BEFORE DAVID GABA, ARBITRATOR
IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2338, on behalf of KEVIN ELLIS (Grievant) (Non-Selection of Voluntary Services Specialist Position), Union and U.S. DEPARTMENT OF VETERANS AFFAIRS, JOHN J. PERSHING VA MEDICAL CENTER, POPLAR BLUFF, MISSOURI, Agency	**ARBITRATION OPINION AND SECOND INTERIM AWARD** **FMCS No. 190727-09451** **Date Issued: April 13, 2023**

APPEARANCES:

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INTRODUCTION

This arbitration arises pursuant to the Master Agreement (the Agreement) between the American Federation of Government Employees, Local 2338 (the Union), on behalf of Kevin Ellis (the Grievant), and the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center (the Agency) (collectively, the Parties), under which David Gaba was appointed to serve as Arbitrator and under which this Arbitration Opinion and Second Interim Award (Second Interim Award) shall be final and binding among the Parties, subject to any exceptions either Party may file in accordance with applicable law and regulations.

PROCEDURAL HISTORY

1. The May 14, 2020, Interim Award

An initial hearing was held on January 23 and 24, 2020, in Poplar Bluff, Missouri. During the first day of hearing, January 23, 2020, the Parties stipulated to the following statement of the issues to be decided:

> 40
> 3 The parties stipulate that
> 4 the issue in this arbitration is the non selection [sic]
> 5 of Mr. Kevin Ellis for the voluntary services
> 6 specialist position. The parties do not agree to
> 7 which grievance is before the arbitrator. The
> 8 parties wish to present evidence and testimony, then
> 9 allow the arbitrator to make a decision on which
> 10 grievance will proceed to arbitration.

The specific procedural issue I was charged to address during the first two (2) days of hearing was whether the grievance dated November 26, 2018 (the November 2018 Grievance), or the grievance dated July 10, 2019 (the July 2019 Grievance) was properly before me. Following receipt of the

Parties' Post-hearing Briefs, I issued an Interim Award on May 14, 2020, finding that "[t]he proper grievance to be heard is the November 2018 Grievance."[1]

On June 15, 2020, the Agency filed exceptions to the Interim Award with the Federal Labor Regulations Authority (the FLRA). On the same date (June 15, 2020), the Union filed objections to the Agency's exceptions. On August 10, 2020, the FLRA's Office of Case Intake and Publication issued an Order to Show Cause, directing the Agency to show cause why the Agency's exceptions should not be dismissed as an interlocutory appeal. The Agency filed a response, asserting that its exceptions are not interlocutory. On October 7, 2021, the FLRA dismissed the Agency's exceptions without prejudice.

Hearings were held on the merits of the November 2018 Grievance on September 6, 2022, September 7, 2022, September 8, 2022 (adjourned without testimony or evidence), October 24, 2022, October 31, 2022, and November 18, 2022 (collectively, the Hearings). The Hearings were all held via Zoom. A transcript of the proceedings was provided.

2. The Agency's Motion to Enforce Jointly Stipulated Issue

At the beginning of the hearing held on September 6, 2022, the Union proposed the following statement of the issues to be decided on the merits of the November 2018 Grievance:

> 1) Did the John J. Pershing VA medical center (hereinafter referred to as the "Agency"), by and through its representatives, refuse and fail to meet their obligations set out in the parties' Master Collective Bargaining Agreement (MCBA) when they denied Kevin Ellis a detail to Voluntary Services Specialist? If so, what shall the remedy be?
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> 2) Did the Agency, by and through its representatives, refuse and fail to meet their obligations set out in the parties' Master Collective Bargaining Agreement (MCBA) when Kevin Ellis was not selected for the Voluntary Services Specialist promotion? If so, what shall the remedy be?
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> 3) Did the Agency, by and through its representatives, refuse and fail to meet

[1]Interim Award at page 18.

> their obligations set out in the parties' Master Collective Bargaining Agreement (MCBA) when they engaged in discrimination against Kevin Ellis on the basis of protected activity? If so, what shall the remedy be?
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> 4) Did the Agency, by and through its representatives, refuse and fail to meet their obligations set out in the parties' Master Collective Bargaining Agreement (MCBA) and 5 USC 7116 (a) (1), (5) and (8) when they did not provide data/information for the Voluntary Services Specialist promotion package, upon statutory request? If so, what shall the remedy be?

The Agency objected to the Union's proposed statement of the issues and informed the Arbitrator that the Agency intended to file a motion to enforce the jointly stipulated issue reached during the hearing held on January 23, 2020. I instructed the Agency to provide a full and complete copy of the hearing transcript to the Union to inspect if the Agency intended to rely on any portion of the transcript.

On September 15, 2022, the Agency filed a Motion to Enforce Jointly Stipulated Issue (the Agency's Motion). On the same date (September 15, 2022), the Agency's counsel e-mailed a copy of the full transcript of the January 23, 2020, hearing to the Arbitrator but only provided the Union with excerpts of the January 23, 2020, hearing transcript as an exhibit to the Agency's Motion. The Agency did not provide a copy of the January 24, 2020, hearing transcript.

On September 22, 2022, the Union filed a Response to the Agency's Motion. On September 30, 2022, the Agency filed its Reply. On October 4, 2022, I issued an Order Denying the Agency's Motion (the Order) because the Agency did not comply with my order to provide a full and complete copy of the January 23, 2020, and January 24, 2020, transcripts to the Union. I ordered that the Agency re-file its Motion and concurrently provide a full and complete copy of the January 23, 2020, and January 24, 2020, transcript to the Union for inspection within seven (7) days of the date of the Order.

Consistent with the Order, on October 11, 2022, the Agency re-filed the Agency's Motion and provided a complete copy of the transcript of the hearing held on January 23, 2020, to the Union. The following day (October 12, 2022), the Agency provided a complete copy of the January 24, 2020, transcript to the Union. On October 14, 2022, the Union filed its written Response. On October 31, 2022, I granted the Agency's Motion.

3. Post-Hearing Submissions

At the November 18, 2022, hearing, the Parties stipulated to file Post-Hearing Briefs on February 10, 2023, by 5:00 p.m. Central Time. On February 1, 2023, the Union requested an extension to file Post-Hearing Briefs until the end of February 2023, with no objection by the Agency. On February 9, 2023, the Parties mutually agreed to submit Post-Hearing Briefs on February 28, 2023, by 5:00 p.m. Central Time. The Parties submitted their Post-Hearing Briefs on February 28, 2023, as agreed upon.

Upon receipt of the Parties' Post-Hearing Briefs, there were issues raised by the parties regarding the "receipt" of the post hearing submission due to the large file sizes of some materials. I requested that both Parties provide a list of what they submitted to me with their Post-Hearing Briefs. On February 28, 2023, the Union's counsel provided a list of the Union's post-hearing submissions, as follows:

1. Brief
2. List of Authorities
3. Exhibit List
4. Union's Timeline
5. List of Stips and Findings
6. Settlement for Information Requests

On March 9, 2023, the Agency's counsel of record provided a list of the Agency's post-hearing submissions, as follows:

1. Agency's Closing Brief
2. Combined Agency Exhibits
3. Combined Case Law Relied Upon
4. Award (2017) Elizabeth Simon…
5. Word copy of Agency's Closing Brief
6. Union's Exhibit 12 – Information Provided by the Agency Through Omari – Reduced Size (this was also part of the "Combined Case Law Relied Upon document" but it made the document too large for everyone to receive).

The Union's counsel of record indicated that he was "good" with the list of post-hearing submissions presented by the Agency. On March 14, 2023, I closed the record. This Second Interim Award is timely issued.

ISSUES

Consistent with my Order on October 31, 2022, the stipulated issue to be decided is "the non selection [sic] of Mr. Kevin Ellis for the Voluntary Services Specialist position." As set forth above, the Union submitted additional issues to be decided, to which the Agency did not stipulate or agree upon. In such a situation, Article 44 at Section F provides:

> If the parties fail to agree on a joint submission, each shall make a separate submission. The arbitrator shall determine the issue or issues to be heard.

Pursuant to the above section, I clarify the record with two (2) additional issues to be decided, as follows:

1. Did the Union establish that the Agency's selection process violated the Agreement?

2. If so, what is the appropriate remedy?

This Second Interim Award answers the first question, based on my Findings of Fact and analysis of the facts below. I am requesting the Parties submit supplemental Post-Hearing Briefs on the second question.

In its Post-Hearing Brief, the Union stated that the issue pertaining to the Voluntary Services Specialist "detail" that occurred in June 2018, prior to the Voluntary Services Specialist promotion selection, is "no longer [sic] relevant issue and is precluded from this arbitration."[2] Dale Garrett, Chief Voluntary Service Officer with the Agency, credibly testified that a "detail" is a "temporary promotion"[3] and not a permanent promotion. Mr. Ellis agreed with Mr. Garrett, as he also credibly testified that a detail is a "temporary assignment," which is separate from a promotion.[4] Both Mr. Garrett's and Mr. Ellis' testimonies comport with the Agreement at Article 12, Section 1.A, which provides:

> A detail is the temporary assignment of an employee to a different position for a specified period of time, with the employee returning to his or her regular duties at the end of the detail. Details are intended only for the needs of the Department's work requirements when necessary services cannot be obtained by other desirable or practicable means.

Hereafter, the word "detail" shall be defined to mean "a temporary assignment," as outlined in Article 12 above (except when discussing use of the word "detail" when defining a grievance).

Based on both Parties' testimony, as well as the above language from the Agreement, the limited issue before me is the Agency's non-selection of Mr. Ellis for the *permanent* vacant position of Voluntary Services Specialist. For these reasons, I do not directly address the Agency's failure to detail Mr. Ellis, other than as probative evidence of the Agency's alleged union animus.

RELEVANT CONTRACT PROVISIONS

The Employer and the Union are parties to a Master Agreement (the Agreement) in effect beginning March 15, 2011, which contains the following relevant articles:

[2] Union's Post-Hearing Brief at page 3.
[3] See Transcript at 491:18.
[4] See Transcript at 1061:1-8.

ARTICLE 1 – RECOGNITION AND COVERAGE

Section 1 – Exclusive Representative

AFGE is recognized as the sole and exclusive representative for all of those previously certified nonprofessional and professional employees, full-time, part-time, and temporary, in units consolidated and certified by the Federal Labor Relations Authority (FLRA) in Certificate No. 22-08518 (UC), dated February 28, 1980, and any subsequent amendments or certifications. The parties agree that should AFGE request the FLRA to include subsequently organized employees in the consolidated unit, such FLRA certification will not be opposed by the Department if the unit would otherwise be considered an appropriate unit under the law. Upon certification of FLRA, such groupings automatically come under this Agreement.

Section 2 – AFGE Role

As the sole and exclusive representative, the Union is entitled to act for and to negotiate agreements covering all employees in the bargaining unit. The Union is responsible for representing the interests of all employees in the bargaining unit.

Section 3 – Employee Representation

A. The Department recognizes that, as the exclusive representative of employees in the bargaining unit, the Union has the right to speak for and to bargain on behalf of the employees it represents. The Department will not bypass the Union by entering into any formal discussions or agreements with other employee organizations or bargaining unit employees concerning all matters affecting personnel policies, practices, or working conditions. The Department will not assist or sponsor any labor organization other than AFGE in any matter related to grievances, collective bargaining, or conditions of employment of employees in the AFGE bargaining unit.

B. Pursuant to 5 USC 7114(a)(2)(A), an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion (including those held with other employee organizations) between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

C. The Department's consultations and dealings with other employee organizations shall not assume the character of negotiations concerning conditions of employment in the AFGE bargaining unit.

ARTICLE 2 – GOVERNING LAWS AND REGULATIONS

Section 1 – Relationship to Laws and Regulations

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

Section 2 – Department Regulations

Where any Department regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern.

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ARTICLE 12 - DETAILS AND TEMPORARY PROMOTIONS

Section 1 - General

A. A detail is the temporary assignment of an employee to a different position for a specified period of time, with the employee returning to his or her regular duties at the end of the detail. Details are intended only for the needs of the Department's work requirements when necessary services cannot be obtained by other desirable or practicable means.

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C. The Department will provide notification of all details to the local union President. Where the detail did not result in changes to conditions of employment, the notification will be at least weekly. Where changes to conditions of employment would result, the Department will provide reasonable advance notice. When a detail is known far enough in advance and affects conditions of employment, the notification should occur as soon as practicable but no later than 10 days prior to the employee being detailed.

D. The following procedures shall apply when offering noncompetitive details of 10 consecutive workdays or more to both classified and unclassified positions:

1. The Department will canvass the qualified employees to determine if anyone wishes to be detailed. If the same number of volunteers as vacancies exist, they shall be selected. If an employee believes he/she is qualified and is excluded from consideration for a detail because of lack of qualifications, the Department, upon request of the local union, will articulate in writing the qualifications required for performance of the detail that the employee lacks.

2. If more employees volunteer than vacancies exist, the Department will select from the qualified volunteers. Seniority will be the selection criterion, except when management demonstrates and determines that the position to which an employee will be detailed requires unique skills and abilities that are not possessed by another qualified employee or that a medical or operational need requires or precludes the detail of a particular employee.

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ARTICLE 17 – EMPLOYEE RIGHTS

Section 1 – General

A. In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping conditions irrespective of the work performed or grade assigned. Employees will also be afforded proper regard for and protection of their privacy and constitutional rights. It is therefore agreed that the Department will endeavor to establish working conditions that are conducive to enhancing and improving employee morale and efficiency.

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E. No employee will be subjected to intimidation, coercion, harassment, or unreasonable working conditions as reprisal or be used as an example to threaten other employees.

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G. An employee who exercises any statutory or contractual right shall not be subjected to reprisal or retaliation, and shall be treated fairly and equitably.

Section 2 – Rights to Union Membership

Under 5 USC 7102, each employee shall have the right to form and join a Union, to act as a designated Union representative, and to assist the Union without fear of penalty or reprisal. This right shall extend to participation in all Union activities including service as officers and stewards/representatives. A bargaining unit employee's grade level, or duties shall not limit the employees' right to serve as a Union official, to represent the bargaining unit or to participate in any Union activities.

Section 3 – Rights to Union Representation

The Department recognizes an employee's right to assistance and representation by the Union, and the right to meet and confer with local union representatives in private during duty time, consistent with Article 48 – Official Time, and local supplemental agreements. If the employee and the local union representative cannot be released immediately, the employee and the local representative will normally be released two hours before the end of their tour of duty. If such release is not made, appropriate relief from time frames will be afforded (e.g., one day extension for each day of delay). The Department agrees to annually inform all employees of the right to Union representation under 5 USC 7114(a)(2)(B) by posting on official bulletin boards and other appropriate means. During his/her initial orientation, each employee will be provided with a copy of Weingarten rights and the Master Agreement. These documents also will be available electronically.

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ARTICLE 23 – MERIT PROMOTION

Section 1 – Purpose and Policy

The parties agree that the purpose and intent of the provisions contained herein are to ensure that promotions are made equitably and in a consistent manner. Promotions shall be based solely on job-related criteria and without regard to political, religious, labor organization affiliation or non-affiliation, marital status, race, color, sex, sexual orientation, national origin, non-disqualifying disabling condition, or age. This article sets forth the merit promotion system, policies, and procedures applicable to bargaining unit positions in the Department.

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Section 6 - Applicability of Competitive Procedures

A. Promotions

Any selection for promotion must be made on a competitive basis unless it is excluded by Section 7 below.

Section 7 - Applicability of Noncompetitive Actions

A. Promotions

The following promotions may be taken on a noncompetitive basis unless otherwise provided:

1. Promotion of the incumbent in a position that is reclassified at a higher grade due to the accretion of additional duties and responsibilities and not as the result of a planned management action;

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Section 8 - Vacancy Announcements and Areas of Consideration

A. All positions to be competitively filled in the bargaining unit by actions covered by this article shall be posted unless filled under Section 7 which provides for exclusions from coverage. For the same type of vacancy (title, series, and grade), a certificate may be used for up to 90 days to refer candidates without re-announcing the vacancy.

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H. Posting and Distribution of Vacancy Announcements

The Department agrees to provide a copy of vacancy announcements to the local union at the time of or prior to postings. In addition, the job analysis, without the rating guide, will be provided to the local union within the area of consideration.

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J. Vacancy Announcement/Locating Candidates

The local union and each applicant will be notified in writing if an announcement is canceled and will be provided with a reason for the cancellation. However, such cancellations will not be used to compromise merit promotion principles.

Section 9 – Knowledge, Skills, Abilities, and Other Characteristics

A. Definition

KSAO stands for knowledge, skill, ability, and other characteristics.

B. The parties agree that KSAOs developed for all current and future unit positions, and changes and modifications thereto, will be fair, job-related, applied equitably and uniformly, and established in accordance with law, higher authority rules and regulations, and this Agreement.

C. Changes to Established KSAOs

KSAOs will be established by a panel which will conduct job analysis and other prescribed duties. The panel will normally include a bargaining unit employee chosen with the concurrence of the local union. Absent mutual agreement, the Department will appoint panel members following discussions with the local union and informing the local union of the reason for its decision. Informational copies will be provided to the local union as part of the vacancy announcements. If KSAOs for specific positions (i.e., position numbers) are changed after their initial establishment and used in a promotion action, the newly developed KSAOs will be sent to the local union in advance of any future vacancy announcements and handled by the parties in accordance with their bargaining obligations under 5 USC Chapter 71.

D. Procedures

1. KSAOs will be developed by:

a. Identifying the major tasks/duties of the position through a job analysis based on information contained in the PD, career ladder plan, qualification standards, and/or classification standards; and,

b. Identifying the worker characteristics and demonstrated abilities (KSAOs) needed to perform the job.

2. KSAOs are defined as follows:

a. Knowledge is a body of learned information used directly on the job;

b. Skill is a present competence to perform a skill, and unlike an ability, involves observable, quantifiable, and measurable performance parameters such as typing and pipefitting;

c. Ability is the power to perform an activity at the present time. (An ability is evidenced by the performance of some activity or work and should not be confused with an aptitude which is only a potential for performing an activity. An aptitude cannot be determined or measured by information in applications.);

d. Other Characteristics must be directly observable or measurable and job-related.
3. For each announced vacancy in the bargaining unit, not less than three and not more than eight KSAOs will normally be identified.

a. KSAOs shall be measurable (degree of possession can be discerned) and reasonable (some candidates can be expected to possess them) . Any KSAOs which do not meet these criteria will be dropped.

b. The KSAOs developed will be reviewed to determine which ones are critical to successful job performance. These KSAOs (at least two) will be designated as selection factors.

c. Task examples shall be developed for each KSAO. The task examples shall be derived from, and consistent with, the official PD of record. Task examples shall be identified in the vacancy announcement and fully documented and made part of the merit promotion package.

Section 10 – Panel for Competitive Action

A. Subject to Paragraph C of Section 10, panels will be established for all competitive actions.

B. Panel Membership Requirements

1. Panel members shall be instructed in the tasks necessary to perform the panel's function.
2. Panels for bargaining unit positions will include two bargaining unit employees chosen with the concurrence of the local union. Absent mutual agreement, the Department reserves the right to appoint panel members following discussions with the local union and informing the local union of the reasons for its decision.
3. The parties recognize that some competitive actions may require larger or smaller panels. The Department may determine the necessary panel size.
4. Panel members will not be in competition for the vacancy(s) and must be at least the same grade or higher, if possible, than the vacancy to be filled.
5. A relative of an applicant may not serve on the panel.
6. Members of the panel should be familiar with the job requirements of the position(s) being filled.

C. Panel Information

The Department will provide the promotion panel with all of the necessary information for completing its function.

D. Panel Responsibilities

The Panel will:

1. Apply evaluation criteria to ensure that a well-qualified candidate is selected:
a. When there are eight or fewer, (nine for two vacancies, ten for three, etc.) qualified promotion candidates, they will be referred in order of entry on duty date at the current Department facility to the selecting official for consideration without rating and ranking.
b. When there are more than eight qualified promotion candidates in the first area of promotion consideration, a Panel shall be convened.

c. Promotion candidates from outside the first area of promotion consideration shall be rated by the Panel if the candidates from the first area were rated and ranked.

d. The Panel will evaluate each application in order to ascertain the relevancy of the candidate's background (including but not limited to work experience, awards, training, outside activities, etc.) to the KSAOs. Candidates will be evaluated on the extent to which they possess the KSAOs relevant to the position being filled. This assessment will be based on the applicant's description of the proportion of time spent performing relevant activities, the complexity of the activity, identifiable results, level of contacts involved in performing the work, or the scope of responsibilities and duties performed.

e. In making this evaluation, the task examples should not be taken as the only types of evidence which demonstrate possession of a KSAO.

2. Determining the Best Qualified List for Referral:

a. First Area of Promotion Consideration.

1) The evaluation panel will review the listing of ranked promotion candidates to determine whether a meaningful break is present. The meaningful break is where:

a) The lowest ranking candidate above the break should be able to perform the job with substantially equal success as all candidates with higher scores, and

b) The highest ranking candidate below the break should not be able to perform with substantially equal success as those above the break.

2) Promotion candidates above the break will be placed on the best qualified list for referral. If there is no break and/or there are too many candidates above the break, the eight highest ranking candidates will constitute the best qualified list and be referred in order of their entry on duty date at the facility.

b. In order to be referred, candidates who have to compete under the procedures of this article and who are outside the facility shall have a rating equal to or better than the meaningful break or cutoff established by the promotion candidates within the first area of promotion consideration.

c. Length of service with the Department shall serve as a tie breaker where one is necessary.

d. A copy of any referral list forwarded to a selecting official will be provided to the local union.

E. Multiple Grade Levels or Locations

If an announcement pertains to more than one grade level or geographic location, a separate list of eligible persons will be developed for each grade level and location.

F. Documentation

The Panel will document working notes. Notes may be annotated on worksheets used by the panel. The notes will serve as reference material to document the process by which the decision was made.

G. Confidentiality

The results of the panel's actions will be treated confidentially and in accordance with provisions of the Privacy Act.

H. Decisions

The panel will make its decision(s) by consensus.

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Section 13 - Priority Considerations

A. Definition

For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee as the result of a previous failure to properly consider the employee for selection because of procedural, regulatory, or program violation. Employees will receive one priority consideration for each instance of improper consideration.

B. Processing

The procedures for processing a priority consideration shall be:

1. Employees will be notified in writing by the authorized Department official of entitlement to each priority consideration. Such notice will advise employees that if a vacancy is announced and posted and the employee wishes to exercise their priority consideration, the employee should submit the necessary application to the Human Resources Management Services (HRMS) with a written request that they wish priority consideration for the vacancy.

2. Priority consideration is to be exercised by the selecting official at the option of the employee for an appropriate vacancy. An appropriate vacancy is one that the employee is interested in, is eligible for, and which leads to the same grade level as the vacancy for which proper consideration was not given.

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Section 15 - Keeping Employees Informed

A. Employees who apply for and inquire about a specific promotion action will be given the following information by the HR Office or the selecting official:

1. Whether they met the minimum qualification requirements;
2. Whether they were in the group from which selection was made;
3. Who was selected; and,
4. Upon request, the selecting official shall provide a verbal statement of the reason(s) why the employee was not selected and/or a written statement regarding what areas, if any, he/she should improve to increase their chances for future selection.

B. Upon request, an employee will be shown any record of production or any supervisory appraisal of past performance which has been used in considering him/her for promotion. An employee is not entitled to see records on another applicant unless he/she is the

selecting official, a member of the selection panel, or otherwise officially involved in the promotion process, or he/she has the written consent of the subject of the record or is an agency official with a need to review the record However, an employee and/or the local union shall have access, consistent with law, government-wide rule, or regulation, to all pertinent records used in the process of filling vacancies which are requested for the purpose of processing or filing a grievance, EEO complaint, or other appeal.

Section 16 - Local Union Review of Competitive Actions

A. The local union will be permitted to conduct audits of promotion packages for all bargaining unit positions when it has reason to believe a discrepancy exists or when requested to do so by an employee.

B. The local union will provide the Department with the names of the local union representatives who are responsible for conducting audits. Any changes to the list of designated representatives will be sent to the Department in writing. The representative designated to conduct the audit will not have been an applicant for the promotion package being audited.

C. If the employee chooses to use the Union procedure, he/she must make a written request to the local union within 15 working days after the selection is posted on the biweekly promotion listing. A local union request under Paragraph A above must be made within the same time limits.

D. The designated Department official responsible for the package will make the pertinent records from the package available to the local union auditor within seven working days of receipt of the audit request. An auditor shall treat information confidentially and review it in HRMS in the presence of a Department official.

E. If, during the course of the audit, additional information is determined to be necessary, such information shall be secured from HRMS.

F. Employees who elect to use the grievance procedure rather than the Union audit procedure must initiate action in accordance with Article 43 - Grievance Procedure.

ARTICLE 43 – GRIEVANCE PROCEDURE

Section 1 – Purpose

The purpose of this article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for Title 5, Title 38 Hybrids and Title 38 bargaining unit employees in resolving grievances that are within its scope, except as provided in Sections 2 and 3.

Section 2 – Definition

A. A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union or the Department concerning the interpretation or application of this Agreement and any supplements or any

claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees.

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Section 4 – Jurisdiction

If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision.

Section 7 – Procedure

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Step 1.

An employee and/or the Union shall present the grievance to the immediate or acting supervisor, in writing, within 30 calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature. The immediate or acting supervisor will make every effort to resolve the grievance immediately, but must meet with the employee/representative and provide a written answer within 14 calendar days of receipt of the grievance. If there is to be more than one Department official involved in the grievance meeting, the Union will be so notified in advance.

Step 2.

If the grievance is not satisfactorily resolved at Step 1, it shall be presented to the Service/Division Chief, or other equivalent Department official or designee within seven calendar days of the Step 1 supervisor's written decision letter. The recipient of the grievance shall sign and date the grievance. The Step 2 grievance must state, in detail, the basis for the grievance and the corrective action desired. If there is to be more than one Department official involved in the grievance meeting, the Union will be so notified in advance. The Step 2 official will provide the Step 2 answer within 10 calendar days from receipt of the grievance.

Step 3.

If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved party or the Union shall submit the grievance to the Director within seven calendar days of receipt of the decision of Step 2. The recipient of the grievance shall date and sign the grievance. The Step 3 grievance must state, in detail, the basis for the grievance and the corrective action desired. The Director or designee shall meet with the aggrieved employee(s) and their Union representative(s) within seven calendar days from receipt of the Step 3 grievance to discuss the grievance. The Director or designee will render a written decision letter to the aggrieved employee(s) and the Union within 10 calendar days after the meeting.

Step 4.

If the grievance is not satisfactorily resolved in Step 3, the grievance may be referred to arbitration as provided in Article 44 – Arbitration. Only the Union or the Department can refer a grievance to arbitration.

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Note 5: It is agreed that grievances should normally be resolved at the lowest level possible. However, there will be times when a grievance may be more appropriately initiated at the second or third step of the procedure, for example, when a disciplinary action is taken by a Service Chief or higher level, when the supervisor at the lower level clearly has no authority to resolve the issue, or when the Union grieves an action of a management official other than a Step 1 supervisor. When a grievance is initiated at a higher step, the time limits of Step 1 will apply.

Section 8 – Extensions

Time limits at any step of the grievance procedure may be extended by mutual consent of all parties.

ARTICLE 44 – ARBITRATION

Section 1 – Notice to Invoke

Only the Union or the Department may refer to arbitration any grievance that remains unresolved after the final step under the procedures of Article 43 – Grievance Procedures. A notice to invoke arbitration shall be made in writing to the opposite party within 30 calendar days after receipt of the written decision rendered in the final step of the grievance procedure.

Section 2 – Arbitration Procedure

A. On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service (FMCS) to provide a list of seven impartial persons to act as an arbitrator. The parties shall meet within 10 calendar days after receipt of such list to select an arbitrator (this may be done by telephone for national level grievances). If the parties cannot mutually agree on one of the listed arbitrators, then the Department and the Union will alternatively strike one potential arbitrator's name from the list of seven and will then repeat this procedure until one name remains. The remaining person shall be the duly selected arbitrator. The parties will choose lots to determine who strikes the first name. Following the selection, the moving party will, within 14 calendar days, notify the FMCS of the name of the arbitrator selected. A copy of the notification will be served on the other party. The time limits may be extended by mutual consent.

B. The arbitration hearing date must be scheduled (not held) within six months from the date the arbitrator was selected or the grievance will be considered terminated. An exception to the time period will be made by mutual consent to extend timeframes. Additionally, an exception will be made for inability on the part of the arbitrator to provide a hearing date. Should the Department refuse to participate in scheduling the arbitration with the time frames set forth in this article, the Union may unilaterally schedule the arbitration hearing date.

C. The procedures used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. All witnesses necessary for the arbitration will be on duty time if otherwise in a duty status. On sufficient advance notice from the Union, the Department will rearrange necessary witnesses' schedules and place them on duty during the arbitration hearing whenever practical. Such schedule changes may be made without regard to contract provisions on Article 21 - Hours of Duty. A reasonable amount of preparation time for arbitration will be granted in accordance with the provisions of Article 48 - Official Time and local supplemental agreements.

D. The arbitrator's fees and expenses shall be borne equally by the parties. If either party requests a transcript, that party will bear the entire cost of such transcript.

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F. The parties will attempt to submit a joint statement of the issue or issues to the arbitrator. If the parties fail to agree on a joint submission, each shall make a separate submission. The arbitrator shall determine the issue or issues to be heard.

G. The arbitrator's decision shall be final and binding. However, either party may file an exception to the arbitrator's award in accordance with applicable law and regulations. The arbitrator will be requested to render a decision within 60 days. Any dispute over the interpretation of an arbitrator's award shall be returned to the arbitrator for settlement, including remanded awards.

***

ARTICLE 48 – OFFICIAL TIME

Section 1 – Purpose

A. Official time as a necessary part of collective bargaining and related activities is in the public interest. The parties recognize that good communications are vital to positive and constructive relationships between the Union and the Department. These communications should facilitate and encourage the amicable settlement of disputes between employees and the Department involving conditions of employment and should contribute to the effective and efficient conduct of public business. They further recognize that this consolidated unit is very large and complex and requires Union coordination of its representational activities at several levels.

B. As provided in 5 USC §7131, official time shall be granted as specified in law and in any additional amount the Department and the Union agree to be reasonable, necessary, and in the public interest. Official time shall be granted for activities as specified in law and in amounts specified by this Agreement or otherwise negotiated.

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Section 10 – Local

A. Every local union will receive an allotment of hours equal to 4.25 hours per year for each bargaining unit position represented by the local union. Each VHA and VBA local union

is entitled to a minimum of 50% official time. Each NCA local union is entitled to a minimum of 25% official time. Where a local represents employees at a CBOC, consolidated Mail Out Pharmacy (CMOP), clinic, service center, or successor, at a duty station greater than 50 miles from the facility, that local union will be allotted 25% official time at that duty station.

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3. The calculation period to determine the number of bargaining unit members represented by a local union is every six months after this Agreement is in effect.

D. The minimum amounts of official time described in Paragraph A in this Section are not intended to limit the amount of official time that can be negotiated by the parties locally.

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ARTICLE 49 – RIGHTS AND RESPONSIBILITIES

Section 1 – Introduction

The Parties recognize that a new relationship between the Union and the Department as full partners is essential for reforming the Department into an organization that works more efficiently and effectively and better serves customer needs, employees, Union Representatives and the Department.

Section 4 – Notification of Changes in Conditions of Employment

A. The Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) 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. The Department will work with the Union to identify and provide specific training and equipment to address concerns related to the use of technology, to include the sending and receiving of electronic communications.

Section 5 – Information

If the Union makes a request under 5 USC 7114(b)(4), the Department agrees to provide the Union, upon request, with information that is normally maintained, reasonably available, and necessary for the Union to effectively fulfill its representational functions and responsibilities. This information will be provided to the Union within a reasonable time and at no cost to the Union.

OTHER RELEVANT PROVISIONS

The Parties are not only governed by the Agreement; they are also governed by applicable Federal law. The following Federal statutes are relevant to this Award:

1. The Employees' Rights Statute. Pursuant to 5 USC § 7102:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

2. Federal Representation Rights and Duties. Pursuant to 5 USC § 7114(b)(4):

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining;

3. Union Official Time. 5 USC §7131, Official time, provides:

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section-

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

4. Unfair Labor Practices. In relevant part, 5 USC § 7116. Unfair labor practices, provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

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(8) to otherwise fail or refuse to comply with any provision of this chapter.

5. Merit System Principles. 5 USC § 2301 Merit system principles, provides:

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

6. Management Rights. 5 § 7106. Management rights, provides:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by management officials.

7. The Back Pay Act. Lastly, the Back Pay Act, 5 USC § 5596, provides, in pertinent part:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

> (i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and
>
> (ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

FINDINGS OF FACT

After a thorough review and careful consideration of the testimony and documentary evidence presented by the parties, I make the following Findings.

The Parties

The Department of Veterans Affairs, John J. Pershing VA Medical Center (the Agency) provides healthcare services to Veterans and other eligible beneficiaries in Poplar Bluff, Missouri. The American Federation of Government Local 2338 (the Union) is the exclusive bargaining agent on behalf of all classifications covered by the Agreement. There are approximately six hundred fifty (650) bargaining unit members who work for the Agency. As of the Hearings, bargaining unit employee Kevin Ellis (Grievant) worked as a Voluntary Services Assistant for the Agency. Mr. Ellis reported to Chief Voluntary Services Officer Dale Garrett. Mr. Garrett was originally hired as a VA Police Officer in or about 2013. He promoted to Police Lieutenant, then in approximately March 2015, he promoted to VA Chief of Police. On May 27, 2018, Mr. Garrett transferred to the classification of Chief Voluntary Services Officer; he has supervised Mr. Ellis from that date to the present.

Mr. Ellis' History with the Agency

As of the Hearings, Mr. Ellis, who is African American, worked for the Agency for approximately nineteen (19) years. Mr. Ellis was originally hired in March 2003 in the classification of Housekeeping Aide in the Environmental Services Department. According to Mr. Ellis' credible unrebutted testimony, the Agency applies a credit for years of military service when calculating a bargaining unit employee's seniority date. Mr. Ellis served ten (10) years in the military prior to working for the Agency, so his ten (10) years of military service were added to his hire date of March 2003.

In April 2007, Mr. Ellis promoted to Executive Secretary for the Associate Director of Patient Care Services. From about October 2007 to December 2007, while he was still employed as an executive secretary, the Agency "detailed" (as defined above) Mr. Ellis to the Voluntary Services Department (the Department) due to the absence of the person who had been working in the Voluntary Services Specialist classification, a classification that is a higher grade than the Voluntary Services Assistant classification. The Department deals with recruiting and scheduling volunteers at the hospital. Mr. Ellis credibly testified about the duties he performed during the October 2007 to December 2007 detail:

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I served as the only acting Voluntary Service representative we had. I served the assistant role, I served the Voluntary Specialist role. I served the voluntary chief role, because we had none. I did all of the work of the Voluntary Services to include annual joint reviews, meeting with -- meeting with congressional leaders, meeting with Veteran Service Officers, meeting with stakeholders, preparing minutes, hosting meetings, hosting all of the events that was occurring that year to include banquets and things of that nature while I was detailed for just that 90 to 120 day

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period.

In or about May 2008, Mr. Ellis applied for, and was appointed to, his current classification of Voluntary Services Assistant. Mr. Ellis credibly testified that between May 2008 and "about" June 2009 (a little over a year), he performed all the duties of the entire line of Voluntary Services classifications because the Voluntary Services Specialist and the Voluntary Services Chief positions were vacant. He credibly testified: "I was a one-man shop in a three-man department. I did everything by myself." The Agency offered no evidence that rebuts Mr. Ellis' testimony.

Mr. Garrett became Mr. Ellis' supervisor when Mr. Garrett was hired as the Chief Voluntary Services Officer in May 2018. In 2018, Mr. Ellis' second line supervisor was Libby Johnson and Patricia Hall was his third line supervisor. Mr. Ellis' current frontline supervisor is still Mr. Garrett; his second and third line supervisors are now Tina Thomas and Paul Hopkins, respectively. As of the Hearings, Mr. Ellis' pay rate was at the General Schedule (GS)-7 level, Step 8. The Voluntary Services Specialist classification pay range is between levels GS-7 and GS-9. The highest Voluntary Services Specialist classification pay is $65,778 per year.

While the record reflects that the Agency proposed to "remove" Mr. Ellis on August 28, 2018, for alleged "inappropriate conduct," the proposed removal was never imposed, and a five (5)-day suspension was imposed instead. The suspension was ultimately reduced to a written reprimand. Nothing in the record reflects that Mr. Ellis has any other disciplinary history.

Mr. Ellis' performance reviews were not made part of the record; however, based on the overall evidence, Mr. Ellis appears to have a considerable amount of experience in his current job classification, having worked as a Voluntary Services Assistant for approximately eleven (11) years as of June 2018, when the Agency made the decision to detail an employee into the Voluntary Services Specialist classification.

Mr. Ellis' 2018 resume, admitted as the Agency's Exhibit 2-16, establishes that Mr. Ellis has the following knowledge, skills, abilities, and other characteristics (KSAOs) as defined in the Agreement:

> • Conducted daily operations for voluntary services in accordance to VHA Directive 1620, VHA Handbook 1620.01, VHA Handbook 1620.02, VHA Handbook 1620.03, VHA Handbook/Directive 4520 and VHA Handbook 4721.
> • Demonstrated excellent knowledge of the Medical Center policies and programs to include VA Acquisition and Material Service Regulations.
> • Resolved conventional and complex problems to effectively distribute the volunteer workloads to meet organizational needs.

> • Organized and hosted annual special events such as Salute to Hospitalized Veterans Week, Valentines for Vets Concerts, Volunteer Recognition Banquets, POW/MIA Ceremonies, Veteran's Day Ceremonies, Wall of Valor Ceremonies and the Care & Share Program.
> • Served as acting Voluntary Service Specialist from October 2007 – December 2007 and May 2008 - June 2009.
> • Developed, planned and managed the daily operations in voluntary services.
> • Communicated and collaborated with VA VS representatives and deputy representatives to improve volunteer processes.
> • Prepared and reviewed correspondences, memorandums, acknowledgement letters, news releases/news articles, minutes, brochures and programs for ceremonies.

Mr. Ellis' Union Activities

Mr. Ellis has been a bargaining unit member since 2003. He became a Shop Steward, then the Chief Steward, and has served as the local Union President since 2011. As the Union President, Mr. Ellis uses "official time" to carry out his Union duties. "Official time" is defined by 5 USC §7131(b), to mean:

> Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues)….

The Agreement further provides at Article 48, Section 1.B.:

> As provided in 5 USC §7131, official time shall be granted as specified in law and in any additional amount the Department and the Union agree to be reasonable, necessary, and in the public interest. Official time shall be granted for activities as specified in law and in amounts specified by this Agreement or otherwise negotiated.

Mr. Ellis is not paid to act as the Union's President; rather, his sole source of income is his work performed as a Voluntary Services Assistant for the Agency. Beginning in or about 2018, the Agency frequently denied Mr. Ellis his contractually negotiated Official Time as set forth in more detail below. The Parties stipulated that Official Time runs from October 1 [of one year] to September 30 [of the following year].

The Arbitrations Between the Parties

The history of contentious arbitrations between the Parties is important to consider when addressing the issues to be decided. All of the below-listed Arbitration Awards have been issued within the past four (4) years, and all have involved Mr. Ellis, either as the grievant or in his capacity as Union President. These Arbitration Awards are summarized as follows:

- The Arbitration Award dated July 23, 2018, issued by Arbitrator Frank E. Kapsch, Jr. (the Kapsch Award), sustaining the grievance concerning the termination of Sonia Ellis (a Union Steward and Mr. Ellis' wife). Ms. Ellis was terminated after she overheard "bits and pieces" of a conversation that took place during a mediation between an Agency employee and the Agency in a conference room next to where Ms. Ellis worked. The employee had issues with Mr. Ellis in his role as the Union President. Ms. Ellis overheard Mr. Ellis' name mentioned in conjunction with the word "removal." Ms. Ellis immediately informed Mr. Ellis about the portion of the conversation she overheard. The Union alleged that the Agency terminated Ms. Ellis on December 18, 2017, because of Union animus, and, given that Ms. Ellis had no previous disciplinary history, termination was excessive. Both Mr. Ellis and Ms. Ellis testified at the hearing. Arbitrator Kapsch agreed that termination was excessive under the circumstances.

- The Arbitration Award dated November 8, 2018, issued by Arbitrator Steven R. Rutzik (the Rutzik Award), sustaining the grievance concerning the Agency's failure to authorize forty (40) hours of Authorized Absence for Union members, including, but not limited to, Mr. Ellis and Ms. Ellis, to attend Union training. Mr. Ellis represented the Union at the hearing and Ms. Ellis testified at the hearing. The Union filed exceptions with the FLRA after the Agency failed to comply with the Rutzik Award. The FLRA reached a settlement agreement between the Parties. The Agency agreed to fully comply with the Rutzik Award within thirty (30) days of the date the Regional Director approved the settlement agreement.

- The Arbitration Award dated February 15, 2019, issued by Arbitrator Earlene Baggett-Hayes (the Baggett-Hayes Award), sustaining the grievance concerning the removal of the Grievant, James Vail. Mr. Ellis attended the hearing on behalf of the Union, and Ms. Ellis, his wife, testified during the hearing. Arbitrator Baggett-Hayes determined:

  > Based on the paucity of evidence, the Arbitrator finds that the Agency has not met its burden in establishing that the Grievant's proposed removal, or the subsequent decision to remove the Grievant, was proper.[5]

  The FLRA upheld the Baggett-Hayes Award in 71 FLRA No. 103 on January 29, 2020.

[5] Baggett-Hayes Award at page 19.

- The Arbitration Award dated January 13, 2020, issued by Arbitrator George Aleman, and Supplemental Award dated June 18, 2020 (the Aleman Awards), sustaining the grievance concerning denial of Union Official Time. Both Mr. and Ms. Ellis testified at the hearing. Specifically, the Aleman Awards found that the Union, including Mr. Ellis and Ms. Ellis, were denied Union Official Time in violation of the Agreement. Arbitrator Aleman held:

  > To remedy the violations found, the Agency shall be required to cease and desist from denying union officials and representatives official time needed to perform their representational functions and other related duties, unless it demonstrates a legitimate operational need for doing so.[6]

  The FLRA upheld the Aleman Award in 72 FLRA No. 63 on June 2, 2021.

- The Arbitration Award dated February 21, 2020, issued by Arbitrator Thomas F. Sonneborn (the Sonneborn Award), sustaining the grievance in part concerning Mr. Ellis' five (5)-day suspension. Mr. Ellis testified at the hearing as the grievant. Arbitrator Sonneborn found that, although the Agency had just cause to discipline Mr. Ellis, the five (5)-day suspension was excessive; he reduced the suspension to a written reprimand. Arbitrator Sonneborn also found that the Agency violated the Whistleblower Act.

- The Arbitration Award dated March 27, 2020, issued by Arbitrator Dennis A. Kist (the Kist Award), sustaining the grievance concerning the Agency's failure to approve Authorized Absence for trainings, and charging Mr. Ellis, amongst other Union members, with 144 hours of Absence Without Leave (AWOL). Mr. Ellis testified as one of the grievants. The Arbitrator ordered that Mr. Ellis and the other grievants must be restored "all time, pay and benefits lost."[7] The Union filed exceptions with the FLRA after the Agency failed to comply with the Kist Award. The FLRA reached a settlement agreement between the Parties. The Agency agreed to fully comply with the Kist Award within thirty (30) days of the Regional Director's approval of the settlement agreement.

- The Arbitration Award dated May 18, 2020, issued by Arbitrator Steven Kane (the Kane Award), sustaining the grievance in part concerning the Agency's proposed termination of Mr. Ellis. Mr. Ellis testified as the grievant at the hearing. Arbitrator Kane found: "[T]he Agency must not use notices of proposed terminations as weapons."[8] The Agency filed exceptions to the Kane Award, and the FLRA overturned the Award, finding that the grievance was barred by § 7121(d) of the Federal Service Labor-Management Relations Statute because Mr. Ellis filed a complaint with the Equal Employment Opportunity Commission concerning the same facts and the same theory of the case. *See*, 72 FLRA 128 (February 10, 2022).

- The Arbitration Award dated August 9, 2021, issued by Arbitrator Ann Breen-Greco (the Breen-Greco Award), sustaining the grievance over the Agency's failure to provide a safe workplace, failing to offer the Grievant, Scotty White, a reasonable accommodation, failing

[6] Aleman Award at page 29.
[7] Kist Award at page 26.
[8] Kane Award at page 14.

to offer an interim reasonable accommodation after the Grievant made known his health issues, failing to assist the Grievant with completing the necessary Office Workers Compensation Program, and causing the Grievant to suffer needlessly and suffer a loss of wages, benefits and insurance because of his disability. Mr. Ellis attended the hearing as the Union President. The Agency's exceptions to the Breen-Greco Award are currently pending before the FLRA.

- The Arbitration Award dated October 20, 2021, issued by Arbitrator John Remington (the Remington Award), sustaining the grievance over the Agency's miscalculation of the number of bargaining unit members and reducing the amount of Official Time available to the Union. Mr. Ellis testified at the hearing. As a remedy, Arbitrator Remington specifically ordered that Mr. Ellis must be paid 196.5 hours of straight time. The FLRA upheld the Remington Award in 73 FLRA No. 15 (June 15, 2022).

At the September 7, 2022, hearing, Mr. Ellis testified that the FLRA upheld a unit clarification Arbitration Award "within the last 90 days." That Award was not made part of the record.

The Voluntary Services Specialist Classification Job Duties

The Voluntary Services Specialist classification has the following job duties:

> Provides administrative support to the Chief of Voluntary Service associated with establishing and implementing a voluntary service program. Reviews policies for compliance with directives and other regulating guidance. Develops and implements SOPs for the direction and operation of service activities with full program authority in the absence of the Chief. Develops and provides orientation and training. Recruits, selects, and places volunteers. Performs evaluations of various components of the program. Has authority to reassign, counsel, and/or remove volunteers. Requires the interpersonal skills of tact and diplomacy. Works in the Voluntary Service System database ensuring accurate volunteer hours and donations received are being entered. Solicits for donations in the community. Informs the community about voluntary service opportunities, benefits to our Veterans, and how donations support Veteran based events. Represents VA Voluntary Service at community events such as job fairs, county fairs, resource fairs, and more. May attend Veteran Service Organization meetings to report on VA activities and/or solicit assistance. May develop and facilitate voluntary service meetings in the absence of the Chief. Coordinates and organizes events.

The Voluntary Services Specialist classification is a Title 5 series. The Parties stipulated that Title 5 refers to all employees who are in a competitive service.

Mr. Ellis' Former Co-Worker, Franklin Day

Franklin Day has six (6) years' military service and was originally hired by the Agency in a part-time work study position in August 2012. Mr. Day's supervisor in the work study position was Libby Johnson, who was Mr. Garrett's immediate supervisor in 2018. Mr. Day is Caucasian. In or about September 2017, Mr. Day was hired in the Voluntary Services Assistant classification, the same classification as Mr. Ellis. As of the date of his appointment to the Voluntary Services Assistant classification, Mr. Day had eleven (11) years of seniority, including his military service. Mr. Day was paid at the GS-7 level in the Voluntary Services Assistant classification. While Mr. Day was in a classification that is covered by the Agreement, nothing in the record suggests that Mr. Day served the Union in any representative capacity.

Like Mr. Ellis, Mr. Day performed the duties of the entire Voluntary Services line for about five (5) months, between January 2018 and May 27, 2018, when Mr. Garrett became his supervisor. Mr. Day's 2018 resume, admitted as Agency Exhibit 2-15, states that Mr. Day had the following experience in the Voluntary Services Assistant classification:

> *I have the ability and experience of management of the internal activities associated with the acquisition, proper method of procurements, storage, use and internal distribution of office supplies and medical supplies used in the facilities.
> *I have use [sic] good judgment to prioritize duties to meet needs and guidelines on a daily basis.
> *I have experience in the GBL and VCBL process of shipping items and goods from one facility to another through the government agencies.
> *I have the knowledge and experience in Sterile Processed Items and the handling and stocking of these items. Knowing the cleaned dates and how to properly store the items.
> *I have worked closely with and lead large events such as the Valentines For Veterans Concert at our Facility.
> *I have managed the POW/MIA event held every year here at our local community to show our support to those who died in combat or have been POWs.
> *I have experience in working with all other services with in [sic] the facility such as the Chaplin Service with activities for the veterans in our CLC.

*I have knowledge in adapting analytical techniques and evaluation criteria.
*I have the ability to communicate in writing and in person.
*I have on a daily basis assisted the inventory manager in reviewing and analyzing reports such as Stock on Hand to determine long supply. On a weekly basis I have ran the Stock Status Report and initiate corrective actions.
*On a daily basis I have scanned medical supply closets and restocked as needed. I have used the pyxis system as a stocking system and inventory control program.
*On a daily basis I use the VISTA inventory control software to access programs like IFCAP, GIP, and the bar code scanner.
*I have set up primary and secondary inventories both physically and in GIP,(Generic Inventory Package)[sic]. Which includes creating new Item Master File Numbers or removing items. Locating supplies for easy customer access. Also adjusting levels for example Normal, emergency, and temporary levels; standard and optional reorder levels.
*On a daily basis I use the IFCAP/GIP to manage the medical supplies in the facilities by running receiving reports and generate picking tickets and then pulling the items, once the items have been pulled from the primary inventory I post the picking ticket to GIP ensuring all items removed from the primary will also be removed in GIP. This guarantees a more accurate inventory.
*I have knowledge of pertinent healthcare laws, regulations, policies and procedures, and surveys.
*I have worked with the Youth Program very closely and tasked them with duties.
*I also have the ability to interpret many different procedures with the Standard Operating Procedures and stay in compliance with the VA handbook 7002 regulations and VA handbook 1761.02.
*I have experience on a daily basis of the use of Microsoft outlook and Excel.
*I have the experience in plaining and initiate requisitions to ensure
*I have on a daily basis dealt with issues with employees and patients and volunteers.
*I have experience in time keeping and logging hours and vacation time for individuals.
*On a daily basis I set work for individuals within the facility.

Much of Mr. Day's job experience listed above does not appear to be relevant to the duties performed in the Voluntary Services Assistant classification. For example, at the Hearings, Sylvia Jackson, a former Chief Voluntary Services Officer, testified that having knowledge and experience in "Sterile Processed Items" is not relevant to the Voluntary Services Specialist position.

Mr. Day's resume has references listed on the last page; these references include but are not limited to Chris Luecke and Ms. Johnson. Based on the overall evidence, as of June 2018, Mr. Ellis had superior KSAOs to Mr. Day, Mr. Ellis was more senior than Mr. Day, and Mr. Ellis was considerably more experienced as a Voluntary Services Specialist than Mr. Day.

The June 10, 2018, Voluntary Services Specialist Detail

In or about June 2018, shortly after he began working as the Chief Voluntary Services Officer, Mr. Garrett made the decision to detail (again, defined above), an employee into the vacant Voluntary Services Specialist position. At the time, the only two (2) employees who were qualified to be detailed to the Voluntary Services Specialist classification were Mr. Day and Mr. Ellis.

Mr. Garrett credibly testified that he worked with "HR," that he personally made the decision that Mr. Day, and not Mr. Ellis should be detailed, and that he "believed" he read Article 23, Section D.1. when developing the detail. Article 23, Section D.1. provides:

> D. The following procedures shall apply when offering noncompetitive details of 10 consecutive workdays or more to both classified and unclassified positions:
>
> 1. The Department will canvass the qualified employees to determine if anyone wishes to be detailed. If the same number of volunteers as vacancies exist, they shall be selected. If an employee believes he/she is qualified and is excluded from consideration for a detail because of lack of qualifications, the Department, upon request of the local union, will articulate in writing the qualifications required for performance of the detail that the employee lacks.

Mr. Garrett credibly testified that he did not "consider" detailing Mr. Ellis "because Mr. Ellis was serving on a hundred percent official time as Union president during this time." Mr. Garrett's testimony showed union animus.

As part of the detail process, Mr. Garrett assisted Mr. Day with updating his resume. Although Mr. Garrett testified that he offered to assist Mr. Ellis with updating his resume, he did not assist Mr. Ellis, and it is unclear why. More likely than not, Mr. Garrett assisted Mr. Day with his resume because he had already decided to detail Mr. Day to the Voluntary Services Specialist classification.

On June 10, 2018, the Agency officially detailed Mr. Day to the Voluntary Services Specialist position, via a "Notice of Personnel Action" (the Detail Notice). At the Hearings, Mr. Ellis, testifying as the Union President, confirmed that the Union was not provided a copy of the Detail Notice within a minimum of ten (10) days prior to the issuance of the Detail Notice. When asked whether Mr. Ellis was "qualified" to be detailed into the Voluntary Services Specialist position, Mr. Garrett credibly testified:

517

21 Was Mr. Ellis
22 qualified to perform the detail in 2018?
23 A Yes.
24 Q Did you review seniority for Mr. Ellis and

518

1 Specialist position in 2018?
2 A No.
3 Q What criteria did you use to place Mr. Day
4 into the detail for Voluntary Service Specialist?
5 A Initially, he was the only employee working
6 in Voluntary Service. And consideration of
7 Mr. Ellis never came into my mind due to him being
8 hundred percent Union president.

Mr. Garrett further credibly testified:

49

14 Q Okay. So not the -- I don't want to focus
15 on the individuals, but what positions did you
16 supervise as Voluntary Service Chief in 2018?
17 A Voluntary Service Assistant, Voluntary
18 Service Specialist.

19 Q And there was just one of each?
20 A Yes. However, the Voluntary Service
21 Assistant is doubled encumbered due to Mr. Ellis
22 being a hundred percent Union president.

Furthermore, Mr. Ellis credibly testified:

590

14 Q Did Mr. Garrett canvass you to ask if you
15 wished to be detailed into the Voluntary Service
16 Specialist position in 2018?
17 A No, he did not.

I find both Parties' testimony to be credible.

Ms. Johnson's July 18, 2018, E-mail to Union Officials

On July 18, 2018, Mr. Garrett's supervisor, Ms. Johnson, sent an e-mail to Union officials, including Mr. Ellis, which stated in pertinent part: **"**you have exhausted all negotiated official time for FY18." The Agency unilaterally refused to approve any use of Official Time from July 18, 2018, through September 30, 2018. Ms. Johnson did not appear to testify at the hearing.

Mr. Garrett Informs Mr. Ellis that Mr. Day Was Detailed into the Voluntary Services Specialist Position

Two (2) days later, on July 20, 2018, Mr. Garrett held a meeting with Mr. Ellis sometime between 7:30 a.m. and 8:30 a.m. Mr. Garrett verbally informed Mr. Ellis during the meeting that Mr. Day had been detailed into the Voluntary Services Specialist position. Mr. Garrett credibly testified:

534

22 I had an open and frank
23 conversation with Mr. Ellis wherein I had told him
24 that I did not want him in Voluntary Service and I
25 knew he didn't want to be in Voluntary Service, he

533

1 wanted to work in the Union. I told him the reasons
2 were because I had heard many things about him and I
3 knew how difficult he was to work with.

Mr. Ellis' testimony comports with Mr. Garrett's testimony:

> 646
> 1 Q (By Mr. Jordan) What did Mr. Garrett, tell
> 2 you on July 20th, 2018?
> 3 A In relationship to the detail, he told me
> 4 that he did not offer me the detail because of my
> 5 Union activity being on official time. Those were
> 6 his exact words to me, verbatim.

Mr. Ellis further credibly testified that Mr. Garrett stated that he (Mr. Garrett) did not "*want*" him (Mr. Ellis) in the Department. Again, both Parties' testimony is credible and shows union animus.

Mr. Day's Detail to the Voluntary Services Specialist Position is Extended

On August 5, 2018, the Agency extended Mr. Day's detail in the Voluntary Services Specialist position to September 1, 2018. Mr. Day's detail ended effective September 2, 2018. Thereafter, the Agency placed Mr. Day back into the Voluntary Services Assistant position. As set forth below, the Agency subsequently posted a recruitment for a permanent appointment to the vacant Voluntary Services Specialist position.

Mr. Ellis' Equal Employment Opportunity Commission (EEOC) Complaint

On August 21, 2018, Mr. Ellis contacted the EEOC, alleging that the Agency "discriminated" and "harassed" him based on his African American race, when the Agency elected to "detail" Mr. Day, and not Mr. Ellis, into the Voluntary Services Specialist position. Mr. Ellis specifically alleged that "race was the bases [sic] for discrimination resulting in a hostile work environment," and that he had "heard," through a "third party," that Mr. Garrett, who is Caucasian, made the comment: "I can't wait to walk his Black Ass out of the Facility." Nothing in the record establishes that Mr. Ellis alleged that the Agency subjected him to disparate treatment based on his Union affiliation.

The EEOC attempted to resolve the dispute, to no avail. Mr. Ellis filed a formal complaint with the EEOC on September 4, 2018. The EEOC accepted the complaint for investigation on October 4, 2018. The EEOC investigated Mr. Ellis' complaint between November 27, 2018, and January 28, 2019. EEOC Investigator Alexandra Liberman issued her report on January 29, 2019. It is unclear what the current status of Mr. Ellis' EEOC complaint is.

The Agency Proposes to Remove Mr. Ellis

On August 28, 2018, the Agency proposed to "remove"[9] Mr. Ellis. Mr. Ellis received the proposed removal on August 30, 2018. The Kane Award was issued as a result of the grievance concerning Mr. Ellis' proposed removal. The Agency ultimately did not impose removal and instead imposed a five (5)-day suspension. The Sonneborn Award was issued as a result of the suspension. As set forth above, Arbitrator Sonneborn reduced the suspension to a written reprimand.

The August 28, 2018, Voluntary Services Specialist Vacancy Announcement

On the same date the Agency proposed to remove Mr. Ellis (August 28, 2018), the Agency posted a vacancy announcement to fill the Voluntary Services Specialist position (the Announcement). The Announcement was limited to the Agency's location in Poplar Bluff and was scheduled to close on or before September 11, 2018. The pay scale and grade was listed as "GS-7," the same GS level that both Mr. Ellis and Mr. Day were being paid.

Both Parties stipulated that it is "proper" for a vacancy notice to go "facility wide." The Agency did not provide the Announcement to the Union either before, or after the Announcement was posted, as required by the Agreement. Both Mr. Day and Mr. Ellis timely applied for the

[9] Pursuant to Article 14, Section 2, a "removal" is an adverse disciplinary action. More likely than not, the word "removal" is used interchangeably with the words "discharge" and "termination."

Voluntary Services Specialist position. Mr. Ellis and Mr. Day were the only applicants for the Voluntary Services Specialist position.

The Panel Selection

In or about August or September 2018, Mr. Garrett personally selected a panel to interview the applicants for the Voluntary Services Specialist position (the Panel). Mr. Garrett credibly testified about his criteria for selecting the Panel:

508
14 Q And what was your criteria for making a
15 selection to this panel?
16 A I was in the VISN 15 Voluntary Service
17 Chief's meeting for that month -- for a month, I
18 can't remember which month, but I asked if there
19 were any chiefs or any of their staff would be
20 willing to participate in a selection process being
21 on a selection panel. I got two responses.

When asked whether he consulted with any Union members when selecting the Panel, Mr. Garrett testified, "I don't recall doing that." More likely than not, Mr. Garrett failed to consult either the Union or the Agreement to determine the procedures the Agency was required to comply with during the recruitment.

The Panel consisted of Sylvia Jackson, Maura Campbell, and Bruce Wareing. At the time, Ms. Jackson was Chief of Voluntary Services at the Columbia, Missouri Facility (the Columbia Facility). Mr. Garrett likely met Ms. Jackson during the chief's meeting where he testified that he asked if there were any chiefs or any of their staff "willing to participate in a selection process being on a selection panel." Ms. Jackson, who is African American, worked for the VA for thirty-two (32) years and retired from the Columbia Facility in February 2019. Mr. Wareing, who appears to be Caucasian, worked as a Chaplain at the Agency. Mr. Garrett personally knew Mr.

Wareing. More likely than not, neither Ms. Jackson nor Mr. Wareing were bargaining unit members.

Mr. Garrett asked Ms. Campbell to be on the Panel through her boss, Martina Gunther, a Chief of Voluntary Services, whom Mr. Garrett personally knew. As of the Hearings, Ms. Campbell, who also appears to be Caucasian, had been employed as a Voluntary Services Specialist at the VA St. Louis Health Care System for seventeen (17) years. Although Ms. Campbell is in the Voluntary Services Specialist classification, she testified that she wasn't "sure" if she is a bargaining unit member and confirmed she is not familiar with the Parties' Agreement. Based on her classification, more likely than not, Ms. Campbell is a bargaining unit member.

Ms. Jackson, Ms. Campbell and Mr. Wareing all testified that they were not instructed on how to score the resumes or the interviews. Specifically, Ms. Jackson testified:

1455

16 Q Okay. And are you aware of which provision
17 of the article that covers merit promotion addresses
18 panels for promotion?
19 A Not specifically, but I know it's in there.
20 So when I say not specifically, like, it's not going
21 off the memory off the top of my head, but if you
22 put the document in front of me, I would -- I would
23 make the assessment that it's there.
24 Q Okay. And what factor did the master
25 agreement play in your process for the Voluntary

1456

1 Service Specialist position in 2018?
2 ARBITRATOR GABA: I'm sorry, I -- I
3 apologize, Mr. Jordan, I just didn't follow you.
4 Could you ask that again?
5 Q (By Mr. Jordan) So, yes. As the lead panel
6 member for the Voluntary Service Specialist in 2018,
7 what specifically did you follow within the master
8 agreement to complete that process for the panel?
9 A I'm not really sure. I'm not really sure
10 how to even answer this question. I just followed
11 the routine that I had been shown previously in my

12 experience. I don't know that I had the master
13 agreement in front of me when I was doing the -- the
14 interviews. In fact, I know that I didn't.

Based on the overall evidence, none of the Panel members received training or instruction regarding the procedures they were required to follow pursuant to the Agreement. Further, the overall evidence establishes that the Panel failed to create KSAOs, as defined in the Agreement, for the Voluntary Services Specialist position.

Mr. Garrett asked Ms. Jackson to serve as the selecting official (the Selecting Official). Mr. Garrett credibly testified about his reasons for requesting that Ms. Jackson serve as the Selecting Official:

543
10 A I didn't serve on the panel because in my
11 conversations with Libby Johnson, we decided it
12 would be best for the selection process for me to
13 pull myself out of the process due to having
14 assisted Mr. Day with his resume and offering to
15 assist Mr. Ellis, though I didn't get the
16 opportunity to, just to show there was no bias or
17 discrimination, to the best extent possible.

More likely than not, although Mr. Garrett did not officially serve on the Panel, a reasonable inference can be made that, since he hand-picked the Panel, he had influence over the Panel's selection process.

According to Ms. Jackson, the "Selecting Official" means:

1403
12 A So, the selecting official acts as the lead
13 person who actually tabulates all of the other panel
14 members' information and scores and then reports
15 that to HR.
16 So, you know, as far as a layman
17 hears the word selecting official, they might
18 believe that it's that one selecting official that
19 has the ultimate final decision, regardless of the
20 scores and that is not so.

Ms. Jackson further testified:

1426

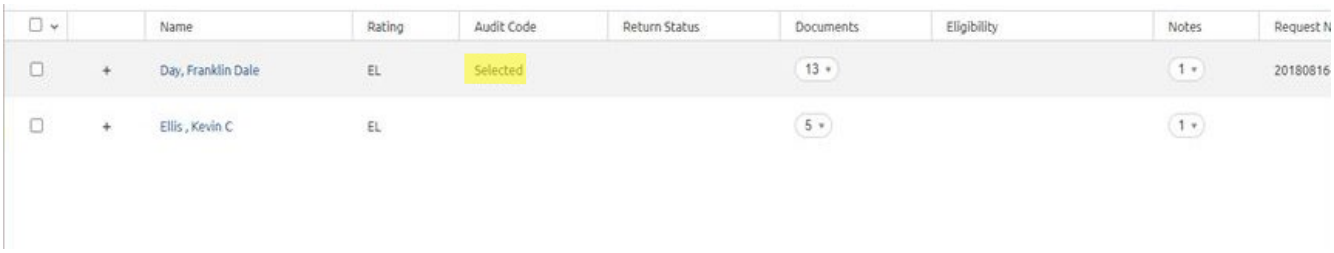
21 In my mind, the selecting official is the
22 one who is just the lead and submitting the
23 information that's collected.

The takeaway from the above testimony is that, even though Ms. Jackson was designated as the "Selecting Official," she did not have the "ultimate final decision, regardless of the scores." This comports with the Union's audit of the Voluntary Services Specialist promotion package, discussed below.

The September 18, 2018, "Merit Referral List"

On September 18, 2018, at "15:28 EDT," Human Resources Specialist Larz A. Smith printed a "Merit Referral List" for the vacant Voluntary Services Specialist position. The Merit Referral List has columns at the top, as follows:

As one can see, the "Status" is listed as "Selection Made." The names of the two (2) applicants, Mr. Ellis and Mr. Day, are listed below the above columns as follows:



Again, the "Audit Code" next to Mr. Day's name shows that he was "*selected*" for the Voluntary Services Specialist position as of *September 18, 2018*, and is evidence of the impermissible pre-selection of Mr. Day.[10]

The Parties stipulated that Mr. Ellis was interviewed by the Panel on October 4, 2018; Mr. Day was interviewed by the Panel on September 27, 2018. Unfortunately, the Agency did not call Mr. Larz Smith to testify as to how it is possible that Mr. Day was "*selected*" for the vacant Voluntary Services Specialist position *before* both Mr. Day and Mr. Ellis had been interviewed. Having said that, reasonable inferences can be made about this evidence, as more fully addressed below.

Mr. Smith's September 19, 2018, E-Mail to Mr. Garrett

The following day, September 19, 2018, Mr. Smith sent an e-mail to Mr. Garrett with the subject line: "Qualification." Mr. Smith marked the e-mail as "High Importance." The e-mail states:

> Applicant Ellis, Kevin is qualified as GS-09 level and should be processed as such.
>
> **Note:**
> ***GS-7 *rating occurred due to admin error by applicant****[11]

During the Hearings, Mr. Jordan showed the above e-mail to Mr. Garrett. In the undersigned's percipient observation, Mr. Garrett seemed genuinely surprised that Mr. Ellis was "qualified at the GS-09 level." Specifically, Mr. Garrett credibly testified:

> 540
> 5 A Looks like that Mr. Ellis is qualified at
> 6 the GS-9 level, however, I did not know that at the
> 7 time of the detail, which was much earlier.

[10] The undersigned has highlighted the words "Selection Made" and "Selected" for emphasis. The yellow highlights are not on the original document.
[11] Emphasis in original.

Unfortunately, no Party asked Mr. Garrett any questions that would clarify whether Mr. Garrett read this e-mail in September 2018, and/or whether the Agency informed any of the Panel members that Mr. Ellis was "qualified at the GS-09 level." More likely than not, had any of the Panel members been made aware of this information, the outcome of the Panel's rankings would have been different.

The Panel Scores the Applicants' Resumes

The scoresheets for rating each applicants′ resume were admitted as Agency Exhibit 2-17. The Parties stipulated that Mr. Ellis received a resume score of 158, and Mr. Day received a resume score of 165.5. The Panel rated the applicants' resumes by factors, with a maximum value of "10" for each factor. Ms. Jackson very obviously changed some of the numbers on her scoresheet for Mr. Day, as follows:

Factor	Description	Original Score	Revised Score
3	Specialized Experience	7	9
4	Knowledge, Skills, Abilities and Other Characteristics	8	10
5	Internal/External Community Involvement	8	10

Ms. Jackson acknowledged under oath that she made these changes but testified that she could not "recall" why she did so. Without the changes to Ms. Jackson's scores, Mr. Day would have received a 155.5 and Mr. Ellis would have received a 158.

The Interviews

As stipulated by the Parties, Mr. Day's interview took place on September 27, 2018, and Mr. Ellis' interview took place on October 4, 2018. As referenced above, these interviews took

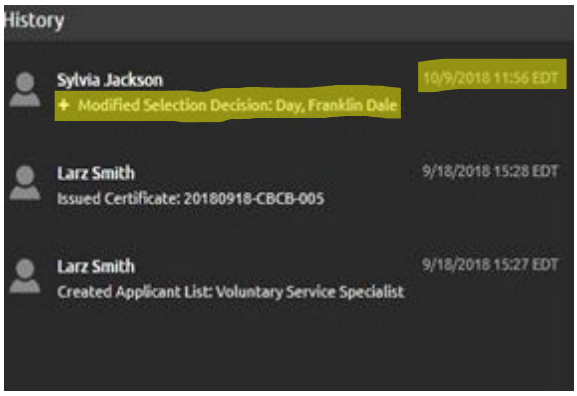
place *after* Mr. Day had already been "selected" for the vacant Voluntary Services Specialist position. The Parties stipulated that Mr. Ellis received an interview score of 95, and Mr. Day received an interview score of 114. When asked how they reached their scores, both Ms. Jackson and Ms. Campbell testified that they used subjective, not objective factors. For example, Ms. Jackson testified:

> 1435
> Q Okay. You had mentioned an "it factor" in
> 6 your testimony; do you recall the -- mentioning the
> 7 "it factor"?
> 8 A I do.
> 9 Q Okay. And where was the "it factor" located
> 10 in the criteria the panel used for the Voluntary
> 11 Service Specialist position in 2018? Where can we
> 12 find that?
> 13 A That, you asked me my opinion, that was my
> 14 assess -- my opinion what I am looking for when I,
> 15 yes, that's what I said.
> 16 Q So it's not -- it's not an objective
> 17 criteria, it's a subjective criteria? The "it
> 18 factor" specifically.
> 19 A However you want to assess that, sir.

On her interview rating sheet, Ms. Campbell commented that Mr. Day was "passionate" about Voluntary Service and veterans. Ms. Campbell testified at the Hearings but did not explain what she meant by her subjective statement. The Parties stipulated that Mr. Ellis' interview score was 95 out of 120; Mr. Day's interview score was 114 out of 120.

The September 18, 2018, "Merit Selection List" is Modified

On October 9, 2018, the Merit Selection List created by Mr. Smith was "modified." Specifically, the following was notated:



The Agency offered no evidence that establishes how, or why, the Merit Selection List was "modified" to show that Mr. Day had again been "selected" *before* the Panel completed the selection process.[12] Again, this evidence of pre-selection is further evidence of union animus.

The Reference Checks

The Parties stipulated that Ms. Jackson was assigned to perform the reference checks for Mr. Ellis and Mr. Day. Ms. Jackson contacted one of Mr. Day's references, Chris Luecke, and questioned him about Mr. Ellis as well as Mr. Day. Ms. Jackson also contacted Lisa Bond for a reference for both Mr. Day and Mr. Ellis, although it is unclear who Lisa Bond is, as she is not listed on either applicants' resume. Ms. Jackson testified that she had no independent recollection of why she contacted Ms. Bond.

Further, rather than ask traditional questions about the applicants' KSAOs for the Voluntary Services Specialist position, Ms. Jackson chose to ask Ms. Bond and Mr. Luecke about each applicant's "character." Ms. Jackson memorialized her reference checks in an e-mail dated November 15, 2018, addressed to Ron Gray, Acting Chief of Human Resources, as follows:

> Here are my notes and my assessment per the two reference checks I completed on both candidates;

[12] Again, the yellow highlights are not in the original; the undersigned highlighted the words "Modified Selection Decision: Day, Franklin Dale," for emphasis.

> I spoke with Lisa Bond who rated both in the following manner based upon my question Can you provide me a character summary based on 1 being poor and 10 being best:
>
> Franklin Day received a 5 rating for his work in Logistics adding that he is much better suited for Voluntary Services due to his customer service skills. I'd asked if she also knew Kevin Ellis and she stated yes, he cleaned our area when he was in housekeeping. With the same question being posed. Kevin Ellis received a 2 rating, stating she did not believe he was ethical. I also called upon a reliable past employee for Poplar Bluff, Chris Luecke.
>
> Franklin Day received an 8 rating
> Kevin Ellis received a 7 rating
> I also asked Chris if he would hire them he stated yes for both.
> These answers along with the ratings from the other panel members establish that Franklin Day be selected and was selected for this position. I will also forward the other material from the other panel members.

Ms. Jackson credibly testified that she "usually" contacts an employee's supervisor for a reference check, but Human Resources told her that Mr. Garrett was not "neutral," so she did not contact him. It is more likely than not that Human Resources was correct when they stated that Mr. Garrett was not "neutral."

The Parties stipulated that Mr. Ellis did not list references on his resume. Mr. Ellis credibly testified that to his knowledge, the Agency did not normally require references for an internal promotion. Ms. Jackson did not ask Mr. Ellis to provide references. More likely than not, Mr. Ellis could have provided Ms. Jackson with a list of references had she asked him to do so. As Ms. Jackson is African American, the only logical conclusion is that her actions were based on union animus rather than racial animus.

Mr. Ellis E-mails Human Resources Concerning the Status of the Selection

On October 19, 2018, Mr. Ellis e-mailed Mr. Gray, the Acting Human Resources Officer, concerning the status of the Voluntary Services Specialist recruitment. Mr. Ellis stated:

> Hey Ron, with you being the new acting HRO. I applied and interviewed for the Voluntary Service Specialist position. I was told the selection and

> recommendation was being made on Friday, October 5th, and then provided to our HR department. But, I have not heard anything at all. Can you assist?

Mr. Gray did not respond to Mr. Ellis' October 19, 2018, e-mail. Mr. Ellis e-mailed Mr. Gray again, on October 26, 2018, noting: "It has been a week now since I notified you, and a [sic] 21 days since the final interview (Mine). Again, Mr. Ellis received no response to his e-mail.

Mr. Day is "Officially" Selected for the Voluntary Services Specialist Position

On November 25, 2018, the Agency issued a "Notification of Personnel Action," that shows Mr. Franklin was promoted from the Voluntary Services Assistant classification to the Voluntary Services Specialist classification. The Notice states that the promotion became effective on November 25, 2018. Mr. Day was appointed at the GS-7 Level, Step 7 (one (1) step below Mr. Ellis).

While the record reflects that Mr. Day had already been pre-selected for the Voluntary Services Specialist position on September 18, 2018, and again, on October 9, 2018, more likely than not, the "Notification of Personnel Action" dated November 25, 2018, is the official date that Mr. Day was promoted to the Voluntary Services Specialist classification. Mr. Ellis credibly testified that he heard "by word of mouth" that Mr. Day had been selected for the Voluntary Services Specialist position. Nothing in the record suggests that Mr. Garrett ever changed his position between July 20, 2018, the date he informed Mr. Ellis he did not "want" Mr. Ellis in the Department, and November 25, 2018, the date Mr. Day was officially selected for the Voluntary Services Specialist.

The Union's Audit and Information Request

The following day, on November 26, 2018, Chief Steward and Second Vice President Jacob Jordan filed a request to audit the Voluntary Services Specialist promotion package, pursuant to Article 23, Section 16. Mr. Jordan requested a copy of the promotion package as part

of the audit process. The Agreement provides that the Agency must produce a copy of the pertinent records to the local union auditor "within seven working days of receipt of the audit request."

On December 4, 2018, Mr. Jordan audited the Voluntary Services Specialist promotion package. Mr. Jordan was allowed to review the promotion package but was not allowed to make any copies. Mr. Jordan took copious notes of his audit, which were not admitted at the Hearings. Upon completion of his audit, Mr. Jordan concluded that the actual deciding official for the Voluntary Services Specialist promotion was Mr. Garrett, not Ms. Jackson.

On December 12, 2018, pursuant to 5 USC § 7114(b)(4), Mr. Jordan filed an information request with the Agency, requesting a copy of the Voluntary Services Specialist promotion package. The Agency did not respond to the Union's December 12, 2018, information request. On January 3, 2019, Mr. Jordan sent a follow-up e-mail to the Agency concerning the Union's December 12, 2018, information request. On January 10, 2019, Daniel Karr denied the Union's information request on behalf of the Agency, citing the fact that the Union had completed an audit of the Voluntary Services Specialist promotional package in December 2018. On January 10, 2019, Mr. Jordan responded to Mr. Karr, as follows:

> I've been down this road before. Please read the following case law.
>
> ***Merely allowing a union to review requested material in the presence of agency representatives is not sufficient to meet the obligation to provide information.***[13] *Army & Air Force Exchange Service, Dallas*, 86 FLRR 1-1868, 24 FLRA 292 (FLRA 1986).
>
> Further,
>
> This info will be used in a grievance arbitration and EEO complaint investigation as evidence of pre-selection and discrimination. Failure to provide the information will result in the Union asserting a claim of adverse inference. Should we discuss an informal solution or will the agency maintain its current position?

[13] Emphasis in original.

Nothing in the record suggests that Mr. Karr, or anyone else on the Agency's behalf, responded to Mr. Jordan's January 10, 2019, e-mail.

On June 7, 2021, Mr. Jordan renewed the Union's request for information concerning the Voluntary Services Specialist promotion package. Over four (4) months later, on October 21, 2021, Labor Relations Specialist Omari Ondwele produced the resume reviews, the grievance, the Agency's response to the grievance, the Panel scoresheets, Mr. Ellis and Mr. Day's redacted resumes, and Ms. Jackson's redacted e-mail to Mr. Gray dated November 15, 2018. The cover e-mail states:

> Please [sic] the Agency response attached to this email. The Agency will not provide the performance appraisals of employees as we believe this would be a violation of the Privacy Act of 1947. The release of information regarding performance appraisals for employees who are not represented by the union is protected information and cannot be released under FOIA due to Privacy Act violations. Veterans Canteen Service, Newington, Conn., 95 FLRR 1-1092, 51 FLRA 147 (FLRA 1995).

Having determined that the Agency's responsive documents sent on October 21, 2021, were not complete, on February 14, 2022, Mr. Jordan renewed the Union's request for information via e-mail to Mr. Ondwele. Mr. Jordan specified that the Parties had reached a settlement agreement with the FLRA in late November 2021, wherein the Agency agreed that information that had been audited is still releasable by statute. Pursuant to the Settlement Agreement, the Agency agreed:

> The Charged Party agrees to communicate with the Charging Party regarding their requests for information under the Statute in good faith and not immediately deny such requests for information without reading or analyzing the articulated particularized need.

Mr. Ondwele responded on February 22, 2022, via e-mail. The e-mail attached a Memorandum, also dated February 22, 2022, which states in relevant part:

> Job Vacancy Case Files are temporary and are *destroyed* two (2) years after the selection service is closed (emphasis added).
>
> ***
> The requested job announcement that is referenced in this memorandum was posted in 2018 [sic] therefore, the Union's request is outside of the VA retention period of two years for job vacancy case files.

More likely than not, the Agency was aware that the November 26, 2018, grievance was still pending when it destroyed the Voluntary Services Specialist promotion file and engaged in the spoilation of evidence.

The Parties' Stipulations

The Parties made the following stipulations at the Hearings:

- Mr. Ellis' interview score was 95 out of 120; Mr. Day's interview score was 114 out of 120.
- Mr. Ellis was interviewed on October 4, 2018; Mr. Day was interviewed on September 27, 2018.
- The question, "What are you currently doing?" was asked on Union's Exhibit 2-12.
- The Parties will place a 2- before each exhibit number.
- The acronym "KSA" stands for "knowledge, skills and abilities." The acronym "KSAO" is defined in the Agreement and means what it says in the Agreement.
- Title 5 refers to all employees who are in a competitive service.
- The acronym "NTE" means not to exceed.
- Union Exhibits 2-20, 2-20A, 2-20B, 2-20C, 2-20E, 2-20F, 2-21, 2-22, 2-28 and 2-29 are admitted.
- Agency Exhibit 2-28 has an identifier of 20180918-CVCV-005.
- Agency Exhibit 2-28 is the same as Union Exhibit 2-12.
- Agency Exhibits 7, 9, 29, 8 and 13 are admitted.
- Agency Exhibits 2-5 and 2-32 are admitted.
- It is proper for a vacancy notice to go facility wide.

- Official Time runs from October 1 to September 30.
- Agency's Exhibit 2-27 is a document from a different proceeding.
- There is a sworn statement in Agency's Exhibit 2-27.
- The fifth tab on top of Agency Exhibit 2-28 is "Certification."
- Daniel Day and Kevin Ellis had separate interview dates.
- Mr. Day's federal service began at the Agency in March 2017.
- The writing after, "Do you have any questions for the panel" on page 79 of the Union's Exhibit 2-12 says, "When selection will be made, what grade comma, who is selecting."
- Sylvia Jackson was assigned to perform reference checks of Mr. Ellis and Mr. Day.
- Dale Garrett was the Chief of Voluntary Services at the Poplar Bluff Facility.
- There are no references listed on Mr. Ellis' resume (Agency Exhibit 2-16).
- Agency Exhibit 2-6 is admitted.
- Agency's Exhibit 2-16 is the resume that Mr. Ellis submitted when he applied for the Voluntary Service Specialist position.
- Post-Hearing Briefs will be due on February 10, 2023, by 5:00 p.m. Central Time.[14]

The Arbitrator's Findings

During the Hearings, the undersigned made the following Findings:

- The Agency is capable of providing un-redacted documents.
- The Agency can respond promptly to information requests, if it so chooses.

The Grievance

On November 26, 2018, at 5:11 p.m., Mr. Ellis sent an e-mail to Ms. Hall, attaching a Step 3 grievance (the Grievance). The Grievance states:

> This grievance is filed in accordance with Article 43 of the Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees, signed March 15, 2011 (MCBA). Article 2, Article 9, Article 17, Article 23 and any other relevant article contained within the master agreement, and any violation of rule, law or regulation, to include

[14] However, as set forth above, the Parties agreed to extend the deadline to submit Post-Hearing Briefs to February 28, 2023.

EEOC Guidelines. The Agency began targeting Kevin Ellis and his wife at this facility shortly after Patricia Hall's arrival as Medical Center Director and Libby Johnson's appointment as Acting Associate Director (AD). Kevin Ellis was Dr. Dale Klein's Representative and has faced relentless targeting from the agency since becoming Dr. Klein's Representative. Dr. Klein is no [sic] in negotiations for settlement due to Patricia Hall's targeted actions, as she and others were found guilty by the Office of Special Counsel (OSC). Additionally, the agency representatives (Dale Garrett) discriminated against Mr. Ellis on several occasions, but more notable [sic], telling him,[sic] he was not wanted back in Voluntary Services. Mr. Garett [sic] then secretly detailed Franklin Day in as the acting Voluntary Services Specialist under the supervision of Libby Johnson. Even though Mr. Garret [sic] was informed he would be violating the contract if he proceeded forward and not offering [sic] it to all employees within their department. The agency announced the position to the department only thinking they (Agency) would terminate Kevin Ellis. Then once it was realized they could not, the agency then decided to announcement [sic] the position hospital wide in an effort to circumvent the merit system process rather than select from the only two qualified candidates. Dale Garrett made the statement "I can't wait to walk his Black Ass out of the Facility" in the presence of other bargaining unit employees while he and the MCD were secretly attempting to build a false file against him. Toni Stoner confirmed to a group of employees, the agency, asked her to submit a false claim against Kevin Ellis for harassment, and this was witnessed by several employees. Mr. Ellis has also turned in Mr. Dale Garrett and Patricia Hall to outside government agencies for abuse of power and abuse of authority As [sic] both were not upholding the ethical standards of federal employees and permitted a criminal to work at the facility. Patricia Hall and Libby Johnson was [sic] utilizing the police department to target Mr. Ellis and his family. The agency has made every conceivable effort to target Kevin Ellis as a federal employee and has shown disparate treatment and targeting towards Mr. Ellis as an employee and as a Whistleblower.

The Remedy:

1. The agency will immediately rescind the appointment, within 48 hours [sic] of Franklin Day and place Kevin Ellis into the position as he was targeted, lied on [sic] and discriminated against. Mr. Ellis was obviously the more qualified candidate as Mr. Ellis qualified at the GS-9 grade with at least 10 years of experience and the other candidate qualified at the GS-7 grade and only about one-year experience as confirmed by the panel and Human Resources.

2. The agency will provide Mr. Ellis with any back pay due to the non-appointment/selection to the Voluntary Services Specialist and the detail it offered and gave to Franklin Day.

> 3. The agency will provide Mr. Ellis with $300k for its continued bullying and harassment as a minority and representative of bargaining unit employees, and targeting him as whistleblower.
>
> 4. The agency will make whole any employee whole [sic] as a result of their actions and/or the union.

A Step 3 Grievance meeting was held on December 11, 2018. On the same date, December 11, 2018, the Agency denied the Grievance, asserting, in relevant part:

> This grievance contained multiple vague allegations across a broad range of dates with no specificity. This is in violation of Article 43 section 7 that states that the step 3 grievance must state, in detail, the basis of the grievance. All of the allegations are well over 30 days old and thus non-grievable and non-arbitrable.

The Union invoked the Grievance to arbitration on December 11, 2018.

Hearings were held on the merits of the Grievance on September 6, 2022, September 7, 2022, September 8, 2022 (adjourned without testimony or evidence), October 24, 2022, October 31, 2022, and November 18, 2022 (collectively, the Hearings). The Hearings were all held via Zoom. A transcript of the proceedings was provided. The Parties stipulated to file Post-Hearing Briefs by February 10, 2023, by 5:00 p.m. Central Time; however, both Parties agreed to extend the deadline to February 28, 2023. The Parties submitted their Post-Hearing Briefs on February 28, 2023, as agreed upon. On March 14, 2023, I closed the record. This Award is timely issued.

DECISION

Contractual Language

It is axiomatic that a Union alleging a violation of a collective bargaining agreement must bear the burden of proof.[15] The standard of proof for contractual disputes is preponderance of the evidence. Preponderance of the evidence can be defined as:

[15] *School City of Hobart*, 109 LA 527 (1997), *Canteen Corp.* 101 LA 925 (1993).

> The standard of proof in most civil cases in which the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.[16]

The applicable standards for contract interpretation are also well established. Where the language in a Collective Bargaining Agreement or Master Agreement is clear and unambiguous, the arbitrator must give effect to the plain meaning of the language. This is so even when one party finds the result unexpected or harsh. Words are to be given their ordinary and popularly accepted meaning unless other evidence indicates that the parties intended some specialized meaning.[17] As stated by Elkouri and Elkouri:

> Arbitrators have often ruled that in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern. The use of dictionary definitions in arbitral opinions provides a neutral interpretation of a word or phrase that carries the air of authority.[18]

In sum, the undersigned is a creature of contract and cannot "ignore clear-cut language"[19] and cannot "legislate new language, since to do so would usurp the role of the labor organization and the employer."[20] I am interpreting the *Parties*' Agreement, and I have no power to modify the Agreement's provisions.

Is the Grievance Arbitrable?

Yes. Article 43, Step 3, of the Agreement provides:

> The Step 3 grievance must state, *in detail*, the basis for the grievance and the corrective action desired (emphasis added).

Based on this provision, the Agency asserts:

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[16] *Merriam-Webster's Dictionary of Law*, 1996.
[17] *Seattle School District*, 119 LA 481 (2004).
[18] Elkouri and Elkouri, *How Arbitration Works* 490-91 (5th ed. 1997).
[19] *Clear Coverall Supply Co.,* 47 LA 272, 277 (1966).
[20] *Clear Coverall Supply Co.,* 47 LA 272, 277 (1966).

> The Union makes no mention of *who* discriminated against Ellis, *how* it occurred, *how* it allegedly impacted his non-selection, nor *what* provisions of the Master Agreement were violated in making the selection. Given that the Union failed to follow the parties' agreed-upon grievance procedures by failing to state "in detail" the basis for its grievance prior to invoking arbitration, this grievance is not arbitrable.[21]

The Agency's point is well-taken, and I sympathize with the Agency. As I stated in the Interim Award, "the Agency has every right to enforce the contractual provisions that require the Union to state, in detail, the basis for the grievance."[22] Having said that, the Agreement defines what a grievance is, at Article 43, Section 2:

> A grievance means *any complaint* by an employee(s) or the Union concerning *any matter relating to employment*, any complaint by an employee, the Union or the Department concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment (emphasis added).

Here, there are several reasons why the instant Grievance is arbitrable. First, the Grievance sets forth a "complaint" about "any matter relating to employment," when it alleges, in pertinent part:

> …..the agency representatives (Dale Garrett) discriminated against Mr. Ellis on several occasions, but more notable [sic], telling him, he was not wanted back in Voluntary Services. Mr. Garett [sic] then secretly detailed Franklin Day in as the acting Voluntary Services Specialist under the supervision of Libby Johnson. Even though Mr. Garret [sic] was informed he would be violating the contract if he proceeded forward and not offering [sic]it to all employees within their department. The agency announced the position to the department only thinking they (Agency) would terminate Kevin Ellis. Then once it was realized they could not, the agency then decided to announcement [sic] the position hospital wide in an effort to circumvent the merit system process rather than select from the only two qualified candidates.

Second, the Grievance answers the Agency's "who-how-what" questions posed in its Post-Hearing Brief. The question "*who* discriminated against Ellis" is answered, as the Grievance

[21] Agency's Post-Hearing Brief at page 16 (emphasis in original).
[22] Interim Award at page 17.

plainly names Mr. Garrett (and possibly, his supervisor, Ms. Johnson) as the Agency representative(s) who allegedly "discriminated against Mr. Ellis." Next, the Agency's question "how" the alleged discrimination occurred is answered where the Grievance alleges that Mr. Garrett "secretly" detailed Mr. Day as "acting Voluntary Services Specialist" and did not follow the "merit system process" to fill the Voluntary Services Specialist position. The second "how" question posed by the Agency is how the non-selection impacted Mr. Ellis. Clearly, Mr. Ellis would have received a promotion and an increase in pay had the Agency selected him for the Voluntary Services Specialist position. That is addressed in one of the Union's requested remedies:

> The agency will provide Mr. Ellis with any back pay due to the non-appointment/selection to the Voluntary Services Specialist and the detail it offered and gave to Franklin Day.

Furthermore, the Agency's "what" question (i.e. *"what* provisions….were violated in making the selection") is answered where the Union lists the articles and other provisions the Agency is alleged to have violated:

> Article 2, Article 9, Article 17, and Article 23, and any other relevant article contained within the master agreement, and any violation of rule, law or regulation, to include EEOC Guidelines.

Lastly, the Grievance, as written, meets the definition of the word "detail" in this context (in instance, the word "detail" is not to be confused with the definition of detail as a temporary promotion). According to a reputable dictionary, "detail" means: "to describe something completely, giving all the facts."[23]

The history of arbitrations between the Parties establishes that the Agency *routinely* denies grievances on grounds that the grievances are not allegedly written in "detail," as defined above.

[23] *Oxford English Dictionary* (3rd ed. 2010)

Here, while the Grievance could have been written in a more clear and concise manner, the Grievance is sufficiently detailed to provide the *gravamen* of the Union's complaint. "Gravamen" simply means: "The substantial point or essence of a claim, grievance, or complaint."[24] For this reason, in the case at hand, I agree with Arbitrator Remington's reasoning, when he opined:

> The Agency…denied the grievance which it had invited by its specious refusal to resolve the matter as provided for in Article 43, Sections 6 and 7 of the Master Agreement. The Agency continued its duplicitous conduct toward the Union in denying the grievance largely on the grounds that the grievance was not sufficiently specific and failed to articulate how the Agency had violated the Master Agreement. *Despite the language of its Step 3 denial, the Agency was well aware of the gravamen of the Union's complaint*.[25]

In sum, the Union established the gravamen of its complaint in the Grievance; as such, the Grievance is arbitrable.

The Agency's Responses to the Union's Multiple Requests for Information

To the extent the Grievance is vague and unclear, the Agency can thank its own actions (or rather, inactions), when it outright *refused* to provide a full and complete copy of the promotion materials for the Voluntary Services Specialist position to the Union as requested on December 12, 2018, less than a month after Mr. Day was officially promoted to the Voluntary Services Specialist position.

As I found during the Hearings, the Agency is certainly capable of providing unredacted documents, and the Agency can respond promptly to information requests, if it so chooses. However, here, the Union had to follow-up several times before the Agency finally produced the information on October 21, 2021, nearly *three (3) years* after the Union originally filed its request. While dicta, the Agency's refusal to produce the Voluntary Services Specialist promotion package documents in a timely manner is a clear violation of the Agreement at Article 49, Section 5:

[24] Black's Law Dictionary (8th ed. 2004).
[25] Remington Award at page 22 (emphasis added).

> If the Union makes a request under 5 USC 7114(b)(4), the Department agrees to provide the Union, upon request, with information that is normally maintained, reasonably available, and necessary for the Union to effectively fulfill its representational functions and responsibilities. This information will be provided to the Union within a reasonable time and at no cost to the Union.

More recently, on February 22, 2022, the Agency notified the Union that any other documents pertinent to the Union's request, were destroyed, pursuant to the Agency's document retention policy. Clearly, the Agency knew, or should have known, the Grievance was still pending when the Agency destroyed the documents. Destroying evidence plainly cannot have been in good faith and can only be seen as an admission that the evidence would be harmful to the Agency.[26] I also note that a failure to provide information is an unfair labor practice under 5 USC § 7116 (a)(8). For this additional reason, the Grievance is arbitrable.

Is Mr. Ellis' Race Discrimination Claim Concerning the Voluntary Services Specialist Detail Barred in this Proceeding?

Yes. The Agency asserts that Mr. Ellis' allegation that he was discriminated and harassed against because of his race when the Agency failed to detail him into the Voluntary Services Specialist position, is precluded by his EEOC complaint.[27] I agree, as this allegation is clearly barred by § 7121(d) of the Federal Service Labor-Management Relations Statute, under the issue preclusion doctrine. Even assuming, *arguendo*, issue preclusion doesn't apply, any such allegation is also probably outside the deadline to timely file a grievance.[28]

Having said that, I couldn't find *anywhere* in the EEOC complaint or in the EEOC investigation report, where Mr. Ellis alleged that the Agency subjected him to disparate treatment

[26] *See Kirkendall v. Dep't of the Army*, 573 F.3d 1318, 1325-27 (Fed. Cir. 2009) (negative inference from spoliation of evidence).
[27] *See* Agency's Post-Hearing Brief at pages 21-23.
[28] *See* Article 43, Section 7, Step 1: An employee and/or the Union shall present the grievance to the immediate or acting supervisor, in writing, *within 30 calendar days* of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature (emphasis added).

based on his Union affiliation. Moreover, while not evidence, I asked Mr. Jordan, who represented the Union at the Hearings:

> 534
> 20 ARBITRATOR GABA: So, Mr. Jordan, let me see
> 21 if I -- if I understand. Is it your argument that
> 22 Mr. Ellis's [sic] grievance is based solely on his Union
> 23 activity.
> 24 MR. JORDAN: Yes, sir.

Mr. Jordan's statement is reflected in the Union's Post-Hearing Brief, which relies *solely* on the theory that Mr. Ellis was not selected for the Voluntary Services Specialist position because of his Union affiliation. As the FLRA has held:

> The legal framework to determine whether a grievance is barred by an earlier-filed ULP charge is well established. As set forth above, § 7116(d) provides, in relevant part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as [a ULP] . . . *but not under both procedures*."
>
> The Authority has held that "this wording precludes duplicate filings of an issue *actually raised* in the grievance and [ULP] forums [but] does not extend to an issue [that] the aggrieved party could have, but did not, raise in [an] earlier[-]selected forum." The Authority has further held that "in order for an earlier-filed ULP charge to bar a grievance under § 7116(d), the issue that is the subject matter of the grievance must be the same issue that is the subject matter of the ULP charge."
>
> In this regard, "the Authority will find that a grievance and a ULP charge involve the same issue when they arise from the same set of factual circumstances *and advance substantially similar legal theories.*" Regarding the "substantially similar-legal-theories" requirement, the Authority has long held that "an alleged statutory violation relies on a different legal theory than an alleged contract violation, and, as a result, a ULP charge alleging a violation of the Statute does not result in a § 7116(d) bar on a subsequent grievance alleging a breach of the parties' agreement." And "the determination of whether § 7116(d) applies to . . . the grievance before the [a]rbitrator depends on the content of the [u]nion's earlier[-]filed ULP charge – and *not* on any subsequent analysis of the charge by [an RD]."[29]

[29] *American Federation of Government Employees, Local 919 and U.S. Department of Justice* 68 FLRA No. 94, 573-574 (May 14, 2015) (footnotes omitted, emphasis in the original).

Here, Mr. Ellis did not advance a "substantially similar legal" theory (i.e., disparate treatment because of Union animus) in his EEOC complaint; his EEOC complaint was strictly limited to an allegation of race discrimination.

Further, in this matter, the Union has shown a number of contractual violations by Ms. Jackson, who is African American; clearly, she was not motivated by Mr. Ellis' race, but rather by his Union affiliation and use of Official Time. Thus, the issue of whether Mr. Ellis was not selected for the Voluntary Services Specialist because of the Agency's alleged union animus, is not precluded. In that regard, based on the inference evidence discussed below, the Agency's failure to *detail* Mr. Ellis can, and will, be considered as evidence on the issue of whether the Agency's *non-selection* of Mr. Ellis was based on Union animus.

Did the Union Establish that the Agency's Failure to Select Mr. Ellis for the Voluntary Services Specialist Position Was Based on Union Animus?

Yes. The Agency asserts:

> The Union has the burden of proving by preponderance of the evidence its claims of disparate treatment and of retaliatory non-selection. *See AFGE, L704 and EPA, Reg. 5*, 118 LRP 29613 at 9 (2017). In claims of disparate treatment raised in the context of Title VII of the Civil Rights Act of 1964, courts use the burden-shifting approach articulated in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973). In a non-selection case, a grievant establishes a *prima facie* case of discrimination by demonstrating that:
>
> (1) they belong to a protected group; (2) they applied for and were qualified for the positions [sic] sought; (3) they were not selected for the position; and (4) the employer selected persons who were not in the protected groups.
>
> Once a *prima facie* case is established, the Agency must articulate a legitimate non-discriminatory reason for its employment action. Then, the burden shifts to the grievant to establish that the Agency's proffered reason is merely a pretext for discrimination.
>
> Here, assuming, arguendo, that the Union met its initial *prima facie* burden as to discriminatory non-selection, it cannot establish that the Agency's legitimate, non-discriminatory reasons for selecting Franklin Day to the

> Voluntary Services Specialist position were pretext to discriminate against Kevin Ellis.[30]

This is an excellent legal argument, and I would agree with the Agency, but for the fact that the record is *replete* with preponderant evidence of the Agency's union animus against Mr. Ellis, *all* of which was essentially *unrebutted* by the Agency. Simply put, based on the below analysis of the proven facts and the inferences that can be drawn from those facts, the Union established a *prima facie* case, and the Agency offered no rebuttal *evidence* that the selection of Mr. Day was for legitimate, non-discriminatory reasons.

1. The Voluntary Services Specialist *Detail*

As set forth above, the Agency's failure to "detail" Mr. Ellis to the Voluntary Services Specialist position is considered *solely* for purposes of determining whether the Agency's non-selection was impermissibly based on the Agency's union animus. Here, there are several facts that lead me to conclude that the Agency's failure to detail Mr. Ellis into the Voluntary Services Specialist position was based on union animus. Those facts include:

- In 2018, there were two (2) employees in the Voluntary Services Assistant classification, Mr. Ellis and Mr. Day.

- Mr. Garrett credibly testified, the "Voluntary Services Assistant is *double encumbered* due to Mr. Ellis being a hundred percent Union president" (emphasis added).

- The dictionary definition of "encumbered" means:
  1 : weigh down, burden
  -tourists encumbered by heavy luggage
  2 : to impede or hamper the function or activity of: hinder
  -negotiations encumbered by a lack of trust
  3 : to burden with a legal claim (such as a mortgage)
  -encumber an estate[31]

[30] Agency's Post-Hearing Brief at pages 9-10.
[31] *Merriam-Webster's Dictionary* (New Edition, 2021).

- Based on the plain and ordinary meaning of the word "encumbered," Mr. Garrett obviously considered Mr. Ellis' Union affiliation and use of his contractual Official Time to be a *"double" burden* on the Agency.

- Mr. Garrett conceded under oath that Mr. Ellis was "qualified" in 2018 to be detailed into the Voluntary Services Specialist classification.

- Mr. Garrett credibly testified that he did not even "*consider*" detailing Mr. Ellis "because Mr. Ellis was serving on a hundred percent official time as Union president during this time" (emphasis added).

- There is no evidence that Mr. Day ever served the Union in a representative capacity, which lends credibility to the fact that Mr. Garrett *deliberately* chose to detail Mr. Day because he did not represent the Union and did not use Official Time due to any Union representation responsibilities.

- Conversely, based on the overall evidence, Mr. Ellis was using a considerable amount of Union Official Time at the time the Agency decided to detail Mr. Day to the Voluntary Services Specialist classification.

- Before authorizing the detail to Mr. Day, Mr. Garrett assisted Mr. Day with updating his resume but did *not* assist Mr. Ellis. More likely than not, Mr. Garrett assisted Mr. Day because Mr. Garrett specifically chose to detail Mr. Day for the Voluntary Services Specialist detail, again, because he did not have any Union representative responsibilities.

- Mr. Garrett credibly testified that he did not consider the seniority status of the two (2) qualified employees when he made the determination to detail Mr. Day into the position.

- Mr. Ellis clearly had more seniority than Mr. Garrett.

- Based on Mr. Ellis' superior seniority status, Mr. Garrett, on behalf of the Agency, violated the Agreement at Article 12, Section 1.D.2, which states:

  > The following procedures *shall* apply when offering noncompetitive details of 10 consecutive workdays or more to both classified and unclassified positions:
  >
  > ***
  >
  > 2. If more employees volunteer than vacancies exist, the Department will select from the qualified volunteers. *Seniority will be the selection criterion*, except when management demonstrates and determines that the position to which an employee will be detailed requires unique skills and abilities that are not possessed by another qualified employee or that a medical or operational need requires or precludes the detail of a particular employee (emphasis added).

- The Agency initially detailed Mr. Day into the Voluntary Services Specialist position on June 10, 2018.

- Mr. Garrett admitted under oath that he "believed" he read the Agreement at Article 12, D.1., and yet he did not ask Mr. Ellis if he wished to be detailed into the Voluntary Services Specialist position *before* the Agency detailed Mr. Day in June 2018. The Agency's failure to canvass Mr. Ellis violates Article 12, Section D.1.:

  > The Department *will* canvass the qualified employees to determine if anyone wishes to be detailed (emphasis added).

- The dictionary definition of the word "*will*" means: "used to express a command, exhortation, or injunction."[32] Based on the plain and ordinary meaning of the word "will," the Agency did *not* have discretion to detail Mr. Day, without *first* canvassing Mr. Ellis, to determine if Mr. Ellis wished to be detailed to the Voluntary Services Specialist position. Another violation of the Parties' Agreement.

- The Agency did not provide a written copy of the Detail Notice to Mr. Ellis as the local union President; this was a violation of Article 12, Section 1.C:

  > The Department will provide notification of all details to the local union President. Where the detail did not result in changes to conditions of employment, the notification will be at least weekly. Where changes to conditions of employment would result, the Department will provide reasonable advance notice. When a detail is known far enough in advance and affects conditions of employment, the notification should occur as soon as practicable but *no later than 10 days prior to the employee being detailed* (emphasis added).

- The Agency did not notify Mr. Ellis that Mr. Day had been detailed to the Voluntary Services Specialist position until July 20, 2018, more than a month after the Detail Notice was issued. This is another violation of the above language.

- Mr. Garrett credibly testified that he (Mr. Garrett) did not "*want*" Mr. Ellis in the Department because Mr. Ellis was "*a hundred percent Union President*" (emphasis added). Mr. Ellis corroborated Mr. Garrett's testimony in that regard.

- Just two (2) days before Mr. Garrett informed Mr. Ellis that he did not "want" Mr. Ellis in the Department, Ms. Johnson, on behalf of the

[32] *Merriam-Webster's Dictionary* (New Edition, 2021).

Agency, notified the Union that it would not approve any Official Time, effective July 18, 2018, through September 30, 2018. Coincidentally (or perhaps not), Ms. Johnson was Mr. Day's former supervisor. Unfortunately, Ms. Johnson did not testify at the hearing, so I simply do not know all the reasons the Agency made this decision. More likely than not, the Agency's refusal to approve Official Time violates Article 48, which specifies:

> **Section 1 – Purpose**
>
> A. Official time as a necessary part of collective bargaining and related activities is in the public interest. The parties recognize that good communications are vital to positive and constructive relationships between the Union and the Department. These communications should facilitate and encourage the amicable settlement of disputes between employees and the Department involving conditions of employment and should contribute to the effective and efficient conduct of public business. They further recognize that this consolidated unit is very large and complex and requires Union coordination of its representational activities at several levels.
>
> B. As provided in 5 USC §7131, official time shall be granted as specified in law and in any additional amount the Department and the Union agree to be reasonable, necessary, and in the public interest. Official time shall be granted for activities as specified in law and in amounts specified by this Agreement or otherwise negotiated.
>
> ***
>
> D. The minimum amounts of official time described in Paragraph A in this Section are not intended to limit the amount of official time that can be negotiated by the parties locally.

- The Parties have been involved in several contentious arbitrations concerning the use of Official Time, particularly in the past four (4) years. The Union has been successful in each of these arbitrations (barring the *Kane* Award, which the FLRA overturned on procedural grounds).

- The Union was forced to file exceptions with the FLRA for two (2) of the Awards because the Agency refused to comply with the Award. The FLRA reached settlement agreements with the Agency. In both settlement agreements, the Agency agreed to comply with both Awards.

- In the most recent Award, the Remington Award, Arbitrator Remington opined:

  > The record in this matter is filled with arbitration awards and an FSIP decision dealing with official time. While none of these are directly relevant to the instant dispute over bargaining unit count, *it is readily apparent that the Employer, specifically in the last four years, has attempted to restrict the Union's legitimate and proper use of official time in a number of ways*.[33]

- I agree with Arbitrator Remington's assessment that it is "*readily apparent*" that the Agency has attempted to restrict the Union's legitimate and proper use of official time as set forth in the underlying Grievance. I reach this finding based on the overall evidence presented at the Hearings.

Based on the overall record, particularly in light of the increasing number of arbitrations that occurred between the Parties, it is reasonable to infer that Mr. Garrett deliberately chose not to detail Mr. Ellis into the Voluntary Services Specialist position, specifically because Mr. Ellis used "Official Time" to carry out his duties as the Union's local President. In doing so, Mr. Garrett impermissibly linked Mr. Ellis' legitimate use of Official Time to Mr. Garrett's perception of Mr. Ellis' ability to perform the duties of the Voluntary Services Specialist position. In a similar case with a similar fact pattern, the FLRA held:

> The standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement.
>
> ***
>
> The parties do not dispute that Union activity increased at the Center from 1988-89 to 1989-90 and that Roach's use of official time increased from

[33] Remington Award at page 21 (emphasis added).

> approximately 2 percent of her time in 1988-89 to approximately 28 percent of her time in 1989-90. The parties also do not dispute that despite this increase in official time use, Roach performed basically the same amount of work during both periods.
>
> During this time of increased Union activity, Henry made a statement to Roach linking Roach's use of official time with the timeliness of her work. *By linking Roach's protected activity with Henry's perception of her performance, Henry effectively discouraged Roach from engaging in further protected activity.*[34]

In sum, based on the above facts and the applicable FLRA case cited above, I have no choice but to conclude that, more likely than not, the Agency's failure to detail Mr. Ellis into the Voluntary Services Specialist position was based on Mr. Ellis' Union affiliation, which clearly violates the Agreement, at Article 17, Section 2:

> Under 5 USC 7102, each employee shall have the right to form and join a Union, to *act as a designated Union representative*, and to assist the Union *without fear of penalty or reprisal*. This right shall extend to participation in all Union activities including service as officers and stewards/representatives. A bargaining unit employee's grade level, or duties shall not limit the employees' right to serve as a Union official, to represent the bargaining unit or to participate in any Union activities (emphasis added).

More likely than not, the Agency's failure to detail Mr. Ellis also violates Article 17, at Section G.:

> An employee who exercises any statutory or contractual right shall not be subjected to reprisal or retaliation, and *shall be treated fairly and equitably*.[35]

2. The Voluntary Services Specialist *Selection*. The Union also presented a plethora of unrebutted evidence establishing that the Agency demonstrated animus against Mr. Ellis due to his Union affiliation when it chose to select Mr. Day, and not Mr. Ellis, for the vacant Voluntary Services Specialist position. These facts include, but are not limited to:

[34] *National Federation of Federal Employees Local 466 and U.S. Department of Agriculture*, 49 FLRA 1375 (May 18, 1994).

[35] The undersigned makes no finding as to whether the Agency either did or did not discriminate against Mr. Ellis based on his ethnicity.

- The Agency issued the vacancy Announcement for the Voluntary Services Specialist promotion on August 28, 2018, *the exact same day* that the Agency proposed to remove Mr. Ellis. Based on the timing of the proposed removal, one can reasonably infer that, more likely than not, the Agency expected that Mr. Ellis would be removed from service, or would otherwise be unavailable to apply, or interview, for the vacant Voluntary Services Specialist position.[36]

- As of August 28, 2018, the date of the Announcement, Mr. Ellis worked in the Voluntary Services Assistant classification for eleven (11) years, whereas Mr. Day had worked in the same classification *for less than one (1) year*. Mr. Day clearly had less experience than Mr. Ellis. Moreover, Mr. Ellis' resume from 2018 establishes that Mr. Ellis' KSAOs were superior to those of Mr. Day.

- Based on the preponderance of the evidence, Mr. Ellis was imminently more qualified to be promoted to the Voluntary Services Specialist classification, having been rated by Human Resources as "*qualified at GS-9 level*." However, there is no evidence that the Agency communicated Mr. Ellis' qualification level to the Panel. Given that the Agency failed to communicate Mr. Ellis' qualification level to the Panel, a reasonable fact finder could infer that anti-union animus contributed to the challenged hiring decision.[37]

- Mr. Garrett did not consult with the Union before personally selecting the Panel, a violation of Article 23, Section 10.B.2.:

> Panels for bargaining unit positions *will* include *two bargaining unit employees* chosen *with the concurrence of the local union*. Absent mutual agreement, the Department reserves the right to appoint panel members following discussions with the local union and informing the local union of the reasons for its decision (emphasis added).

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[36] *See, e.g.*, *S&B Safety Systems, LLC*, 370 NLRB No. 90 (2021), where the Board unanimously adopted the Administrative Law Judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging an employee for engaging in union activities. Specifically, the Board held:

> In finding that the General Counsel met his burden of proving that the Respondent bore animus toward Stroup's union activity, *we rely only on the timing of the discharge and evidence of pretext* as found by the judge, including the Respondent's shifting explanations for Stroup's discharge, its failure to conduct a meaningful investigation of Stroup's production error, and its disparate treatment of Stroup for committing that error.

S&B Safety Systems, LLC, 370 NLRB No. 90 at pages 1 and 2 (emphasis added).

[37] *See e.g., Nat'l Labor Relations Bd. v. FES*, 301 F.3d 83, 91 (3rd Cir. 2002), which held:

> Finally, we believe that a reasonable fact finder could infer that anti-union animus contributed to the challenged hiring decisions from the testimony that the union applicants possessed the qualifications that FES itself advertised as belonging to the "ideal" candidate, yet FES hired instead applicants who lacked the advertised qualifications.

Again, use of the word "*will*" makes it clear that the Union *must* concur with the Agency's choice of employees to serve on the Panel.

- Moreover, based on the above language, the Agency failed to comply with the Agreement by choosing only one (1) bargaining unit member (Ms. Campbell) to serve on the Panel.

- Not only did the Agency fail to consult with the Union, but the Agency also selected an employee, Mr. Wareing, to serve on the Panel, whom Mr. Garrett *personally knew*.

- Furthermore, Mr. Garrett personally selected the Panel using methods that are not outlined in the Agreement (e.g., he attended meetings with other chiefs and asked if anyone would "volunteer"). Because Mr. Garrett hand-picked the Panel without first consulting with the Union, the reasonable inference is that Mr. Garrett directly communicated his expectation that the Panel should "select" Mr. Day, and not Mr. Ellis, because of Mr. Ellis' Union affiliation and use of Official Time.

- The Agency did not provide a copy of the Announcement to the Union, either before, or at the time, the Announcement was posted, a violation of Article 23, Section 8.H.:

  > The Department agrees to provide a copy of vacancy announcements to the local union at the time of or prior to postings. In addition, the job analysis, without the rating guide, will be provided to the local union within the area of consideration.

- The Agency failed to instruct the Panel on the "tasks necessary" for the Panel to perform, a violation of Article 23, Section 10.B.1.

  > Panel members *shall* be instructed in the tasks necessary to perform the panel's function (emphasis added).

- The Agency failed to provide the Panel with all the necessary information to complete its function, a violation of Article 23, Section 10.C.:

  > The Department *will* provide the promotion panel with all of the necessary information for completing its function (emphasis added).

- The Agency failed to instruct the Panel to develop KSAOs for the Voluntary Services Specialist position, a violation of Article 23, Section 9.C.:

  > KSAOs *will* be established by a panel which will conduct job analysis and other prescribed duties (emphasis added).

- The Agency failed to refer Mr. Ellis and Mr. Day "in order of their entry on duty date" to the Selecting Official for consideration, violating Article 23, Section 10.D.1.a:

> When there are eight or fewer, (nine for two vacancies, ten for three, etc.) qualified promotion candidates, they *will* be referred *in order of entry on duty date* at the current Department facility to the selecting official for consideration without rating and ranking (emphasis added).

- Had the Agency complied with the Agreement, the Agency would have, and should have, referred Mr. Ellis to the Selecting Official as the first candidate, and Mr. Day as the second candidate, based on their "order of entry on duty date."

- The Agency *preselected* Mr. Day on September 18, 2018, *before* the Panel had even interviewed the applicants. The Agency offered no evidence as to *why* this occurred. More likely than not, the Agency preselected Mr. Day because of the Agency's bias against Mr. Ellis as the Union President.

- The Agency *preselected* Mr. Day for a second time on October 9, 2018, before the selection process was complete. Again, the Agency offered no evidence that would rebut the fact that, more likely than not, the preselection occurred because of the Agency's animus against Mr. Ellis due to his Union affiliation.

- The Agency allowed Ms. Jackson and Ms. Campbell to use subjective criteria such as the "it factor," when rating the candidates' resumes and interviews. Not only is using criteria such as the "it factor" strange and bizarre, it is a clear violation of Article 23, Section 9.D.1 and 2:

> 1. KSAOs *will* be developed by:
>
> a. Identifying the major tasks/duties of the position through a job analysis based on information contained in the PD, career ladder plan, qualification standards, and/or classification standards; and,
>
> b. Identifying the worker characteristics and demonstrated abilities (KSAOs) needed to perform the job.
>
> 2. KSAOs are defined as follows:
>
> a. Knowledge is a body of learned information used directly on the job;
>
> b. Skill is a present competence to perform a skill, and unlike an ability, involves observable, quantifiable, and measurable performance parameters such as typing and pipefitting;

c. Ability is the power to perform an activity at the present time. (An ability is evidenced by the performance of some activity or work and should not be confused with an aptitude which is only a potential for performing an activity. An aptitude cannot be determined or measured by information in applications.) (emphasis added).

- The Agency allowed Ms. Jackson to use strange and subjective criteria, such as a "character summary," rather than checking references that could speak to the candidates' KSAOs. This also is a clear violation of Article 23, Section 9.D.1 and 2 (see above bullet point).

- Ms. Jackson did not obtain references from Mr. Ellis. More likely than not, if Ms. Jackson had requested references, Mr. Ellis would have provided them.

- Adding insult to injury, the Agency allowed Ms. Jackson to contact one of *Mr. Day's* references to talk about Mr. Ellis' "character." Again, this fact lends credibility to the Union's argument that the Agency selected Mr. Day, and not Mr. Ellis, because of the Agency's union animus.

- The Agency allowed Ms. Jackson to *deliberately* change her resume score sheets, so that Mr. Day would receive a higher score. Again, this demonstrates the length the Agency went to avoid selecting Mr. Ellis, who frequently used "Official Time."

- During the selection process, the Agency failed to keep Mr. Ellis informed concerning the status of his application for the Voluntary Services Specialist position. This constitutes a violation of Article 23, Section 15.A.:

Section 15 - Keeping Employees Informed

A. Employees who apply for and inquire about a specific promotion action will be given the following information by the HR Office or the selecting official:

1. Whether they met the minimum qualification requirements;
2. Whether they were in the group from which selection was made;
3. Who was selected; and,
4. Upon request, the selecting official shall provide a verbal statement of the reason(s) why the employee was not selected and/or a written statement regarding what areas, if any, he/she should improve to increase their chances for future selection.

- The Agency offered no evidence that rebuts the Union's contention that, despite the fact that Ms. Jackson was officially the "Selecting Official," *Mr. Garrett* actually selected Mr. Day for the Voluntary Services Specialist position. The Union's contention that Mr. Garrett ultimately made the decision is supported by Ms. Jackson's credible testimony:

  > So, you know, as far as a layman hears the word selecting official, they might believe that it's that one selecting official that has the ultimate final decision, regardless of the scores *and that is not so*.

- Upon receiving his "official" promotion on November 25, 2018, Mr. Day was promoted at the GS-7, Step 7 level; whereas, Mr. Ellis was "qualified as GS-09 level," further evidence that Mr. Ellis was more qualified for the Voluntary Services Specialist position than Mr. Day, likely should have been selected for the Voluntary Services Specialist position.

- After the Union filed the instant Grievance, the Agency *willfully* denied the Union's request for information and failed to provide any responsive documents until *three (3) years* after the original request for information was filed. The Agency then revealed, in February 2022, that the Agency had *destroyed* any further evidence concerning the promotional package. As I noted above, the Agency clearly committed an unfair labor practice. Moreover, these actions violate the Agreement at Article 49, Section 5:

  > If the Union makes a request under 5 USC 7114(b)(4), the Department agrees to provide the Union, upon request, with information that is normally maintained, reasonably available, and necessary for the Union to effectively fulfill its representational functions and responsibilities. This information will be provided to the Union *within a reasonable time* and at no cost to the Union (emphasis added).

  Clearly, waiting nearly three (3) years to produce the information, then destroying whatever other information that could have been available, is not "*within a reasonable time*" and constitutes a spoliation of evidence. Under circumstances such as this one, the FLRA has held that a party may be sanctioned for destruction of evidence that it knows, or reasonably should know, is relevant to reasonably foreseeable litigation.[38]

- Lastly, there is simply no *evidence* establishing that Mr. Garrett ever changed his opinion between July 20, 2018, when he stated he did not "want" Mr. Ellis in his Department *because he was the Union President and used "a hundred percent"*

[38] *Soc. Sec. Admin., Dall. Region, Dall, Tex.,* 51 FLRA 1219, 1225-26 (1996), citing *Turner v. Hudson Transit Lines, Inc.,* 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991).

> *official time*, and November 25, 2018, the date the Agency officially selected Mr. Day for the Voluntary Services Specialist position.

In sum, based on the overall record, particularly Mr. Garrett's raw honesty in testifying that he did not "want" Mr. Ellis in his Department, that he unilaterally detailed Mr. Day, and he failed to follow the procedures set forth in the Agreement in hand-picking a Panel to select Mr. Day for the Voluntary Services Specialist position, the Union established that Mr. Ellis was not selected for the Voluntary Services Specialist position based on the Agency's animus against Mr. Ellis for taking "Official Time" to tend to his Union duties as the local Union President. This is a clear violation of Article 23, Section 1:

> Promotions shall be based *solely* on job-related criteria and without regard to….labor organization affiliation (emphasis added).

Indeed, I agree with the Union that "[t]his Grievance is based on the *intentional misconduct* of the Agency by refusing to promote Mr. Ellis to the Voluntary Services Specialist GS-9, because of his protected status of Union affiliation."[39]

Having said that, this isn't a case that is *only* about union animus; it also concerns a substantial number of violations of the Agreement as outlined above, including the requirement that Mr. Ellis be listed as number one (1) on the list submitted to the Selecting Official. The bottom line is, even *if*, for argument's sake, Agency did not select Mr. Ellis because of union animus, the Union met its burden of proof, and easily established that the Agency committed *multiple* violations of the Agreement throughout the selection process, which the Agency simply failed to rebut. For these reasons, I have no choice but to sustain the Grievance.

[39] Union's Post-Hearing Brief at page 98 (emphasis added).

What is the Appropriate Remedy?

In its Post-Hearing Brief, the Union requests as a remedy:

> The Agency will within thirty (30) days appoint Mr. Ellis as a GS-9, Voluntary Services Specialist, provide back pay for the difference in salary from September 18, 2018, plus interest, to the present.[40]

The Union also requests:

> …..should the Grievance be sustained in whole or in part, the Union respectfully requests that the Arbitrator retain jurisdiction for purposes of resolving any question of attorney fees to which the Union may be entitled based on the Arbitrator's findings pursuant to the Back Pay Act and the Master Agreement…[41]

On the other hand, the Agency asserts that "Arbitrator Gaba lacks authority to award the Union's requested remedies."[42] In support of this argument, the Agency cites *Carl T. Hayden VAMC and AFGE L2382*, 103 FLRR-2 140 at 16 (2003), which held:

> Where there is nothing procedurally wrong with the way in which a certification list was created, there is nothing that allows a permissible encroachment into management's statutory right to select and promote a candidate.

I do not find the *Carl T. Hayden* case persuasive, as the record establishes that nearly every aspect of the recruitment and selection process for the Voluntary Services Specialist position was "*procedurally wrong*" because it did *not* comply with the process the Parties agreed upon in their contract. Notwithstanding, the Agency *could* be right that I lack authority to award the remedy requested by the Union, albeit for a different reason than the Agency asserted. For this reason, I am requiring the Parties to provide supplemental briefing on the issue of the remedy.

[40] Union's Post-Hearing Brief at page 97 (omitting reference to an exhibit).
[41] Union's Post-Hearing Brief at page 97.
[42] Agency's Post-Hearing Brief at page 17.

CONCLUSION

I have carefully reviewed all of the evidence, testimony and arguments by both Parties. While the Agency's counsel did an excellent job, both at the Hearing and in the Agency's Post-Hearing Brief, no amount of good lawyering could help the Agency overcome the Union's evidence that established that the Agency violated the Agreement in numerous ways and deliberately failed to promote Mr. Ellis because of his protected Union activities. *For these reasons alone,* the Grievance is sustained.

The conundrum for this Arbitrator is, what authority does the Arbitrator have to grant the remedy requested, based on *all* of the Arbitrator's above findings of fact? For this reason, I pose the following questions to the Parties to answer in supplemental briefing:

1. Does the Arbitrator have the power to grant the Union's requested remedy under the Agreement and/or Federal law?

2. If not, what shall the remedy be?

AWARD

The Grievance is sustained in part and denied in part. To the extent the Grievance alleges the Agency's non-selection of Mr. Ellis was based on Mr. Ellis' race, the Grievance is denied. The Grievance is sustained on the issue of the Agency's non-selection of Mr. Ellis for the Voluntary Services Specialist position because of union animus and because of the Agency's multiple contract violations.

Within fourteen (14) days of the date of this Award, the Parties shall meet-and-confer and determine a briefing schedule for submitting supplemental Post-Hearing Briefs (Supplemental Briefs) that answer the Arbitrator's questions, posed above. The Parties shall communicate the briefing schedule in writing to the Arbitrator within that same timeframe. Per Article 44, Section

G, upon receipt of both Parties' Supplemental Briefs, the Arbitrator shall issue a Final Award on the sole issue of the remedy, within sixty (60) days.

The Arbitrator shall retain jurisdiction over this Grievance up to and including one hundred twenty (120) days from the date the Final Award is issued, to allow the Parties an opportunity to address any issues associated with the awarded remedy, and to allow for any attorney's fees and/or expense reimbursement claims asserted under the Back Pay Act.

The Arbitrator's fees for this Second Interim Award shall be borne equally by the parties, as provided for in Article 44, Section D.

/s/ David Gaba
David Gaba, Arbitrator
Lincoln, Nebraska
DATED: April 13, 2023