

## Ellis, Kevin C

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**From:** kevin ellis <kce40@yahoo.com>  
**Sent:** Sunday, December 17, 2023 3:41 PM  
**To:** Ellis, Kevin C; Jordan, Jacob W.; Jack P. Cerone; Julie Ray; White, Scotty L. (VHAPOP); Eudaley Tracie; Scotty White; Amy Musgraves; Pamela Putman  
**Subject:** [EXTERNAL] Fw: decision  
**Attachments:** 1-Arb decision AFGE 2338 and Pershing VA.docx; Arb final billing AFGE 2338 & Pershing VAMC.docx

He guys, this this is the decision that came in last week, this decisions speaks of the retaliation we have been suffering from the agency. I haven't had time to send to everyone due to being in arbitration last Tuesday through Friday last week. But, some of you is awarded significant backpay. We will talk later. Im in arbitration tomorrow and surgery on Friday. I could find everyone email address, but attest some of you i have.

----- Forwarded Message -----

**From:** Cynthia Stanley <stanleyc1234@rocketmail.com>  
**To:** Roper Dane R. (OGC) <dane.roper@va.gov>; Kevin Ellis <kce40@yahoo.com>; Jacob W. Jordan <jacob.w.jordan1987@gmail.com>; Scotty L. White <scotty.white@va.gov>  
**Sent:** Tuesday, December 12, 2023 at 09:53:42 AM CST  
**Subject:** decision

**In the Matter of the Arbitration Between:**

<b>AFGE Local 2338,</b>	)	
<b>Union,</b>	)	
<b>-and-</b>	)	<b>Arbitrator Cynthia Stanley, JD</b>
	)	
	)	<b>FMCS Case No. 210524-06980</b>
<b>Department of Veterans Affairs,</b>	)	
<b>John J. Pershing VA Medical Center,</b>	)	<b>Unsafe Working Conditions</b>
<b>Poplar Bluff, Missouri,</b>	)	
<b>Agency.</b>	)	

**Arbitrator's Decision**

This case is before the arbitrator on a grievance filed on April 28, 2021 by the American Federation of Government Employees Local 2338 ("AFGE" or "Union") against the Department of Veterans Affairs, John J. Pershing VA Medical Center ("Agency" or "VAMC"), alleging unsafe working conditions. The Union was represented by Kevin Ellis, President of the Union; Jacob Jordan, Chief Steward; and Scotty White, Union Local Safety officer ("LSO"). The Agency was represented by Dane Roper, Shaneatra Jones, and Andrew Zleit, Attorneys for the Department of Veterans Affairs. Hearing was held by Zoom on the following days: November 12, 2021; December 7, 2021; December 10, 2021; January 4, 2022; January 24, 2022; January 26, 2022; February 15, 2022; February 16, 2022; March 18, 2022; March 28, 2022; May 18, 2022; May 25, 2022; August 16, 2022; September 2, 2022; September 19, 2022. Record was taken by stenographers, and transcripts were duly produced. Under extensions agreed to by the parties, emailed briefs were timely received by the arbitrator by September 1, 2023. Briefs were then cross-served. This decision is due to issue, by agreement of the parties, no later than four months from that date, or by December 31, 2023.

**Statement of the Issues**

Union statement in brief: Did the Agency fail to provide a safe working environment for bargaining unit employees in the laboratory, Magnetic Resonance Imaging ("MRI"), West Plains Community Based Outpatient Center ("CBOC"), fifth floor Community Living Center, and all other facilities associated with the Agency; did the Agency fail to provide the necessary reasonable accommodations to bargaining unit employees as a result of the bad air quality, mold, and unsafe working environment; did the Agency assist the affected employees with completing the necessary office of workers compensation program; and did the Agency cause bargaining unit employees to suffer needlessly and lose benefits? If so, what shall the remedy be?

Agency statement: Did the Agency violate the Master Agreement when it addressed any alleged indoor air quality issues in the Telemed room, the old MRI room, the medical laboratory, and West Plains CBOC; has there been any showing of causation between alleged safety issues in those areas

and yet to be disclosed alleged health conditions of employees who worked in those areas? If so, what shall the remedy be?

The arbitrator finds the appropriate statement of the issues to be: Did the Agency fail to receive and investigate bargaining unit employee reports of unsafe or unhealthy conditions in the laboratory ("lab"), MRI, Telemed (or "Tele-Health"), or CBOC; did the Agency fail to provide a safe working environment for bargaining unit employees in the lab, MRI, Telemed or CBOC; did the Agency fail to provide the necessary reasonable accommodations to bargaining unit employees as a result of the alleged bad air quality, mold, and unsafe working environment; did the Agency fail to assist the affected employees with completing the necessary Office of Workers' Compensation ("OWCP") applications; has causation been shown for illnesses alleged by employees; and has retaliation been proved? If so, what shall the remedy be? (One additional issue is from the grievance-failure to investigate; the other from the Agency's list-causation of illnesses.)

### **Relevant Language**

#### **MASTER CONTRACT, Collective Bargaining Agreement ("CBA")**

#### **ARTICLE 1 – RECOGNITION AND COVERAGE (Jx1, Pg. 3)**

##### **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. (emphasis added)

##### **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. (emphasis added)

#### **ARTICLE 2 - GOVERNING LAWS AND REGULATIONS (Jx1, Pg. 6)**

##### **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**. (emphasis added)

## **ARTICLE 3 - LABOR-MANAGEMENT COOPERATION**

### **Section 1 - Guidance**

The parties agree that the following sections should be interpreted as suggestions, not prescriptions.

### **Section 2 - History**

A. Since the inception of 5 USC Chapter 71, cooperation and communication have been and remain goals of labor-management relations. The implementation and maintenance of a cooperative working relationship between labor and management known as "Partnership" was established by Executive Order 12871 and a Presidential Memorandum dated October 28, 1999. The Order and the Memorandum were revoked by Executive Order 13203 in 2001.

B. In December, 2009, Executive Order 13522 was issued, creating Labor-Management Forums. Pursuant to the spirit of that Executive Order and this Master Agreement, the Department shall allow employees and their Union representatives to have predecisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 USC 7106; provide adequate information on such matters expeditiously to Union representatives where not prohibited by law; and make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 USC 7106(b)(1), through discussion in its Labor-Management Forums.

### **Section 3 - Purpose**

While the parties are no longer required by Presidential Executive Order to engage in Partnership, the desire and intent in this Article is to describe and encourage effective labor-management cooperation. The Department and the Union are committed to working together at

all levels to improve service to veterans, ensure a quality work environment for employees, and effect a more efficient administration of VA programs. The parties support and encourage cooperative labor-management relationships at all level.

#### **Section 4 - Principles**

Labor-management cooperation is premised on open communication between Union and Department officials. Because different approaches may effectively foster communication in different settings, specific methods for cooperation will be jointly determined by the affected parties. Normally, these efforts should be guided by the following principles:

- A. Cooperation;
- B. Mutual respect;
- C. Open communication and sharing of information at all points along the decision-making process;
- D. Trust;
- E. Efficiency;
- F. Consideration of each other's views and interests;
- G. Identification of problems and workable solutions;
- H. Understanding of, and respect for, the different roles that the Department and the Union can play in achieving mutual goals; and,
- I. Minimizing or eliminating collective bargaining disputes.

#### **Section 5 - Scope**

- A. In a cooperative labor-management relationship, the parties may discuss any topic, including:
  - 1. Matters involving personnel policies, practices, and working conditions;
  - 2. Numbers, types, and grades of employees as well as methods, means and technology of work; and,
  - 3. Participation on labor-management committees.
- B. If an agreement is reached using cooperative methods, by mutual consent the parties may choose to fulfill the collective bargaining obligation through such cooperation.

#### **Section 6 - Training**

To promote effective labor-management relationships, the parties may determine the need for, and identify, appropriate training. Some types of training that may be appropriate include ADR, work process improvement, group dynamics, and relationship by objectives.

## **Section 7 - Use of Time**

A. Where the parties establish a joint labor-management committee (forum) under this article, union representatives will be on official time. This official time will not be counted against any allocated official time as described in this agreement.

B. In instances where sub-committees are established by this joint labor-management committee, and the parties have determined that Subject Matter Experts (SME) and/or union representatives are required, the Union will notify the Department of the appointment of a person to participate in sub-committee activities under this article and whether that person is participating as a SME for which duty time would be appropriate or as a union representative for which official time would be appropriate. If designated as a union representative, that time will not be counted against any allocated official time as described in this agreement.

C. To the extent possible, activities will be conducted during the normal duty hours of the participants. Committee members will be compensated in accordance with applicable law. Once an individual has been designated by the Union to participate in cooperative labor-management activities, that person will be made available for such participation.

## **Section 8 - Expenses**

When activities are conducted under this article, the Department will bear the travel and per diem expenses of bargaining unit members involved in that activity to the extent permitted under the Federal Travel Regulations.

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## **ARTICLE 7 - QUALITY PROGRAMS**

### **Section 1 - Introduction**

A. Both parties recognize the importance of a strong commitment to comprehensive quality programs in the Department. Service to the veteran is the cornerstone of the relationship between the Department and employees.

B. Both parties agree that a successful quality program must empower all employees to fully participate in the development and implementation of Department programs and processes. The Department recognizes the Union as the exclusive bargaining unit representative in implementing, maintaining, and improving these quality programs. Participation of bargaining unit employees in the Department's quality programs is a matter left to the discretion of the Union in its role on the facility Quality Council.

## **Section 2 - General**

A. The Quality Programs referred to in this article are to include Quality Programs initiated by the Department utilizing methods (such as LEAN, Six Sigma, Baldrige Criteria and Systems Redesign) aimed at reviewing and improving Department programs and processes.

B. Both parties agree that the commitment of the local facility Director and local union President is critical for success of Quality Programs.

C. Bargaining unit employees who spend time on Quality Programs initiated by the Department in a nonrepresentational capacity will be on duty time. Bargaining unit employees serving in a union representational capacity will be on official time. This official time will not be counted against any allocated official time as described in this agreement.

D. Time spent on Quality Programs initiated by the Department **will be considered duty time.**

E. It is recognized that all levels of the Department and the Union are responsible for successful implementation, maintenance, and improvement of quality programs. Therefore, the parties should strive for open communication, developing teamwork, sharing of information, integration and acceptance of the union/management role, reduced paperwork, improved work processes, etc.

F. **It is in the interest of both parties that there be a sharing and communication of information regarding, e.g., Joint Commission, requirements, processes, and results.** (emphasis added)

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## **ARTICLE 17 – EMPLOYEE RIGHTS (Jx1, Pg. 60)**

### **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.** (emphasis added)

B. Instructions will be given in a reasonable and constructive manner. Such guidance will be provided in an atmosphere that will avoid public embarrassment or ridicule.

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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. (emphasis added)**

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### **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 union 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 U.S.C. 7114(a)(2)(B) by postings 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 made available electronically.

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### **Section 4 - Use of Recording Devices**

No electronic recording of any conversation between a bargaining unit employee and a Department official may be made without mutual consent except for Inspector General investigations, other law enforcement investigations, ORM/EEO investigations, or duly authorized Boards of Investigation. All electronic recordings will be transcribed. The employee will be given a copy of the recording at the same time they receive the transcript for review. The employee will have the right to review the transcript for accuracy, and may make corrections. The employee will receive a copy of the final corrected transcript. Information obtained in conflict with this Section will not be used as evidence against any employee.

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### **Section 6 – Access to Documentation**

Consistent with the Privacy Act and related government wide regulations in existence on the effective date of the Master Agreement, employees have a right to be made aware of any information specifically maintained under their name and/or social security number or any other personal identifiers. This includes any documentation that is not covered by official records referenced in Article 24 – Official Records. In most cases, employees will be provided with copies



of documents maintained in their eOPF, MRPF, or other system of records is automatically provided, the employee will receive a copy upon request. The Department will annually provide employees with a list of systems or records in which information is maintained and retrieved by employee name, social security number, or other personal identifier. Such list will include general descriptions of the types of documents included in each system of records. **Information not in compliance with this provision may not be used against the employee.** (emphasis added)

#### **Section 8 – Dignity and Self Respect in Working Conditions**

Employees, individually and collectively, have the right to expect, and to pursue, **conditions of employment which promote and sustain human dignity and self-respect.** (emphasis added)

### **ARTICLE 18 – EQUAL EMPLOYMENT OPPORTUNITY (Jx1, Pg. 66)**

#### **Section 1 – Policy**

The Department and the Union affirm their commitment to the policy of providing equal employment opportunities to all employees and to prohibit discrimination because of race, color, religion, sex (including sexual harassment), sexual orientation, national origin age (40 years of age and over), or **disabling condition.** (emphasis added)

#### **Section 2 – Equal Employment Program**

The Department's Equal employment Opportunity (EEO) Program shall be designed to promote equal employment opportunity in every aspect of the Department's personnel policy and practice in accordance with applicable law and government-wide rules and regulations. The program shall include, but not be limited to the following:

- A. Providing reasonable job accommodation for qualified disabled employees;
- B. Reviewing selection processes and staffing procedures to identify those which are inconsistent with governing Federal EEO rules and regulations and taking corrective actions consistent with such rules and regulations in those instances where adverse EEO impacts are found:
- C. Procedures that allow for the of redesigning jobs, where feasible and desirable, and which do not create an undue hardship to achieve the Department's mission to utilize to the maximum extent possible the present skills of qualified disabled employees.
- D. Making reasonable accommodations for the religious needs of employees when such accommodations can be made without undue hardship to the conduct of Department programs.
- E. Commitment to the prevention of workplace harassment and sexual harassment; and
- F. Affirmative Employment Plan(s).

### **Section 3 – Reasonable Accommodations for Employees with Disabilities**

A. In accordance with Section 501 of the Rehabilitation Act of 1973, as amended, and other government-wide rules and regulations pertaining to the employment of individuals with disabilities, the Department is committed to affirmative action for the employment, placement, and advancement of qualified individuals with disabilities including disabled veterans.

B. The Department will offer reasonable accommodation to qualified individuals with known physical disabilities or mental impairments, or those who have a record of past impairment regardless of the type of appointment, unless the Department can demonstrate that the accommodation would impose an undue hardship on the operation of the Department's program (as defined in 29 CFR 1614.203).

C. Requests should be made in accordance with VA Handbook 5975.1 (Processing Request for Reasonable Accommodation by Employees and Applicants with Disabilities) or in accordance with the local facility's Equal Employment Commission (EEOC) approved policy on request for reasonable accommodation. The Department shall process requests for reasonable accommodation and provide accommodations, when appropriate, in as short a timeframe as is reasonable. When possible, decisions regarding accommodations should be rendered within 30 calendar days of the date the request was received.

D. The parties recognize the individual accommodation will be determined on a case-by-case basis, taking into consideration the employee's specific disability, the employee's suggestions for reasonable accommodations, existing limitations, the work environment, and undue hardship imposed on the operation of the Department's program as defined above. Qualified employees with disabilities may request specific accommodations. However, the Department is not required to provide the employee's accommodation of choice, as long as the Department provides a reasonable accommodation.

E. Should a non-probationary employee become unable to perform the essential functions of their position even with reasonable accommodation due to a disability, the Department shall offer to reassign the employee when there is a funded vacant position available for which the employee is qualified, subject to all conditions in 29 CFR 1614.203(g) being met.

F. For employees with disabilities, job restructuring is one of the principal means by which some qualified workers with disabilities can be accommodated. The principal steps in restructuring jobs are:

1. Identify which factor, if any, makes a job incompatible with the worker's disability;
2. If a barrier is identified in a nonessential job function, the barrier is eliminated so that the capabilities of the person may be used to the best advantage; and

3. Job restructuring does not alter the essential functions of the job (if any changes made are those which enable the person with a disability to perform those essential functions).

G. The parties agree that in many cases, changes in the work environment and other accommodations enable person with disabilities to more effectively perform their job duties. Alterations and accommodations may be, but are not limited to, the following:

1. Rearranging files or shelves;
2. Widening access areas;
3. Maintaining hazard-free pathways;
4. Raising or lowering equipment;
5. Moving equipment controls from one side to the other, or modifying them for hand or foot operations;
6. Installing special holding devices on desks, benches, chairs or machines; and
7. Providing qualified interpreters for the hearing impaired.

H. With respect to the modernized systems environment, examples of accommodations are:

1. The surface that holds the terminal will be adjusted to a level suitable to the employee needs;
2. The keyboard will have "light touch," guards, and other adaptive devices that will be considered;
3. Visually impaired employees will be permitted to label "home" keys;
4. Operational and training materials will be available in Braille;
5. Lap trays will be considered;
6. Computer based voice-output systems or VDT screen enlargers or other appropriate devices will be provided for visually impaired employees;
7. Hardware and software will be configured to accommodate color blindness (e.g., blinking cursor, highlighting); and,
8. Printer switches will be available in "light touch" and located in an easily accessible location.

I. An employee may be provided assistive devices if the Department determines that the use of the equipment is necessary to perform official duties. Such equipment does not cover personal items which the employee would be expected to provide, such as hearing aids or eye glasses.

J. The Department's facilities shall be accessible to employees with disabilities.

K. The Department will be liberal in granting leave to accommodate disabling conditions of employees. For example:

1. Leave without pay may be granted for illness or disability; and,
2. Sick leave can be appropriately used by a person with a disability who uses prosthetic devices, wheel chairs, crutches, guide dogs, or other similar type devices for equipment repair, guide dog training, or medical treatment.

L. The Department will provide training to employees with disabilities on the same basis as other employees, consistent with this Agreement. Once an employee is selected for training, the Department will provide reasonable accommodations to the employee to attend and complete the training.

M. For the purpose of continuing to provide reasonable accommodations for hearing-impaired employees, the Department agrees to provide interpreter services for those employees who seek local union assistance and/or representation for their individual concerns, unless the employee wants to retain confidentiality. To the extent possible, interpreter services should be arranged in advance, and the entire process treated with confidentiality.

N. For the purpose of performing official business travel, the Department agrees to reimburse travel expenses that are necessary to reasonably accommodate the employee's disability, consistent with Federal Travel Regulations.

O. Employees with disabilities may, where appropriate as a reasonable accommodation, request telework arrangements.

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## **ARTICLE 29 – SAFETY, HEALTH AND ENVIRONMENT (Jx1, Pg. 144)**

### **Section 1 – General**

- A. The parties recognize that a safe and healthful work environment is valued by the Department; is necessary for the accomplishment of the Department's missions; and contributes to a high quality of life for the employees. **It shall be the responsibility of the Department to establish and maintain an effective and comprehensive Occupational Safety and Health Program (Program) in accordance with Public Law 91-**

595, the Occupational Safety and Health Act of 1970 (referred to as the Act), Executive order 12196, 29 CFR Part 1960 (and all of its sub parts along with Directives and the VA Handbooks 7700 and 7700.1) and, 29 CFR 1904 (Occupational Safety and Health Administration (OSHA) Recordkeeping Provisions for Federal Employees). In administering the program, the Department agrees to recognize the Union as the exclusive representative of bargaining unit employees. **The Department shall furnish places and conditions of employment which are free of recognized hazards and unhealthful working conditions.** (emphasis added)

**B. The Department will abate recognized hazards that are causing or are likely to cause death or serious harm and protect employees in the interim.**

C. Specific procedures for preventing and abating safety and health hazards will be jointly developed with the Union through the National, Intermediate, and Local Safety committees.

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### **Section 3 - Union Participation**

A. The Union President will designate five National Safety and Health Representatives who will each be on 50% official time. They will work with the Department's national-level safety and health officials in developing and implementing the Program. The National Safety and Health Representatives will represent the interests of the Union and the employees in the development and implementation of all aspects of the Department's and Administrations' occupational safety and health program. The National Safety and Health Representatives will be the points of contact for any safety and health initiatives at the Department, Administration, and/or System levels that impact employee safety and health. The parties will develop joint training programs and materials in safety and health for bargaining unit employees. The representatives will provide training and assistance to local unions in the performance of their responsibilities under the Program. The National Safety and Health Representatives may visit facilities within the bargaining unit to work with local unions on safety and health matters. Notice of such visits will be given to the Director of each facility.

B. The Department recognizes that Union participation in its Occupational Safety and Health Program is essential for the success of that Program. The Union may designate representatives at the facility level, intermediate levels, and the National level who will represent the interests of the Union and the employees in the development and implementation of this Program. The parties agree that work on the Safety and Health Program is a part of the ongoing Partnership between the Department and the Union. **Time spent serving as a Union representative during safety and health inspections, as a member of a Safety and Health Committee or its subcommittees, developing plans for abatement of materials, investigating accidents, and safety-related committee assignments will be considered duty time.**

C. The National Safety and Health Representatives will be given copies of all Designated Agency Safety and Health Official (DASHO) letters and other national-level communications to the field on safety and health matters as well as all safety manuals and publications. The DASHO written correspondence and reports will include the Department's goals and objectives annually for reducing and eliminating occupational accidents, injuries, and illnesses. The report should include the plans and procedures for evaluating VBA, NCA, and VHA occupational safety and health programs and their effectiveness at all operational levels.

D. The Department will pay tuition, travel, and per diem expenses for each National Safety and Health Representative to attend at least one conference each year.

E. The NVAC President may designate additional representatives to work on individual projects of mutual interest to the parties. The NVAC President may designate representatives at the National or appropriate intermediate levels within the Department to develop and implement the Safety and Health Program at that level.

F. The Union's National, Intermediate, and local union Safety and Health Representatives will be authorized the use of long distance communications and conference call capabilities.

G. **Each local union** at a bargaining unit facility may designate a local Safety and Health Representative who will serve as the local union's point of contact for safety and health matters at the facility. Functions of local Safety and Health Representatives include, but are not limited to the following:

1. Conduct **joint** inspections;
2. Issue **joint** reports regarding inspection findings to the appropriate Department official;
3. **Participate**, as appropriate, in inspections conducted by governmental authorities outside the Department's control including Joint Commission;
4. **Receive and investigate employee reports of unsafe or unhealthy conditions** (employees should submit such reports to both the local union's and Department's representatives);
5. **Develop and monitor** abatement plans needed to correct local conditions as appropriate (all personnel subject to the hazard shall be advised of the action and of the interim protective measure in effect and shall be kept informed of the subsequent progress on the abatement plan. To document receipt, the completed Abatement Plans will be jointly signed by the local union's Safety Representative and a representative from the Department);

6. Refer matters to Environmental Protection Agency (EPA), OSHA and/ or National Institute for Occupational Safety and Health (NIOSH) as appropriate;

7. **Receive copies** of any written notice referred by a facility official in response to an employee report of an unsafe or unhealthy condition, in compliance with 29 CFR 1960, time limits;

8. **Monitor preventive maintenance plans** for Heating, Ventilating, and Air Conditioning (HVAC) system components;

9. Receive all reports of security incidents involving threats to employees, their offices, and property (such reports may be sanitized as appropriate);

10. Receive all accident reports (such reports may be sanitized as appropriate).  
(emphasis added)

H. Each facility with 25 or more employees will have an Occupational Safety and Health and Fire Prevention Committee (Committee) in accordance with 29 CFR 1960 and all its subparts.

I. The local union will be afforded representatives on such Committees, the number of which is subject to local negotiation. The facility's Committee may establish subcommittees to address particular issues or subjects, and the local union will be represented on each subcommittee. The local union will be given the opportunity to have a representative on any other facility-level committee that relates to the safety and health issues of bargaining units. These will include, but not be limited to, Blood Borne Pathogens and Infection Control Committees.

**J. The local union will be given the opportunity to participate in all scheduled workplace inspections which are intended to detect hazards to employee safety and health, whether conducted by Department Safety and Health personnel, non-Department employees acting on behalf of the Department, OSHA and EPA personnel, or other regulatory agencies and bodies.** (emphasis added)

#### **Section 4 – Standards**

A. The Department shall comply with Occupational Safety and Health Standards issued under Section 6 of the Act and/or where the Secretary of Labor has approved compliance with alternative standards in accordance with 29 CFR 1960 and all its sub-parts. The Department will notify the Union in accordance with Article 47 – Mid Term Bargaining, prior to submission of any alternative standards to the Secretary of Labor. On a case-by-case basis, the parties shall adopt more stringent safety and and/or health standards to address specific concerns.

B. Personal Protective Equipment (PPE), as required by appropriate OSHA standards to protect employees from hazardous conditions encountered during the performance of their official duties will be provided and replaced as necessary at no cost to employees required to wear specific PPE. Employees who are exposed to the hazards of outdoor environments, such as heat or extreme cold weather, will be provided appropriate PPE to OSHA recommendations. Some commonly needed types of PPE include, but are not limited to: safety glasses; steel-toed shoes/boots; SPF lotion; etc. **Hazard assessments to determine the need for PPE will be conducted by each facility for each workplace.** These assessments will also evaluate the need for and feasibility of engineering controls or other devices designed to reduce workplace injuries and illnesses or eliminate the need for PPE. **These assessments will be documented and a copy provided to the local union.** When assessments determine the appropriateness of PPE, affected employees will have the opportunity to choose from available and appropriate styles and sizes to optimize employee comfort and protection. Employees will receive training on the proper use and care of PPE. (emphasis added)

C. Consistent with 5 CFR 1910.2, the Department shall provide training to those employees who are required by this section to use PPE and shall certify in writing that the training was provided.

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#### **Section 5 - Report, Evaluation, and Abatement of Unsafe and Unhealthful Working Conditions**

A. Any employee, group of employees, or representatives of employees who believe that an unsafe or unhealthful working condition exists in any workplace **has the right to report such condition to the appropriate supervisor, the facility director, the appropriate Department Safety and Health official, and the Union.** In the case of immediate threat to life or danger of serious physical harm, the employee shall immediately report the situation to the supervisor and/or facility Safety and Health personnel.

B. Facility Safety and Health personnel and local safety representatives will evaluate employee reports of unsafe or unhealthful working conditions in accordance with 29 CFR 1960. The local union will be formally notified of all hazards as defined in 29 CFR 1960.

C. The Department agrees to ensure prompt abatement of unsafe and unhealthful working conditions.

D. If there is an emergency situation in an office or work area, the first concern is for the employees and the public they serve. Should it become necessary to evacuate a building, the Department will take precautions to guarantee the safety of employees and the public. Individuals ordinarily will not be readmitted until it is determined in conjunction with whatever expert resources have been called in, depending on the circumstances, that there is no longer danger to the evacuated personnel. "Expert resources" may include, but are not limited to, local



police departments, the Federal Protective Service, local fire departments, appropriate health authorities, etc. The local union Health and Safety Committee members or local union Health and Safety Representatives will be notified as soon as the Department becomes aware regarding the emergency situation.

**E. In accordance with 29 CFR 1960, an abatement plan will be prepared if the abatement of an unsafe or unhealthy working condition will not be possible within 30 calendar days. Such plan shall contain a proposed timetable for the abatement and a summary of steps being taken in the interim to protect employees from being injured as a result of the unsafe or unhealthy working conditions.**

F. When abatement action is dependent upon GSA or other lessors, the abatement must be prepared in conjunction with appropriate members of that group. The facility Health and Safety Committee will be timely notified and consulted, and all personnel subject to the hazard shall be advised of interim measures in effect and shall be kept informed of subsequent progress on the abatement plan.

G. Prior to the establishment of an official abatement plan, the Department shall take interim steps for the protection of the employees.

H. Any equipment, devices, structures, clothing, supplies, tools, or instruments that are found to be unsafe will be removed from service, locked-out, and/ or tagged-out or rendered inoperative, as appropriate.

I. An employee and/or their representative submitting a report of unhealthful or unsafe conditions **should be notified in writing within 15 days if the official receiving the report determines there are not reasonable grounds to believe such a hazard exists and does not plan to make an inspection based on such report.** A copy of each such notification shall be provided by the Department to the appropriate certified safety and health committee, where established. The Department's inspection or investigation report, if any, shall be given to the employee and/or their representative 15 days after completion of the inspection, for safety violations, or within 30 days, for health violations, unless there are compelling reasons. (emphasis added)

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#### **Section 7 - Imminent Danger Situations**

A. The term "imminent danger" means any conditions or practices in any workplace which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through normal procedures (29 CFR 1960 .2(u)).

B. In the case of imminent danger situations, employees shall make reports by the most expeditious means available. Consistent with 29 USC 651 and 29 CFR Part 1960 the employee has a right to decline to perform his/her assigned tasks because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm coupled with a reasonable belief that there is insufficient time to effectively seek corrective action through normal hazard reporting and abatement procedures. However, in these instances, the employee must report the situation to his supervisor or another supervisor who is immediately available.

C. If the condition can be corrected and the corrected condition does not pose an imminent danger, the employee must return to work. If the supervisor cannot correct the condition, the supervisor shall request an inspection by facility safety and/or health personnel.

D. **A local union representative will be given the opportunity to be present during the inspection by the facility safety and/or health personnel.** If facility safety and/or health personnel decide the condition does not pose an imminent danger, the instruction to return to work shall be in writing and contain a statement declaring the area or assignment to be safe. When this notification is given to the employee, the local union shall be notified in writing as well. (emphasis added)

....

### **Section 8 - Training**

A. The Department shall provide safety and health training for employees, including specialized job safety training, appropriate to the work performed by the employee. This training will address the Department's and the facility's Occupational Safety and Health Program, with emphasis on the rights and responsibilities of employees.

B. The Department will provide basic and specialized safety and health training for Union Safety and Health Representatives. In accordance with applicable law and regulations, the Department shall provide training for all duties commensurate with the scope of the responsibilities.

C. The Union will participate in the development of safety and health training, including curriculum and training materials.

### **Section 9 - Allegations of Reprisal**

**The Department agrees there will be no restraint, interference, coercion, discrimination, or reprisal directed against an employee for filing a report of an unsafe or unhealthful**

**working condition or for participating in Department Occupational Safety and Health Program activities or because of the exercise by an employee on behalf of him/herself or others, of any right afforded by Section 19 of the Occupational Safety and Health Act, Executive Order 12196, or 29 CFR 1960. (emphasis added)**

#### **Section 10 - Work-Related Injuries and Illnesses**

A. Employees must report any and all injuries that are work-related to their supervisor. The supervisor will take appropriate action to insure that:

1. The employee has the opportunity to report to the Employee Health Physician or his/her personal physician for treatment, completion of necessary reports, etc.
2. Appropriate facility personnel are promptly notified to ensure timely processing of necessary reports and employee claims. The Department agrees that assistance will be given to employees in preparing necessary forms and documents for submission to the Office of Workers' Compensation Programs (OWCP) and those employees will be informed of their rights under the Federal Employees' Compensation Act, as amended in 1974.

B. An employee who has sustained a work-related injury or illness will be required to perform duties only to the extent and limits as prescribed by the treating physician or the Employee Health Physician, as appropriate. No employee will be assigned duties when, in the physician's opinion, this would aggravate the employee's injury or illness. In the event that the employee's supervisor does not have limited duty that meets the physician's stated limitations for the employee, the supervisor will make a good faith effort to locate limited duty work within the facility that the employee can perform. If limited duty is not available, the employee will be placed on continuation of pay, if eligible, or in an appropriate leave status at the employee's option. The local union may suggest limited duty opportunities at the facility. The Union has the right to represent any unit employee at any stage of this procedure (see Article 19 - Fitness for Duty).

C. Within seven calendar days after receiving information of an occupational injury or illness, appropriate information concerning such injury or illness shall be entered on the log. The record shall be completed within seven calendar days after the receipt of information that an occupational injury or illness has occurred.

D. Qualified inspectors must have sufficient documented training/experience in recognizing the particular safety and/or health hazard that they are inspecting (note 29 CFR 1960 .25). At the request of the local union, the Department will certify in writing, by reference to classes/experience, that the inspector is sufficiently competent to recognize and evaluate the particular safety and/or health hazard that they are inspecting, and to suggest general abatement procedures.

## **Section 12 - Leases**

A. Prior to occupancy by any employee of space occupied by the Department, the Department will provide the local union a copy of the pre-occupancy inspection to identify possible hazards or serious violations of OSHA standards. All leases will comply with 29 CFR 1960.34 and 41 CFR Part 102. Careful consideration should be made by the Department to avoid incompatible groupings, e.g., chemical or biological laboratories in office space.

B. Pursuant to 29 CFR 1960.30(d), when a hazard cannot be abated before occupancy, the local union and all employees subject to the hazard shall be advised of the preliminary abatement plan and of interim protective measures in effect, and shall be kept informed of subsequent progress on the abatement plan.

C. These provisions are not a waiver of the local union's right to request additional information, consultation, and bargaining.

....

## **Section 15 - Mold**

A. The Department shall conduct an inspection in each facility to determine the existence of mold. Qualified inspectors will inspect the facility for mold under EPA standards for Hazardous Air Pollutants regulation.

B. The Department will review all construction and/or space modification contracts and/or work orders to determine if mold is present and, if so, how to proceed with appropriate removal or containment.

**C. The Department will notify the local union prior to initiating procedures for mold removal.**

**D. Where it has been determined that mold exists in a facility, the Department will conduct periodic surface and air sampling as appropriate.**

E. If surface or air sampling indicates that airborne concentrations of mold exceed levels in the control sample, exposed employees will be notified in writing of the exposure within five days after discovery of the excessive mold concentration. **The Department will assist affected employees in filling out and filing the appropriate OWCP forms.**

F. If the airborne or surface mold concentration amounts are exceeded, the Department will ensure abatement of the mold hazard.

G. Once **significant** airborne or surface mold particles are detected, the Department **will conduct sampling at intervals of no greater than three months** to monitor employee exposure levels.

H. Union Health and Safety Representatives will be given training on mold removal and permitted to monitor removal procedures.

I. Union Health and Safety Representatives will be given a copy of all tests monitoring mold levels.

J. Mold abatement plans may include the discontinuance of work or the shifting of employee work location. Notice of such abatement action will be provided to the local union in advance, except in an emergency situation in which the local union will be notified as soon as possible. The Department will meet its labor obligations in both instances.

K. The Department will ensure that all external surfaces within the unrestricted work environment in any facility shall be maintained free of accumulation of mold.

(emphasis added).

## **Section 22 - Indoor Air Quality**

A. The parties agree that all employees are entitled to work in an environment containing safe and healthful indoor air quality.

B. The Department shall provide safe and healthful indoor air quality by conforming to laws, guidelines, regulations, and/or policies issued by federal regulatory agencies such as OSHA, ASHRAE, EPA, and GSA.

C. On-site investigations/inspections will be conducted when a problem concerning Indoor Air Quality or Building Related Illness is formally brought to the Department's attention. These investigations/inspections shall meet the criteria of the GSA Federal Property Management Regulations and the ASHRAE, the protocols of OSHA, or the American Conference of Government Industrial Hygienists.

D. In compliance with engineering standards, the Department shall maintain ventilation efficiency:

1. Ensuring that outdoor air supply dampers and room vents are open;
2. Removing or modifying partitions or obstructions which block fresh air flow;

3. Balancing the system to prevent to prevent inflow or outflow of contaminated air due to pressure differentials between rooms.

E. In all facilities, the Department shall ensure that:

1. Appropriate measures are taken to minimize and/or eliminate the impact of contamination from outside sources such as garages, cooling towers, building exhausts, etc.;
2. Where the levels of such contaminants become health threatening, the Department will either seek to relocate or evacuate the facility;
3. Temperature is maintained in accordance with ASHRAE standards;
4. Humidity is maintained in accordance with ASHRAE standards;
5. Filtration, electronic cleaners, chemical treatment with activated charcoal or other absorbents are used.

F. Microbial Contamination.

1. The Department agrees to eliminate or control all known and potential sources of microbial contaminants by assessments and appropriate response to all areas where water collection and leakage has occurred including floors, roofs, HVAC cooling coils, drain pans, humidifiers containing reservoirs of stagnant water, air washers, fan coil units, and filters. Such response will normally require prompt cleaning and repair of contaminated areas.
2. The Department also agrees to:
  - a. Clean and disinfect or remove and discard porous organic materials that are contaminated (e.g., damp insulation in ventilation system, moldy ceiling tiles, and mildewed carpets); and,
  - b. Clean and disinfect non-porous surfaces where microbial growth has occurred with detergents, micro biocides, or other biocides and insuring that these cleaners have been removed before air handling units are turned on.

In any leased space the Department will deal with the lessor and/or GSA to achieve these objectives.

### **Section 23 - Renovation and Construction**

A. Wherever the Department decides to alter the physical work site of employees represented by the Union, **the local union will be notified in advance** in accordance with Article 47 - Mid-Term Bargaining. (emphasis added)

B. The Department will:

1. Isolate areas of significant renovation, painting, and carpet laying from occupied areas that are not under construction;
2. Perform this work during evenings and weekends;
3. Ensure that contaminated concentrations are sufficiently diluted prior to occupancy;
4. Supply adequate ventilation during and after completion of work to assist in dilution of the contaminant level; and,
5. In leased space work with the lessor and/or GSA in order to achieve and maintain these standards.

....

#### **Section 27 – Safety and Health Records**

A. The Department agrees to compile and maintain records required by the Act and the Department safety and health programs. The Department agrees to ensure access by employees, former employees, and Union representative to records/logs of facility occupational injuries and illnesses (including copies of accident reports) and to the annual summary of these in accordance with 29 CFR 1960, consistent with FOIA and Privacy Act requirements.

B. The Department and the Union will identify employees who occupy positions that carry potential risks to their health. The parties **will establish and maintain procedures for medical surveillance of such employees.** (emphasis added)

#### **Section 28 – Hazardous Duty Pay and Environmental Differential.**

A. Environmental Differential (FWS)

1. In accordance with 5 CFR Part 532, Subpart E, Appendix A, the appropriate environmental differential will be paid to an employee who is exposed to an unusually severe hazard, physical hardship, or a working condition meeting the standards described under the categories stated therein.
2. If at any time an employee and/or the local union believes that differential pay is

warranted under 5 CFR Part 532, Subpart E, Appendix A, the matter may be raised at step 3 of the negotiated grievance procedure.

**B. Hazardous Duty Pay**

1. Pay for irregular or intermittent duty involving physical hardship or hazard for GS employees will be paid in accordance with the provisions of OPM regulations (5 CFR Part 550, Sub-part I)
2. The parties agree that any physical hardship or hazardous duties must be considered as part of position classification. Upon request, the Department shall inform the employee or local union whether or not such duties were taken into account in establishing the grade of the position and how the duties affected the grade established including whether, absent those duties, the grade would have been lower.

....

**ARTICLE 30 - OCCUPATIONAL HEALTH (Jx1, Pg. 171)**

**Section 1 - Purpose**

The purpose of this article is to aid in the protection of employees from communicable diseases, maintain a healthful working environment, and provide preventive health measures.

**Section 2 - General**

The following occupational health services, among others, shall be provided:

- A. Emergency diagnosis and first aid treatment of an injury or illness that becomes necessary during working hours and that are within the competency of the professional staff and facilities of the available occupational health service unit, whether or not such illness was caused by employment. Local policy may define emergency treatment of non-work related conditions in tracking of infectious diseases among the employee population. In cases where necessary emergency treatment is not available onsite, the employee may be taken to his/ her physician or suitable community medical facility if the employee requests it or is unable to request it. Employees will be made aware annually that there may be charges for some services rendered;
- B. Pre-placement examinations where required by applicable laws, VA policy, or the OPM instructions;
- C. In-service occupational examinations of employees or examinations to appraise and report work environment health hazards to prevent and control health risks, as required;



D. Administering, at the discretion of the responsible occupational health service unit physician or occupational healthcare provider, treatments and medications:

1. Furnished by the employee and prescribed in writing by a personal physician as reasonably necessary to maintain the employee at work; or,
2. Prescribed by a physician providing medical care under 5 USC Chapter 81.

E. Preventive services to provide health education to maintain personal health; and to provide specific disease screening examinations and immunizations, in accordance with Article 29 - Safety, Health, and Environment, Section 24, D 2 and D 3 of this Agreement.

F. Referral, upon their request, of employees to community health resources.

### **Section 3 - Service Requirements**

The Department **shall**:

A. Provide post-exposure examinations as mandated by applicable regulatory agencies;

B. **Provide medical surveillance** for employees exposed to hazardous materials and communicable diseases (such as asbestos or tuberculosis). The Department shall provide the local union a list of any classification or position that is required to be part of the medical surveillance program, including but not limited to the "fit-tested" for respirators program. (emphasis added)

C. Cooperate with local public health agencies, physicians and programs in providing measures that protect against diseases of public health significance.

D. The occupational health unit will be supplied the specific medical information about the duties of an employee's position and any other pertinent factors necessary to assess that employee's ability to perform the job. (See Article 19 - Fitness for Duty.)

E. Provide, or make arrangements for, health maintenance examinations for all Department employees eligible for them. The occupational health care provider will use discretion in determining how comprehensive the medical evaluation will be. Special tests and diagnostic procedures may be ordered as appropriate, based upon the evaluation's findings. Employees will be informed of any discrepancies or abnormalities shown in the evaluation; and, they will be encouraged to follow up with treatment or corrective action as soon as possible with their personal primary care provider.

## **ARTICLE 35 – TIME AND LEAVE (Jx1 Pg. 205)**

### **Section 1 - General**

- A. Employees will accrue and use sick and annual and other types of leave in accordance with applicable statutes, OPM regulations, and this Agreement.
- B. All leave charges shall be in increments of one-quarter hour, except in the case of Title 38 physicians, dentists, chiropractors and optometrists, who accrue and use leave in full-day increments.
- C. For clearly compassionate and appropriate reasons, the Department may increase the stated limits applicable to all forms of leave in accordance with applicable government-wide regulation and law.
- D. Employees will not be denied leave based solely on their leave balance.
- E. No arbitrary or capricious restraints will be established to restrict when leave may be requested.
- F. Changes to the Department's automated time and attendance system shall be negotiated in accordance with government-wide law, regulations and this Agreement.
- G. Employees should request, in advance, approval of anticipated leave.
- H. When the employee is present on duty, the employee can use the electronic time and attendance system or SF-71 to request leave.
- I. Leave will be denied only for appropriate reasons and not as a form of discipline. No approved leave or approved absence will be a basis for disciplinary action except when it is clearly established that the employee submitted fraudulent documentation or misrepresented the reasons for the absence.
- J. Employees will not be adversely affected in any employment decision **solely because of their leave balances.**

....

## **ARTICLE 43 – GRIEVANCE PROCEDURE (Jx1 Pg. 228)**

### **Section 1 – Purpose**

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.

...

## **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.  
(emphasis added)

## **Section 7 – Procedure**

### **B. 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.  
(emphasis added)

### **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.

## **ARTICLE 44 – ARBITRATION (Jx1 Pg. 234)**

### **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.

.....

H. An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level. Where it is mutually agreed between the NVAC President and the Department within 30 days after a local union has filed a notice for arbitration, an arbitration dispute will be elevated to the national level. The arbitrator has full authority to award **appropriate remedies including reasonable legal fees pursuant to the provisions of Section 702 of the Civil Service Reform Act, in any case in which it is warranted.** (emphasis added)

## **ARTICLE 49 – RIGHTS AND RESPONSIBILITIES (Jx1 Pg. 250)**

### **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.** (emphasis added)

### **Section 2 – Rights and Responsibilities of the Parties**

A. In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the obligations imposed by 5 U.S.C.S Chapter 71 and this Agreement and the maintenance of a cooperative labor-management working relationship.

B. Each party shall recognize and meet with the designated representative(s) of the other party at mutually agreeable times, dates, and places that are reasonable and convenient.

C. The Department supports and will follow statutory and contractual prohibitions against restraint, coercion, discrimination, or interference with any Union representative or employee in the exercise of their rights.

### **Section 3 – Union Representation**

**The Union will be provided advance notice of, be given the opportunity to be present at, and to participate in any formal discussion between one or more representatives of the Department and one or more employees in the unit or their representatives concerning any grievance, personnel policy or practice, or other general condition of employment. The**

**Union will also be allowed to be present and represent a unit employee at any examination by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary/adverse action against the employee and the employee requests representation. (emphasis added)**

#### **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. (emphasis added)

#### **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.**

(Emphasis added)

#### **APPLICABLE STATUTORY LANGUAGE**

##### **5 USC §5596 Back Pay due to Unjustified Personnel Action**

(a) For the purpose of this section, “agency” means –

- (1) an executive agency;
- (2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;
- (3) the Library of Congress;
- (4) the Government Publishing Office;
- (5) the government of the District of Columbia;
- (6) the Architect of the Capitol, including employees of the United States Senate Restaurants; and
- (7) the United States Botanic Garden.

(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 law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which 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 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 the accordance with standards established under section 7701(g) of this title; and (emphasis added)

(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 within the same time limit 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 may not be to the credit of the employee under section 5552(2) of this title.

(B) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

(C) interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement

under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period more than **6 years** before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.

(5) For the purpose of this subsection “grievance” and “collective bargaining agreement” have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, “unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and “personnel action” includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.  
(emphasis added)

## **5 USC § 7114 Representation rights and duties**

### **(a)**

(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –

(A) any formal discussion 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; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if –

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

.....

(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 **(the Union)** involved, or its authorized representative, upon request and, to the extent not prohibited by law, **data: (information requested by the Union)**

(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 .... (emphasis added)

## **5 U.S.C. § 7116 Unfair Labor Practices**

(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;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or **otherwise discriminate against an employee because** the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or



**(8) to otherwise fail or refuse to comply with any provision of this chapter. (emphasis added see 5 USC 7114(b)(4) to provide information as requested by the Union)**

.....

**(d)** Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of the is title, an employee has an option of using negotiated grievance procedure or an appeals procedure, 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 an unfair labor practice under this section, but not under both procedures.

(Emphasis added.)

### **APPLICABLE CODE OF FEDERAL REGULATIONS**

#### **20 CFR 10.330**

##### **§ 10.330 What are the requirements for medical reports?**

**In all cases reported to OWCP, a medical report from the attending physician is required.**

**This report should include:**

- (a) Dates of examination and treatment;**
- (b) History given by the employee;**
- (c) Physical findings;**
- (d) Results of diagnostic tests;**
- (e) Diagnosis;**
- (f) Course of treatment;**
- (g) A description of any other conditions found but not due to the claimed injury;**
- (h) The treatment given or recommended for the claimed injury;**
- (i) The physician's opinion, with medical reasons, as to causal relationship between the diagnosed condition(s) and the factors or conditions of the employment;**
- (j) The extent of disability affecting the employee's ability to work due to the injury;**
- (k) The prognosis for recovery; and**
- (l) All other material findings.**

(Emphasis added.)

## **Statement of the Relevant Facts**

### **Telemed:**

#### **Sonia Ellis, Senior Union Representative**

Tr.5, Pg.18-124.

Ms. Ellis worked in Room 5025 (or 5025A-variously labelled) from December 2016 through March 2020. She is a Telehealth Clinical Technician. She reported mold growth by a series of emails from August 2017 that came into evidence as UF7. She reported mold in 2018 and 2019 as well. Agency did no testing until 2020 when the Agency found mold. A March 13, 2020 Robert Jurgiel RE indoor air quality survey for mold on fifth floor, the former Telemed area where she worked, shows presence of Stachybotrys and memnoniella mold growth. Other molds were present: Cladosporium, Chaetomium, penicillium, aspergillus, psaria and Trichoderma species. Jurgiel's report to Gary Robertson, Maintenance and Operations Supervisor for the Telemed area. UF2.

Photos from 2021 show black mold behind the sheet rock, under window frames, behind baseboards, even in areas not close to the windows, including around the metal door frame with a glass door. She has had multiple symptoms including rashes, concentration issues, swollen and watery eyes, blurred vision, sore throat, hair loss, and fungal growth in her hair, since 2017 while she worked there. In a test dated October 12, 2021, ordered by her doctor, she tested positive for Aspergillus, Alternaria, and Cladosporium, some of the same strains of mold found by Robert Jurgiel in Telemed in March 2020. Tr.5, p.59, UF4J and K. The report was not provided to the Union or to Ellis at the time. She was never told that she had been exposed to mold. No help was offered with an OWCP application. Sonia Ellis was discharged and reinstated by an arbitrator on November 11, 2017.

#### **Kevin Ellis, Union President since 2011**

Tr.1, Pgs.40-124.

Employees had long complained to management about moldy smells and bad air quality in the Telemed workplace. The Agency did not test for mold. In 2017, Kevin Ellis and others met with Libby Johnson, Associate Director, and Patricia Hall, Facility Director, and informed them of the mold issue in Telemed Room 5025. No testing was done. Finally, in 2020, mold was found when baseboards were pulled up in the initial stage of remodeling. Employees were then moved out. The Agency disconnected the HVAC system and sealed the room. The Agency did not notify employees that they had been working in an unsafe environment, as required by the Master Contract ("CBA"). The Agency did not advise employees to go to their doctors for testing.

### **West Plains CBOC:**

#### **Kevin Ellis, Union President**

Tr.1, Pgs. 40-124.

Employees complained to management for years about the smells in the West Plains CBOC

workplace. In the same meeting in 2017 (see Telemed above), Kevin Ellis told the two supervisors about mold in the West Plains CBOC and the MRI building. No testing was done for years. Only after the Union tested and found mold and formaldehyde at the CBOC did the Agency test and was told to move employees out of the West Plains CBOC building but instead the Agency got a second, more favorable report which told them to perform additional testing to determine where the formaldehyde was coming from. As of the April 2021 filing of the grievance, that second report had not been done.

### **Harold Lampley, Union Chief Steward**

Tr. 7, Pg 9

Lampley is classified as an Advanced Medical Support Assistant (“AMSA”). He started on or around April 20, 2018. He first witnessed mold growth at the CBOC in late 2019 or early 2020. In the years since, he has seen multiple mold growths. Tr.7, Pg.102. He reported mold growth to Ashley Lepold, Environment of Care Manager; Lance Cravens, Chief of Facilities Management; Kyle Snow, Engineer in Facilities Management; Tim Lowe, Kim Adkins, OSC (Office of Special Counsel); Medical Center Directors Desmond McMullen, Paul Hopkins, Patricia Hall and Candace Miller; and the Union. He has had allergic rhinitis, ruptured eardrum, sinus infections, ear infections. His physical problems have gotten worse because of exposure to mold. Mold was found by AirTecs Environment, a study ordered by the lessor of the CBOC facility, but employees have not been moved. He applied for a reasonable accommodation on April 20, 2020, and October 1, 2021, but it has not been granted. He asked to do telework but was denied. At the time of his testimony, he was on telework for knee surgery, not for mold. The reasonable accommodation will expire soon. Tr. 7, Pg.130.

Monitoring every three months has not been done since the finding of mold as required by the CBA. His doctor’s records, Union brief p131, UxW82, Uxw82A, UxW82B, UxW82C, provide a detailing of symptoms, stopping when out of the workplace and returning in the workplace. UxW82D is a letter from his ENT dated April 10, 202, suggesting he find a new job due to his continued reactions to the workplace. UxW82E is another letter from the ENT suggesting that due to his mold allergies and symptoms that he work from home. Union Brief 132. UxW82F is emails between Lampley and Shelly Hudson, an employee health nurse, discussing his reasonable accommodation request and the possibility of telework. He was directed to file an OWCP claim which the Agency did not assist with. He filed a complaint with the Office of Special Counsel “(OSC)”, and supervisor Ginger Potts told him not to be on campus when they came or she would have VA police remove him. Tr.7, Pg.89. He supplied documents to the reasonable accommodation coordinator. UxW82F.

### **Pamela Putnam**

Tr.7, Pg.171-204.

Putnam is a Clinical Social Worker. She has been at West Plains CBOC since 2016. Between when she started and when she began teleworking from home, she had respiratory problems. While at CBOC, she started noticing shortness of breath and rapid heartbeat. She went to the ER. Her symptoms included headaches, nausea, respiratory issues, itchy and watery eyes, sore throat,

cough, and sneezing. In 2019 she got pneumonia and couldn't get better. She had some x-rays and they found emphysema and asthma. She had no symptoms before working at CBOC. UW87, 88, 89. A coworker took her to the doctor who found these conditions in April 2019. She told her supervisor and no one advised her of anything in the workplace that could be causing it. UW4 is an email with mold test by AirTecs Environmental attached dated August 17, 2019, from Room 132 where she was working. Spore count was 400,000 spores per cubic foot. A comment at the end of the report states: "It is recommended that anything above 10 spores (Observed Counts/Calculated Counts) be eliminated."

If the AC failed, mold would grow on furniture and clothing. The AirTecs report listed *Aspergillus/Penicillium*. She was moved when someone came in and found moisture on the walls. She was approved for an interim reasonable accommodation for telework, UW85, by an email 4/23/21. She had headaches, nausea, and respiratory issues. Tr7, p185. Prior to working at CBOC she had no respiratory issues. She had to go to the doctor before she was approved for telework and was put on steroids and antibiotics. She has not had any respiratory infections since leaving CBOC, but still has asthma and mild emphysema. She uses an inhaler. Her supervisor was granting reasonable accommodation for a few months at a time, UW90, at the time of the hearing. Her supervisor kept telling her to come back into the building but her doctor says she can't. Her doctor and allergist told her that mold is an irritant and will cause flare-ups of the asthma and emphysema. Tr.7, Pg.199. She wasn't told there was water intrusion in the building and no one helped her with the worker's compensation application.

### **Rick McCoy**

Tr.8, Pgs.6-72.

McCoy works at CBOC as an Outpatient Therapist. He is a licensed professional counsellor. He was in the Marine Corps. He has observed mold at CBOC, and has reported mold growth and bad air quality in the work environment. He reported mold to supervisor Dr. Donna Parkinson before she left and then to new supervisor Amanda Wallace. He never got a response. He has had problems from the mold: sinus infections, chronic cough, nodule on his lungs, headaches, almost migraines. He never had the problems before. He was not advised of safety problems. He works in room 123. No one told him about wet insulation in that room, water intrusion or roof problem. He has requested reasonable accommodation for his mold medical problems, but he doesn't know the status of it. He was given an interim accommodation, which has to be recertified often. Symptoms go away when he is away from the building. He fears for his health, if the Agency forces him back. There are several types of mold there, and formaldehyde and carbon dioxide, none of which have been remediated. He knew the OMI came and interviewed people but he wasn't interviewed. UxW100 is his medical records for the reasonable accommodation and there are more documents on telework. UxW104 is a letter from his primary care physician providing more information on his diagnosis as moderate/severe mold exposure. He had previously provided medical documents but the Agency said it needed more. UxW106 emails Oct. 1 and 2, 2022 show that mold at CBOC is a continuing problem, with a memo about mold at CBOC dated Sept. 30, 2019. He was never given this information. His telework agreement has been revoked and Agency has counted him AWOL. His permanent reasonable accommodation has not been granted. He's allergic to mold; the primary one is *Aspergillus*. Exhibit UxW3 lists the *Aspergillus* mold count at 250,000 spores per cubic foot in his room at CBOC and 3,000 in the

room next to his. Tr.8, Pg.53. The CBA on mold calls for EPA standards not OSHA standards. UxW58, Industrial Hygiene Summary Report, also listed as Agency Ax31, dated September 8, 202, shows internal spore counts elevated, at page 3-5. He quoted from the Jurgiel report for CBOC, UxW78, which recommended further investigation and air sampling to determine the source of the formaldehyde found. No one has told him anything about further testing being done.

### **Lab (including Medical lab, Hematology, and Blood Bank)**

#### **Scotty White, Union Safety Officer**

Tr.2, Pg.240 to Tr.4, Pg.785.

Scotty White started May 4, 2014 in the medical lab. He has a Bachelors degree in microbiology, is an LPN, and is certified as an American Medical Technician. He is a GS-11. He is titled a Clinical Laboratory Scientist or Medical Technologist, interchangeably. Brenda Norden is his supervisor. As a laboratory scientist, he is trained in collection of samples and chain of custody forms. He was declared an expert by this arbitrator based upon his credentials.

He was not notified prior to any of the testings for which results were offered by the Agency at hearing, in violation of the CBA. He was not notified of the 2019 Jurgiel inspection in the lab; he wasn't present, nor was any other Union official. Tr.2, Pg.245 and 377.

The floors in the lab got so wet that the employees were slipping. They would run the dehumidifier. White notified Ashley Lepold of mold coming out of the vents in the lab and she replied that they don't do mold testing. Tr.2, p255. No mold testing was done before White took samples and sent them to the outside company, Mold Armor. Mold Armor sends the samples to a certified lab that was used by Robert Jurgiel, expert for the Agency. UM3, UM4, Tr.2, Pg.329, UxL, Pg.2, A-2a, A2b. The Mold Armor report of January 17, 2019, found Aspergillus was coming out of the vents. Ux90 on the sample from Ux87. The Agency had changed vent flex hoses twice during this period and it did not alleviate the problem.

The high concentration of Aspergillus and Cladosporium in the lab led to his asthma attacks from mold. Tr.2, Pgs.258 to 260. Jurgiel, advised in 2019 that the HVAC system be checked to see if adequate, because it didn't control humidity. It was not done. Tr.2, Pg.261. White's symptoms from mold include asthma attacks, blurred vision, allergic conjunctivitis and so on. Ux1; Tr2, ps258-263. His blood test for Aspergillus was positive. Tr.2, Pg.389.

The CDC states humidity should be between 30 percent and 60 percent to prevent mold growth, and temperatures should be between 75 and 80 degrees Fahrenheit in summer and 68.5 and 70 degrees in winter. Ux1A. CBA Article 29, Section 22 requires the Agency to abide by ASHRAE and CDC guidelines. His supervisor, Brenda Norton, had frequent notifications from TempTrak that humidity was out of bounds. Tr.2, P. 261, 265. Multiple work orders reported high humidity. Tr.2, P.262. The TempTrak readings prove continuing problems with control of temperatures in the lab which led to mold growth: Ux120, Ux123, Ux124, Ux135, Ux136, Ux172, Ux186. The HVAC in lab was inadequate through the testimony of Ashley Lepold in a prior arbitration (U-113) and an email from the Agency's witness, Jurgiel. Tr.2, Pg.397.

The Agency did a remediation in April 2019. The Union had asked to be present for the remediation, but was not allowed. The Agency claimed it had remedied the mold problem. But the HVAC system still allowed humidities up to 80 percent. Employees still had mold exposure symptoms in October 2020. Tr.2, Pg.271. Retesting by White revealed on-going mold problems. U-99 is an invitation from White to management to attend his testing in the lab in November 2019. (For more specifics on various tests, see Pages 40-46 of this decision. The hearing record contains many fact sheets on mold and the TempTrak readings, see, e.g., U1, U2, U3, U4, U6, U7, U8, U9, U74, U173, 178, 186, and 186A.)

As the Union LSO, Scotty White has received complaints from employees in CBOC including a manager, about allergies and asthma. Scotty White and then a new employee in his work area in the lab did not have problems until coming to work but in April 2021 the new employee has a bacterial lung infection. (Later testimony shows that entire HVAC system has been replaced.) The violations occurred for years, putting employees at risk, and were ignored for at least ten years. Tr.11, pgs.190, 213; Tr.12 p52, Ux19. White worked in the lab from May 14, 2014, through January 14, 2019. He now works at a reasonable accommodation location, as a result of an arbitration award of August 9, 2021.

The Agency failed to let the Union know about inspections, tests, remediations, findings and reports, and failed to provide copies of reports, all of which are violations of the CBA. Tr.2, Pg.387, 398.

The Union found formaldehyde in the CBOC. Tr.2, P275.

Scotty White laid out \$849.57 for testing. (See also Pages 40-46 of this decision and U-100-A. For the EMSL Analytical, Inc. certifications, see U111.)

#### **Diana Stewart**

Tr.6, Pgs.17-53.

Stewart has been a medical technologist for 32 years, the last eleven with the VA. Tr.6, Pgs.17-53. No one from the Agency told her there was mold in the workplace. Supervisor Ashley Lepold did not help with her worker's compensation claim. She was present in April 2018 when the black particles came through the HVAC vents multiple times. Tr.6, Pg. 19. All five lab employees had blisters in the week following the black particles' blowing in. She was not advised to get checked out by her doctor. Tr.6, Pg.19. Mold was found on the wall of the lab in April 2018 and painted over. She didn't know about it at the time, but was told by coworkers. Tr.6, Pg.19.

She was called to testify in the OMI investigation but was not offered Union representation nor was she allowed to review the transcript, both required by the CBA. Parts of the transcript from her testimony, which she saw at the arbitration, for example where it said the particles came through only once, were inaccurate. Un. Exh.70, her medical record from Dr. Nagy, her personal physician, states: "Calcified granuloma within the right lung apex. Emphysema changes. And scattered fluid within the right mastoid air cells." A common cause of this condition is a fungus, she was told. Other symptoms included headaches, nasal issues, and fatigue.

#### **Tracie Eudaley**

Tr.5, Pgs.125-209.

Eudaley worked in the lab for 26.5 years. She has been a medical technologist, a BFMT, for almost 40 years. Her specialty is hematology and microbiology, including molds. She is qualified to check a slide for mold. She and another worker saw mold growing on the wall in the corner above her coagulation analyzer in April 2018 and told their supervisor Brenda Norden about it. Tr.5, Pg.128. Norden and the Agency decided to paint over the mold with antibacterial paint. The Agency acknowledged mold growth in April 2018 but did not notify the Union or employees. Eudaley put black particles from the HVAC vents under a microscope and they were mold. Tr.5, Pg.165. Exhibit UL, the 2019 Jurgiel report, identified the black particulates as mold, with high amounts of Cladosporium spores and Hyphal fragments.

After the remediation in 2019 she and another employee saw black mold particles in the lab and examined it under a microscope. Tr.5, Pg.161. The supervisor told them not to look at it again. The supervisor knew mold had been discovered within the workspace but did not notify employees, as required by the CBA.

She was interviewed by OMI in February 2020. They did not give her a chance to review the transcript, as required by the CBA. She looked at the transcript during the arbitration. In places it was wrong. Tr.5, Pg.130. The OMI report states: "Several witnesses reported they observed one episode of a dark particulate material that came from a supply vent in the laboratory." This was wrong; it occurred multiple times. Tr.5, Pg.230; CBA, Article 17, Section 4. The interviewers repeatedly cut off her answers. Tr.5, Pg.157.

There was mold found all over the inside of the coagulation machine. There was also mold growing in the urinalysis machine in July 2021. Tr.5, Pg.133. She asked her manager about it.

She received TempTrak readings. Tr.5, Pg.162. The EPA standards for humidity are between 30 and 60%. When it hits 60% and over, the floors get slippery in the lab. It has happened on multiple occasions. Tr.5, Pg.161. U173, U178, U186, U186A.

She has had daily headaches since 2014, sneezing, coughing and body aches, plus memory problems. When she was away from work, over weekends, she had no symptoms. She tested positive for mold exposure on January 21, 2021. The labs were ordered by her physician. Tr.5, Pg.150-157; U230. She had asked Employee Health to do allergy tests for mold and they refused. Tr. 5, Pg. 190. In Union 230, her test results, she was positive for exposure to Cladosporium. No one from the Agency ever told her there was mold. Tr.5, Pg.142.

Tracie Eudaley called the VA public affairs officer because a reporter approached her asking about the unsafe conditions in the lab. Within fifteen minutes, the executive assistant to the "front management" came to her. He said his wife worked for the deputy undersecretary, and Eudaley would lose her job through the work reduction program, if she talked to the reporter. Tr.5, Pg.154-155. She was aware that Scotty White had been retaliated against for reporting mold problems.

### **Andrea Osborn**

Tr.6, Pgs.154-197.

Osborn worked for 27 years in the lab. She is now Laboratory Information Manager. She saw mold on the wall in 2018. Her supervisor never told her about the mold. If she would have been told about it, she would have understood the symptoms she was having including sinus issues and headaches. U82 is hers, dated Sept. 10, 2021. She started in the lab in 1995 and has been

getting sicker through the years: coughs, drainage, with headaches and blurred vision. She was aware of the mold in the ceiling tiles, in the coagulation machine and other instances. She was present when the black particles came out of the vents several times. In the week after it started, employees had blisters on their faces. "It covered us, it was horrible," Tr.6, Pg.170, "I know at least four employees walked in with sores, different sores on their face. One had it close to the nose, another two had it around their lips." She testified in the OMI investigation, but was not offered the transcript of the OMI interview to review it for accuracy. U232 is a copy of her sick leave and time and attendance. Tr.6, Pg.174. U231 is ENT test results for her dated Jan 10, 2022. Results of tests on the black particulates in the lab and the ceiling tiles in the blood bank showed *Alternaria Camas* and *Helminthosporium* Tr.6, pg.176. She has never had black particles fall on her outside. Tr.6, Pg.204.

### **Tracy Jones**

Tr.7, Pgs.142-170.

Jones has worked in the VA lab since September 2020 as a Medical Technologist. She's been a Medical Technologist for 27 years. She's never had respiratory problems from mold before. Tr.7, Pg.142. She had been having problems for about a month and went to her primary care doctor and pulmonologist. In May 2021 after being sick for two and a half months, taking three different rounds of antibiotics, plus antifungals and cough medicine, her lungs were scoped and they found molds, U-77, *Candida albicans* yeast and fungus *Dematiaceous*, growing in her lungs. U-78 is a better copy of the test results, taken on May 5, 2021. She developed this after the mold remediation in April 2019. She saw the mold in the urinalysis machine. Tr.7, Pg. 156.

She sent an email to Scotty White saying OSHA had found yeast in the lab which was higher than that outside. Tr.7, Pg.144. Her supervisor never told her what to do, nor did anyone from the Agency give her assistance. No one offered to put her on medical surveillance or help with a worker's compensation application. She works evenings in the lab as a generalist, running tests with chemistry and hematology, and with the microbiology lab and blood bank. Tr.7, Pg.148. She filed a whistleblower protection form. She's been sick and missed six days of work.

### **Jane Parker (formally Baron)**

Tr.8, Pgs.73 to 114.

Parker started in 2001 as a medical technologist; she retired as an Ancillary Testing Coordinator. She was a generalist, like Tracy Jones. She observed mold more than once, first in 2003, when cleaning behind a work area where she found mold growing on the wall and on paperwork. She cleaned it up and went back to work. She recognized a photo of black particles spewing out of a vent near Scotty White's work area in the lab from Sept 28, 2018. It had been going on for years. She saw mold on the walls in hematology, once below an air vent and the other time by the co-ag machine. She put some under a microscope and it was mold. Supervisor Ashley Lepold told them they weren't credentialed for that and not to put anything under a microscope again. She felt really tired after she started and had gone to her doctor with sinus problems, headaches, and blurred vision. Tr.8, p78. There was a dehumidifier in the room. They would turn it on when the floors got wet and they were slipping.

Ux105 is a work order for the lab dated April 19, 2013 stating temps were too low. Moisture was dropping from the light fixture for two or three years. Tr.8, Pg.82. A work order she put in,



dated March 3, 2014, states the room temperature exceeds acceptable limits. Tr.18, Pg.81. The leak continued; the Agency said it was condensation but the light fixture kept filling up with water. Tr.8, Pg.82. Then on August 17, 2016, humidity too high. On Jan 18, 2017, the temperature was too low. On August 9, 2017, the blood bank was too warm. On January 3, 2018 the blood bank was again too hot. The blood refrigerator was saying products were getting too warm; they might lose blood. On February 2020, the chemistry lab was too hot. Ux90, report from MoldArmor dated Jan. 17, 2019 identifies Aspergillus found in the lab. The material from U87 sample date 12/17/2019, was identified as Aspergillus, which she is allergic to. Tr.8, Pg.88. Ashley Lepold said the Agency didn't do mold testing, Tr.2, Pg.333. She retired after 20 years in June 2021. She went to the doctor, doesn't know how many times, for sinuses. She wanted to work longer but it just got too bad.

**Amy Musgraves**, Tr.14, Pgs.109-112. She left the VA in February 2017. She had become really sick while working in the lab; her doctor said she had suffered from mold exposure. Tr.14, Pg.110, U284.

## **MRI**

### **Laura Jackson (formerly Laura Black)**

Tr.6, Pg. 54-116.

She sent exhibit UM2 in February 2017 because when the AC kicked on, black particles came out of the vents over her desk. She was having dizziness and headaches. She emailed her supervisor, Debby Shepard; Joanne Miller, safety management; Lisa Lansford, her coworker; and Tonya McIntosh. Tr. 6, Pg 57. Her supervisor didn't warn her of the mold or the need to be tested. Joanne Miller, safety management, sent an email saying it wasn't her responsibility to have mold testing. Laura responded and said she and her coworker Lisa were going to purchase a testing kit and send a sample off. Tr.6, Pg.60. When testing was finally done by the Agency, Miller didn't provide testing results to employees. Laura's symptoms included shortness of breath, dizziness, and sinus issues. Management kept insisting the mold was not dangerous. Tr.6, Pg.120, UM1 and UM4 were test results from the mold over her desk which showed growth of Rhodotorula and Cladosporium. Her worker's compensation form is UM12. She got no help from management.

### **Lisa Lansford**

Tr.6, Pgs.117 to 151. Lansford has been employed in the lab since 2008. At the time of her testimony, she was Assistant Supervisor in Radiology. She was assigned as an MRI tech prior to August 2020. She and Laura Jackson reported the black particles coming out the HVAC vents, blowing directly on them. Tr.6, Pg.119. They sent emails to and from management. UM2. Management kept saying it wasn't a safety issue and refused to test it. On January 4, 2019 she submitted an injury report for mold exposure in the MRI room. Tr.6, Pg.131, UM15. Tim Lowe, a manager, may have helped her fill out UM15. She doesn't know how many sick days she took because of mold. Her symptoms included sneezing, dizziness, and coughing. Marilyn Lowe was the FMS supervisor; she knew of mold because she was copied on emails. Lansford goes out to

walk and shop and never has black mold particles falling on her outside or anywhere else. Despite her efforts to access her medical records, a change in the VA computerized system prevented her from accessing them. She is willing to provide, if she can get access. Tr.6, Pg.134-135.

### **Summary of Union Witnesses**

These employees went to their own attending physicians and were told by their attendings that they had illnesses related to mold in the workplace: Scotty White, Tracey Jones, Andrea Osburn, Tracie Eudaley, Sonia Ellis, Diana Stewart, Harold Lampley, Lisa Lansford, Pamela Putman, Rick McCoy, Jane Parker, Laura Jackson and Amy Musgraves.

**Scotty White**, Tr.2, Pg.240 to Tr.4, Pg.785, is seeking no remedies in this arbitration, other than reimbursement for monies fronted for mold testing. His details (above) have been included because he is Union LSO, worked in the same place, experiencing the same occurrences, and did numerous mold samplings. He was certified as an expert in this arbitration. The high concentration of *Aspergillus* and *Cladosporium* in the lab led to his asthma attacks from mold. Tr.2, Pgs.258 to 260. White's symptoms from mold include asthma attacks, blurred vision, allergic conjunctivitis and so on. Ux1; Tr2, ps258-263. His blood test for *Aspergillus* was positive. Tr.2, Pg.389.

**Sonia Ellis**, Tr.5, Pgs.20-121; Sonia Ellis worked in the Telemed room from December 2016 to March 2020, when the Agency finally decided to renovate the room and found mold under the sheet rock. Ellis had repeatedly reported the mold in Telemed. She has suffered hair loss, rashes, inability to concentrate, blurred vision, memory loss, and swollen eyes. Tr. 5, pages 42, 46, 53, 59, 61; Exhibits UxF1, UxFB, UxFC, UxF4A, UxF4B, UxF4D, UxF4E, UxF4F, UxFG, UxFK, UxF4M, Ux4FN, UxF5, UxF4I. She tested positive for molds including *Aspergillus*, *Alternaria* and *Cladosporium*. Tr.5, Pg.59.

**Tracie Eudaley**, Tr.5, Pgs.125-209; Tracie has worked in the lab for more than 26 years. She suffers from daily headaches, sneezing, coughing, body aches, lack of concentration, memory loss. Tr.5, Pgs.156, 158; Exhibits Ux230, Ux293, Ux298.

**Diana Stewart**, Tr. 6, pages 17-53. She has worked at the VA for eleven years in the lab. Her doctor found calcified granuloma in right lung; emphysema and fluid within the right mastoid air cells, fever blisters, headaches. Ux70.

**Laura Jackson**, Tr.6, Pgs.54-152. She worked in the old MRI room where mold came out of the vents on a regular basis. She suffered from dizziness, shortness of breath, sinus problems. Tr. 6, pages 89, 91. Exhibit UxM12.

**Andrea Osborn**, Tr. 6, pages 153-205. She has worked at the VA for 27 years in the lab. She has suffered from coughing, drainage, headaches, and blurred vision. Ux82.

**Harold Lampley**, Tr.7, Pgs.7-141. He has worked at the CBOC since 2018, and suffers from allergic rhinitis, ruptured eardrums, sinus infections, ear infections. He asked for reasonable accommodation, see Exhibits UxW82, UxW82A, UxW82B, UxW82C, UxW82D, UxW82F, UxW82G, Ux84.

**Tracy Jones**, Tr. 7, pages 142-170. She began in the lab in September 2020 as a medical technologist. She had no respiratory problems prior to working at the VA. Tr. 7, page 142. She

found out she had mold growing in her lungs. Tr.7, page 145. Exhibits Ux76, Ux77, Ux77A. The doctor found Dematiaceae Fungai, black mold, in her lung and Candida Albicans. Tr.7, Pg.157.

**Pamela Putnam**, Tr. 7, pages 171-203. She has worked at the CBOC since 2016. She began having respiratory problems then. Tr. 7, 171. She suffered itchy eyes, watery eyes, sore throat, sneezing, headaches, emphysema, asthma, shortness of breath, rapid heartbeat. She is teleworking now and many symptoms have gone away but still has asthma and emphysema and has to use an inhaler. Tr.7, Pg.187.

**Rick McCoy**, Tr. 8, Pgs.6-72. He has worked at the CBOC since January 2020. He has suffered sinus infections, chronic cough, a nodule on his lungs, headaches. Tr. 8, page 21, Exhibit UxW104. He was given an interim accommodation only which needs to be applied for again and again. Tr.8, Pg.16. UxW101, UxW102.

**Jane Parker**, Tr.8, Pgs.73-114. She was a medical technologist. She first saw mold in 2003. She has suffered from sinus problems, blurred vision, and headaches. Tr.8, Pg.78.

**Amy Musgraves**, T.14, Pgs.109-112. She left VA in February 2017. She had become really sick while working in the lab; her doctor said she had suffered from mold exposure. Tr.14, Pg.110, UX 284.

**Lisa Lansford**, Tr.6, Pgs.117 to 151.

She and Laura Jackson reported the black particles in the lab. UM2 Management kept saying it wasn't a safety issue and refusing to test it. Her symptoms included sneezing, dizziness, and coughing.

Because the Agency refused to test, despite repeated notice of mold, mold smells and/or formaldehyde and associated symptoms, from employees in all four locations, Scotty White, the Union LSO, did testing, despite efforts by the Agency to stop him. Tr.2, Pg.381 and Tr. 2. Pg.240 -T.4 Pg.785, Exhibits UM3, UM4, UW22, UW43, UW45A, UW106A, U90, U90A, U93, U98, U100, U152, U153, U166, U236-A. He found extensive mold. The Agency finally began to test.

The following list of studies is not exhaustive.

Robert Jurgiel's report on the lab from February 11, 2019 came into evidence as A-9 and Ux L; also see U-115. Jurgiel was hired by the Agency to do testing several times at the lab and the CBOC. The Jurgiel report on mold in the lab from February noted that filtration by the HVAC was a problem. The sampling was done on two different days. Sampling on two days is not normal procedure. There are no current occupational exposure guidelines or regulations regarding airborne mold spore levels. He found no indoor amplification of airborne mold, the standard he applied, but he did find Penicillium, Aspergillus, Hyphal fragments, and Stachybotrus spores from between 10 s/m<sup>3</sup> (cubed) to 300 s/m<sup>3</sup> in the chemistry lab. In the Hematology lab, surface mold results included high amounts of Cladosporium spores and hyphal fragments, which are indicative of nearby mold growth, not just airborne mold. Lesser amounts of Alternaria spores and Basidiospores were noted. In the Blood Bank room, high amounts of Alternaria spores, Hyphal fragments, plus low amounts of Cladosporium were found on surfaces.

The Agency did not advise the employees in the lab of the results of the Jurgiel report. The Agency did not offer to place White or any other lab employees in a medical surveillance program. The Agency did not help employees with reasonable accommodations or applications for worker's compensation. The Agency did not do follow-up testing at least every 90 days after finding mold. See the CBA, Article 29. Tr.2, Pg.369.

Jurgiel testified that in Exhibit U-115, dated February 11, 2019, in an email he sent to management about the results of his testing he stated: "As discussed, initial investigation should be conducted by a mechanical engineer for the HVAC system that supports the hematology and chemistry lab to ensure it's working properly –that it's working properly to control relative humidities in the space and not to lead to condensation and potential future mold growth during warm outdoor months." The Agency did not follow-up on this advice.

Ashley Lepold sent out an email on February 12, 2019 advising supervisors and maintenance of the testing and results, based on amplification, and the plans for remediation. U-263-E. The email states that employees in the lab and blood bank should be advised to consult with their doctors to determine an appropriate course of action, based on the actual spore counts that were found. None of the employee witnesses (see above) recalled being advised by supervisors about the mold or that they should see their doctors.

Kevin Ellis was made aware by supervisor Brenda Norden on April 12, 2019 that the deep cleaning was going to be done. U-91. In response, he raised concerns about the cleaning not addressing the root cause of the mold, and employees with respiratory conditions still incurring health risks. The deep cleaning began on April 26, 2019. The lab was closed for two days. The Agency budgeted \$63,214.08 for the project. A-54.

The cleaning did not eliminate the problem of mold, but only temporarily cleared the air. Post-remediation, White found mold on all six floors of the lab by samples taken June 28, 2019. Tr. 2, Pg. 380. White's testing yielded results of 100 spores per cubic foot in Hematology, 7,760 in the chemistry lab, and 520 in Microbiology. Tr.2, Pgs.369-371. U98. Some of the counts were much higher than those outside. The Union used a certified lab and presented chain of custody documents on each testing. Tr.2, Pg.368. The chemistry lab results show amplification.

Cladosporium mold was found by medical lab employees in tubing on the urinalysis machine after the April 2019 remediation in the lab. Tr.7, Pg.156.

AirTecs Environmental testing at CBOC: This study for the lessor of the CBOC building issued August 17, 2019, UW-3, -4, -5, -6, and A-66a, recommends anything above ten mold spores (Observed Counts) be eliminated. The high mold spore count is dangerous. **Mold spore count should be under 10 per cubic foot. Anything over 100 is unsafe.** (Emphasis added) This is an industry standard. Results showed very high mold counts per cubic foot: Room 124, Aspergillus/Penicillium, 300000, Mycelial fragments, 3000; Room 122, Aspergillus/Penicillium, 250000, Mycelial fragments, 9000; Room 123, Aspergillus/Penicillium, 3000, Ulocladium, 6000.

Jurgiel reports on CBOC, dated September 20, 2019, October 9, and November 6, 2019, were again without Union notice or participation, and were based on lack of indoor amplification. The limited survey found only one visible mold growth (September). Only a few rooms were tested. On May 7, 2021, Jurgiel did another limited survey at CBOC, without notice to the Union and again basing his analysis solely on amplification. CBA Article 29, Section 3, Union Participation and Article 3, Section 4, page 9, Principals. A-23, A-24a, A-24b.

Post-remediation in the lab, in a mold report (U100) dated November 12, 2019, sampling done by Scotty White, the ground floor tested 250 mold spores per cubic foot; second floor tested 100; third floor, 50; fourth floor, 350; fifth floor, 150; next to the outside door 720; and the chemistry lab spore count was 2,280 with a dehumidifier running. Tr. 2, Pg. 384-385. Aspergillus was higher in the lab than outside, 480 to 400, showing amplification.

Through repeated FOIA requests, White found that TempTrak and work orders showed continuous variations in temperature and humidity in the lab, Ux3, Ux105, Ux120, ux123, Ux124, Ux135, Ux136, Ux137, Ux172, Ux186, which accelerate the growing of mold. Multiple FOIA requests were also required to obtain reports that should have been provided to the Union LSO automatically. See White testimony, Tr.2-4. The Agency has now admitted the problem and a new system was in the planning stage during the hearing of this case. Ax19. By the time of briefing, the system had been installed.

Except for the notice given to Union President Kevin Ellis of the remediation of April 2019 in the lab, through fifteen days of hearing the Agency did not provide evidence of including the Union in planning, testing, or remediation, as required by CBA Article 29, Section 3, Union Participation and Article 3, Section 4, page 9, Principals.

A March 23, 2020 Jurgiel indoor air quality survey for mold on the fifth floor, the former Telemed area where Sonia Ellis worked, shows the presence of high levels of Stachybotys and memnoniela mold growth. Other molds included Cladosporium, Chaetomium, penicillium, Aspergillus, Psaria and Trichoderma species. UF-2. The room is no longer in use. UF7.

Rhyneer Riverfront's Industrial Hygiene Summary Report, dated September 8, 2020, Ax31 and UxW58, is a limited report, investigating only readily accessible spaces at CBOC, and suggesting more extensive testing is needed, page 8.

Rhyneer Riverfront Project, Ax42 and U-183, dated October 5, 2021, Tr.9, Pg.18, found elevated mold readings in the lab. A commercial grade dehumidifier was in operation. Again, the Union was not notified or copied on the report. White asked repeatedly for a copy of the report and it was finally provided. The document reports aspergillus is higher inside the lab than outside. These two Rhyneer reports were paid for by the Agency.

OSHA procedures are not presented for review. OSHA gives much weight to amplification. The OSHA results do not equate with the White results. The Agency placed an air conditioner in the

lab the day before OSHA came. Eudaley testimony, Tr.5, Pg.146. Eudaley believed it was intended to skew the results. The Union was not notified before employees in the bargaining unit were interviewed by OSHA; the Union was not invited; employees and the Union were not given a copy of the report. Ashley Lepold tried to notify the Union the day of the OSHA interviews, before OSHA came into the building on November 12, 2019. U-95. No one was in the Union office.

OSHA took samples on February 3, 2020 at the lab. They found only permissible levels of formaldehyde. A-22.

OMI: The February 2020 OMI report on mold in the lab had facts wrong; e.g., black particles that were mold came through the HVAC system multiple times, not once (see testimony of Diana Stewart and Tracie Eudaley in Facts above.) Employees were not heard fully (see Tracie Eudaley testimony above.) The Union was not invited. Interviewees were not given a chance to review their testimony. Copies of the report were not provided to the Union.

During the OMI investigation at the CBOC in February 2021, the Union was not notified as required by the CBA. Tr.10, Pg.8. McCoy and Lampley had reported mold and/or formaldehyde, but were not interviewed. Investigations have been done in 2018, 2020, 2021, and one currently, but the supervisor has not given notice before or reports to the Union, as required by the CBA, Article 29, Section 3, Paragraph G7. The OMI report came into evidence as Agency Exhibit 88 at Tr.15, Pg.7, however the report was not signed, nor were the underlying facts made available. The OMI report stated that the Union did not use a certified lab. The Union did.

Mold is dangerous, see Ux3, EPA Fact Sheet on mold and the CDC Fact Sheet on common triggers for asthma, Ux9. The continued problems with temperature and humidity exacerbate mold, see TempTrak readings, Ux120, Ux123, Ux124, Ux135, Ux136, Ux172, Ux186.

The affected employees have mold sensitivities, which can constitute a life changing condition. Mold sensitivities are person-specific. The mold in the CBOC and the lab is dangerous to the named employees' health and lives. See OSHA Fact Sheet on Mold, Ux4 or 3, CDC Fact Sheet on common triggers for asthma, and White and other Union witnesses' testimony. Ux.9.

The testing companies for the Agency applied amplification as the sole criterion to determine whether mold was too high in the workplace. The CBA does not name amplification at all, let alone as the sole criterion.

The spore count in the workplace is critical, not the comparison between outside and inside counts. The location of the VAMC in the Mark Twain National Forest in the southeastern United States means spore counts outside are high, throwing off the comparison value. A high mold spore count is toxic, even if it does not exceed the outside count.

AirTecs Environmental testing at CBOC, issued August 17, 2019, UW-3, -4, -5, -6, and A-66a, recommends anything above ten mold spores (Observed Counts) be eliminated. The high mold spore count is dangerous. Mold spore count should be under 10 per cubic foot. Anything over 100 is unsafe. The report states this is an industry standard.

Indoor amplification of spores is only one factor in how efficient an HVAC system is. Controlling humidity is as or more important. See U-115.

The CBA requires an inspection in each facility to determine the existence of mold, performed by qualified inspectors under the EPA standards for Hazardous Air Pollutants regulation. The Agency has not done this.

The CBA requires notice to the Union before the Agency initiates procedures for mold removal. The Agency has not done this, except for the April 2019 remediation in the lab.

The CBA requires periodic surface and air sampling, when it has been determined that mold exists in a facility. Once significant amounts have been found, sampling should be done at least every three months. Significant counts were found. The Agency has not done this.

The CBA requires the Agency to develop and monitor, with the Union LSO, abatement plans needed to correct local conditions as appropriate. The Agency has not done this.

The CBA requires the Agency to advise all personnel subject to hazards of plans and of the interim protective measure in effect and keep them informed of the subsequent progress on the abatement plan. The Agency has not done this.

The CBA requires the Agency to conduct joint inspections with the Union LSO. The Agency has not done this.

The CBA requires the Agency to provide in a timely fashion, upon request by the Union, information that is normally maintained. Repeatedly, the Agency did not do this.

### **Analysis**

Arbitrator finds the appropriate statement of the issues to be: Did the Agency fail to receive and investigate employee reports of unsafe or unhealthy conditions in the lab, MRI, Telemed, or CBOC; did the Agency fail to provide a safe working environment for bargaining unit employees in the lab, MRI, Telemed or CBOC; did the Agency fail to provide the necessary reasonable accommodations to bargaining unit employees as a result of the alleged bad air quality, mold, and unsafe working environment; did the Agency fail to assist the affected employees with completing

the necessary Office of Workers' Compensation applications; has causation been shown for illnesses alleged by employees; and has retaliation been proved? If so, what shall the remedy be?

The fourth and fifth floors of CLC were not named in the grievance. Tr. 1 page 129-131. For this reason, the arbitrator will consider only the named four locations: West Plains CBOC, MRI Building, the lab, and Telemed (5025 or 5025A).

The CBA supersedes Agency regulations and directives. CBA, Article 2, Sections 1 and 2.

The agency argues that the grievance was timely filed. However, it alleges continuing violations. As such, it is timely.

The Agency also has argued that other grievances were filed: CBOC on October 7, 2019, A-35A, and A-37, dated May 29, 2019, but neither grievance went forward. Res judicata has not attached.

Because the Agency refused to test, despite repeated notice of mold, mold smells, formaldehyde, and associated symptoms from employees in all four locations, Union LSO Scotty White did testing, despite efforts by the Agency to stop him. Tr.2, Pg.381 and Tr. 2. Pg.240 -T.4 Pg.785, Exhibits UM3, UM4, UW22, UW43, UW45A, UW106A, U90, U90A, U93, U98, U100, U152, U153, U166, U236-A. He found high levels of mold. The Agency finally began to test.

The following list of testings is not exhaustive.

Robert Jurgiel's report on the lab from February 11, 2019 came into evidence as A-9 and Ux L; also see U-115. Jurgiel was hired by the Agency to do testing several times at the lab and at the CBOC. The Jurgiel report on mold in the lab, dated February 11, 2019, A-9 or UxL noted that filtration by the HVAC was a problem. The sampling was done on two different days. Sampling on two days is not normal procedure. There are no current occupational exposure guidelines or regulations regarding airborne mold spore levels. He found no indoor amplification of airborne mold, but he did find Penicillium, Aspergillus, Hyphal fragments, and Stachybotrus spores from between 10 s/m3 (cubed) to 300 s/m3 in the chemistry lab. In the Hematology lab, surface mold results included high amounts of Cladosporium spores and hyphal fragments, which are indicative of nearby mold growth, not just airborne mold. Lesser amounts of Alternaria spores and Basidiospores were noted. In the Blood Bank room, high amounts of Alternaria spores, Hyphal fragments, plus low amounts of Cladosporium were found on surfaces.

The Agency did not advise the employees in the lab or the Union of the results of the Jurgiel report. The Agency did not offer to place White or any other lab employees in a medical surveillance program. The Agency did not help employees with reasonable accommodations or applications for worker's compensation. The Agency did not do follow-up testing at least every ninety days after finding mold. See the CBA above. Tr.2, Pg.369.

Quoting in testimony from Exhibit U-115, dated February 11, 2019, an email he sent to



management about the results of his report on the lab, Jurgiel stated: "As discussed, initial investigation should be conducted by a mechanical engineer for the HVAC system that supports the hematology and chemistry lab to ensure it's working properly –that it's working properly to control relative humidities in the space and not to lead to condensation and potential future mold growth during warm outdoor months." The Agency did not follow-up on this advice.

The Agency had a deep cleaning of the lab in April 2019; the lab was closed for two days. The deep cleaning did not eliminate the problem of mold, but only temporarily cleared up the symptoms.

Post-remediation; White found mold on all six floors of the lab by samples taken June 28, 2019. Tr. 2, Pg. 380. White's testing yielded results of 100 spores per cubic foot in Hematology, 7,760 in chemistry lab, and 520 in Microbiology. Tr.2, Pgs.369-371. U98. These counts were much higher than those outside. The Union used a certified lab and presented chain of custody documents on each testing. Tr.2, Pg.368. White is trained in taking samples and chain of custody. The chemistry lab results show amplification.

The AirTecs Environmental study for the lessor of the CBOC building, issued August 17, 2019, UW-3, -4, -5 and -6, recommends anything above ten mold spores (Observed Counts) be eliminated. The high mold spore count is dangerous. Mold spore count should be under 10 per cubic foot. This is an industry standard. Anything over 100 is unsafe.

Again post-remediation, in a mold report (U100) dated November 12, 2019, sampling done by Scotty White, the ground floor tested 250 mold spores per cubic foot; second floor tested 100; third floor, 50; fourth floor, 350; fifth floor, 150; and next to the outside door 720. The chemistry lab spore count was 2,280 with a dehumidifier running. Tr. 2, Pg. 384-385. Aspergillus was higher in the lab than outside, 480 to 400, showing amplification.

Through FOIA requests, White found out that TempTrak and work orders showed continuous variations in temperature and humidity in the lab, Ux3, Ux105, Ux120, Ux123, Ux124, Ux135, Ux136, Ux137, Ux172, Ux186, which accelerate the growing of mold. The Agency has now admitted the problem and a new system was in the planning stage during the hearing of this case. Ax19.

Cladosporium mold was found by medical lab employees in tubing on the urinalysis machine, after the remediation. Tr.7, Pg.156.

Jurgiel reports on CBOC, dated September 20, October 9, and November 6, 2019, were again performed without Union notice or participation, and were based on lack of indoor amplification. The limited survey found only one visible mold growth (September). Only a few rooms were tested. Again, on May 7, 2021, Jurgiel did another limited survey at CBOC, without notice to the Union and again basing his analysis solely on amplification.

A March 23, 2020 Jurgiel indoor air quality survey for mold on fifth floor, the former Telemed area where Sonia Ellis worked, shows presence of Stachybotrys and memnoniella mold growth. Other molds included Cladosporium, Chaetomium, Penicillium, Aspergillus, psaria and Trichoderma species. UF-2. The room is no longer in use. UF7.

Jurgiel used EMSL Analytic to analyze his samples, the same lab used by Scotty White with his sampling.

Rhyneer Riverfront's Industrial Hygiene Summary Report, dated September 8, 2020, Ax31 and UW58, is a limited report, investigating only readily accessible spaces at CBOC, and it suggests more extensive testing is needed, page 8. The Union was not notified, nor was a copy of the report provided. Again, amplification is the standard.

Rhyneer Riverfront Project, A-42, dated October 5, 2021, Tr.9, Pg.18, found elevated mold readings in the lab. The document reports aspergillus is higher inside the lab than outside. A commercial grade dehumidifier was in operation. Again, the Union was not notified and was not given a copy of the report.

OMI: The February 2020 OMI report on mold in the lab had facts wrong; e.g., black particles that were mold came through the HVAC system multiple times, not once (see testimony of multiple lab employees in Facts above.) Employees were not heard fully (see Tracie Eudaley testimony above.) The Union was not invited. Interviewees were not given a chance to review their testimony. Copies of the report were not provided to the Union.

During the OMI investigation at the CBOC in February 2021, again the Union was not notified as required by the CBA. Tr.10, Pg.8. McCoy and Lampley had reported mold and/or formaldehyde, but were not interviewed. Investigations have been done in 2018, 2020, 2021, and one currently, but the supervisor has not given notice before or reports to the Union after, as required by the CBA, Article 29, Section 3, Paragraph G7. The report came into evidence as Agency Exhibit 88 at Tr.15, Pg.7, however the report was not signed, nor were the underlying facts made available. The OMI report stated that the Union did not use a certified lab. The Union did.

OSHA reports are difficult to analyze as they use a different type of test and their procedures are not presented for review. OSHA gives much weight to amplification, which in the mold-rich environment of southern Missouri, in the middle of a forest, does not make sense; the outside molds tend to be very high and the comparison is skewed. The OSHA results do not equate with the White results. See Union brief, page 261. The Agency placed an air conditioner in the lab the day before OSHA came. Eudaley testimony, Tr.5, Pg.146. She believed it was intended to skew the results. The outside comparison sample was taken in the middle of a pool of water on the roof where mold had been found, elevating the mold count. Scotty White testimony. Tr.2, Pg.395. The Union was not notified before employees in the bargaining unit were interviewed by OSHA; the Union was not invited; employees and the Union were not given a copy of the report. Ashley

Lepold tried to notify the Union the day of the OSHA interviews, before OSHA came into the building on November 12, 2019. U-95. No one was in the Union office.

OSHA took samples on February 3, 2020 at the lab. They found only permissible levels of formaldehyde. A-22.

The arbitrator finds that the evidence of formaldehyde in the lab and CBOC is insufficient.

Except for the lab remediation in April 2019 and the OSHA visit (no one was in the Union office to receive the news of OSHA's coming that day), the Agency did not provide evidence of including the Union in planning, testing, or remediation as required by the CBA, Article 29, Section 3, Union Participation and Article 3, Section 4, page 9, Principals.

Mold is dangerous, see Ux3, EPA Fact Sheet on mold and the CDC Fact Sheet on common triggers for asthma, Ux9. The continued problems with temperature and humidity exacerbate mold, see TempTrak readings, Ux120, Ux123, Ux124, Ux135, Ux136, Ux172, Ux186.

The affected employees have mold sensitivities, which can constitute a life changing condition. Mold sensitivities are person-specific. The mold in the CBOC and the lab is dangerous to the named employees' health and lives. See OSHA Fact Sheet on Mold, Ux4 or 3, CDC Fact Sheet on common triggers for asthma, and White and other Union witnesses' testimony. Ux.9.

The spore count in the workplace is critical, not the comparison between outside and inside counts. The location of the VAMC in the Mark Twain National Forest in the southeast United States means spore counts outside are high, throwing off the comparison value. A high mold spore count is toxic, even if it does not exceed the outside count. U5, Tr.2, Pgs.289-291.

The testing companies for the Agency applied amplification as the sole criterion to determine whether mold was too high in the workplace. The CBA does not name amplification at all, let alone as the sole criterion.

Again, AirTecs Environmental testing at CBOC, issued August 17, 2019, UW-3, -4, -5, -6, and A-66a, recommends anything above ten mold spores (Observed Counts) be eliminated. The high mold spore count is dangerous. Mold spore count should be under 10 per cubic foot. Anything over 100 is unsafe. The report states this is an industry standard.

Indoor amplification of spores is only one factor in how efficient an HVAC system is. Control of humidity is at least as important. See U-115.

These employees went to their own attending physicians and were told by their attendings that they had illnesses related to mold in the workplace: Scotty White, Tracey Jones, Andrea Osburn, Tracie Eudaley, Sonia Ellis, Diana Stewart, Harold Lampley, Lisa Lansford, Pamela Putman, Rick

McCoy, Jane Parker, Laura Jackson and Amy Musgraves. The record contains substantial evidence supporting a finding that illnesses suffered by these employees were caused by mold in the workplace: Scotty White, Tracey Jones, Andrea Osburn, Tracie Eudaley, Sonia Ellis, Diana Stewart, Harold Lampley, Lisa Lansford, Pamela Putman, Rick McCoy, Jane Parker, Laura Jackson and Amy Musgraves.

If the Agency wanted to contest the findings as to causation presented by the Union and employees, the Agency should have sent them to other physicians and presented any conflicting evidence at hearing. It has not done so. The attending physicians' opinions stand as to causation.

**Has the Agency failed to receive and investigate employee reports of unsafe or unhealthy conditions in the lab, MRI, Telemed or CBOC?** Yes. The evidence provided for each of the four locations is substantial. See Facts and Analysis above. CBA, Article 29, Section 3, G4.

**Has the Agency failed to provide a safe working environment in the lab, MRI, Telemed or CBOC?** Yes, the evidence provided for each of the four locations is substantial. See Facts and Analysis above. CBA, Article 29, Section 3, G.

The Agency argues that the Telemed area has not been in use since March 10, 2020. However, the effects of the years spent in that mold-filled environment may well affect Ms. Ellis for life. The same reasoning applies to the old MRI room.

**Did the Agency fail to provide the necessary reasonable accommodations to bargaining unit employees as a result of the alleged bad air quality, mold, and unsafe working environment?** See facts above. The evidence supports a finding that Scotty White was denied assistance in applying for reasonable accommodation. Harold Lampley, Pamela Putnam, and Rick McCoy have been given only interim accommodations that must be recertified often.

**Did the Agency fail to assist the affected employees with completing the necessary OWCP applications?**

Yes, see Facts above. The evidence supports a finding that the Agency failed to assist the following employees with completing the necessary applications for the OWCP program: Scotty White, Sonia Ellis, Harold Lampley, and Rick McCoy.

**Has there been showing of causation between alleged mold or formaldehyde in workplace and the alleged illnesses?**

These employees went to their own attending physicians and were told by their attendings that they had illnesses related to mold in the workplace: Scotty White, Tracey Jones, Andrea Osburn, Tracie Eudaley, Sonia Ellis, Diana Stewart, Harold Lampley, Lisa Lansford, Pamela Putman, Rick McCoy, Jane Parker, Laura Jackson and Amy Musgraves. Please see Relevant Facts and Summary above.

Yes, the record contains substantial evidence that supports a finding that illnesses suffered by these employees were caused by mold in the workplace: Scotty White, Tracey Jones, Andrea Osburn, Tracie Eudaley, Sonia Ellis, Diana Stewart, Harold Lampley, Lisa Lansford, Pamela Putman, Rick McCoy, Jane Parker, Laura Jackson and Amy Musgraves.

If the Agency wanted to contest the findings as to causation presented by the Union and employees, the Agency should have sent them to other physicians and presented any conflicting evidence at hearing. It has not done so. The attending physicians' opinions stand as to causation.

The arbitrator finds that the evidence of formaldehyde in the lab and the CBOC is insufficient.

**Has retaliation been proved?**

Yes, the Agency has retaliated against employees, including Sonia Ellis, Kevin Ellis, and Scotty White, for reporting health and safety issues. The Agency has threatened retaliation against Harold Lampley and Tracy Eudaley for reporting or asking about reporting health and safety issues.

**Scotty White** was denied assistance in his request for reasonable accommodation; the Agency issued AWOLS against him and absences without pay and a constructive suspension, all in response to his legitimate reports of mold in the workplace.

**Kevin Ellis:** Ellis was barred from safety rounds and escorted away by VA police. Union brief p47-49. The Agency counted him AWOL when he attended safety meetings.

**Sonia Ellis:** Sonia was discharged and later reinstated by an arbitrator.

**Tracie Eudaley:** Tracie called the VA public affairs officer because a reporter approached her asking about the unsafe conditions in the lab. Within fifteen minutes, the executive assistant to the "front management" came to her and told her she would lose her job if she talked to the reporter. The executive assistant said his wife was well connected and Eudaley would lose her job through the work reduction program.

**Harold Lampley** filed a complaint with the Office of Special Counsel and Supervisor Ginger Potts told him not to be on campus when they came or she would have the VA police remove him.

**Rick McCoy** has been denied reasonable accommodation and counted AWOL when, on advice of his doctor, he refused to return to the CBOC workplace.

**Additional Rulings:**

**The Union has met its burden of proof on these additional contract violations:**

- The Agency failed to let Union know about inspections, findings and reports; and when they were going to talk to employees; etc., all of which are violations of CBA, Article 29, Section 15, paragraph C and Article 29, Section 23. The only exceptions are the original OSHA investigation (no one was in the Union office to receive the call) and the lab remediation in 2019.
- The Agency did not establish a program of medical surveillance to safeguard the health of the employees who reported health impacts from mold. Failure to place employees in a medical surveillance program to monitor health is a violation of the CBA, Article 29, Section 27.

- The Agency has failed to develop specific procedures with the Union LSO for preventing and abating safety and health hazards. CBA, Article 29, Section 1, C.
- The Agency has failed to conduct periodic surface and air sampling as appropriate, once mold has been found to exist in a facility. See CBA, Article 29, Section 21, D. Sampling should be done at intervals of no greater than three months to monitor employee exposure levels. See CBA, Section 21, G.
- The Agency has failed to issue joint reports with the Union LSO regarding inspection findings to the appropriate Department official. CBA, Article 29, Section 3, G2.
- The Agency has failed to develop and monitor, with the Union LSO, abatement plans needed to correct local conditions as appropriate. CBA, Article 29, Section 3, G5.
- The Agency has failed to advise all personnel subject to hazards of plans and of the interim protective measure in effect and keep them informed of the subsequent progress on the abatement plan. CBA, Article 29, Section 3, G5.
- The Agency has failed to conduct joint inspections with the Union LSO. CBA, Article 29, Section 3, G1.
- The Agency has failed to provide in a timely fashion, upon request by the Union, information that is normally maintained. 5 USC Section 7114(b)(4) and CBA, Article 49, Section 5.

### **HOLDING**

The grievance was timely filed, as it is continuing in nature.

The representatives of both parties were verbally aggressive during hearing, adding days to an already lengthy proceeding.

The Union witnesses were credible, professional people. The testings done by the Union were professionally competent. The arbitrator rules that Scotty White's findings on mold are at least as reliable as those offered by the Agency, because the Agency's findings were based solely on the criterion of amplification and frequently were limited in scope.

The arbitrator rules that a high mold spore count is toxic, even if it does not exceed the outside count. The arbitrator rules that mold is a recognized hazard under CBA, Article 29, Section 1A.

The testing companies for the Agency applied amplification as the sole criterion to determine whether mold was too high in the workplace. The CBA does not name amplification at all, let alone as the sole criterion. Mold spore count should be under 10 per cubic foot. Anything over 100 is unsafe.

The arbitrator rules that the Union evidence on formaldehyde is insufficient.

The Agency failed to receive and investigate employee reports of unsafe or unhealthy conditions in all four locations. The Agency failed to provide a safe working environment for bargaining unit

employees in all four locations. The Agency failed to provide the necessary reasonable accommodations to bargaining unit employees. The Agency failed to assist the affected employees with OWCP applications. Causation has been shown for illnesses suffered by employees. Retaliation has been proved.

The arbitrator rules that the Agency has violated the CBA in these additional ways:

- The Agency failed to let Union know about inspections, findings and reports; and when they were going to talk to employees; etc., all of which are violations of CBA, Article 29, Section 15, paragraph C and Article 29, Section 23. The only exceptions are the original OSHA investigation (no one was in the Union office to receive the call) and the lab remediation in 2019.
- The Agency did not establish a program of medical surveillance to safeguard the health of the employees who reported health impacts from mold. Failure to place employees in a medical surveillance program to monitor health is a violation of the CBA, Article 29, Section 27.
- The Agency has failed to develop specific procedures with the Union LSO for preventing and abating safety and health hazards. CBA, Article 29, Section 1, C.
- The Agency has failed to conduct periodic surface and air sampling as appropriate, once mold has been found to exist in a facility. See CBA, Article 29, Section 21, D. Sampling should be done at intervals of no greater than three months to monitor employee exposure levels. See CBA, Section 21, G.
- The Agency has failed to issue joint reports with the Union LSO regarding inspection findings to the appropriate Department official. CBA, Article 29, Section 3, G2.
- The Agency has failed to develop and monitor, with the Union LSO, abatement plans needed to correct local conditions as appropriate. CBA, Article 29, Section 3, G5.
- The Agency has failed to advise all personnel subject to hazards of plans and of the interim protective measure in effect and keep them informed of the subsequent progress on the abatement plan. CBA, Article 29, Section 3, G5.
- The Agency has failed to conduct joint inspections with the Union LSO. CBA, Article 29, Section 3, G1.
- The Agency has failed to provide in a timely fashion, upon request by the Union, information that is normally maintained. 5 USC Section 7114(b)(4) and CBA, Article 49, Section 5.

The arbitrator rules that there is a pattern of violation of the CBA by the Agency. The Union is contentious, but that does not relieve the Agency of its obligations under the CBA. Also, while the aging VA medical center may be the cause of the mold intrusions, that does not excuse the Agency's pattern of ignoring legitimate reports of mold and the illnesses caused by it.

**The grievance is SUSTAINED. In addition, the Agency has committed an Unfair Labor Practice. (See lists of violations above.)**

**The Agency is ORDERED to:**

- Cease and desist from violating the CBA: see lists above.**
- Perform tests for molds in each location named in the grievance, performed by a qualified inspector jointly chosen by the parties, with proper written notice to the Union and the Union**

**LSO; remediate, with written notice to the Union and Union LSO of work dates and work to be performed. Allow the Union LSO to attend any and all testing and treatments anywhere in the facility, including CBOCs. If the Union LSO agrees in writing that no additional testing is needed at this time in a specific location, that satisfies this part of the order.**

**-Conduct follow-up sampling for a year, by a jointly chosen qualified inspector, at intervals no greater than three months in each location where mold has been found by the White testings, with proper written notice of the sampling date to the Union and Union LSO; provide written notice of the testing prior to and the results after, to the Union and the Union LSO. If the Union LSO agrees in writing that these testings are not needed in a specific location, that satisfies this part of the order.**

**-Give written notice to the Union and the Union LSO whenever a complaint is made by an employee regarding health and safety anywhere in the workplace, including all CBOCs.**

**-In writing, invite the Union and the Union LSO to attend all safety and health inspections in the facility, including all CBOCs.**

**-Notify the Union and Union LSO in writing of plans for remedial work for the health and safety of employees anywhere in the facility, including all CBOCs, with copies of the planned remedies. Allow the Union LSO to attend and witness the remediations. Copy the Union and the LSO on post remediation reports.**

**-Retaliation: Rescind all disciplinary actions and AWOLS, if any, taken against these employees based on the facts of this case: Rick McCoy, Kevin Ellis, Harold Lampley, and Sonia Ellis. Scotty White is not included in the list, as he has sought no remedies in this arbitration, except reimbursement for testing. Tracie Eudaley is not included in the list because she was solely threatened.**

**-Assist these employees with applications for permanent reasonable accommodations: Harold Lampley, Pamela Putnam, and Rick McCoy.**

**-Assist employees with applications for worker's compensation: Sonia Ellis, Harold Lampley, and Rick McCoy.**

**-For recompense for damage done to these employees, their health and their careers: pay to each of these employees \$50,000: Sonia Ellis, Tracey Jones, Andrea Osburn, Tracie Eudaley, Harold Lampley, Lisa Lansford, Diana Stewart, Laura Jackson, Pamela Putnam, Rick McCoy, Amy Musgraves, and Jane Parker. Scotty White is not included, as he has not sought remedies in this arbitration, except for reimbursement for expenses of testing.**

**-Offer to place the named employees into a medical surveillance program.**

**The Union is ORDERED to provide to the Agency a statement of attorney fees within ten days. The Agency is ORDERED to pay to the Union reasonable attorney fees within thirty days of receipt of the statement.**

**The Agency is ORDERED to pay for the cost of the court reporter and transcripts.**

**The Agency is ORDERED to pay the cost of the arbitrator within thirty days, including**



**paying the remaining amount due to the arbitrator and paying back to the Union the amount already paid by the Union to the arbitrator.**

**The Agency is ORDERED to pay to Scotty White within thirty days the \$849.57 he fronted for testing materials.**

**The arbitrator retains jurisdiction for sixty days to resolve any questions about remedy, attorney fees, or costs of arbitration. She reminds the parties that she is not empowered to enforce this decision.**

**SO ORDERED this 12th day of December, 2023.**

**Cynthia Stanley, JD  
Arbitrator**