLRA 7, 9 (2021)

Goal (or Issue Goal)[22] FYTD benchmark (in the "green"), or not meeting it (in the "yellow") in each and every pay period. I also find that for some years prior to FY 2021, being green in this column *as of the most recent payroll date* was necessary or at least considered by the Agency in order for the attorney to be deemed Fully Successful for purposes of mid-year and end-of-year performance evaluations, special ratings of record in connection with consideration for promotion, and for the award of within-grade increases.

However, that sort of "snapshot" use of the Case Goal FYTD is distinct from what began to occur in fiscal year 2021. I find that in FY 2021, four attorneys were denied promotion at least in part because they had not been consistently on pace throughout the fiscal year (Attorneys 2 and 4 in the Union's testimony, and Attorneys 46 and 50 in the Agency's testimony). Three of these involved promotion to GS-14; one involved promotion to GS-13.

I find that the Union demonstrated that in FY 2022, 5 attorneys were denied promotion to GS-14 at least in part because of failure to be "green" in the Case Goal FYTD column for a sufficient number of pay periods (Attorneys [redacted] and those identified by numbers 8, 16, and 20), one (Attorney #14) whose promotion to GS-14 was delayed at least in part because of the same reason, one (Attorney [redacted]) whose application for early promotion to GS-14 was denied for the same reason, and two ([redacted] and [redacted] who signed a waiver to delay consideration until they could improve the number of pay periods where they would be "green" in the Case Goal FYTD column.

[22] For ease of reference, the term Case Goal FYTD will be used here to include both the Case and Issue Goal FYTD columns.

Also in FY 2022, Attorney [redacted] promotion to GS-13 was delayed (not denied) for the same reason. In FY 2023, Attorney [redacted] promotion to GS-14 was denied because he was not sufficiently "green" in the Case Goal FYTD column.[23]

Another attorney, [redacted], was placed on a Performance Improvement Plan (PIP) on June 30, 2023 because she had not been consistently "green" during the fiscal year. DVC Robert Scharnberger had issued guidance to supervisors (but not to the Union or attorneys) that consideration should be given to placing attorneys on PIPs when they were three weeks in the "yellow" in the Case Goal FYTD column.

I find by preponderant evidence that the Agency's use of consistently on pace in its handling of attorneys' promotions starting in 2021 as a justification to delay or deny grade promotions or to facilitate waivers of consideration for promotion, and as a justification for placing attorneys on a PIP including placement of Attorney [redacted] on a PIP, constituted a change in conditions of employment.

A number of Union witnesses testified credibly and without contradiction that prior to first hearing about unit members being adversely affected starting in FY 2021, they had not been advised of a policy that any adverse employment consequences could flow from failure to be on pace or be "green" in the Case Goal FYTD column on a consistent basis throughout the year.

This included VLJ [redacted] who has worked at the Agency for about 22 years, and Union President Douglas Massey, a 26-year employee. Testifying to the

[23] Besides the 13 affected attorneys noted here, the Union also proved that there were other unit members who were denied promotion, suffered delays in promotion, or were offered waivers by which consideration would be delayed, during FYs 2022 and 2023. See Union Exhibit 30. However, there is insufficient evidence to establish that any of these other personnel actions involved Agency determinations *regarding being consistently on pace or failure to be consistently "green" in the Case Goal FYTD or Issue Goal FYTD column* of the DOC.

same effect was Nicholas Keogh, an employee of the Agency since 2017 who served on the negotiations team for the FY 2019, 2020, and 2021 MOUs, and Union sergeant at arms John Ryan Cummings, also employed by the Agency since 2017.

The other Union witnesses [redacted], [redacted], [redacted], [redacted], and [redacted], all testified credibly that before they themselves were subjected to the Agency's use of consistently on pace in connection with their promotions, the Agency had never put them on notice that their promotional opportunities could be adversely affected by failure to have been consistently on pace or "green" with regard to the annual quota during the year. Moreover, Ms. [redacted] VLJ had identified only the midterm and end-of-year evaluations as times that she needed to be on pace in relation to the annual quota.

In addition to the testimony of Union witnesses Massey, Keough, Cummings, and VLJ [redacted] to the effect that consistently on pace had never been used as a reason for any adverse employment action, which I take to include placement on a PIP, both [redacted] and [redacted] testified that they had never heard of any such practice.

While the exact number of attorneys whose promotions were denied, delayed or made the subject of a waiver in the past few years because of failure to have been consistently on pace is not known,[24] it is clear that there have been many such instances. In addition, there has been at least one instance in which an attorney ([redacted] was placed on a PIP at least in part because she was not consistently on pace.

[24] I do not make any assumption that all of the attorneys whose promotions were delayed, denied, or the subject of a waiver, were so affected because of any failure to be consistently "green" throughout the year.

The Agency's argument that there has been no change in the way the on pace factor has been applied to attorney promotions and/or that there is an established past practice of using consistently on pace in the way they have been, is unpersuasive. Of the specific instances cited by the Agency at the hearing, only three (Employees 10, 46 and 50) had been treated adversely because of failure to be consistently on pace. Moreover, all three took place in 2021 or 2022. The Agency cited no specific examples prior to FY 2021, which is when the Union has argued, successfully I find, that the changes began.

Despite the testimony of DVC Scharnberger and VLJ Jenna Brant that they held the attorneys they supervised to the consistently on pace requirement, neither witness named any attorneys to whom the requirement had been applied; nor did they cite any examples of promotions being adversely affected prior to FY 2021 by an attorney's failure to have been consistently on pace. To the contrary, VLJ Brant acknowledged at least one instance, in 2019, where she recommended a promotion to GS-14 despite the attorney's not being on pace regularly throughout the year.

DVC Scharnberger disclosed that more than one VLJ told him they had not been aware that consistently on pace was a factor in attorney promotion. While he doubted the veracity of their professed lack of awareness, it is evident that VLJ [redacted] is not the only VLJ who has stated to him that they were not aware of any prior use of consistently on pace in attorney promotion.

The Agency's witnesses also did not effectively refute the Union's evidence regarding PIPs. DVC Scharnberger's testimony that guidance was given to supervisors in early 2023 on placing attorneys on a PIP if they fail to be sufficiently in the "green,"

supports the Union's argument that this was a recent change in policy. VLJ Brant's testimony did not identify the time or times that she asserts that she placed attorneys on a PIP for failure to be consistently on pace, so it gives no support to the Agency's position that there was no change, or that there is a past practice of using consistently on pace in this manner.

The change in how the productivity element was applied to promotions and being placed on a PIP affected working conditions in a more than *de minimis* way. It is not disputed that an attorney's failure to have been consistently on pace was used to justify denial of promotions to the higher salary grade, and to justify delays in promotion or as a means to facilitate waivers of consideration for promotion to the higher salary grade. Promotion in grade means an increase in salary, so denial or even delay – whether unilaterally imposed by management or by way of a waiver - means loss of income. The Agency has not argued that a lost or delayed salary increase is a trivial or *de minimis* matter, and no such argument would be convincing.

I find also that placing an attorney on a PIP has a more than *de minimis* effect on conditions of employment. Placement on a PIP reflects a finding that the employee is not meeting the standards in a critical element, and results in the establishment of a plan of action involving at least 90 days of heightened scrutiny including meetings and monitoring that would not otherwise necessarily take place. Further, being placed on a PIP is the first remedial step in a process that could ultimately lead to performance-based actions including reassignment, reduction in grade, or even removal.[25]

[25] Master Agreement Article 27, Sections 10 and 11.

Consistent with its position that there was no change, the Agency does not claim that any notice was given to the Union prior to implementing these changes, and I find that there was in fact no notice or opportunity to bargain prior to the Agency's implementation of these changes.

To the extent that the Agency is arguing that the grievance must fail because the Agency's use of on pace is an exercise of the management right to assign work and direct employees within the meaning of 5 USC §7106(a)(2) (Agency Brief at 32) and therefore not negotiable, such argument is not persuasive. In the sole authority cited for this proposition, *NTEU v. FLRA*, *supra*, the D.C. Circuit held that a bargaining proposal to prevent management from using any rating level higher than "Successful" was not negotiable. That proposal interfered with management's right to establish performance standards, which has long been held to include the right to establish rating levels. Here, the Agency's use of on pace cannot be reasonably seen as anything other than an application or implementation of the critical element of productivity within the performance standards for the attorneys. The Union has the right to bargain over the impact and implementation of performance standards.

I conclude that by using an attorney's failure to have been consistently on pace: (1) as a justification to delay or deny Attorney Advisor grade promotions; (2) to facilitate waivers of consideration for promotion; and (3) as a justification for placing an attorney on a PIP; without providing prior notice to the Union or an opportunity for bargaining, the

Agency violated Sections 7106(a)(1) and (5),[26] thus committing an Unfair Labor Practice.[27]

With regard to within grade increases, there is no evidence in the record of any unit member actually being denied such an increase for any reason related to the productivity performance standard. I therefore find that the Union has not proven that the Agency violated the Statute, the Master Agreement, the MOUs, or past practice, in connection with within grade increases.

Regarding unit members' rights to overtime work, the only relevant evidence came from [redacted], whose request for overtime was denied in March 2023 because she was "yellow" on the Case Goal FYTD column for the most recent pay period. There was no evidence that being on pace at the time of requested overtime was a novel requirement at that point, or that there had been a different criterion applied to overtime requests before that. Therefore, I find no change in conditions of employment and consequently, no violation of the Statute, with regard to eligibility for overtime.

Nor was there a contract violation proven with regard to overtime. Paragraph 14 in the FY 2020 MOU (and similar provisions in the FY 2018 and 2019 MOUs) stated that unit members must be on pace for meeting the annual quota at the time of request for overtime. While no such provision appears in the FY 2021 MOU, that MOU, unlike the MOUs going back to 2018, did not include a provision superseding previous guidance

[26] *See*, *Federal Bureau of Prisons*, *supra*, 55 FLRA at 852. The ULP falls squarely within Section 7116(a)(1) and (5), so I find no violation of Section 7116(a)(8), which refers to "otherwise" failing or refusing to comply with the Statute.

[27] I decline to reach the Union's argument that the Agency's actions leading to agreements by certain attorneys to waive their rights to consideration for promotion at the time of their first eligibility constitutes the separate ULP of unlawfully bypassing the Union. Such a ULP was not alleged in the grievance, or referenced in the opening statements made by Union counsel at the arbitration (Days 1 and 3).

on the element of productivity. In these circumstances, I decline to find that the Agency violated the FY 2021, the Master Agreement, or past practice when it denied Ms. [redacted] overtime work.

2. Contractual Claims Relating to Promotion and PIPs

The above-described violation of federal law by the Agency in its use of consistently on pace in the context of grade promotions and PIPs also constitutes a violation of Article 2 of the Master Agreement, which states that Agency actions are to be governed by applicable federal statutes.

The Agency's unilateral imposition of its new use of consistently on pace without prior notice to the Union also violates notice and bargaining provisions in the Master Agreement, specifically Article 27, Section 5(E), which required the Agency to give the Union reasonable written notice and to meet all bargaining obligations prior to implementation when it changes, adds to, or establishes new elements and performance standards. The new use of consistently on pace added to the productivity element.

The Agency also violated Article 49, Section 4, which required the Agency to "provide reasonable advance notice" to the Union "prior to changing conditions of employment of bargaining unit employees," including "all information and/or material relied upon . . ." sufficient for the Union to exercise "its full rights to bargain." The Agency also failed to give notice to the President of AFGE Local 17 regarding "proposed changes in personnel policies, practices, or working conditions affecting the interests" of the Union in violation of Article 47, Section 4(B) of the Master Agreement.

The Agency also violated Article 27, Section 5(A) of the Master Agreement, which requires the Agency to communicate "all aspects of the performance plan, including numerical standards, measurement indicators, priorities, and weightings, if applicable," in writing to affected employees at the time they receive their performance elements and standards. The record shows that the Agency's use of consistently on pace to adversely affect employment was not communicated to unit members prior to being imposed. Further, the Agency violated the final sentence of Section 5(A) of Article 27, which gives the Union the right to provide input into any changes to performance standards.

I find that the Agency did not violate Section 6(E) of Article 27, which I read to be limited to communication of changes to the actual elements of the performance standards. Those elements, set forth in the attorney performance standards (FY 2021), were not revised, though the Agency's interpretation of them changed.

However, the changes did violate Article 23, the 1994 MOU, and the FY 2021 MOU, because they added a new requirement, i.e., the need to have been consistently on pace, to the provisions in Article 23 and the 1994 MOU governing procedures for promotion from GS-13 to GS-14, and in the FY 2021 MOU governing procedures for application of the critical element of productivity.

I do not credit the Union's argument that inconsistencies in the way the new requirement has been described and applied by different supervisors and in different contexts amount to a discrete violation of the Master Agreement, the MOUs or 5 U.S.C. §4302. Rather, the inconsistencies are best understood as fallout from the Agency's

imposition of a new requirement without first discharging its statutory and contractual bargaining duties.

3. Other Agency Arguments

I do not find the Agency's argument that its actions were authorized by the FY 2021 MOU to be persuasive. The Agency correctly points out that the 2021 MOU which is still in effect specifically sets forth the annual case quota and authorizes management to "continue to track" the number of signed decisions and issues an attorney produces, and to conduct frequent progress checks to ensure each attorney is on pace to meet the annual quota. However, I find that this right to track and check attorney progress is not the same as a right to enforce or apply the annual quota in the way the Agency has done, i.e., denying or delaying promotion or facilitating a waiver of consideration of promotion, or to place attorneys on a PIP, because they have not been consistently on pace throughout the year.

Nor does any reasonable reading of the FY 2021 MOU relieve the Agency of its statutory (and contractual) duty to bargain over changes in the procedures related to productivity performance standards in these circumstances: The MOU contains some procedures but is silent on the subject of the relevance of consistently on pace performance to conditions of employment.

The September 29, 2020 email to staff from Agency Vice Chair Kenneth Arnold, cited by the Agency, also does not support its position. In the email, VC Arnold pointed to the successfully completed negotiation of the FY 2021 MOU, and noted that because the number of hearings would be going up that year, with additional time being spent on

hearing-related matters by VLJs and some attorneys, the annual quota was being reduced.

VC Arnold's statement that "we dropped the minimum individual expectations for the number of decisions signed each year from an average of 3.25 per week to 3 decisions per week" did not state that attorneys would be required to have 3 decided cases per week. Rather, it stated that this was the new, smaller weekly average.

Nor do I interpret the email as reflecting an understanding even on management's part that attorneys can be subject to adverse employment action based on whether or not they consistently produce 3 signed decisions per week. DC Arnold's use of the word "average" is inconsistent with the idea that every attorney will be required to have three decisions signed each and every week. In any event, the FY 2021 MOU that DC Arnold was referencing, does not refer to 3 decisions per week, or 6 per pay period, or any number of decisions other than the annual quota of 156.

Further, there is nothing in the 1994 MOU or the Master Agreement that references the use of consistently on pace, or that authorized the Agency to impose a new procedure for evaluating attorneys' productivity performance without fulfilling its statutory and contractual bargaining duties.

The Agency's arguments based on the wisdom or effectiveness of using a per pay period on-pace requirement to regulate the flow of work to the VLJs and to help manage its massive and important workload, may be of use in its negotiations with the Union, but they do not justify imposing such a requirement without bargaining first.

Article 27, Section 5(B) of the Master Agreement, also cited by the Agency, gives various examples of how management can "apprise the employee of the requirements

against which he/she is to be measured" in the performance appraisal process, including "additional information" beyond what is specified in this clause.

I do not credit the Agency's argument that Section 5(B) authorized the use of the consistently on pace requirement, as Section 5(B), reasonably interpreted, refers solely to how an employee can reach the "Exceptional" performance level in each element, an issue that is not involved in this grievance. Regardless of that contextual limitation, Section 5(B) is about informing employees of what is expected of them prospectively, whereas the consistently on pace requirement has been used after the fact by the Agency, e.g., to deny or delay promotion.

I therefore find that the Union has established the above contract violations by preponderant evidence.

4. The Appropriate Remedy

In light of the Agency's violation of its obligation to bargain over the use of the consistently on pace requirement, it is appropriate to order a return to the *status quo ante* until the Agency has fulfilled its bargaining obligations.

Such relief is appropriate here, where the duty to bargain is limited to implementation procedures, based on my consideration of the factors set forth in *Federal Correctional Institution & AFGE Local 2052*, 8 FLRA 604 (1982). Those factors are:

> (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon;
>
> (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change;

(3) the willfullness of the agency's conduct in failing to discharge its bargaining obligations 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.

I have found that there was no notice given to the Union concerning the Agency's use of consistently on pace, which was a change from the *status quo*. Further, I find that any request by the Union to bargain over the change would have been futile given the Agency's position that its actions did not constitute a change in conditions of employment.

In addition, I find that that the Agency's failure to notify the Union of the change so as to afford the Union an opportunity to engage in bargaining prior to implementing the change was willful. I have determined that the Union's evidence established that the Agency made a change in how on pace has been applied, and I have not credited the testimony of the Agency's witnesses to the contrary. The Agency's use of consistently on pace was deliberate, so I find that the Agency acted in a willful manner when it imposed the change without notice or an opportunity for bargaining.

I have also found that unit members were adversely affected in a substantial way by the change, including many having promotions denied or delayed and one being placed on a PIP. Finally, there is no evidence in the record that a *status quo ante* remedy would disrupt or impair the efficiency of the Agency's operations. The Agency asserted at the arbitration that it wanted to avoid situations where an attorney waits until the end of the fiscal year and then overloads their VLJ with a huge volume of draft decisions, but it gave no examples of this ever having happened.

In addition to ordering a return to the *status quo ante*, I find that the employees adversely affected by the Agency's use of consistently on pace without fulfilling its bargaining obligations should be made whole with interest pursuant to the Back Pay Act, 5 USC §5996, to the extent that a causal link can be established between the Agency's use of consistently on pace requirements and specific monetary losses. The appropriateness of monetary relief here is also supported by *NTEU v. FLRA*, 856 F.2d 293 (D.C.Cir. 1988), in which the court endorsed the make whole remedy of back pay to compensate employees for losses resulting from unilateral changes in working conditions.[28]

Unfortunately, while it is not disputed that many attorneys' failure to have been consistently on pace was used by the Agency to justify denial of promotion to the higher salary grade, and to justify delays in promotion or as a means to facilitate waivers of consideration for promotion to the higher salary grade, the record in this case does not identify each affected unit member; nor does it identify the amount of compensation lost as a result of the Agency's violation of the Statute and collectively bargained agreements. As the information necessary to determine which Attorney Advisors are entitled to make whole and/or *status quo ante* relief is under the parties', and particularly the Agency's, control, I am directing the parties to work cooperatively and in good faith to make that determination over the next 60 days.

Regarding unit members placed on a PIP, [redacted] should be restored to the *status quo ante* and made whole for any monetary loss suffered as a result of having been placed on a PIP, plus interest. Any other unit members who were placed

[28] Id., 856 F.2d at 297.

on a PIP starting at the commencement of the 2021 fiscal year because of the Agency's use of the consistently on pace requirement, shall be restored to the *status quo ante* and be made whole for any monetary loss suffered as a result of having been placed on a PIP, plus interest. As with the attorneys affected by the Agency's actions with regard to promotions, the record is not sufficient for me to determine who is entitled to make whole or *status quo ante* relief in the context of placement on a PIP, or the extent of the relief that is appropriate, so the the parties are directed to resolve that issue cooperatively and in good faith.

I will retain jurisdiction for 60 days to address any issues that arise in the implementation of the Award.

Finally, I am ordering the Agency to cease and desist from using a consistently on pace requirement in attorney promotions and placement of attorneys on a PIP until it has fulfilled bargaining obligations with the Union. Such a cease and desist order is authorized by 5 USC §7118(a)(7)(A). In the absence of any cited authority compelling me to order that a notice be posted in the circumstances of this case, I decline that portion of the Union's request for a remedy.

Therefore, based on the facts and circumstances of this case and the preponderance of the evidence, and for the reasons explained, the Arbitrator issues the following:

AWARD[29]

1. The Grievance is sustained in that the Agency's use of Attorney Advisors' failure to have been consistently on pace as a justification to delay or deny Attorney Advisor promotions, to facilitate waivers of consideration for promotion, and as a justification for placing Attorney Advisors on a Performance Improvement Plan (PIP), without providing prior notice to the Union or an opportunity for bargaining, constituted a change in conditions of employment that had more than a *de minimis* effect, violated 5 USC Sections 7106(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the "Statute"); and also violated Article 2, Article 23, Article 27 Sections 5(A) and 5(E), and Article 49 Section 4 of the Master Agreement; the 1994 MOU; and the Fiscal Year 2021 MOU.

2. The Agency did not violate the Statute or the Master Agreement or the FY 2021 MOU with regard to within-grade increases or overtime and did not violate Article 27 Section 6(E) of the Master Agreement.

3. As the appropriate remedy:

a. The Agency is ordered to cease and desist from using Attorney Advisors' failure to have been consistently on pace as a justification to delay or deny Attorney Advisor promotions, to facilitate waivers of consideration for promotion, and/or as a justification for placing Attorney Advisors on PIPs, until it satisfies its statutory and contractual bargaining duties owed to the Union, and the Agency is further ordered to bargain with the Union over the change in conditions of employment.

[29] As used here, to be "consistently on pace" means that from the Agency's perspective, the number of pay periods in which the Attorney Advisor has been on pace with respect to the annual goal for decisions or issues, or in the "green" on the Decision Output Calculator in the "Case Goal FYTD (Fully Successful)" or "Issue Goal FYTD (Fully Successful)" column, is sufficient for purposes of a particular personnel action such as being promoted or avoiding being placed on a PIP.

b. The Agency is further ordered to restore the *status quo ante* with regard to any Attorney Advisors whose promotions were denied, delayed, or delayed via a waiver since the start of FY 2021, based on their failure to have been consistently on pace.

c. The Agency is further ordered to make whole those Attorney Advisors whose promotions were denied, delayed or delayed via a waiver since the start of FY 2021, based on their failure to have been consistently on pace, including back pay and any other monetary losses and loss of benefits, plus interest.

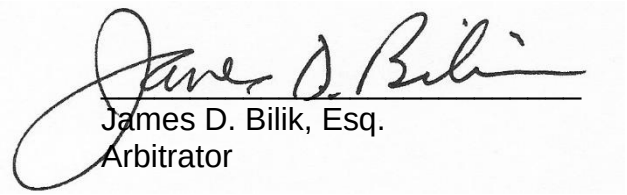
d. The Agency is further ordered to restore the *status quo ante* with regard to Attorney Advisor [redacted] and those other Attorney Advisors who were placed on a PIP since the start of FY 2021 based on their failure to have been consistently on pace, and to make them whole for any monetary loss and loss of benefits suffered as a result of having been placed on a PIP, plus interest.

4. The Arbitrator retains jurisdiction for 60 days from the date hereof for the limited purpose of resolving any disputes that may arise in implementing this Award.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

I, James D. Bilik, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

Dated: April 3, 2024



James D. Bilik, Esq.
Arbitrator