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May 30, 2007

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Re: Federal Mediation Conciliation Service Case # 04-53970-A

Dear Ms. Serwin Flanz and Ms. Sims,

Enclosed is my Decision and Award in the above described case. Two copies of my Invoice are also enclosed. I would appreciate you sending one copy to the appropriate office in your organization. If you have any questions or concerns please contact me at the above phone or fax numbers or address, USPS or email.

Yours Truly,

Donald S. Wasserman

May 30, 2007

In re Federal Mediation and Conciliation Service Case No. 04-53970-A

American Federation of Government Employees, National Veterans Affairs Council; and United States Department of Veterans Affairs

Representing the Union: Jacqueline M. Sims, Esq. AFGF Staff Counsel

Representing the Employer: Meghan Serwin Flanz, Esq. Assistant General Counsel

Before: Donald S. Wasserman, Arbitrator; Re Decision and Award Issued February 16, 2005.

I. INTRODUCTION, BACKGROUND AND POST 2005 AWARD DEVELOPMENTS

This dispute arises subsequent to a Decision and Award I issued on February 16, 2005. That Award (a few typos corrected) is attached as an Appendix and is a constituent element of this Award. Because of the detailed directives in the earlier Award, Veterans Administration (VA) agreed to the American Federation of Government Employees' (AFGE) request that I retain jurisdiction of this matter for an indefinite and unspecified period of time. I agreed to retain jurisdiction during a conference call with AFGE and VA counsel on March 24, 2005. We also agreed that the parties would contact me if they required assistance. It was further agreed that it was premature for the union to document its request for attorney fees. Part IV of the earlier Award is the Analysis and Decision on pages 15 to 21 and Part V is the Award on pages 21 and 22 of the attached Appendix 1. They need not be repeated here, although the directives of that Award will be reviewed in this Decision and Award.

One year following the original Award the Veterans Administration (also referred to as Veterans Health Administration or VHA) notified the union (AFGE or National Veterans Affairs Council or NVAC) that "VA has completed the re-determination process regarding weekend premium pay eligibility under Public Law 108-170, Section 303". This followed an exchange of correspondence conducted over a period of several months between NVAC President Alma Lee and VA Assistant Secretary for Human Resources and Administration, R. Allen Pittman. The relevant substance of this correspondence follows:

Ms. Lee initiated the exchange on May 2, 2005. She requested that the union receive information and periodic updates on "VA's reconstruction and implementation process" and expressed the desire to "collaborate with VA and provide meaningful input in the development of the reconstruction and implementation process." She cited an example of where such collaboration between VA and AFGE has "proven to be greatly beneficial" to VA.

Mr. Pittman responded on June 9 stating that "VA has developed a written methodology for reviewing every position omitted from the current list of covered positions". VA had also "consulted with other agencies in an effort to define the term 'direct patient-care services or services incident to direct patient-care services'" (hereafter referred to as "the term"). Formal requests for views were sent to OPM, DOD, and HHS. To date only DOD had responded although conversations had also been conducted with the other agencies and VA was hopeful that OPM and HHS would formally respond. Further, VA would be "happy to consider any input (AFGE) wish (es) to provide" even though "the arbitrator's decision does not require VA to consult with AFGE on the definition of "the term". When the definition is "finalized" VA would review each position in the agency (VHA) "omitted from the current list of covered positions...."

An enclosure outlining VA's Methodology for Re-determinations of Weekend Pay Eligibility accompanied the letter, as did a statement that "any occupations deemed eligible for weekend pay will be retroactive to January 11, 2004". Also enclosed were copies of the letters sent to OPM, DOD, and HHS requesting those agencies' definition of the term cited above, and whether that agency "has ever reviewed GS and FWS positions against such a definition, the methodology used and the results of the review."

Ms. Lee wrote again to Mr. Pittman on October 12, 2005 "to request VA finalized definition of "the term" and the reconstructed list of covered positions," as well as "VA's compiled list of all positions with VHA" and other related information so that the union "may provide our comments and input prior to implementation." The letter also reminded Mr. Pittman that almost eight months had passed since the arbitration award had been issued.

Mr. Pittman responded on November 25 informing Ms. Lee that VA "had established the following definition for pay administration purposes":

Positions that provide direct patient-care services or services incident to direct patient-care services are those that provide/perform:

1. Clinical care services to patients such as diagnosis, treatment, prevention, follow-up, patient counseling, etc.,

2. Medical support of health care delivery to patients, and/or

3. Health care administration of the services described in 1 and 2 above.

Attached to the letter was a list of all positions in VHA identified by Occupational Series, Title Code, Title, and Pay Plan (GS, WG, etc.). The letter expressed the expectation that the re-determination process would be completed "no later than March 15, 2006... (and that) AFGE will be given the opportunity to comment on the reconstructed list of covered positions prior to implementation."

In her next letter, dated December 2, 2005, Ms. Lee's tone was more urgent. After citing previous VA letters she wrote that "it is imperative that VA provide (the union) with a copy of VA's written methodology which was used to review every position omitted from the current list of covered positions." Similarly, "that it receive a copy of the information that was provided by DOD, OPM, HHS and the other sources...that you considered in establishing the definition for pay administration purposes within VA." The union also requested an explanation of how the definition was arrived at, "using the information provided by the previously mentioned agencies and sources." Otherwise, "AFGE would be greatly disadvantaged because it would be reviewing the reconstructed list in a vacuum." The exclusive representative should have the "opportunity to review all of the omitted VA positions utilizing the same methodology" and the same information used by VA. The need for this information was evident because the union "was not asked to initially collaborate with VA and provide meaningful input" as requested in its April 25, 2005 letter, according to Ms. Lee. She requested that the information be received by December 9, 2005.

Mr. Pittman's reply dated December 16 informed Ms. Lee that the re-determination process "is expected to be completed no later than March 15, 2006" and that "AFGE will be given the opportunity to comment...prior to implementation." In response to Ms. Lee's request he enclosed "the written methodology for reviewing positions previously omitted from coverage, the decision paper for the definition of "the term"...for pay administration purposes, and the sources considered in developing the definition." The parties have these documents so there is no need to attach them. A brief summary of the "Methodology" and the "Decision Paper" follows:

Methodology

- Seek written advice from OPM, DOD, and HHS of the "interpretation or definition" of "the term". Other organizations may be contacted if necessary.

- Using this and other relevant information and prior VA guidelines "develop a definition of or evaluative criteria for determining" "the term."

- Compile a list of all VHA position titles and review those previously omitted from (Saturday premium pay) coverage using OPM's Handbook of Occupational Groups and Families. Consult with VHA officials as necessary.

Decision Paper

- The issue is the definition of "the term" within VA, particularly pertaining to Saturday premium pay.

- The arbitrator's decision requires VA to:

  Seek advice from OPM and others regarding "the definition of" "the term." "Develop a definition for determining" "the

term." Re-determine "eligibility for all positions initially omitted from coverage."

- Neither DOD nor OPM had defined "the term". HHS supplied its working definition. OPM added that what constitutes "the term" "is a determination to be made by each agency" with delegated authority (VA, DOD, and HHS). None of the agencies has conducted a review of GS or WG positions against a definition of "the term."

- Based on all of the information received, as well as The Medicare billing information (Appendix 2), and VA's past use of "the term" VA established, for pay administration purposes within VA, the following definition:

    1. Clinical care services to patients such as diagnosis, treatment prevention, follow-up, patient counseling, etc.

    2. Medical support of health care delivery to patients, and/or

    3. Health care administration of the services described in 1 and 2 above.

On February 16, 2006 Mr. Pittman wrote to inform Ms. Lee that VA had completed the re-determination process. Ten positions were added to coverage, along with the 635 positions already covered. However, 863 positions, "remain ineligible as they do not fit the definition of the term...for pay administration purposes." He added that AFGE comments on the re-determination could be submitted through March 17, 2006, at which time the re-determination will be implemented. The letter had two Attachments, A and B. Attachment A had five parts. The first part listed the Occupational Series, Title Code, Description (Position Title), and Pay Plan along with a brief description of duties of the ten positions found eligible.

Part (a), (b), (c), and (d) of Attachment A did not provide brief descriptions of position duties. Other than this omission, the lists of VA Position Titles had the same information as the newly eligible ten positions. All titles listed in (a), (b), (c), and (d) remain ineligible.

Attachment A. (a) was a two page listing of positions that remained ineligible "because they provide support to facility operations and are not involved in patient care. These positions (mostly GS along with some GM, ES and AD pay plans) ensure the physical plant is available for those providing patient care".

Attachment A. (b) was a nine page list of excluded position titles in the same Pay Plans. The positions were excluded because the employees "provide support to the staff that provides patient care by handling budget, personnel, systems, supply equipment, and other administrative support to allow the facility to operate." They are not involved in patient care.

Attachment A. (c) was a two page list of ineligible positions in the same pay plans. These employees were found to be excluded because they perform in "specialized positions supporting general operations, information needs, and services that are several layers removed from the patient. (They) support facility programs and patient care providers without being involved in patient care."

Attachment A. (d) was the final section of the attachment consisting of five and one-half pages of FWS positions (pay plans WG, WS, WL, WB, and AD), all of which failed to meet the criteria for coverage of Saturday premium pay. "(T)hey provide manual, labor, and craft support to the facility and are not involved in patient care. (They) operate, maintain and repair physical structures, utility systems and equipment...(and) provide housekeeping support, food, laundry and cleaning services that establish an environment conducive to the mission of the facility but is not part of patient medical care. (They) support the facility and the patient care providers but are several layers removed from patient care".

Attachment B was a 31 page list of all VHA Position Titles (all Pay Plans) with the same information as in Attachment A (a through d) along with the additional notation of whether that "Description" (actually Position Title) is eligible for "Weekend Pay" (actually Saturday Premium Pay).

On March 2, 2006 VA Agency Counsel, Meghan Serwin Flanz, responded to my February 21 inquiry by informing me that VA had completed it's re-determination process and "shared the results...with AFGE ." She enclosed a copy of Mr. Pittman's February 16 correspondence as well as his earlier letters of June 9, November 25, and December 16, 2005, reviewed above.

Also on March 2, AFGE Assistant General Counsel Jacqueline M. Sims responded to my February 21 inquiry. Among other factors she wrote that AFGE had not submitted comments to VA. "In this regard, AFGE firmly believes that VA has failed to comply with your February 16, 2005 Decision and Award..." Ms. Sims requested that after reviewing the aforementioned letters, I either "render a decision as to whether VA has complied with (my) February 16, 2005 Decision and Award (or whether)...the parties should submit supplemental documentation...prior to rendering a decision." AFGE was also open to "another course of action (if) more appropriate." She also requested that VA be directed to delay the deadline for AFGE to submit comments, but that VA proceed to implement the re-determination for the ten positions deemed to be eligible.

The March 2 letters were followed by a March 15, 2006 letter to Mr. Pittman from Ms. Lee who also requested "that the March 17, 2006 deadline for AFGE submission of comments by suspended or held in abeyance until arbitrator Wasserman and counsel for the parties have discussed the issues involved in this case..." She also asked that VA now implement the newly determined eligibility of the ten positions retroactive January 11, 2004.

My February 21, 2006 letter, in addition to requesting a progress report also suggested a telephone conference call between Ms. Serwin Flanz, Ms. Sims and the arbitrator. The parties agreed and that conversation took place on March 30, 2006. The VA counsel maintained that the agency did comply with my award; AFGE counsel maintained that VA had failed to comply. We did agree that the parties would have an opportunity to submit briefs on their position. The parties also agreed that the issue in dispute was: Did the Veterans Administration comply with The Arbitrator's Decision and Award dated February 16, 2005? If not, what is the appropriate remedy? It was agreed that briefs would be posted no later than April 14, 2006, and both briefs were timely sent.

The VA brief referred to the above reviewed correspondence from Mr. Pittman to Ms. Lee as documentation concerning the agency's review. The brief also provided a summary of these efforts and requested that they "satisfy the requirements set forth in (the) award".

1. Specifically the brief referred to Mr. Pittman's June 9, 2005 correspondence, including the written methodology, the advice requested and received, the creation of a definition of "the term" for use in implementing Public Law 108-170, compiling a list of VHA, GS, and FWS positions and reviewing those against the definition of "the term". According to the brief, Mr. Pittman's letter asked for the union's input of its proposed methodology and the union did not comment.

2. The agency's letter dated November 25, 2005 referred to correspondence from OPM, DOD, and HHS and other sources concerning the appropriate definition of "the term" and cited VA's newly established definition. Attached to the letter was a list of all VHA positions. It further stated that "AFGE will be given the opportunity to comment...prior to implementation." The brief commented that the union "did not at that time object to the Department's re-determination methodology nor to the definition the Department proposed to use in that process."

3. The VA's letter dated December 16, 2005 supplied the written methodology for reviewing VHA positions, a decision paper supporting the new definition of "the term", and the sources considered, including Medicare billing information. The brief again stated that "the union did not object at that time to either the Department's methodology or its definition of "the term."

4. The agency's letter of February 16, 2006 informed the union that it had completed the re-determination process and included a written description of the results (already described above in this Decision and Award). "The listing was created by the Department's classification specialists, who reviewed the duties of each VHA occupation - as set forth in OPM classification standards and in position descriptions maintained by the Department – against the

definition." The union was invited to comment through March 17, 2006. The union did not do so. Other than in its March 2 letter to the arbitrator "alleging that the Department had failed to comply with (the) award, the union has provided no comments on the Department's methodology or specific re-determination efforts."

The AFGE brief asserted that, contrary to the February 16, 2005 Decision and Award, "VA excluded approximately 863 occupational ("class") series" en bloc, citing Attachment A.(a through d) of Mr. Pittman's February 16, 2006 correspondence. The brief further argued that VA did not cease its "a priori automatic exclusions" of all FWS positions, contrary to the February 16 Award.

The VA requests sent to OPM, VA, and HHS on March 8, 2005 did not, but should have, included the February 16 Award. These letters addressed only two matters: how these agencies defined "the term" and whether they had ever reviewed GS and FWS positions against such a definition. The brief then reviewed the agencies' response. Most noteworthy was OPM's response that: "Based on the advice OPM received in May 1997 from the Interagency Committee on Health Care Occupations, OPM decided not to define this provision in the delegation agreements because of the difficulty in developing a definition that all of the agencies could agree upon that would cover every conceivable 'health care' scenario. Thus what constitutes ("the term") is a determination to be made by each agency." Further, OPM had not conducted a review of positions against such a definition.

The brief also reviewed one of the attachments to VA's December 16 letter, specifically an article from HHS' Center for Medicare and Medicaid Services. The article concerns billing for services incident to professional services, an issue not on point to the matter in the case. HHS' response to the VA inquiry stated that the agency had not reviewed GS or FWS positions against "the term". It did define "the term", however, to include "positions primarily involving the practice of medicine as a direct service to patients, including the performance of diagnostic, preventive, or therapeutic services to patients in hospitals, clinics, public health programs, diagnostic centers and similar settings."

The union also asserted that "VA's single letters to OPM, HHS and DOD" constituted "woefully inadequate" consultation in the face of February 16, 2005 Decision and Award's directives. There was no attempt by VA to meet with OPM "or engage in any formalized consultations." The brief also maintained that VAs' new definition of "the term" "as constructed now further limits and restricts" "the term". It relates far more to "billing practices of Medicare for professional services rendered, instead of providing a definition that is reflective of a definition for VHA occupations providing such care." While the definition could include some of the already covered positions, it "does not comport with (the) review and determinations set forth in (the) February 16, 2005 Decision and Award".

The union argued that bargaining unit employees, both GS and FWS, provide services that are covered by "the term", "including but not limited to protecting patients, assisting health care providers in all areas and maintaining a sanitary, healthy...and safe environment...."

The brief cited U.S. Department of the Air Force Carswell Air Force Base, Texas and American Federation of Government Employees Local 1364, 38 FLRA No. 14 (1990), "Where an agency disregards portions of an arbitrator's award or otherwise changes an award, the agency fails to comply with the award within the meaning of section 7122 (b) of the Statute", in contending that VA did not "fully comply" with the February 16, 2006 Award.

Finally, AFGE's brief requested that my "re-determination include any recommendations and/or remedy as (I) deem appropriate and that (I) continue to retain jurisdiction in this case." The brief had a number of attachments including a memo from a VA Police Chief supporting inclusion of police officers; and VHA position postings for vacancies in various locations for Telephone Operator, Motor Vehicle Operator, Boiler Plant Operator, Laundry Worker and Housekeeping Aid to demonstrate that the major duties of these positions fall within the meaning of "the term".

The correspondence and attachments as well as the briefs, all reviewed above, shall be considered as part of the record of this case. Inasmuch as the parties have all of these documents they need not be attached here.

II. ISSUE AND ANALYSIS

As stated above the issue agreed to by the parties is: Did the Veterans Administration comply with the Arbitrator's Decision and Award dated February 16, 2005? If not, what is the appropriate remedy?

Mr. Pittman's correspondence dated December 16, 2005 had several attachments, including a Methodology and a Decision Paper. Both attachments emphasize the importance of: defining "the term"; or to "develop a definition of or evaluate criteria for determining "the term"; or "how to define the term" the Decision Paper stated that my February 16, 2005 Award "requires VA to: Seek advice from OPM and other agencies regarding the definition of the term" and further to "Develop a definition for determining the term". The Award did instruct that "VA must reconstruct the implementation process...(which) includes developing a methodology and reducing it to writing." The Award then specified aspects of the process and methodology that must be included. It also stated that "VA is urged to seek appropriate assistance from and formally consult with, OPM in accomplishing those efforts." Finally, it was suggested that "VA may also find it beneficial to consult with other organizations or entities, perhaps even AFGE." (February 16, 2005 Decision and Award, pg. 21 V. Award).

It is clear, however, that the Award did not require VA to "develop a definition for determining 'direct patient-care services' or 'services incident to direct patient-care services'", as stated in VA's Decision Paper. It was VA's sole decision to develop a new definition of "the term". It is also understandable that VA would seek advice from the other agencies with delegation authority as well as OPM as to how they interpret or even define "the term". It is less clear why they felt compelled to redefine "the term" despite OPM and DOD declining to do so. Nevertheless it was VA's right to do so. HHS very narrowly, limited "the term" to include "positions primarily involving the practice of medicine as a direct service to patients, including the performance of diagnostic, preventive or therapeutic services to patients in hospitals, clinics, public health programs, diagnostic centers, and similar settings." This definition was much narrower than the practice followed by VA, even prior to adopting or developing its own definition. HHS would obviously exclude many positions that VA previously included and continued to do so. As reported earlier, none of the agencies ever reviewed GS or WG "positions against a definition of the term...."

In a further attempt to "ascertain whether there is a definition of "the term" in either the public or private sector, VA found Medicare rules under which services billed by providers may be billed to Medicare. VA stated that "Under Medicare rules, qualifying 'incident to' services must be an integral part of the patient's treatment course". One problem with the information publication issued by Medicare to providers specifically states that, "Incident to services are defined as those services that are furnished incident to physician professional services in the physician's office...or in a patient's home." Because such "incident to" services must be incident to "physician professional services", the Medicare definition is far more restrictive than the relevant legislation which does not require that "direct patient-care" be "physician professional services". Further if the "incident to" services (under Medicare) are supervised by non-physician practitioners they are paid at a lower reimbursement rate. Most commonly the services are preformed in an office or clinic, rather than an institutional setting. It is important to note that the major thrust of this information publication concerns billing and reimbursement. It does little to inform the issues in dispute here.

Putting aside the issue of definition for a moment, VA's "developing a methodology and reducing it to writing" was a first step in "reconstruct (ing) the implementation process" and in complying with the February 16, 2005 Award. Writing to DOD and HHS as well as OPM was another step. Writing a Decision Paper, one might add, was "incident to" the Methodology paper, and another positive idea. The problem arises, not in the writing of a Methodology but rather in the narrow and deflective nature of the inquiry and in the implementation process. It is appropriate to note here that the Award was written deliberately and purposefully to establish specific minimum standards that VA should adhere to, while at the same time extending considerable flexibility to the agency on the consultation and implementation process. It is tacitly understood that parties must act in good faith and reasonably in executing an arbitration award.

Initially VA appears to have concentrated on defining "the term" and then on whether other agencies "had reviewed positions against such a definition, the methodology used, and the results of the review." The inquiry was, as stated a good first step, but was not very fruitful. VA did not explain why the matter was not followed up with OPM. The February 2005 award specifically "urged" (but did not order) VA "to seek appropriate assistance from, and formally consult with OPM, in accomplishing those efforts". After receiving the one page letter by OPM in response to its inquiry, VA did not follow through or request for a face to face meeting. Similarly, contacts with DOD and HHS yielded little.

Returning to the matter of defining "the term", there are a few issues that require review and comment. The first issue is that 5 USC § 5371 (a) defines health care employees as those who "provide direct patient-care services or services incident to direct patient-care services." Any redefining, defining, or refining of "the term" must be within the term's parameters. It cannot expand or diminish the meaning of that legislation. Impermissibly, VA re-wrote "the term"—and in effect rewrote 5 USC § 5371 (a) to suit its own purposes. As stated in the earlier Award, "VA vigorously opposed the addition of any Title V employees to be eligible for Saturday premium pay, most emphatically employees in FWS positions." During the course of the earlier proceedings in this case, VA asserted that some positions were excluded from eligibility because their duties do not include "services incident to direct patient-care". Other positions were excluded only because the statute "excludes" FWS titles. The Award ruled otherwise; FWS positions were not excluded by the statute at issue.

The redefining to health care employees as follows is consistent with VA efforts to exclude all FWS employees. VA's Decision Paper stated in relevant part that, "the following definition is established for pay administration purposes within VA:

1. Clinical care services to patients such as diagnosis, treatment, prevention, follow-up, patient counseling, etc.,

2. Medical support of health care delivery to patients, and/or

3. Health care administration of the services described in 1 and 2 above."

There is no explanation of the clause "the following definition is established for pay administration purposes within VA," or what that clause is intended to mean, or why it is added. A review of the redefinition also leads to questions. It certainly appears that No. 1 (above) attempts to define direct services while Nos. 2 and 3 refer to services incident to. No. 1 is initially very explicit in the types of services it considers as direct services and then adds the vague "etc." that can mean: and so forth; and the like; and the rest; and others; or all of the above. It can also provide sufficient flexibility for VA to include or exclude positions as it deems appropriate at a later date. Even more likely, it provided VA with sufficient flexibility to make final determinations of inclusion/exclusion that it sent to AFGE on February 16, 2006. At

any rate the word "etc." (without explanation) dilutes the specificity of the preceding descriptive words and appears to be out of place in an otherwise attempt at precision.

More importantly, major questions concerning the issue of compliance or non-compliance with the February 16, 2005 Award center on the continued exclusion of every FWS position and VA's redefinition of the words "or services incident to direct patient-care services." It must be noted that your arbitrator does not have position descriptions for any of the approximately 1,500 VHA positions or titles. I do have brief summaries of the duties of the ten previously excluded positions that were included as a result of VA's "reconstruction" and review. The union attached to its April 14, 2006 brief examples of job postings for several positions. Thus, questions and concerns raised in the following paragraphs are done so, for the most part, using only Position Titles (officially referred to in Attachments A and B of Mr. Pittman's February 16, 2006 letter as Descriptions) and/or Occupational Series, Title code or Pay Plan. Many of the position titles are even abbreviated so as to be difficult to distinguish. VA classification personnel, of course, had access to actual position descriptions. As VA's April 14, 2006 brief explained, the list of all VHA occupations "was created by the Department's classification specialists, who reviewed the duties of each VHA occupation-as set forth in OPM classification standards and in position descriptions maintained by the Department—against the definition." However, this arbitrator is persuaded that the redefinition is unfaithful to the meaning of "the term" as stated in 5 USC § 5371 (a). The redefining or defining process actually narrowed or contracted the meaning of "incident to" services (No. 2 and 3), the insertion of the word "etc." in "direct patient-care services" (No. 1), not withstanding. For example, in No. 2 the word "medical" inappropriately narrows and qualifies the meaning of "incident to". In No. 3 the words "health care administration" can be restrictive or stretched like a rubber band to include Assistant Deputy Under Secretary or Dir, Policy Forecas (0601).

Your arbitrator readily acknowledges that he was not immune from thinking about this case when he read about and witnessed on television the horror stories at some out patient facilities at Walter Reed Hospital in Washington, D.C. The problems were not limited to Building 18—they were simply more striking there than at some of the other buildings—and they were compounded by the bureaucratic nightmares that affected the patients' physical and mental well being. People (mostly contractor's employees) responsible for this bungling were not direct medical care givers for the most part. But their indifference or negligence or working on overload had a terrible impact on the physical and mental health of the patients. It is well understood that Walter Reed is a DOD hospital. VA is not responsible for its operation or administration. However, as revealed by the Associated Press, VA facilities were not without problems either. According to the Washington Post of March 22, 2007, AP reported that, "The Veterans Affairs' vast network of 1,400 health clinics and hospitals is beset by maintenance problems such as mold, leaking roofs and even a colony of bats, an internal review says."

This is not intended as criticism of VA's concern for veterans' healthcare. Rather it demonstrates the direct connection between patients' (veterans) health care and the

work of employees in positions who may be somewhat removed from "direct patient-care services." A failure by employees who provide "services incident to direct patient-care services," the so-called support people may directly affect the delivery of health services to the patients being served, as testified to by the Walter Reed experience.

These events were further corroboration that VA too narrowly "defined" the meaning of "incident to" by its determination to redefine it as "2. Medical support of health care delivery to patients, and/or 3. Health care administration of the services described in 1 and 2 above."

Even more compelling is the definition of the word "incident" found in Black's Law Dictionary, Sixth Edition, 1991:

> Incident. Something dependent upon, appertaining or subordinate to, or accompanying something else of greater of principal importance, something arising or resulting from something else of greater or principal importance. Mola v. Reiley, 100 N.J. Super. 343, 241 A.2d 861, 864*. Used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. Used as a noun, it denotes anything which inseparably belongs to, or is connected with or inherent in, another thing, called the "principal". Also, less strictly, it denotes anything which is usually connected with another, or connected for some purposes, though not inseparably.

Black's and Webster's far more directly and accurately informs the actual language of 5 USC 5371(a) than VA's rewrite of "incident to".

Clearly, services "incident to" are performed by employees in some positions (whether direct medical services or not) in "support of health care delivery to patients" and should therefore be eligible for Saturday premium pay. The paragraphs that follow discuss and/or question selected position titles. It should be noted that the AFGE brief asserts that "in direct contradiction" to the earlier award "VA excluded approximately 863" occupational (class) series (or titles or positions) en bloc.

Attachment A (a) to Mr. Pittman's February 16, 2006 letter excluded about 85 positions because "they provide support to facility operations and are not involved in patient care." They ensure the physical plant is available for those providing patient care. VA's explanation as to why all of these positions do not provide services that are "incident to" is not convincing. (All position titles are stated as they appear in the attachment.)

*This portion of the definition cited here actually did cite the definition in Webster's Third New International Dictionary (1964), P. 1142 where incident is defined as "something dependent upon, appertaining or subordinate to, or accompanying something else of greater or principal importance;...something arising or resulting from something else of greater or principal importance".

Among these positions are four Safety and Occupational Health titles (0018) and two Safety Technicians (0019). Even assuming most of the job responsibilities are concerned with plant and other hospital employees, is there a wall between their job responsibilities and performance and patient care and well being? The same question is raised about the position of Environmental Protect (0028). There are a number of firefighter positions, two of which are Firefighter (Parame) and Firefighter (Haz Mat) (0081). Does VA assert that these positions are unrelated to patient care in the case of fire or other emergencies? This list includes two Police Officer positions (0083). The AFGE brief included as an attachment a memo from a police chief at a VA facility who stated in relevant part that officers "stand by on patients for hours until medical staff can see them"; "talk to patients to get them to calm down, or prevent them from harming themselves or others"; "they leave the station and join the health care team when searching for missing patients"; they "control disturbance scenes"; "push patients in wheelchairs, listen to their complaints, provide first aid"; "certified in CPR and Automated Electronic Deliberator since we respond to code blue, assist staff when patients refuse medications." Moreover, the earlier AFGE brief stated that under USC 38 § 7455 the VA Secretary had discretion to make police officers eligible for special (higher) pay.

According to AFGE's brief, Attachment A (b) excludes roughly 420 position titles. VA asserts that these positions provide administrative support to the facility and are not involved in patient care. These positions provide support to the staff that provides patient care by handling budget, personnel, supply, equipment, and other administrative support to allow the facility to operate. Despite this standard the following position titles are among the excluded: Health Care Fac. Spec, Medical Admin Spec, Patient Representative and Medical Admin Assis (all 0301), Medical Data Clerk and Patient Relations A (both 0303), Office Auto Clerk (Med (0326), X-Ray Film Proc Equ (0350), Claims Examiner (0990), Library (Biolog & Med and Librarian (Med Scie (1410). Standing alone these position titles (especially the abbreviated titles) do not necessarily reveal the nature of the duties. Unless these titles are very misleading, they do, however, raise questions especially in light of the last portion of the redefinition: "3. Health care administration of the services described in 1 and 2 above." There is no explanation as to why Patient Representative (0301) is excluded but Patient Services Assistant (0303) is included as eligible, other than they are in different occupational series. However, Patient representative is in the same occupational series as the recently eligible Rehabilitation Medical Coordinator (0301).

Attachment A(c) excludes slightly less than 100 positions that are specialized and support general operations, information and services that are several layers removed from patient care. They "support facility programs and patient care providers without being involved in patient care." Some examples that raise questions about this group of ineligible positions include Sports & Fitness Of (0030 see similar titles below); Geneticist (0440) is excluded but all Biologist position titles are eligible including Biologist, Research Biologist, Research Microbiolo, Biological Science, Biolog Science Lab, and Biolog Sci Lab Tec (all 0401, 0403, and 0404). Statistician (Biolo as

well as Statistician (Health and Medic (1530) are excluded. Also ineligible are Health Care Educ Sp and Health Care Educ Off, (both 1701), to name just a few selected titles.

Attachments A(a,b,c) position titles are all under GS and related Pay Plans. Attachment A(d) position titles are all under FWS pay plans. AFGE's brief states that more than 250 position titles are listed in this Attachment A(d). VA maintains that all are ineligible for Saturday premium pay "because they provide manual, labor, and craft support to the facility and are not involved in patient care." These "positions operate, maintain and repair physical structures, utility systems, and equipment. They provide housekeeping support, food, laundry and cleaning services that establish an environment conducive to the mission of the facility but is not part of patient medical care...(and) are several layers removed from patient care."

This determination was made in the face of VA's testimony during the hearing in the earlier proceedings that the reason that Hospital Housekeeping Management employees in Occupation Series 0673 were included on the list, while Housekeeping Aides were not, was that the 0673 series is paid under the General Schedule while the Aids are Wage Grade employees (3566) and therefore historically excluded—by HHS and OPM as well as VA—from Title 38 compensation. My February 16, 2005 Decision (IV) stated in relevant part:

"3. In order to be eligible for Saturday premium pay an employee must provide direct patient-care services or services incident to direct patient-care services.

4. Congress did not exclude FWS or wage board employees from being eligible for Saturday Premium Pay. To the contrary, the intention was to include them similarly to GS employees, provided of course that they are involved in patient care as described above in 3.

5. Aside from the agency's automatic elimination of wage grade employees from eligibility for Saturday premium pay, the arbitrator cannot determine whether, as the union argued, VA too narrowly determined GS occupations with respect to eligibility. Even if the implementation process was not flawed there is insufficient record evidence to make this determination."

The "Methodology" attached to Mr. Pittman's letter dated December 16, 2005 stated that after compiling a list of all VHA position titles, those that had been deemed ineligible for Saturday premium pay would be reviewed. This would apply to every such ineligible position title. Point 4 of the Methodology stated:

> Review each position title identified in #3 above (ineligible titles) against the definitions of GS occupational groups and series and FWS job families and occupations contained in OPM's Handbook of Occupational Groups and Families. Each title will be annotated as to whether it meets the criteria for providing "direct patient-care

services or services incident to direct patient-care" or determined in #2 above (VA's newly developed definition of "the term").

VA's brief of April 17, 2006 stated that this was, in fact, done. Assuming arguendo that this procedure was followed by VA, a number of issues remain. The February 16, 2005 Award admonished VA that: "the same standard must be used for both FWS and GS series and titles. It is critical that no title be ignored simply because the occupational series to which it belongs is considered ineligible as not being health care related. It is important to be aware that it is the employee in a specific position who provides patient care." That final sentence means it is critical to review the actual duties of a specific position title in VHA against the standard, i.e. "the term". OPM's Handbook may certainly be a helpful guide, but of necessity must be generic in nature. The determination must be made based primarily on specific duties that are performed by the employees in a VA position title, as determined by the description for that position title as written and implemented by VA. Agency classification personnel should not be strangers to this process. Just as elementary, it is also critical that the standard against which the eligibility of a position title is determined must be reliable and valid. In this case it must accurately reflect the requirements of 5 USC § 5371 (a), specifically "the term". VA's redefinition fails this test. VA's entire reconstruction process is not credible. It raises too many questions and its' apparent inherent inconsistencies raise doubts as to the validity and reliability of the end product. The sections above questioned the exclusion of selected position titles in Attachment A(a, b and c). The section below raises questions about the exclusion of selected position titles from A (d) as well as questions resulting from pairing off position titles from GS only pay plans and from pairing titles from both GS and FWS pay plans. Position Titles from FWS schedules are noted as such.

Medical Record Libr (0669) and Medical Records Adm, Medical Rec Admin Trne are all eligible. Why then are Librarian Biolog & Med, Librarian Med Scie (1410) and Tech Info Spec Med (1411) all ineligible. Veterinary Medical (0701) and Animal Health Tech (0704) are eligible. If this is patient care why is Animal Caretaker, an FWS title (5048) not eligible, only because it is FWS? All 0670 position titles are eligible including: Trainees, Assistant Deputy Under Secretary (Ast Dep Undr Sec Fo), Center Director and other positions that appear to be in the Senior Executive Service. Even a Chief of Staff (0671) is eligible. Although administrative titles in the 0670 series are eligible, virtually every position title in series 0301 is ineligible including Med Administration, Hlth Care Fac Spec, Health Care Fac Off, Environmental Care, Medical Admin Speci, and Medical Admin Assis. Patient Representative is also among the ineligible. Similarly, in Series 0303 virtually every position title is excluded including Patient Relations A. Although this latter title and Patient Representative are both ineligible, Patient Services As is one of the very few 0303 titles that is eligible. Medical Data Clerk also 0303 is excluded as is Medical Admin Assis. Med records Tec (0675) on the other hand is included as is Med Sup Asst (0679) and Medical Clerk Steno (0679). Similarly Med Sup Asst Titles in 0679 are also included. The 0301 Environmental Care Title is excluded, but the series 0698 Environmental Healt position title is eligible. Sports & Fitness Of (0300) is excluded while Recreation Speciali

(0188) and Recreation Aid and Recreation Assistan (0189) are included as eligible. Safety & Occup Hlth position titles (0018) as well as Safety Technician titles (0019) are excluded but Industrial Hygienis and Industrial Hygine/Safe titles (0690) are included. Prosthetic Clerk is one of the rare 0303 titles that are included but Orthopedic Applianc (4845) is excluded. The latter is under the FWS or WG pay plan. Is there any other reason for the ineligibility of this position title?

All 0401 through 0404 positions are eligible for Saturday premium pay. These titles include Biologist, Microbiologist, Research Biologist and Microbiologist, Biological Science and Biolog Science Laboratory Technician titles. Also included is Cytology Technician (0646). But the Geneticist (0440) is ineligible without logical explanation. There are ten Engineer position titles, all of which are excluded except Clinical and Biomedical. Examples of those excluded are Civil, Environmental, Mechanical and Safety. Medical Illustrator (1020) and Photographer Medic (1060) are included but Assoc Ch Pt Care So (0340) is excluded. The letter title does appear to provide direct or "incident to" patient care. Similarly the Interpreter title (1001) is excluded. Does this employee interface with patients or their immediate family? Social Science Program, Anal, Offi, (all 0101) and Tech (0102) are eligible while Statistician(s) Biolo, Healt, and Medic (all 1530) are ineligible. Nor is there an explanation why in contrast the Dir, Policy Forecas who may be SES (0601) or Science Advisor (0601) are included. Dieticians and related titles (0630) and Dietetic Interns and Technicians (0640) are eligible for Saturday premium pay; Cooks (7404), Food Service Worker, Food and Sanitation Worker (both 7408) are all ineligible. Is there any reliable or persuasive explanation other than the former series are GS and the latter services are FWS? Also perplexing is why the GS Housekeeping position titles (probably supervisory and managerial) and all 0673 are eligible but the FWS Housekeeping titles (3566) are ineligible. This appears to be a determination without foundation—at best as rationalized by the explanation in the February 16, 2006 Attachment A. Is there any other explanation for including Med Sup Asst. Steno (0679) on a GS pay schedule and excluding Medical Equipment Re (4805), an FWS position title? Similarly Industrial Hygienis (0690 and GS) is eligible and Hazardous Waste Dis (6913 and WG) is not eligible. Animal Health Technician (0704) and Veterinary Medical 0703 are both GS and included although Animal Caretaker (5048) and Pest Controller (5026) are both WG and excluded.

It is also difficult to understand why Tech Writer Medica, Tech Wr-Ed Biomed, and Tech Writer-Ed Med (all 1083) are excluded as is Hlth Sup Acquistc (1101). Health Care Educ Sp and Health Care Edu Off (1701) are not eligible, but Health Educator (1725) is eligible. Health Aid Typing (0640) and Medical Lab Aid (0645) are both eligible and under the GS pay plan, whereas Laboratory Worker (3511) is WG and ineligible. The Medical Supply Aid and Medical Supply Tech (0622) are also eligible. How many "levels" removed from patient care is Research Sociologist (0184)? It appears to be eligible essentially because it is within a GS pay plan. On the other hand Prescription Eyegla (4010) is on the FWS schedule and therefore may be ineligible for that reason only. It also appears that many other blue collar or WG position titles also may be ineligible only because the employees are on the FWS pay plan. A few of these

titles are Instrument Maker (3314), Instrument Machanic (3359), Asbestos Abatement (3502), Wastewater Treatment and related titles (5408 and 5409). Aside from the 24 Social Worker and related positions (0185) there are another five Social Service and related positions (0186 and 0187) for which one may question whether these eligible titles (GS) are removed (levels?) from patient care. The name situation may prevail for the several Social Science and related titles (0101 and 0102). Another interesting question involves Chaplains (0060) who are also eligible. Inasmuch as they do provide spiritual care and support, but do not provide clinical care services or medical support of health care delivery or health care administration, their inclusion must be derived from the redefinition's words "patient counseling etc." Does this account for why those words were added to the redefinition of "the term", even though chaplain was previously included.

VA's explanation in Attachment A (a through d) as to why entire groups of position titles are excluded—according to AFGE's brief 85 excluded in A(a); 422 excluded in A(b); 96 excluded in A(c); 258 excluded in A(d)—centers on the positions not being involved in patient care. According to VA's explanation (c), employees are also "several layers removed from the patient", and in (d), employees are "several layers removed from patient care." The questions, doubts and apparent inconsistencies raised in the above sections (using position titles and abbreviated titles only) lead to the conclusion that these blanket statements are assertions are without merit. As pointed out above a number of eligible position titles appear to be "levels" removed from patient care, however the irrelevant word "level" is defined. Moreover, employees in some of the position titles declared ineligible appear to be less removed from direct patient care than the aforementioned eligible titles.

The purpose of the foregoing exercise was not to center on questioning the inclusion of some position titles, but rather to question why other titles were excluded, especially in examples of when the titles were juxtaposed The overriding issue remains whether employees in any of the excluded position titles provide services that are "incident to direct patient-care services"? VA's determinations are conlusionary and not persuasive. Their process was flawed and determinations lacked credence and therefore were improper personnel actions. Harmful errors were therefore committed. This arbitrator is persuaded that, much more likely than not, many employees in many excluded position titles do, in fact, provide "services incident to direct patient-care services".

III. DECISION

For all of the reasons stated in the previous section, the Veterans Administration did not comply with my February 16, 2005 Decision and Award. VA carefully did adopt words from that Award. It did reconstruct the implementation process. It did develop a methodology and reduce it to writing. It did review position titles, including those in FWS or WG pay plans. It appears to have used the same standard for both GS and FWS position titles, ignoring none. It did communicate with OPM and it used their Handbook of Occupational Groups and Families. It made inquires from DOD and

HHS. It did retroactively apply Saturday premium pay eligibility to those previously excluded ten position titles that were included during its review. These actions notwithstanding, the entire process was fraught with fatal flaws constituting harmful errors.

VA sought limited assistance form OPM—limited to "regarding their definition or interpretation or definition of 'the term'". OPM was not helpful on that matter. VA did not submit a more expansive request, for example seeking advice, assistance, or a meeting to discuss the process. VA did not attempt further contact with OPM. Similarly, inquires to DOD and HHS were of little benefit. Information gleaned from a Medicare publication was not relevant. It is understandable why VA made no further attempt to contact DOD or HHS. Its decision to refrain from further contact with OPM is subject to criticism given the urging of the February 16, 2005 Award. That award also suggested that VA might find it beneficial to consult with AFGE. Especially in light of its lack of success in dealing with the aforementioned federal agencies, it is perplexing that VA determined not to reach out to the union, except on a proforma basis. VA merely responded to AFGE letters and questions raised therein. The agency informed the union of decisions it had reached and stated that the union's comments or questions would be welcome. On May 2, 2005 the union did write of its desire "to collaborate with VA and provide meaningful input in the development and reconstruction and implementation process." It also requested that VA provide periodic updates on the status of progress. Mr. Pittman's reply did not address the request for collaboration but did state that VA would "consider any input" on the definition of "the term" that the union provides. Seeking input prior to making decisions may encourage cooperative participation. To "welcome" comments or to "consider any comments" after making decisions is bound to raise suspicion and invite criticism. This and all other post Award correspondence between the parties has been reviewed in an earlier section. I am persuaded that VA's "arms length" dealings with both OPM and AFGE were more in the way of form than of substance. However, it is unlikely that VA's actions in either situation were significantly out of compliance with the Award or rose to the level of harmful error.

For reasons not stated, VA determined to define or redefine "the term". The Award did not compel the agency to define "the term". In doing so it significantly altered, rather than defined the meaning of "the term". These acts remain troublesome. VA's exercise of redefining "the term" was designed to be a self-fulfilling prophecy. Recall that VA determined from the outset to resist the legislation from being enacted, then fought against any Title V employee from being included, and most emphatically objected to the inclusion of any FWS employees. Having failed, it simply decided to change "the rules of engagement" by redefining the meaning of healthcare, thereby excluding its entire FWS workforce. Of course this redefinition of "the term" also excluded hundreds of Title V GS positions as well. The agency cannot be permitted to change the United States code by redefining its provisions to suit its current wishes. If VA believed it beneficial or necessary to further clarify the meaning of 5 USC 5371 (a), they should have used an accepted definition such as the definition of the word

"incident" in Black's or a similar definition from Webster's Third New World Dictionary. Their redefinition constitutes an egregiously harmful error.

VA's use of only the OPM Handbook of Occupational Groups and Families as the primary guide to compare a VA Position Title (employee duties) against its new definition of "the term" to determine "whether it meets the criteria for providing direct patient-care services or services incident to direct patient-care services--as it redefined the term--constitutes a harmful error. Actual job responsibilities of VHA employees as documented by actual VA position title descriptions should have been compared to the standard—in this case "the term" as set forth in 5 USC § 5371 (a). As expressed firmly in the earlier Award: "It is important to be aware that it is the employee in a specific position who provides patient care." It is not an occupational group that performs the work. Nor will a generic description accurately portray duties performed. As further explained below, comparing an inappropriate standard, i.e. VA's definition rather than "the term", to generic descriptions and occupational series rather than actual position descriptions did not comply with the prior award and it did constitute a harmful error.

VA's carefully constructed, if contrived, reconstruction process also flagrantly and inexplicably violated the terms of the February 16, 2005 Award by its continued exclusion of all FWS position titles on pretext. The use of patient red flags (PRF) described in the union's earlier brief also belies VA's position. Here too, VA failed to comply with the Award, thereby constituting a harmful error.

The February 16, 2005 Award afforded considerable latitude to VA in exercising its discretion and judgment during the reconstruction and review process, while setting forth some minimum standards that were to be adhered to. Clearly, VA exceeded the parameters of reasonableness in applying its judgment in performing specific acts to comply with the award. In the process it also violated the principle that managerial discretion must be exercised reasonably as well. How Arbitration Works, Elkouri and Elkouri, Sixth Edition, 2003, Chapter 9.3.B.iii covers the Duty of Good Faith and Fair Dealing. A few excerpts include:

> "Standard Contract jurisprudence holds that 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'." "The implied covenant of 'good faith and fair dealing' is similar to the principle of reason and equity and is deemed to be an inherent part of every collective bargaining agreement." "Indeed, this implied covenant is sometimes referred to as the doctrine of reasonableness." "The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract...." "Essentially, the implied covenant of good faith and fair dealing serves as a springboard for a case-by-case determination of reasonableness. Thus, the covenant serves as the basis for the proposition managerial discretion must be exercised reasonably and discretionary

management decisions will be reviewed to determine if they were arbitrary, capricious, or discriminating." (Pgs. 478-480).

VA's failure to adhere to this long held well-established principle was arbitrary and did discriminate against a now unknown number of employees. It therefore resulted in its committing several improper personnel actions that constituted harmful errors as stated above.

IV. AWARD

Essentially, my authority was granted by the parties and the Federal Service Labor-Management Relations Statute (Chapter 71 of Title 5). 5 USC 7121 (b) (1) (C) (iii) provides for binding arbitration. Collective Bargaining Agreement (CBA) Section 40.2.G provides in relevant part that "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". The awarding of appropriate remedies under the statute and CBA is grounded in U.S. Supreme Court decisions involving private sector cases reaching back to the famous Enterprise Wheel and Car, part of the so-called Steelworkers Trilogy. Even where the CBA is silent "...in the absence of language limiting the scope of a remedy in the agreement itself, arbitrators generally have been considered to possess broad discretion to fashion an appropriate remedy" (Elkouri and Elkouri, Pg. 1189). Federal sector standards add that there must be a harmful error in order for the arbitrator to overrule management's behavior (Cornelius V. Nutt). In the instant case there have been multiple improper personnel actions, constituting harmful errors. An appropriate award in this case should assist VA to act in good faith in implementing the orders of this Award.

The initial Decision and Award of February 16, 2005 is an element of this Award; this Award, of necessity, shall take precedent. The earlier award's terms have been reviewed and there is no need to repeat them. Similarly, the issues that were to be decided earlier as well as the issue in this proceeding have been reviewed above and need not be repeated.

The Award follows:

1. VA shall not use the "definition" of "the term" that it wrote specifically for this case. To the extent it requires assistance in determining the meaning of "the term" it shall seek guidance from Black's and Webster's as stated above.

2. VA is not precluded from using OPM's Handbook of Occupational Groups and Families as a general guide. However, it must use actual VA position descriptions to

compare against the standard, i.e., "the term" as set forth in 5 USC 5371(a) when making determinations of exclusion and inclusion. The CBA provision for VA position descriptions is set forth in CBA section 9.1. A-D.

3. As written in the earlier award: The agency (VA) must also assure that wage grade or wage board employees are also treated as P.L. 108-170 intended, rather than being declared ineligible en bloc.

4. VA has previously committed to making retroactive to January 1, 2004 the inclusion of any additional position titles that were previously declared to be ineligible. That action must also be taken for position titles determined to be eligible as a result of the forthcoming review.

5. The parties lost an opportunity to work together in a constructive way subsequent to the prior award. It is intended that not be repeated. Their CBA is replete with provisions that are designed to assist them in this effort. To refresh their collective memories attention is called to the Preamble where they "agree to work together in partnership...craft solutions...and deliver the best quality of service to the nation's veterans"; Article 3 Partnership, providing for the union's pre-decisional involvement and shared responsibility; Article 4 Labor Management Training; Article 5 Labor-Management Committee; Article

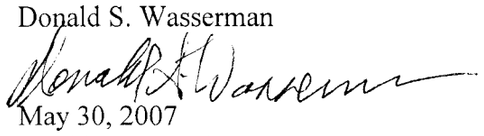
6. Alternative Dispute Resolution; Article 7 Total Quality Improvement; and Article 46 Rights and Responsibilities. The parties should be able to select an appropriate vehicle through which they engage in a constructive process enabling them to share information and input. The union must be involved on a pre-decisional basis throughout the process, on all determinations including those on inclusion/exclusion. The parties are encouraged to discuss whether it would be beneficial to invite outside assistance in their deliberations, either governmental or private.

7. Subsequent to the issuance of the prior Decision and Award the parties and arbitrator agreed that it would be appropriate to postpone a union brief justifying its request for attorney fees until this dispute was resolved.

8. In keeping with the parties' request, the arbitrator shall continue to retain jurisdiction over this matter in the event

clarification of this award is required or the service of the arbitrator is required.

Donald S. Wasserman



May 30, 2007
Washington, D.C.