BEFORE AN ARBITRATOR APPOINTED THROUGH THE FEDERAL MEDIATION AND CONCILIATION SERVICE

In the matter of:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2338,

Union,

and

FMCS Case No. 220722-07856
(Office Space Grievance)

U.S. DEPARTMENT OF VETERANS AFFAIRS, JOHN J. PERSHING VA MEDICAL CENTER, POPLAR BLUFF, MISSOURI,

Agency.

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ARBITRATOR'S AWARD

Appearances:

For the Union (hearing):	Kevin Ellis, President Jacob Jordan, Union Advocate AFGE Local 2338 John J. Pershing VA Medical Center 1500 N Westwood Blvd Poplar Bluff, MO 63901
For the Union (brief):	Robert L. Smith, Esq. 502 Vine Street, Suite 2 Poplar Bluff, MO 63901
For the Agency:	Le'ta H. Wicker Erica Werner Human Resource Specialists (ER/LR) John J. Pershing VA Medical Center 1500 N Westwood Blvd Poplar Bluff, MO 63901
Arbitrator:	Christopher M. Shulman Shulman ADR Law, P.A. 13014 N. Dale Mabry Highway, No. 611 Tampa, FL 33618

PROCEDURAL HISTORY

This matter was submitted under the grievance arbitration provisions of the applicable collective bargaining agreement. JX-1, Articles 43 and 44.[1]

Following a cancelled January 2023 hearing, the undersigned arbitrator conducted a short prehearing conference with the Parties on March 15, 2023, and the matter was heard by ZOOM videoconference (by agreement of the Parties) on March 17, 2023, and April 18, 2023. A court reporter attended the hearings, and the Parties stipulated a transcript would be prepared and constitute the official record of the proceedings. (T.6/11 – 24)[2]

At hearing, the Agency raised an issue regarding timeliness as to the principal issue, regarding office space, as well as an assertion of issue preclusion, on the basis that an earlier arbitration award (JX-6, "the Remington Award") had addressed the substance of the present matter. After hearing both Parties' arguments thereon, I ruled that the office space issue was not untimely, under the so-called "continuing violation" theory, and that the Remington Award (JX-6) did not address all the concerns raised in the present matter. (T.7/3 – 15/7) Those rulings are expressly confirmed herein (keeping in mind that whether the Agency later complied with the Remington Award was, necessarily, *not* included within Arbitrator

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[1] Throughout, references to Joint Exhibits are denoted as "JX-[n]," where "[n]" corresponds to the number of the exhibit. Thus, JX-1 refers to Joint Exhibit 1, the Collective Bargaining Agreement ("CBA") between the Parties. Union Exhibits are denoted as "UX-[n]," and Agency Exhibits are denoted as "X-[n], using the same convention. (Note, in its submissions, the Agency used the letter "M" instead of the letter "A". While this award uses the convention "AX-" instead of "MX-", the numbering of the Agency Exhibits tracks, whether MX- or AX is used in the transcript or elsewhere.)

Additionally, references to the transcript follow the convention of "T.[p]/[l]", where "[p]" refers to the page number, and, where given, "[l]" refers to the line numbers. Thus, Day T.7/1 – 8, refers to the hearing transcript, page 7, lines 1 – 8. (Note, while there were two days of hearings, the transcript for both days are numbered sequentially, thus, the transcript for the second day of hearings begins on the page after the end of the first day's transcript.)

[2] The Parties were kind enough to allow an arbitration trainee, Britney Beck, who is pursuing admission to the FMCS arbitrator roster, to attend the proceedings.

Remington's Award).

The Parties did not stipulate to the issue; instead, the Parties each stated their respective proposed issues and the undersigned indicated he would determine the statement of the issue(s) to be decided based on the record. (T.15/13 – 19/9) Thereafter, over the course of two days of hearings, the Parties made opening statements, presented the testimony of three witnesses (Local 2338 Union President Ellis testified twice, in the Union's Case in Chief and in Rebuttal; Management presented the testimony of Pershing VAMC Associate Medical Center Director Kimberly Adkins and Pershing VAMC Hospital Housekeeping Officer Stephen Keene), and proffered several exhibits accepted into evidence: eight Joint Exhibits (JX-1 to JX-8); twenty Union Exhibits (UX-1 to UX-5D, UX-6 to UX-20); and thirty Agency Exhibits (AX-1 to AX-30). In lieu of closing oral arguments at the conclusion of the hearing, the Parties agreed to submit post-hearing briefs.

I received the Parties' briefs by August 2, 2023 (with an agreed extension, the second Party's brief was emailed to me when I was out of the office, on July 31, 2023); I forwarded each Party's brief to the other on August 2, 2023, and closed the record that date. The Parties' Collective Bargaining Agreement ("CBA") specifies the award is due within 60 days following close of the record. Thus, this award was due Monday, October 2, 2023 (the first business day after the 60th calendar day from close of the record).

After reviewing the transcript, exhibits, and briefs, I have deliberated and hereby issue the following award.

ISSUE(S) PRESENTED

The Parties did not specifically stipulate to the issue for decision, but the CBA empowers me to determine the issue. CBA, Art. 44, § 2.F. The FLRA has likewise held such authority resides with the arbitrator: *U.S. Department of Defense Education Activity*, 56 FLRA 887, 891 (2000); *U.S. Immigration & Naturalization Service*, 34 FLRA 342 (1990).

For its part, the Union framed the issues differently at various stages of these proceedings. At Step 3 of the present Grievance process, the Union referred to the dispute, in its email transmitting the Grievance, as "Step Three Grievance Article 51." Therein, the Union referred to several CBA Arts. and ". . . any other relevant article contained within the master agreement and any other relevant article contained within the master agreement rule, and/or rule, law or regulation, to include Equal Employment Opportunity Commission," but only specifically recited Art. 51, regarding Union Use of Official Facilities. The Union simply stated its request for relief:

> Resolution:
>
> 1) The agency will provide the union with the necessary office space, equipment and resources necessary to fulfill its representational responsibilities.
>
> 2) The agency will reimburse the union for any related cost of not providing the union with necessary space, resources and equipment needed to fulfill our representational responsibilities.
>
> 3) Make the union whole with any other remedy necessary.

(JX-2) On the last business day before the hearing, however, the Union expanded its statement of the issues to the following:

> 1. Has the Department of Veterans Affairs, the VA, Veterans Health Administration, VHA; John J. Pershing VA Medical Center, hereinafter referred to as the Agency, violated the Parties' Master Collective Bargaining Agreement, or MCBA, when it failed/refused to provide necessary office space to the American Federation of Government Employees, AFGE, Local

2338, hereinafter referred to as the Union, in violation of Article 51, Use of Official Facilities? If so, what shall the remedy be?

2. Has the Agency continually violated the Parties' MCBA by failing/refusing to follow arbitration awards and determinations by the Federal Labor Relations Authority, FLRA, in violation of Article 2, Governing Laws and Regulations, and Article 44, Arbitration? If so, what shall the remedy be?

3. Has the Agency committed acts of repudiation of the Parties' MCBA, Article 47, Mid-Term Bargaining, Article 49, Rights and Responsibilities, and Article 51 in violation of 5 U.S. Code, Subsection 7116(a)(1), (5), and (8)? If so, what shall the remedy be?

4. Has the Agency continually refused or repudiated the Parties' Mid-Term Ground Rules, even after being instructed by Arbitrator Michael Jordan to bargaining [sic] in good-faith? If so, what shall the remedy be?

5. Finally, has the Agency created a pattern of refusing to negotiate in good-faith after the Medical Center Director, Assistant Chief of Staff, and Employee/Labor Relations Specialist were each disciplined for 12 to 15 days for whistleblower retaliation against a Bargaining Unit Employee (BUE)? If so, what shall the remedy be?

(T.15/22 – 17/6) When asked if this statement of the issues was contained in the original Grievance, the Union advocate stated it was, at JX-2, p.2. (T.17/23 – 18/12)[3]

The Agency did not agree with this statement of the issues, indicating the Union had not previously provided this expanded statement of the issues to the Agency. Instead, the Agency asserted the only issue of which it was aware was "the issue of additional office space." (T.18/13 – 25) Thus, in its prehearing submission, the Agency suggested framing the issues as, "Whether the Agency violated Article 51 of the [P]arties' Master Agreement when the Agency did not agree to additional office space." However, in its 3rd-Step Response to the Grievance, the Agency

[3] While, in the Step 3 Grievance, the Union stated it was ". . . reserving the right to amend if there were other violations discovered," the Union did not alert the Agency to any additional alleged violations submitted for decisions here until its statement of the issues immediately before and during hearing.

discussed at length certain other aspects of the Union's concerns regarding the Agency-provided office space, specifically:

- whether the Agency had complied with JX-2, the Remington Award (and JX-7, an FLRA ULP Settlement Agreement related to alleged failure to comply with the Remington Award);

- whether the Agency should have to reimburse the Union for the expenses the Union incurred for off-site storage and meeting space since the earlier Union Office was closed due to Executive Orders issued by President Trump (JX-4), which were rescinded by President Biden's subsequent Executive Order (JX-5) and addressed by a Global AFGE/VA Settlement Agreement (JX-8); and

- whether the Agency should provide the Union with additional office space.

(JX-3)

In short, both sides' presentation of the issue at hearing misstated their respective prior statements of the issues for decision: the Union sought to add to the scope of the issues and the Agency sought to remove discussed items from the issues submitted.

The Union sought to expand the issues beyond simple violation of Art. 51, to include the Agency's alleged refusal to bargain or violation of the mid-term bargaining provisions of the CBA (Union's Statement of Issue, items 3 – 5). However, these were clearly beyond the scope of the 3rd-Step Grievance, even taking into account the reservation of rights to amend the Grievance stated in JX-2. In fact, the Union did not actually place the Agency on notice of the expanded scope prior to the day before the hearing – despite the fact that this matter was originally scheduled for hearing two months earlier.

I do not believe the Parties' CBA contemplates that kind of surprise about something as fundamental as the substance of the dispute. Since grievance arbitration is best viewed as an extension of the Parties' bargaining process, *see, e.g.,* Charles B. Craver, Labor Arbitration as a

Continuation of the Collective Bargaining Process, 66 CHI.-KENT L. REV. 571 (1990), the Union's failure to raise timely the broadened scope of the grievance to be arbitrated actively foiled any attempts the Parties might have made to resolve those concerns earlier.[4] Having said that, as the substance of the issues as I have framed them above was discussed in the Agency's 3rd-Step Response, the Agency was placed on notice that these matters were being submitted to arbitration.

Accordingly, based on the evidence, the Parties' arguments, and the arbitrator's sense that both the CBA's grievance language and fundamental fairness contemplate limiting issues submitted solely to those which can fairly be stated to have been discussed by the Parties in the grievance process prior to invocation of arbitration, the undersigned determines the issue to be decided is:

> *Whether the Agency has violated CBA Article 51, with respect to the Union's Office Space at the Pershing VAMC since December 2021, both as interpreted by the Remington Award and otherwise, as to adequacy of the space, furniture, technology, and "necessary storage of confidential materials" and/or by failing to reimburse the Union its off-site storage and meeting space expenses, for the period since July 2021 forward,[5] and, if not, what shall the remedy be?*

As the Parties' collective bargaining agreement does not address the applicable burden of proof, and there appears to be no law, rule, or regulation requiring application of any specific

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[4] Moreover, as to whether this was just a one-off instance of inadvertent failure to disclose timely, I note the Agency quotes another arbitrator as having found this to have been a strategic pattern of the Union's: "[T]he Union decided that its best chance at success was to ambush the Agency at arbitration. And ambush, they did. . . . The Arbitrator must take notice of these events. The Union simply cannot be permitted to hide the ball until the arbitration stage, and ambush the Agency with undisclosed issues, testimony, and evidence, and then be permitted to prevail." *AFGE Local 2338 and Pershing VAMC*, FMCS Case No. 210226-04394 (Paull, Arb. Aug. 19, 2022), *quoted in* Agency Post Hearing Brief, at 18 – 19. (The arbitrator here notes that a better practice would have been for the Agency to provide the arbitrator with a copy of all arbitral awards the Agency wishes the arbitrator to consider, as FLRA does not attach the awards to the online versions of their Decisions on appeal of arbitrator awards. *See, AFGE Local 2338 and Pershing VAMC*, 54 FLRA No. 103 (73 FLRA 522 (May 17, 2023)) (appeal from referenced Arb. Paull award).)

[5] At hearing, Mr. Ellis stated the Union did not seek reimbursements for the period covered by JX-8, through July 19, 2021, the effective date of the National AFGE/VA Settlement Agreement. (T. 118/10 – 22)

burden, I have authority to apply the burden of proof I believe appropriate here. *United States Customs Service and National Treasury Employees Union*, 22 FLRA No. 68, at pp. 608–09 (1986), *cited in Department of Veterans Affairs and LIUNA Local Union 1056*, 49 FLRA No. 16, at p. 112 (1994). Accordingly, the Union has the burden of proof on the substantive contract interpretation issue. *See, e.g., Tamarack Materials, Inc.,* 138 Lab. Arb. (BNA) 522 (Arb. Van Kalker 2018) (citing authorities); ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 8th Ed. May (2016), p. 8-104.

RELEVANT CONTRACT PROVISIONS

ARTICLE 51 – USE OF OFFICIAL FACILITIES

Section 1 – Union Office Space

A. The Department recognizes the importance and value of the Union's mission and purpose. Accordingly, the Department agrees to furnish office space to the Union appropriate for carrying out its representational and partnership duties in locations easily accessible to employees and private citizens and of size, furnishings, and decor commensurate with other administrative offices within the facility. Office space shall be sufficiently private to ensure confidentiality to the maximum extent possible. The office(s) shall be of sufficient size for necessary storage of confidential materials.

B. Each office shall be equipped with adequate telecommunication lines for most advanced telecommunications technology used by the Department, fax, and computer capabilities equal to those used in the top-level administrative offices in the facility. The Department shall authorize and thereafter install or permit the installation of private data lines (high speed internet) and private phone lines.

C. The Department shall provide to National Union Officers, District Representatives, National Representatives, National Safety and Health Representatives, and other Union representatives, separate space, equipment, etc., as provided in this article.

Section 2 – Meeting Space

The Department will, on an as-needed basis, provide conference rooms as available for discussions between employees and Union officials. The Department will also provide suitable space for regular Union meetings. The Union agrees to exercise reasonable care in use of such space.

Section 3 – Telephone

The Department will make internal telephones and government long distance service available to the Union for handling representational duties and conducting labor-management relations. The Union will use government long distance service in a reasonable, prudent, and cost-conscious manner. Telephones provided to the Union shall have voice mail and speaker phone capabilities for representational and labor-management activities. In no instance will government long distance service be used for internal Union business.

Section 4 – Equipment and Technology

A. The Department will provide to each Union office the following:
    1. Fax machine;
    2. Personal computer with standard software, programs, and capabilities compatible with the Department's technology (examples of capabilities to be included are the ability to write to storage media, to host net meetings, and to run programs on storage media that contain audio and video files);
    3. Color printer;
    4. Remote access to the local area network (LAN);
    5. Remote access to the Department intranet;
    6. Access to e-mail, internet, intranet, and Departmental administrative functions (such as mail distribution lists, employee time and leave menu, etc.) in the Union office;
    7. Photocopier equal to administrative office level in the Union office and access to high-volume production equipment in the facility;
    8. Additional equipment may be negotiated locally;
    9. Additional equipment can be provided consistent with VA Handbook 6500 and current MOU.

B. It is understood that technology is being provided with an expectation that increased efficiencies will be realized for both the Department and the Union. It is expected that the Union will utilize such equipment and technology to communicate with and receive notices from the Department as provided elsewhere in this Agreement. The above list of equipment is not intended to be all-inclusive. As new technology becomes available, equipment/software/programs used by administrative office level officials shall be made available to the Union in a time frame consistent with availability with other administrative offices. Within 90 days after receipt of technology or equipment, the Department will work with the Union to identify and provide specific training to address concerns related to the use of technology to include security, reliability, and appropriateness of use. Nothing herein is intended to impact or change the provisions of any other article in this Agreement.

C. Maintenance, shuttle service (where available), and other customary and routine services and equipment, such as the telephone conferencing (currently Veterans Affairs National Telecommunications System (VANTS)) shall be provided to the Union office. Video conferencing/Live Meeting or successor systems shall be provided to the NVAC President's Office. The Department will make the public address system available to the Union for appropriate use.

. . . .

(JX-1, pp. 255 – 256)

FACTS AND ARGUMENT OF THE PARTIES

The facts in this case are not significantly in dispute.

The Department of Veterans Affairs, Veterans Health Administration, operates more than 150 medical centers and similar facilities around the United States, including the John J. Pershing Veterans Administration Medical Center ("Pershing VAMC" or "the Agency") in Poplar Bluff, MO. At all relevant times, the American Federation of Government Employees ("AFGE") Local Union 2338 ("the Union) has represented a bargaining unit comprised of employees of the Department of Veterans Affairs.

For some time prior to and including 2017, the Agency provided the Union with certain office space, Pershing VAMC Rooms 44 and 44B. In 2017, the Union grieved and, ultimately, in his August 2018 award, Arbitrator Remington found, that the "furnished office space" was inadequate in certain particulars, and required the Agency to provide, within 90 calendar days,

1) . . . [a] V-TEL unit, together with necessary equipment, comparable to that provided to the Medical Center Director and Associate Director. This unit will be wall mounted in the union office at a location chosen by the Union. In the event of any change in V-TEL units at the Medical Center, the Union will be notified in advance and will choose their replacement unit which will be installed by the Agency so as not to interrupt Union operations.

2) . . . [a] wall mounted television comparable to that in the quad suite. The television will be equipped with viewing channels selected by the Union.

3) . . . workstations chosen by the Union, compatible with those workstations depicted in the "blueprints/space plans AFGE office" exhibit offered into evidence at the hearing. The employer, at a minimum, will perform a Veterans Administration search for furniture in order to assist the Union in making its workstation selection. Once furniture has been selected, it will be shipped, installed and maintained at no cost to the union. The Union will choose its chairs for workstations and ergonomic equipment. The Union will be provided with dual monitors for all of its workstations.

4) . . . four (4) new locking file cabinets and bookshelves. The furniture will be selected by the Union and match other union furniture in style and color.

Arbitrator Remington denied the Union's request for "VeriDesk" (this term was not defined on JX-2 nor addressed in the present arbitration), carpet squares and a partial glass doors because such requests were beyond the scope of the grievance; he also denied the Union's request for an annual budget for office supplies, stating that was beyond the scope of Art. 51 of the CBA. (JX-6, at pp. 12 – 14)

On May 25, 2018, President Trump issued Executive Order 13837 (the "Trump EO"). As a result, the Union was forced to move off-site for the better part of some two to three years but was allowed to return to the same office space after President Biden issued EO 14003 (January 22, 2021), in pertinent part rescinding the Trump EO. (JX-4; JX-5) Thereafter, in July 2021, the AFGE and the Department settled grievances regarding the Trump EO in their VA-AFGE Settlement Agreement ("National Settlement"), JX-8.

Section I.B(4)D of the National Settlement specially discussed resolution of "Office Space and Storage Space" concerns, calling on the Agency to ". . . restore and provide all office space and storage space that AFGE formerly occupied, . . . as soon as practicable" and to reimburse ". . . out-of-pocket expenses for costs incurred to secure and maintain office space and storage

space, between the date the Agency implemented [EO] 13837, November 15, 2019, . . ." and the National Settlement's effective date. Section I.B(4)E required the Agency to provide "all equipment and technology" required by the CBA, and to reimburse the Union for its out-of-pocket expenses incurred for such equipment and technology in the same interval. (JX-8, p. 5)[6] Mr. Ellis testified that all the reimbursements called for in the Settlement Agreement, those through July 20, 2021, were properly made. (T. 118/10 – 22) Thereafter, at an unspecified date in "Fall 2021," the Union was allowed to move back into Rooms 44 and 44B.

In the interim, in May 2021, the Parties settled an Unfair Labor Practice charge the Union had filed with the Federal Labor Relations Authority; in its Charge, the Union had asserted the Agency had failed to comply with the Remington Award. In the resulting "FLRA Settlement," the Parties agreed that the Agency would promptly provide the Union with:

(1) A wall mounted television comparable to the one in the quad suite, equipped with viewing channels selected by the Charging Party consistent with the facility's existing cable package.

(2) Workstations chosen by the Charging Party comparable with those workstations depicted in the "blueprints/space plans AFGE office" exhibit offered into evidence at the hearing (hereinafter, "Blueprints Exhibit").

(3) Chairs selected by the Charging Party.

(4) Ergonomic equipment selected by the Charging Party; and

(5) Three new locking file cabinets and bookshelves selected by the Charging Party that match the other furniture in style and color.

(JX-7, pp. 2 – 3) To meet its obligations as to items (2) – (4), the Agency agreed to order new

[6] The Settlement Agreement addressed other items as well, including rescission of discipline meted out against certain named Union officials, including Mr. Ellis, as well as restoration of leave time that should properly have been characterized as Official Time.

furniture, unless it had no funds to do so. (*Id.*, at p. 3) Thereafter, between June and September 2021, the Parties cooperated in the selection of the furniture, etc. to be procured, including working with diagrams that had been presented during the arbitration before Arbitrator Remington. The Agency also put together renderings of the furniture and workspace that relied on the earlier drawings, but these renderings were, oddly, not to scale and did not reference any obstruction of any doors. The Union picked out which workstations/desks and chairs it wished but did not specifically determine the size of the furniture ordered; it relied on the initial drawings it provided from 2016 and the Agency's various renderings, especially AX-11 and AX-12. At a cost of $23,930.20, the furniture was slated for delivery in January 2022 but was actually delivered in December 2021. (T.198/25 – 208/19; AX-11 to AX-13, AX-15 to AX-18, AX-23)

The Union moved back into Rooms 44 and 44B in the Fall of 2021 and, as stated above, the furniture was delivered. Unfortunately, as it turns out, the workstations that were delivered were larger than the Union expected. Consequently, one of the workstations' privacy panels overlaps the door jamb from Room 44B to Room 44, and there is insufficient room to use some of the "nooks and crannies"[7] or to have the six-foot oblong conference table and chairs shown in the 2016 drawings.[8] (*Compare* MX-11, MX-12, and MX-15 *with* UX-6, UX-20 (pp. 7, 9 – 11, 14)) Moreover, the file cabinets the Agency provided at the time (in addition to those integrated into the workstations) were low, 2-drawer cabinets in a faux-wood finish that did not match the colors of the balance of the décor in the offices.

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[7] This is the arbitrator's term to describe the small spaces at the top right of Room 44B, immediately next to the main Room 44B entry doorway; the spaces are created by a structural member sticking out into the office, and the farthest right corner is not currently usable in the current configuration. (See UX-6, UX-20, p. 14)

[8] In subsequent discussions, the Union agreed to accept four "flip tables", which could be configured together as a conference table. (T.112, T.139, T.167)

On April 15, 2022, the Union filed its present Grievance at the 3rd Step, leading to the present arbitration.

The Union's Position.

The Union argues that the Agency has violated Art. 51 by not timely heeding the Remington Award or the subsequent FLRA Settlement, by not providing furniture that fits into the Union's current office space, by not providing proper storage cabinets, and by failing to reimburse it for its storage expenses and off-site meeting space since July 2021.

Further, separate and above the Remington Award/FLRA Settlement issues, the Union asserts that the current office space is simply too small to allow it to conduct Union business properly. In this regard, the Union states there is essentially no way to have confidential conversations as needed (since the Union assists bargaining unit members not only with traditional Union business but also with medical, disability, retirement, and similar matters, all of which require confidential space within which to speak with the bargaining unit members). Similarly, the Union states, the amount of paperwork the Union has to store, related to these other services the Union provides, has expanded greatly. On this point, the Union also notes that the bargaining unit has expanded significantly, so that, in addition to creation of and growth at various Community Based Outpatient Clinics (CBOCs) served by VAMC Pershing, the staff at VAMC Pershing itself has increased by more than 40% since 2018. Thus, with two full-time representatives (Mr. Ellis and Union Vice President Harold Lampley) and up to six other part-time Union officials needing to use the space, the Union has outgrown the two small rooms the Agency has provided, stating the rooms are simply inadequate to allow the Union to conduct its business properly.

Thus, the Union urges me to sustain the Grievance, to require bargaining over office space-related matters (or, as Mr. Ellis stated repeatedly at hearing, to require the Agency to allow the Union the use of Room 44C as additional space[9]), to reimburse the Union approximately $1,449 in storage space rental expense (per UX-5C) and approximately $9,200 in office space rental expense (per UX-5D) the Union has incurred, and, claiming the Agency's conduct has constituted a violation of the Back Pay Act or an Unfair Labor Practice, to award the Union a reasonable attorney's fee.

The Agency's Position.

The Agency argues that it has not violated Art. 51, and has, now, fully complied with the CBA, the Remington Award, and the FLRA settlement, by providing all the items those documents called for. As to the fact that the furniture does not fit, the Agency notes the Union was involved in the selection of – and in fact specifically approved – the furniture that was purchased and delivered. There was no new measurement or the like because both Parties were relying on the measurements taken in 2016, and subsequently included in the Remington Award. Thus, if the ordered furniture does not all fit perfectly, the Agency states that is not something the Union may lay at the Agency's feet. Moreover, the Agency notes the right side panel on the workstation that abuts the Room 44/Room44B door could be removed, obviating the concern that the workstation encroaches on that door jamb. The Agency states it has met its other listed obligations and, with respect to storage space, specifically offered several more filing cabinets in June 2022, but the Union refused, stating it did not have the space for these filing cabinets.

The Agency also argues that, with only two full-time Union representatives and two offices

[9] Curiously, the Union has not requested the Agency order smaller desks/workstations.

(with a door that closes between the two offices), the Union has enough space to conduct its business appropriately and confidentially. Further, to the extent the Union may need more space, such as Room 44C, the Agency states it does not have the space to offer – indicating it had other plans for Room 44C, moving Biomedical Engineering staff and equipment into it.

For all these reasons (and a few others),[10] the Agency asks me to deny the grievance.

DISCUSSION

Ruling on the present matter requires interpretation and application of the Parties' CBA and any applicable external law. As noted by the Supreme Court,

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long ***as it draws its essence from the collective bargaining agreement***.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (emphasis supplied). The FLRA applies that same "essence" of the CBA standard. 5 U.S.C. § 7122(a)(2); *United States Small Business Administration and AFGE Local 3841*, 70 FLRA No. 107, at p. 527 (May 2, 2018).

Accordingly, to determine the merits of the grievance at issue here, i.e., whether the Agency has violated CBA Article 51, with respect to the Union's Office Space at the Pershing VAMC since December 2021, both as interpreted by the Remington Award and otherwise, as to adequacy of the space, furniture, technology, and "necessary storage of confidential

[10] The Agency did not address the Union's argument that, whenever the VAMC needed more space but did not have it, the Agency rented additional space; the arbitrator presumes this was not addressed because management argued the Union did not need more space.

materials" and/or by failing to reimburse the Union its off-site storage and meeting space expenses, for the period since July 2021 forward, and, if not, what shall the remedy be, we first turn to the contract language.

Article 51, § 1.A, provides in relevant part: ". . . the Department agrees to furnish office space to the Union appropriate for carrying out its representational and partnership duties in locations easily accessible to employees and private citizens and of size, furnishings, and decor commensurate with other administrative offices within the facility. Office space shall be sufficiently private to ensure confidentiality to the maximum extent possible. The office(s) shall be of sufficient size for necessary storage of confidential materials." The key issues before me are whether the currently-provided office space: is ". . . of size, furnishings, and decor commensurate with other administrative offices within the facility[;]" is ". . . sufficiently private to ensure confidentiality to the maximum extent possible[;]" and ". . . of sufficient size for necessary storage of confidential materials."

These terms are not further defined in the CBA. Since the terms require explanation to understand, and the four corners of the CBA do not provide such explanation, the terms are ambiguous. Having made that determination, I may look to external sources for guidance. *See, e.g., Warren Concrete & Supply Co. and Teamsters Local 377*, 121 Lab. Arb. (BNA) 1806 (Arb. Felice 2005). I note that some of the terms are defined, at least to an extent, by parol evidence of interpretation of the meaning: the Remington Award and the FLRA Settlement. Thus, I will use those documents for at least part of my interpretation of the quoted terms.

Furniture, etc. and the Remington Award/FLRA Settlement. This first issue was addressed, in large part, in the Remington Award. Therein, Arbitrator Remington found the Agency had

violated Art. 51, and ordered the Agency to provide the Union Office with a V-TEL unit; a wall-mounted TV; workstations consistent with UX-6; Union-selected chairs/ergonomic equipment for workstations; dual monitors for each workstation; and four new locking file cabinets and bookshelves that matched the selected furniture. While most of this remedy was, apparently, temporarily superseded by the Trump EO, once the Biden EO rescinded it and the National Settlement achieved in July 2019, the Union was allowed to move back into the same space it had before.

There is no indication in the record that, at the time they moved back into the same space, the Union objected that the space was unsuitable to allow the Union to carry out its representational and partnership duties.

A wall-mounted TV and most of the equipment and communications services the Agency was required to provide (by the Remington Award and Art. 51) were provided, although the V-TEL unit (and a needed HDMI cable) were not provided until May 2022, per JX-3. As discussed above, the Parties engaged in a lengthy back-and-forth process concerning selection of the workstations, chairs, and the like. The Parties apparently relied on UX-6 and AX-13, as to what kind of furniture would be ordered and where it would be installed; AX-13 has handwritten measurements/dimensions of the furniture thereon but the record has no indication as to who made or recorded the measurements/dimensions, other than the management witness responsible for purchasing the furniture stating that "I believe as part of the previous arbitration, this was the dimensions that were agreed upon." (T.207/24 – 208.1)[11]

[11] The record developed by the Parties leaves much to be desired. Much of the Union's testimony consisted of conclusory statements of how management violated the contract and much of the Agency's second witness' testimony was of the same ilk, i.e., conclusory statements that the Agency had done everything required. The only witness who seemed not to have an axe to grind was the Agency's first witness, Pershing VAMC Hospital Housekeeping Officer

During the back-and-forth between the Parties about the furniture, there was apparently a lengthy meeting (spanning an afternoon in June 2021), in which the Parties discussed and the Union selected the furniture to be procured. Although both Parties reference this meeting, and the record contains lengthy email strings about setting the meeting up, the record contains no minutes – nor any detailed testimony about – of the content of the meeting or what the Parties specifically agreed should be purchased.

The Agency thereafter submitted to the Union contractor-created renderings of the selected furniture (AX-15, AX-18). The renderings showed, among other things, a dual workstation installed in Room 44B on the wall next to the door leading into Room 44, with space on both sides of the dual workstation, and no incursion on the door jamb by the workstation's privacy panel. (AX-15) Unfortunately, the renderings were not to scale. (T.220/9 – 10). The Union apparently was unaware that the renderings were not to scale, and that the furniture being ordered actually would not leave the gap indicated in the rendering.

Given that there had been measurements taken, it is unclear how the furniture that was ordered, with both Parties' involvement, was larger than the measurements listed on AX-13, but that is what happened. Looking at the photographs the Union submitted for the record, it is clear the furniture (at least the furniture on that wall) is slightly too large for the space on the wall for which it was ordered. (UX-20, pp. 8 – 11) It is not as clear that the other workstation in Room 44B (the one on the opposite wall) is too large or whether the lack of usable space in the niche to

Stephen Keene. He testified about the procurement process. However, the questions he was asked did not adduce much of the specific information needed here. Given that a major issue here has to do with the procured furniture being too large for the office space, it is quite disappointing that neither side presented evidence about who measured the room and the size of the furniture to be purchased. Neither do the Parties post-hearing briefs identify where, in the several hundreds of pages of documents admitted into evidence, these answers may be found.

the workstation's left is the result of poor placement. (UX-20, pp. 13 – 14) Further, the only evidence regarding the furniture delivered for Room 44 fit was that the workstations were too large to allow the ordered file cabinet to fit opposite the doorway. (UX-6)

No complaints regarding the chairs and ergonomic features appear in the record, although, given the volume of complaints regarding the other furniture, I am inclined to find this lack of complaint means the chairs, etc. fit. Finally, while the conference table shown in UX-6 and AX-13 was not ordered, the undisputed record shows that the Union agreed to the purchase of the nesting tables instead. (T.231/13 – 22) Thus, other than the ill-fitting workstations and the lack of file cabinet space, the Agency has otherwise complied with both the Remington Award and the FLRA Settlement, albeit none of the compliance was timely with respect to either document's requirements.

That does not end the inquiry. While the Agency did not meet its obligations under Art. 51, the Remington Award, or the FLRA Settlement as to the workstations, since it delivered workstations that did not conform to the measurements in AX-13, the Union nonetheless accepted the furniture as installed.

Mr. Keene testified that, the week after the furniture was installed, Union Vice President Harold Lampley accepted it:

> Q. . . . And when did you have a conversation with Mr. Harold Lampley where he accepted furniture provided by the Agency?
>
> A. I believe that was the end of the week after the furniture installation.
>
> Q. So you're saying that Mr. Lampley accepted it after it was installed?
>
> A. Correct.

(T.228/20 – 229/3) The Union asked Mr. Keene whether Mr. Lampley had "settlement authority"

on this issue, Mr. Keene replied, "It was unknown. I believe that Mr. Ellis may or may not have been available and assigned Mr. Lampley to meet with myself and the associate director." (T.229/4 – 9) The Union later stated Mr. Lampley never had authority to do so, that only Mr. Ellis had such authority. (T.309/12 – 23)

However, the Union did not disprove – indeed, did not address – the conversation Mr. Keene reported; instead, all the Union claimed was that Mr. Lampley did not have express authority, without addressing, at all, the Agency's assertion that Mr. Lampley had apparent authority to bind the Union. The Union did not present Mr. Lampley's testimony in its Case in Rebuttal, although it could have done so, to rebut Mr. Keene's testimony and at least create a contested issue on this point. Thus, on the record before me, the only evidence is Mr. Keene's assertion that Mr. Lampley examined the furniture after it was installed, acting in Mr. Ellis' stead, and accepted the furniture. Consequently, I find Mr. Lampley had apparent authority, a contract concept expressly recognized in *AFGE Local 2207 and United States Department of Veterans Affairs Medical Center Birmingham, Alabama*, 52 FLRA No. 138, at pp. 1480 – 1481 (May 15, 1997), to bind the Union as to acceptance of the furniture, despite the fact that the furniture varied in size from had been agreed to earlier.

Therefore, as to all the items in the Remington Award and the FLRA Settlement (other than file cabinets and bookshelves, which are discussed below), the Grievance should be denied.

File Cabinets and Bookshelves. In the Remington Award, the Agency was ordered to purchase ". . . four (4) new locking file cabinets and bookshelves. The furniture will be selected by the Union and match other union furniture in style and color." In the FLRA Settlement, the Agency agreed to purchase "[t]hree new locking file cabinets and bookshelves selected by the

Charging Party that match the other furniture in style and color." The Agency thereafter provided the Union with two two-drawer lateral file cabinets (that are not, apparently, even waist-high, per the pictures in evidence) and limited cabinet space and drawers integrated into the workstations. The Agency also offered, in June 2022, additional locking file cabinets, which the Union refused on June 23, 2022, stating there was no room for them in the offices because the furniture was too large.

Having said that, I note that the various plans and drawings, including, for example UX-6, only show a single file cabinet (in Room 44) in addition to the storage/filing space in the workstations. Moreover, the photographs the Union presented at hearing (UX-20) show inefficient use of space. For example, it appears a tall but narrow file cabinet could fit in the niche behind single workstation (in the top right corner of UX-6, p. 4), if it were put in parallel to the back of that workstation; likewise, another narrow file cabinet could fit between the structural member and the door that leaves the Union Office suite. (UX-20, p. 14) Further, where at least one of the low-to-the-ground, two-drawer file cabinets – the one immediately next to the single workstation described in the previous sentence – could be replaced with one or two three- or four-drawer lateral file cabinets. (UX-20, pp. 7, 13) An additional narrow file cabinet could fit between the window and the leftmost of the dual workstations on the opposite wall, where the photograph shows a portable fan. (UX-20, p. 12)[12] Disappointingly, no photographs of Room 44 were entered into evidence, but it seems, from how one of the workstations encroaches on the door jamb in Room 44B, it is possible that the workstations in Room 44B should allow for at least a single, narrow file

[12] The arbitrator acknowledges this space may not suit a tall file cabinet, depending on the amount such a cabinet might block part of the window.

cabinet in the space where the Parties had intended to place a wide, tall lateral file cabinet. (*See* UX-6, p.3, and AX-13, p.1)

Thus, the Agency violated Art. 51, the Remington Award and the FLSA Settlement by not providing three more file cabinets, but the Union has failed to mitigate its damages somewhat by refusing the additional file cabinets tendered in June 2022 (since the Union apparently did not consider more efficient use of the space and instead focused on its argument that more space was needed overall – and that, therefore, the Agency should give Room 44C to the Union for its own use). (AX-10) Consequently, the Grievance on this point should be sustained in part and denied in part.

Sufficient privacy to maintain confidentiality "to the extent possible." The Union presented evidence of the various activities it conducts that deal with confidential materials related to bargaining unit members' health, medical records, retirement applications, VA benefit applications, and many other matters whose confidentiality is protected by federal law. The Union stated that, in the current configuration, Rooms 44 and 44B do not provide sufficient space to afford the privacy needed for conversations with bargaining unit members about these confidential matters.

However, given that there are only two full-time Union officials, and that there was no evidence that the several other officials who may need to use the office space ever, much less frequently, had to use the same space at once, the Union has not met its burden to prove that the current office space, in its current configuration, deprives the Union of the necessary private meeting space. In reaching this conclusion, I note that Room 44 has a door that closes. The Union offered no evidence why, if there were others present in Room 44B, the persons needing privacy

could not simply walk into Room 44 and close the door in order to get their privacy.

Thus, the Union has not proven the Agency has violated Art. 51's obligations to afford the Union with office space that provides required privacy. The Grievance should be denied on that point.

Interim Offsite Office Space and Storage Reimbursement

The undisputed record supports a finding that, from July 20, 2021, through the second week of December 2021,[13] the Agency had not provided the Union with space featuring the office furniture the Agency was obligated to, and had agreed to, purchase and install. Thus, even though the Union was able to move back into the space at some time in the Fall of 2021, I find the furniture delivery date was the first time (following the National Settlement) that the Union Office was in the state the Agency believed was required by Art. 51, the Remington Award and the FLRA Settlement. (Of course, there were other issues about space, which the Union has raised here.)

Consequently, I find that the Union properly incurred expenses for its offsite office space through December 17, 2021 (the end of the second full week of December 2021). The record shows that the Union incurred rent at "Smart Space" during that interval, at the rate of $400 per month. (UX-5D, pp. 7 – 15) No evidence to the contrary presented by the Agency, I find that amount was reasonable, incurred, but not reimbursed. Thus, the Agency owes the Union the sum of $2,000 for five months' rent. After installation of the furniture, I do not find that the rental expense was necessary.

As to storage space, the Union presented photographs of stored files in a storage unit as well as in storage space at the office rental location (UX-20, pp. 4 – 5) I note that the 10' X 20'

[13] Mr. Keene testified, and the Union did not dispute, the ordered furniture was delivered and installed in the second week of December 2021. (T.209/5 – 6)

storage unit was not close to full; I would estimate, from the photograph that one tenth of the unit was used (based on the fact that less than half of the floor space was used and no stacks of boxes, etc. were higher than waist height – and no file cabinets were used). Adding in the items that were stored at the office space rental location would increase the storage unit's usage to approximately 20%. Having said that, there is no evidence in the record that smaller storage spaces were available at the time. Thus, while it appears more space was rented than may have been needed, I nonetheless find the storage space rental at the rate of $60/month to be reasonable.

It is unknown, on the record before me, whether these offsite items could have been stored in the three additional file cabinets the Agency had offered on June 23, 2022, but the record is clear that the Agency had not offered those cabinets until then. Thus, from July 20, 2021, to June 23, 2022, the Union reasonably incurred, and the Agency has never reimbursed the Union, the sum of $720 (12 months at $60/month) for its offsite storage expenses. From that latter date forward, by refusing the offered file cabinets, the Union has failed to mitigate its losses related to offsite storage expenses.

Consequently, the Grievance, as to the unreimbursed office space and storage space expenses, is sustained in part and denied in part.

Need for Greater Office and Storage Space generally. The gist of the Union's grievance throughout has been that its current space is not "appropriate for carrying out [the Union's] representational and partnership duties." The Union did not meets its burden of proof on this point.

First, the only evidence presented at hearing regarding the size and necessity for sharing space in comparable "administrative offices," was that of Mr. Keene. He explained that his workspace consists of a "share[d] . . . cubicle in a space with six other administrative employees

from my service line." (T.197/17 – 21) He described his space as administrative offices. (T.229/18 – 230/5) When he has to have a confidential meeting, he stated he tries to find a private meeting space, often using the laundry and linen management staff break room. (T.197/22 – 198/1) The record does not contain evidence as to the size of the administrative space he shares, but the Union did not challenge Mr. Keene on cross-examination, to counter the reasonable inference that the office containing his and his six fellow administrative employees was roughly comparable to the space the Union currently has – Rooms 44 and 44B. (T.215 – 229)

The Union's proof on this issue consisted of Mr. Ellis' testimony that more space was needed and various photographs of file boxes in both a storage unit as well as some storage space at the location where the Union has rented off-site office space. Mr. Ellis also testified that, since 2018, when Arbitrator Remington issued his award, the number of employees at Pershing VAMC has increased by at least 40% to approximately 943. He stated this required the Union to have more office and storage space, since that many more employees necessarily generated that many more employee interactions and that much more paper that needs to be filed. Ms. Adkins, on behalf of the Agency, made the conclusory statement that she believed the Union had enough storage space on site, stating that the bargaining unit had not changed in size (816 members) in the past two years.

Mr. Ellis did not testify that the *bargaining unit* the Union represents increased by 40%; he testified that the over-all employee population experienced such an increase. No evidence was adduced at hearing as to the portion of the Pershing VAMC employee population was represented by the Union. Likewise, the record shows that much of the recent growth centered on the creation or expansion of the CBOCs, which are, themselves, offsite. Thus, the Union argued but did not

prove that it needed more space due to increased bargaining unit membership.

Moreover, with only two full-time Union representatives, Messrs. Ellis and Lampley, who, presumably, use the two workstations in Room 44B, there is sufficient space otherwise for the occasional visits of the other, part-time Union representatives and the bargaining unit members they serve. The Union failed to persuade that Rooms 44 and 44B are so busy (or so *frequently* busy) as to prevent the ordinary functions of administrative office space – even with the occasional need to use Room 44B for privacy – which is all the CBA requires.

Furthermore, to the extent that the Union asserts more space is needed due to increased storage of paper, the arbitrator notes that he has an almost completely paperless office, and that paper documentation that is generated in hardcopy (rather than being provided electronically) can easily be scanned in and stored digitally, requiring much less physical storage. Thus, paper Union and bargaining unit member records could be scanned and stored digitally, perhaps obviating – or, at the very least, minimizing – the need for more paper storage. Of course, having said that, I do not find the CBA *requires* the Union to convert its paper to digital storage. What the CBA does require is that the Agency provide the Union with an office that is "of sufficient size for necessary storage of confidential materials." The reality is, in its current configuration and with its current contents, the Union's Office is not "of sufficient size for necessary storage of confidential materials."

The Union has stated, throughout, that the proper resolution of the Grievance would be by the Agency allowing the Union exclusive use of Room 44C, in addition to its current suite (Rooms 44 and 44B). Alternatively, the Union has suggested the Agency could rent storage space for the Union – as the Agency has done whenever the Agency needed more storage space (*see, e.g.*, UX-

20, pp. 2 – 3 and testimony related thereto). The Agency has resisted giving the Union Room 44C because, the Agency asserted, (a) the Union does not need the extra space and (b) there are year-long plans in place to move Biomedical Engineers into that room, as a clinical necessity in connection with the Agency's Electronic Health Management Records System initiative. (T.260/2 – 261/1)

It is not the place of the undersigned to tell the Agency how to address clinical needs, but it is my place to decide the Grievance submitted to me – and I find the Agency has violated Art. 51 by not providing sufficient space for confidential storage, and that the Agency must do something to remedy that violation. Thus, the Grievance as to the lack of sufficient storage space should be granted, but the remedy is in question.

Given that labor arbitration is best seen as an extension of the Parties' collective bargaining process, I find that there is insufficient information in the record before me to craft a remedy on this point, and I refer the Parties to the bargaining table on the one issue as to how to remedy the Agency's violation of the Art. 51 lack of confidential storage space (see discussion in remedy). If the Parties do not reach agreement, then either (a) the Parties may agree that the undersigned will conduct a hearing as to the remedy to be afforded or (b) the arbitrator has provided a default remedy.

AWARD

Taking all these factors into consideration, rejecting any other arguments that are not specifically addressed herein, I find the Agency has violated Art. 51, only as to the particulars stated above, and therefore, the Grievance is Sustained in Part and Denied in Part.

Specifically, the Grievance is Denied as to:

A. Failure to provide proper workstations (whether under Art. 51, the Remington Award, or the FLRA Settlement)

B. The claim of insufficient privacy to maintain confidentiality; and

C. The current need for additional office space;

but the Grievance is Sustained as to:

D. failure to reimburse the Union (some) of its offsite office space and (some) of its file storage space expenses; and

E. failure to provide required bookshelves and file cabinets, as well as adequate confidential storage space generally.

REMEDY AWARDED

As such, I award the following remedy.[14] Within 30 days from issuance of this award:

I. The Agency shall pay the Union $720 for reimbursement of offsite storage space expense;

II. The Agency shall pay the Union $2,000 for reimbursement of offsite office space expense;

III. The Parties shall commence negotiations regarding remedy as to my finding that the Agency has not provided the required bookshelves and file cabinets, as well as adequate confidential storage space generally, to-wit:

A. At the table, the Parties should consider and discuss, in good faith, the following possible remedies (or any others they believe appropriate):

[14] As I do not find Back Pay Act or ULP violations were within the scope of the issue decided, I find there is no basis upon which to consider and award of attorney's fees to the Union.

(1) Providing the Union with three extra file cabinets of similar tone and color to the workstations currently in Rooms 44 and 44B, and

a) Assigning Room 44C to the Union (in addition to Rooms 44 and 44B);

b) Allowing the Union to move from its current Office Space into other agreed space within the Pershing VAMC that has approximately the same square footage as the aggregate of Rooms 44, 44B, and 44C (roughly 600 – 700 square feet) and has at least one private area (with a closeable door) of at least 150 square feet) in lieu of Rooms 44, 44B, and 44C; or

c) Keeping the Union in Rooms 44 and 44B, but also renting on- or offsite air-conditioned storage space of approximately 150 square feet at no cost to the Union, for the Union's sole use for storage of paper files; and/or

(2) Providing the Union with a high-speed scanner to facilitate the Union scanning in its paper records in the future and either:

a) The Agency paying for an agreed third party to scan in the Union's currently-existing paper records; or

b) The Agency paying the Union the same sum as would be incurred in Suggestion B.1, above for a Union representative to scan in the Union's currently-existing paper records.

B. If the Parties should not reach an agreement as to remedy on this item within 60 calendar days after commencement of negotiations, then the Parties shall,

unless they agree to have the arbitrator conduct a separate hearing as to remedy, abide by the following as remedy:

(1) The Union shall remain in Rooms 44 and 44B, only; and

(2) The Agency shall, within 150 calendar days after issuance of this Award, replace, at Agency expense, the workstations and file cabinets[15] in the Union Offices with ones that fit in the Union Office, per AX-13 (attached hereto), and that are of the same or substantially similar color scheme and materials as are currently in the Union Offices. In this regard, unless the Parties agree in writing otherwise, the Agency shall purchase and install the exact quantity and size of workstations, conference chairs, tables, and file cabinets as are listed in AX-13.

Respectfully submitted today, September 26, 2023,
at Tampa, in Hillsborough County, Florida.

Christopher M. Shulman, Arbitrator

[15] But not the workstation chairs, ergonomic features, or nesting tables used in lieu of a conference table, to none of which the Union voiced an objection in this proceeding.