FEDERAL MEDIATION AND CONCILIATION SERVICE

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In the Matter of the Arbitration between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL AFFAIRS COUNCIL, UNION

- and -

DEPARTMENT OF VETERANS AFFAIRS, AGENCY

OPINION & AWARD

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FMCS Case Number: 04-06944

Arbitrator: Ellen S. Saltzman

In accordance with the Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees, 1997, (Joint Exhibit No. 1), the Undersigned was selected to hear and finally decide the Union's claim that the Agency violated Article 44, "Mid-Term Bargaining", Section 4(B), "Local" of the parties' Master Agreement by denying travel and per diem for Union team negotiators who are outside of the local area in situations where there are two or more locals at one facility under one management.

The parties stipulated to the following issue:

> Whether the Department of Veterans Affairs violated Article 44, "Mid-Term Bargaining", Section 4(B), "Local" of the parties' Master Agreement by denying payment of travel and per diem for union team negotiators who are outside the local area in situations where there are two or more locals at one facility under one management?

The parties to this grievance are the American Federation of Government Employees, National Affairs Council, (AFGE, AFGE-NVAC, or Union), and the Department of Veterans Affairs, (Agency, Department, or VA). A hearing on this matter was held on February 3, 2005 at the Veterans Affairs Building, 810 Vermont Avenue, NW, Washington, DC.

The parties were represented and were afforded a full and fair opportunity to present relevant evidence and to conduct direct and cross-examination of

witnesses. For the Union: Jacqueline M. Sims, Staff Counsel, American Federation of Government Employees, AFL-CIO, and for the Agency: Meghan Serwin Flanz, Attorney, Department of Veterans Affairs. The parties submitted post-hearing briefs.

Witness for the Union: Oscar L. Williams, Jr., Second Executive Vice President, AFGE-NVAC via telephone. Witnesses for the Agency: Norman E. Jacobs, Senior Labor Relations Specialist, and Bonnie Kerber, HR, VHA HRM Group.

Based on all of the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

MASTER AGREEMENT BETWEEN THE DEPARTMENT OF VETERANS AFFAIRS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (JOINT EXHIBIT 1), RELEVANT PROVISIONS:

ARTICLE 44-MID-TERM BARGAINING
SECTION 3- INTERMEDIATE

> The President of the NVAC or designee will provide the names of the bargaining team members for the specific issue(s) to be negotiated when the Union delegates national bargaining to the intermediate level. Ground rules for intermediate bargaining shall be established by the parties at that level. The parties will make every effort to use bargaining team members from the geographic area of concern with travel and per diem for team members being paid by the Department.

SECTION 4 – LOCAL

> A. On all policies and directives or other changes for which the Department meets its bargaining obligation at the national level, appropriate local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated national policy and agreements. Upon request, the Union will be briefed on the proposed subject prior to the demand to bargain.

B. Proposed changes in personnel policies, practices, or working conditions affecting the interests of one local Union shall require notice to the President of that local. Proposed changes in personnel policies, practices, or working conditions affecting the interests of two or more local Unions within a facility shall require notice to a party designated by the NVAC President with a copy to the affected local Unions. Proposed changes in personnel policies, practices or working conditions affecting the interests of more than one facility shall require notice to a party designated by the National VA Council President.

C. Upon request, the parties will negotiate as appropriate. The Union representative shall receive official time for all time spent in negotiations as provided under 5 USC Section 7131 (a).

ARTICLE 45 – OFFICIAL TIME
SECTION 2 – DESIGNATED UNION OFFICIALS/REPRESENTATIVES

Note 1: Travel and per diem is authorized for National Council Officers, District Representatives, and the National Safety Representative in connection with the semiannual meetings described in Article 5 Labor Management Committee. *Travel and per diem is also authorized as provided elsewhere in this Agreement or where otherwise agreed to by the parties or where required by law, rule, or regulation.(italics added)*

INTEGRATIONS, MERGERS AND CONSOLIDATIONS OF MEDICAL FACILITIES, HEREIN (MOU), (Union Exhibit 1, Agency Exhibit 2), signed 7/11/95

The following constitutes agreement between the Department of Veterans Affairs and the AFGE, National VA Council as regards the establishment of integrated facilities within the Department and merger/consolidations of Services with and between facilities.

1. For the purpose of this agreement, an integration is defined as the combining of two or more facilities into one facility such that there is a single management structure of the newly formed integrated facility. Integration, as such, does not include mergers or consolidations of services between previously defined facilities. This definition in no way affects the parties, bargaining rights and obligations as regards integrations, mergers or consolidations.

2. a. There will be no implementation of an integration prior to the completion of these national mid-term negotiations with the exception of the following integrations:

    1) Newington and West Haven
    2) Fort Howard, Baltimore and Perry Point
    3) Buffalo and Batavia
    4) Marion, IN. and Fort Wayne
    5) Temple, Waco and Martin
    6) San Antonio and Kerrville
    7) Seattle and Tacoma (American Lake)
    8) Palo Alto and Livermore

For the above integrations, management must meet its local labor-management obligations.

b. For any future integrations, or mergers and consolidations of services between facilities the Chairman, Midterm Bargaining Committee, will be notified sufficiently in advance of implementation to allow for negotiation, if requested. It is the intent of the parties that negotiations will take place at the local level.

3. Local unions, consistent with local partnership agreements, will have pre-decisional and continuous involvement in all local decisions regarding integrations, mergers and consolidations at all levels of the local facility.

4. All reorganization re-engineering, streamlining, merging or similar initiatives within the integrated facility will be negotiated with the appropriate AFGE local union(s) prior to implementation.

5. Consistent with local partnership principles/agreements, proposed mergers, consolidations or other related organizational changes that would add, eliminate or consolidate Services within an integrated facility or between facilities will be sent to appropriate AFGE local Union(s) when they are sent for final review to the Facility Director's next higher level of supervision. This notice will include:

A clear description of the proposed changes, a revised organization chart, a description of the rationale for the changes, and the benefits derived. (punctuation added)

6. The appropriate AFGE local Union(s) will be notified by the Facility Director of the approval or disapproval of the previously described mergers and consolidations when the Facility Director is notified.

7. Mergers and consolidations may affect individual employees and may include, but is not limited to, affects on accreditation, certification, continuing education opportunities and change of duty station.

8. Local Human Resource Manager will, upon receipt, provide a copy of the MOU to the local Union President.

9. Neither party at any level waives its statutory rights as a result of this agreement.

10. Where Services are merged or consolidated between facilities, local unions will negotiate at midterm.

11. The following items are examples of matter that may be addressed, as appropriate, in local bargaining regarding mergers and consolidations:

    a) adverse affect on employees
    b) 5 USC 7106 (b)(1) matter
    c) promotion opportunities for affected employees
    d) training for affected employees
    e) retaining current performance evaluation as employee acclimates to new job
    f) employee choice of position assignment
    g) employee transfer opportunities
    h) temporary details
    i) travel and per them/sic for union representatives

BACKGROUND

In the early to mid 1990's, the Agency began to combine several hospitals that had been independent placing them under the management of a single Facility Director. In some situations hospitals were grouped together with their neighboring outpatient clinics. These changes were known as integrations, mergers and consolidations of medical facilities. On July 11, 1995, the VA and NVAC entered into a Memorandum of Understanding, (MOU), (Agency Exhibit 2 and AFGE Exhibit 1) that listed the eight (8) integrations that had already been completed or were in the process of completion; defined what an "integration" is for purposes of this agreement; and set forth procedures for bargaining on future integrations.

After the integrations were completed, there was one Management at the facility and oftentimes, there were two or more locals at the newly combined facility.

The Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees is effective as of March 21, 1997, (Joint Exhibit 1, Article 61, Section 1). The Master Agreement remains in effect for three years after its effective date and renews automatically in one-year periods every year from 2000 to 2003. The Master Agreement has been in the process of renegotiation and until finalized, the 1997 Master Agreement continues in effect.

The Master Agreement, (Article 44), provides for mid-term bargaining at the national, intermediate, and local levels.

This matter involves a grievance filed on June 13, 2003 by the AFGE, (Union Exhibit 5 and Agency Exhibit 1). AFGE filed this National Grievance in response to the May 14, 2003 letter sent from Ms. Bonnie M. Kerber, HR Consultant, VHS HRM Group, to Oscar L. Williams, Jr., Chairperson, Mid-Term Bargaining Committee, National VA Council #53, and to the continuous efforts of

Ms. Kerber to deny travel and per diem for union team negotiators who are outside of the local area in situations where there are two or more locals at one facility under one management.

Briefly stated, the Union considers this intermediate bargaining which provides travel and per diem for bargaining team members, Article 44, Section 3, and the VA considers this local bargaining, Article 44, Section 4, which is silent on the issue of travel and per diem.

POSITIONS OF THE PARTIES

CONTENTIONS OF THE UNION

The Union states that the National VA Council maintains the authority to act as the exclusive representative within each bargaining unit whenever conditions of employment involving VA employees represented by more than one AFGE local area is at issue and only through delegated authority, do local Unions have the right to bargain on issues.

The Union states that it is the position of the National VA Council #53 that any changes in working conditions affecting one or more local unions is a national level issue. The Union asserts that the parties have already agreed these issues are national and by Article 44, Section 3 of the Master Agreement have agreed to use bargaining teams members from the geographical area of concern and state that this does not make the bargaining done locally. The Union's interpretation of Article 44 of the Master Agreement is that when two or more locals in the Veterans Integrated Service Network, hereinafter, (VISN) are affected, that would be national bargaining.

The Union acknowledges that Article 44 of the Master Agreement provides for midterm bargaining at the national, intermediate and local levels. However, the Union's interpretation of Article 44 has always been, that when two or more locals in a VISN are affected, that is intermediate bargaining and if two or more locals in two or more VISN's were affected, that would be national bargaining.

The Union maintains that while there is an extensive history of the Agency's refusal to pay the travel expenses of Union Negotiators in these situations, the established practice has been to pay the expenses of Don Fowler, 11th District Representative, AFGE Chief Negotiator for VISN 20, as noted in the letter from Mr. Oscar Williams to Ms. Kerber dated December 2, 2002. The Union also notes that in a March 21, 2003 letter from Alma L. Lee, AFGE NVAC President, to Ms. Kerber, Ms. Lee wrote that the negotiations involving the Ft. Howard reorganization were handled as intermediate bargaining and Robert Fetzer was the chief negotiator, and that authority was to Brenda Larke, AFGE NVAC 14th District Representation. Ms. Lee further stated that in previous negotiations, there was a district representative and a national representative in addition to Representatives of the local union. Ms. Lee said that this practice has been part of VISN 5 ground rules and VISN 5 management has permitted this practice including paying per diem in the past.

The Union contends that the past practice of paying travel and per diem for those Union Officials negotiating when two or more locals are involved in one integrated facility is supported by the language under Article 44, Section 3, Master Agreement, Intermediate Bargaining which states that the parties will make every effort to use bargaining team members from the geographic area of concern with travel and per diem for team members being paid by the department. The Union continues that its' use of experienced District Representatives, National Representatives, and the Union's Executive Board members during mid-term bargaining best serves and is in the primary interest of the government. The Union notes that the Agency constantly utilizes career labor-management officials as their Chief Negotiators and negotiating team members during midterm bargaining which effectively leaves the "playing field" at the table unbalanced in a situation where the Union would be forced to sometimes use inexperienced or novice local officers to serve as Chief negotiators or bargaining team members on complex issues affecting its' bargaining unit members. The Union also states that the Union's utilization of its' experienced leaders best serves the "efficiency of the

government" by saving time to get novice local union officials properly informed on negotiation strategies and the complex issues at hand when necessary.

The Union contends that Ms. Bonnie Kerber testified that she has sent out management bargaining team members and that not all of its members are from the geographic area of concern to the local bargaining. The Union would surmise that travel and per diem was and is being paid by the Agency for those management officials, a practice which is not fair or equitable, according to the Union.

The Union also asserts that the VA's interpretation and application of Article 44 is flawed in that it sends out notification to the NVAC President or her designee in situations in which they consider local bargaining when that type of notification is required for intermediate and National level bargaining.

The Union points out that while the Federal Travel Regulations does not mandate reimbursement of travel and per diem expenses incurred by federal employees in the role of union representatives, it does permit the negotiation of agreements, such as Article 44, providing for such reimbursement.

The Union argues that the past practice of VA has been to allow intermediate bargaining and to pay for travel and per diem for team negotiators who are outside of the local area in situations where there are two or more locals at one facility under one management. The Union also asserts that the past practice of the Union naming local members to a bargaining team indicates intermediate bargaining. In addition, the past practice has been that the President of the NVAC does not appoint members for local bargaining. For all of the above reasons, VA's interpretation and application of Article 44 violates the Master Agreement and the parties past practices. Therefore, the Union respectfully requests that based on the evidence and testimony presented in this case that the National Grievance be sustained and that as remedy, VA should be required to immediately cease and desist from denying travel and per diem for union team negotiators who are outside of the local area in situations where there are two or more locals at one facility and under one management.

CONTENTIONS OF THE AGENCY

The VA insists that the relevant provision of the parties' Master Agreement, Article 44, Section 4B, provides for local level bargaining, not intermediate. The Agency states that under this provision, the contract requires the Agency to provide notice to AFGE at both the national and local levels, but bargaining occurs locally and VA is not obligated to pay travel or per diem for union negotiators who do not work at the subject facility. The VA continues that the plain wording of the contract negates AFGE's grievance, as do the parties' bargaining history, past practice, and relevant legal authorities.

The VA states that the 1995 MOU provides that the Department must notify the chairman of AFGE's national midterm bargaining committee prior to integrating a facility but that negotiations, if any, will take place at the local level. The VA declares that the MOU only reference to travel and per diem for union representatives is in a list of subjects that the local parties may wish to bargain on in the context of a particular facility integration.

The VA points out that the Master Agreement which took effect well after the MOU was signed, does not define facility or speak directly to the topic of integrated facilities and insists that the omission in Article 44, Section 4-Local of any provision for Union travel must be afforded its due weight under the doctrine of *expressio unius est exclusio alterius*.

The VA also declares that the term "facility" in the Master Agreement must be presumed to have the meaning that the parties attached to that same term in the MOU absent evidence to the contrary.

The VA insists that it has consistently denied the Union's requests for travel and per diem for outside union negotiators in such cases from at least 1998 through the time the grievance was filed in 2003. The Agency position is that the Union's failure to register any formal objection to this practice for five years or more can only be read as acceptance, rendering the practice mutual. The VA states that the past practice established in this matter supports the Department's position, and not the Union's.

The Agency's position is consistent with applicable law and Union representatives have no statutory right to have their travel or per diem expenses paid by Federal agencies. Provisions for such expenses may be provided by contract only if they conform to the requirements of the Federal Travel Regulation, (FTR), which is codified at 41 CFR Ch. 3000304 according to the VA. The VA states that contract provision involving travel and per diem must, therefore, comport with the FTR's general requirement that paid travel be "in the primary interest of the government." Additionally, according to the VA, such contract provisions must comply with the FTR's prohibition on payment for travel within the city, town, or general commuting area of an employee's regular duty station as defined to include the corporate limits of the city, town or other established area in which an employee is stationed.

The parties' Master Agreement calls for local bargaining on issues affecting two or more union locals at a single integrated facility and the intent of this provision is that such issues be negotiated by management and union representatives who work at the facility states the Agency. The Agency notes that unless the campuses are in different commuting areas, local negotiators are not eligible for travel or per diem expenses, but the Union always has the right to bring in representatives from outside the facility. The VA declares that an award in the Union's favor on this grievance would contravene applicable law.

The Agency respectfully requests that the grievance be denied as to do otherwise demands an interpretation of the parties' master agreement that is contrary to the plain wording of the agreement, the parties' bargaining history and past practice, and the applicable law.

OPINION

This matter involves contract interpretation. Contract interpretation requires an analysis of the language of the contract and, whenever the contract is unclear or vague, it requires an analysis of the bargaining history and past practice. The Arbitrator's role is to interpret the contract or agreement and apply the provisions.

THE MEANING OF PERTINENT AGREEMENTS

THE MEMORANDUM OF UNDERSTANDING, (MOU) 1995, INTEGRATIONS, MERGERS, AND CONSOLIDATIONS OF MEDICAL FACILITIES, (Union Exhibit 1 & Agency Exhibit 2).

This MOU signed on July 11, 1995 constitutes agreement between the Department of Veterans Affairs and the AFGE, National VA Council regarding the establishment of integrated facilities within the Department and mergers/consolidations of Services within and between facilities. For purposes of the agreement an integration is defined as the combining of two or more facilities into one facility such that there is a single management structure of the newly formed integrated facility.

The MOU listed eight, (8), integrations on which the parties agreed implementation could proceed prior to the completion of the national mid-term negotiations with the agreement that management must meet its ***local*** labor-management obligations for the eight integrations listed.

With regard to future integrations, the Chairman, Midterm Bargaining Committee would be notified and it is the intent of the parties that negotiations will take place at the ***local*** level. The MOU continues to refer to "***local***" as explained in part as follows:

3. ***Local*** unions, consistent with local partnership agreement, will have pre-decisional and continuous involvement in all ***local*** decisions…
4. All reorganization re-engineering, streamlining, merging or other similar initiatives within the integrated facility will be negotiated with the appropriate AFGE ***local*** union(s) prior to implementation.
5. Consistent with local partnership principles/agreements, proposed mergers, consolidations or other related organizational changes that would add, eliminate or consolidate Services within an integrated facility or between facilities will be sent to appropriate AFGE ***local*** Union(s) when they are sent for final review to the Facility Director's next higher level of supervision…
6. The appropriate AFGE ***local*** Unions(s) will be notified…

8. Local Human Resource Managers will, upon receipt, provide a copy of the MOU to the ***local*** Union President.
10. Where Services are merged or consolidated between facilities, ***local*** unions will negotiate at midterm.

The MOU also provided a list of items as examples of matters that may be addressed in ***local*** bargaining regarding mergers and consolidations and included travel and per diem for union representatives. The MOU concerns integrating or integrated facilities where there are one or more local unions and the bargaining is anticipated to be conducted on the local level. This is a similar bargaining situation to those stated in the grievance concerning integrated facilities with two or more unions.

At the hearing, the Union made no claim that there were any problems with regard to any of the terms of the MOU. The MOU provides for notification to the Chairman, Midterm Bargaining Committee and states that it is the intent of the parties that negotiations will take place at the ***local*** level. The MOU continues to expand on the bargaining relationship between management and the ***local*** union(s). The MOU states in part that it is agreed to: 1. provide notification about any future integrations, or mergers and consolidations of services between facilities to the Chairman, Midterm Bargaining Committee, 2. notify appropriate AFGE local union(s), 3. negotiate with the appropriate AFGE local union(s), and 4. local unions will negotiate at midterm where Services are merged or consolidated between facilities. The MOU is acknowledgment that in some of the integrations, mergers and consolidations of medical facilities more than one local union might be involved and this is expressed by writing union(s) – indicating the possibility of more than one.

THE MASTER AGREEMENT BETWEEN THE DEPARTMENT OF VETERANS AFFAIRS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Effective March 21, 1997(JOINT EXHIBIT 1).

In drafting the Master Agreement it was recognized that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed…Article 44, Section 1C. At issue here, is Article 44- Mid-Term Bargaining, Section 4-Local

> B. Proposed changes in personnel policies, practices, or working conditions affecting the interests of one local Union shall require notice to the President of that local. *Proposed changes in personnel policies, practices, or working conditions affecting the interests of two or more local Unions within a facility shall require notice to a party designated by the NVAC President with a copy to the affected local Unions.* Proposed changes in personnel policies, practices or working conditions affecting the interests of more than one facility shall require notice to a party designated by the National VA Council President. (italics added).

The Union's argument is that once the President of the NVAC or designee is notified, then the matter is escalated up to intermediate, as detailed in Article 44, Section 3 Intermediate, which provides for the NVAC President to be notified and also provides for travel and per diem for team members being paid by the Department. The fact that the entire statement about conditions affecting the interests of two or more local Unions is included in the section entitled Local and not in Intermediate indicates that this is considered a "local" matter. The fact that the identical language from Section 3 – Intermediate: …"The parties will make every effort to use bargaining team members from the geographic area of concern with travel and per diem for team members being paid by the Department", was not included in Article 44, Section 4B which provides what happens when the interests of two or more local Unions indicates it was intentionally omitted and, it cannot logically be considered a mere oversight as it was included in Article 44, Section 3 Intermediate. In addition, there is no language in Article 44 that speaks about the escalation to Article 44, Section 3 Intermediate to support the Union's assertion.

In both the MOU and the Master Agreement, Article 44, Section 4B, the issue concerns the procedure between management and union when more than one local union is involved. Just as the MOU provided notification to the Chairman, Midterm Bargaining Committee, the Master Agreement in Article 44, Section 4B, provides for notice to a party designated by the NVAC President. The MOU states

that "local" unions will negotiate at midterm where Services are merged or consolidated between facilities. The Master Agreement includes in the Section 4 – "Local", the section on proposed changes in personnel policies, practices, or working condition affecting the interests of two or more local Unions, indicating that it will be "local" negotiations.

The MOU, (Agency No. 2, Union No 1), regarding Integrations, Mergers, and Consolidations of Medical Facilities was signed July 11, 1995. The Memorandum of Understanding, Ground Rules for Master Negotiations, (Joint Exhibit 2), for the purpose of negotiating a Master Agreement was signed February 17, 1995. The signatories on the MOU, (Agency No. 2, Union No.1), for the Department: Mr. Melvin S. Weinstein, and for the Union: Mr. Walter Glocker. Both Mr. Weinstein and Mr. Glocker were also signatories among other members on the Memorandum of Understanding- Ground Rules, (Joint Exhibit 2) as well as the Master Agreement, (Joint Exhibit 1). This is proof that some of the same people were dealing with similar issues on all three documents during overlapping periods of time. The fact that the MOU and the Master Agreement documents share similarities and are consistent with respect to issues concerning two or more unions is further support that the latter document, the Master Agreement, Article 44, 4B, intended to state what it says and intended to not say what it does not say about travel and per diem for team members being paid by the Department.

Management and the Union differ on the meaning given to the word "facility" in the Master Agreement. Management contends that "facility" includes integrated facilities while the Union does not agree. All parties agree that there is no language in the Master Agreement that defines facility or even mentions integrated facility. In the Master Agreement, Article 44, Section 4B the only terms are "facility" and "facilities." Undated background information from the Management history file re: Article 44, (Agency Exhibit 4) in part is handwritten and states:

> 5. Local
> The term facility remained without definition. Management contends a facility includes an integrated facility which once may have been 2 (not

> easy to ready, might be 3) Facilities. The Union disagreed and felt it should still be considered multiple facilities.

There was credible testimony by Mr. Norman Jacobs that he was unaware of any agreement between Management and the Union on a definition for "facility". Mr. Norman Jacobs had served on the Master Agreement negotiation committee for part of the time.

The MOU defines what an integration is:

> 1. For the purpose of this agreement, an integration is defined as the combining of two or more facilities into one facility such that there is a single management structure of the newly formed integrated facility. Integration, as such does not include mergers or consolidations of services between previously defined facilities. This definition in no way affects the parties, bargaining rights and obligations as regards integrations, mergers or consolidations.

While the definition of integration does not mention two or more local unions, the entire document that it is in, the MOU, consistently makes reference to local union(s).

For the purpose of deciding this grievance only, the meaning of "facility" is interpreted to include facilities that have been integrated and facilities that may not be integrated. The reasons are as follows: 1. At the time of signing the Master Agreement, there had been many integrations already completed. There were eight (8) integrations listed in the MOU of 1995 and more facilities were continuing to be integrated as the testimony of Mr. Oscar Williams and Mr. Norman Jacobs indicates that there are now between twenty-two, (22), and twenty-five, (25), or thirty, (30, integrated facilities to date. Absent a separate agreement regarding the integrated facilities that removes them from the Master Agreement, it is logical to include all types of facilities under the term "facility", 2. Again, there were some of the same people involved in the MOU, 1995, which did define what an integration is and the Master Agreement that did not do so. These parties had already dealt with these issues and terms and if the intent was to distinguish

between an integrated facility and a non-integrated facility, it would have been included and, 3. the background on bargaining indicates that the parties could not agree on the definition, indicating that it was not an error that there was no definition of "facility" included in the Master Agreement.

Mr. Oscar Williams thought that the MOU, 1995 was terminated when the Master Agreement became effective. Mr. Oscar Williams said that the Memorandum of Understanding Ground Rules, (Joint 2) provided that all MOU's would end if not incorporated into the Master Agreement. In fact, the Memorandum of Understanding, Ground Rules, (Joint 2) is silent on the subject. However, there is a statement regarding existing and future MOU's contained in the Master Agreement at Article 44, Section 2- National:

> G. ....An automated data base for existing and future memorandums of understanding will be established and maintained by Management. This data base will be made accessible to both the national and local Union officials.

PAST PRACTICE

The Master Agreement does not distinguish the term "facility" from an "integrated facility" nor define either term in clear and unambiguous language. Therefore, the Union's assertion that there was a past practice of the Department granting travel and per diem for union team negotiators who are outside of the local area in situations where there are two or more locals at one facility under one management will be examined. The Union lists examples of a past practice such as paying the expenses of Donald L. Fowler, 11th District Representative, AFGE Chief Negotiator for VISN 20 (Union Exhibit 4, letter dated December 6, 2002). The Agency acknowledges that local VA facilities may in some instances have mistakenly paid such travel expenses.

Ms. Alma L. Lee, AFGE NVAC President, in her March 2, 2004 Memorandum, (Union 4), wrote in part:

> 5. ...The negotiations involving the Ft Howard reorganization were handled as intermediate bargaining. That reorganization of functions affected only the campuses at Baltimore, Perry Point, and Ft. Howard. At that time,

> Robert Fetzer was the chief negotiator, and that authority was delegated to Brenda Larke, AFGE NVAC 14th District Representative. During previous negotiations, we had a district representative and a national representative, in addition to representatives of the locals in Maryland HCS.

Ms. Lee wrote that the practice of paying per diem has been part of VISN 5 ground rules. Ms. Bonnie M. Kerber, HR Consultant, VHA HRM Group responded to Ms. Lee by Letter dated March 25, 2003, (Union 4), and wrote that unless the local parties have signed ground rules that call for management to pay travel and per diem for negotiators outside of the local area, there is no entitlement to travel pay under the Master Agreement. Ms. Kerber testified that she was aware that Mr. Don Fowler was paid once and it was something that the local parties did and Portland decided to do it. Ms. Kerber said she called and found out that the person was new and didn't realize that it should not have been done.

From December 2, 1998 through May 14, 2003, (Agency Exhibit 6 & 7 B & C, & Union Exhibit 5), there have been in excess of ten (10), (Union Exhibit 4, & Agency Exhibits 6 & 7 B&C) demands to bargain from the Union which have received a similar response from the Agency explaining its' interpretation of the Master Agreement which denied travel and per diem for union team negotiators who are outside of the local area in situations where there are two or more locals at one facility.

To prove a past practice, the Union needs to show that the practice of paying travel and per diem for union team negotiators who are outside of the local area in situations where there are two or more locals at one facility under one Management was a fixed and practice accepted by both parties. The Union has not upheld this burden. The Agency has demonstrated that it has consistently responded with correspondence denying the Union's request for travel and per diem for union team negotiators who are outside of the local area in situations where there are two or more locals at one facility under one management. The Union has only cited a few examples in support of its position.

Mr. Oscar Williams testified that from the time the MOU was signed in 1995 until late 2001, there had been no problems. Mr. Williams also stated that local representatives still received money, even though the Department said it would not pay, including for example, Mr. Fowler, who was paid to come from Connecticut to Portland Oregon to negotiate paid parking.

Mr. Norman Jacobs testified that Mr. Mel Weinstein was probably the person who handled the requests based on the MOU, 1995. Mr. Norman Jacobs, Labor Relations, had been involved in the decision and correspondence on whether to pay or not pay per diem and travel after he took over the responsibility from Mr. Mel Weinstein in approximately 1998. Mr. Jacobs testified that normally if it's beyond the commuting area and if management would be paid any travel and per diem, we would deal with the Union equally. Also involved in the decision and correspondence is Ms. Bonnie Kerber who continued beginning approximately October 2001, after Mr. Jacobs no longer held this responsibility. There were a few others in this capacity for short periods of time. Mr. Jacobs and Ms. Kerber both testified that if the Union wants to bring in someone from outside of a facility to come to the negotiations, it can, but it is not an obligation for the VA to pay per diem and travel expenses. With regard to past practice, Ms. Kerber testified that some requests would have been covered under prior agreements, either the MOU or local agreements, but not the Master Agreement.

CONCLUSION

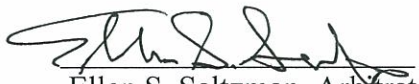
There were issues raised that were not decided or discussed because it was not necessary to do so to decide this grievance. There were no arguments or stipulation with respect to the standard of proof that should be applied. In the absence of any evidence to the contrary, the Union bears the burden to prove that the VA violated the Master Agreement by a fair preponderance of credible evidence. The Union did not meet this burden as explained herein and the grievance is denied.

Therefore based on the facts and circumstances of this instant case, the Undersigned issues the following:

AWARD

1. The Department of Veterans Affairs did not violate Article 44, "Mid-Term Bargaining", Section 4(B)"Local" of the Master Agreement, by denying payment of travel and per diem for union team negotiators who are outside the local area in situations where there are two or more locals at one facility under one management.

I, Ellen S. Saltzman, do hereby affirm upon my oath as Arbitrator, that I am the individual who executed the foregoing instrument, which is my Opinion and Award.



May 25, 2005 Ellen S. Saltzman, Arbitrator