American Federation of Government Employees, Local 1923 and Department of Defense, Navy, Indian Head Division, Naval Surface Warfare Center

100 FLRR 2-1084

January 31, 2000

Appealed (O-AR-3287)

THE ARBITRATOR IMPOSED VARIOUS REMEDIES ON THE AGENCY AFTER IT FOUND THE AGENCY GUILTY OF VARIOUS INSTANCES OF NONCOMPLIANCE REGARDING AN AGREEMENT WITH THE UNION.

This arbitration was the fifth compliance proceeding in this matter. The parties had reached an agreement where the agency acknowledged wrongdoing. However, this arbitration resulted after continued efforts by the union to get the agency to comply with the agreement failed. The arbitrator, in the present matter, first addressed the issue of jurisdiction. The agency argued that by virtue of filing exceptions to an award, the entirety of the award is stayed. The arbitrator noted that allowing the agency to block enforcement of prior awards by filing exceptions to the award of attorney fees would violate the interests of justice. The agency also argued that the jurisdiction of this arbitrator ended with a prior proceeding. However, the arbitrator found this to be disingenuous because the parties had agreed that this arbitrator would retain jurisdiction. The arbitrator said based on these and other jurisdictional arguments "the agency's conduct and meritless arguments" were viewed by the arbitrator as the agency "engaging in cynical delay to frustrate the rights of the union and those it represents."

Next, the arbitrator addressed the merits of the claim. The arbitrator noted that the grievant did not receive by May 13, 1999, an accurate job description as promised by the agreement. Accordingly, the compliance proceeding resulted in the agency being ordered to reclassify her to a higher position. She was to receive retroactive back pay, with interest to that date. She was finally reclassified on September 26. The union alleged, in the present matter, the grievant did not receive back pay and interest and that new evidence revealed she should have been promoted at an earlier date. The arbitrator found that the union was correct and the grievant should have been promoted in January. Therefore, her back pay, with interest should be backdated to January. Next, the arbitrator pointed out the delay by the agency of posting notice of the previous order. Also, the arbitrator noted that there were problems in regard to posting of notice of an All-Hands Forum to be held to reduce the chilling effect of the non-compliance. In compliance proceeding III, the agency agreed that it would address at an All-Hands Forum the non-compliance. The arbitrator, in the instant matter, concluded that there was compliance by the agency in postings but that its implementation was carried out in a manner intended to reduce its intended effect. Finally, the arbitrator addressed the issue of remedies. The arbitrator noted that the Authority has sanctioned the use of non-traditional remedies. The arbitrator ordered, among other things, posting of the notice of

this order and with each posting a videotape recording should be made showing the posting. The tape should be time and date stamped.

Arbitrator: Hugh D. Jascourt

Decision And Award

This is an arbitration which is the fifth compliance proceeding on what was entitled "Arbitration Settlement Agreement" between the Naval Surface Warfare Center (Agency) and AFGE Local 1923 (Union) dated April 13, 1999, and on compliance with subsequent agreements and determinations. Because of the unusual genesis of this matter, the unique aspects of this matter which should be obvious from this being Compliance Proceeding V, and the assertion by the Agency that this Arbitrator's jurisdiction ceased at the end of Compliance Proceeding IV, the more traditional summary used to explain the setting of the case is insufficient. Instead, the setting of this case is set forth below in great detail in the section entitled "Background."

The Union filed, on November 5, 1999, a request for an "emergency hearing" on November 8 or 9, 1999 "to order compliance and award relief." A hearing was held on the premises of the Agency on November 15, 1999*4 and was continued to December 3, 1999 also on the premises of the Agency*5. In the interim, on November 30, 1999, the Union filed a supplemental motion "to order compliance and compel relief." On December 16, 1999, the hearing was continued in a building operated by the Agency but off the base*6. The hearing on that date was concluded at the Union Hall on the premises of the Agency. At these hearings, each party was afforded an opportunity to present witnesses and evidence, to examine and cross-examine witnesses and to present arguments for their respective positions. At these hearings, four joint exhibits, two Agency exhibits and 24 Union exhibits were admitted as evidence. Because of the irregular - one might even say bizarre - aspects of these hearings, a separate section entitled "The Hearings" sets forth more fully what transpired at these bearings. At the hearing on December 16, 1999, the Agency presented its brief on the jurisdiction of the Arbitrator. The parties ultimately were afforded the opportunity to file written briefs within five days after their receipt of the final transcript. Only the Union timely filed a post-hearing brief received by the Arbitrator on January 6, 2000. The award in this matter is due no later than February 7, 2000.

A. BACKGROUND

1. The Genesis

a. Paiva

The Arbitrator was chosen by the parties from the roster of arbitrators maintained by the Federal Mediation and Conciliation Service, to arbitrate the grievance of Robert D. Paiva, captioned "Interference with Protected Activities," FMCS Case No. 980821-15354-9 (hereinafter Paiva). The Arbitrator, on May 29, 1999, commenced a hearing -

which was to be transcribed by a Court Reporter. However, the Agency with no prodding from the Arbitrator - indicated it was guilty of the allegations made by the Union. It, subsequently on that date, signed a "Stipulated Arbitration Agreement" in which the Agency agreed that Grievant's supervisor, Steve Carrier, issue the Grievant an apology citing his interference, intimidation, retaliation or coercive behavior, that Mr. Carrier would be provided sensitivity training and will cease and desist from future similar or like violative conduct, and that the Department will continue to honor its past practice of affording to power plant control employees the privilege of television viewing at certain times as was afforded to similarly situated employees at the Power Plant. The Arbitrator did not retain jurisdiction in that case.

b. ADR Proceeding

Unlike Paiva, the Arbitrator was asked by the parties to conduct an alternative dispute resolution (ADR) proceeding on April 12 and 13, 1999. He was not chosen from any list of arbitrators, but was chosen because of his experience in dispute resolution. By doing so, he was not to act as an arbitrator, unless specifically mutually requested by the parties on a designated matter. Instead, the Arbitrator was to assist the parties to resolve a number of outstanding grievances, some of which dated back to 1997 and some of which asserted non-compliance with awards of prior arbitrators including this Arbitrator, some of which also dated back to 1997. No Court Reporter was present.

The Arbitrator at no time was asked to serve in the capacity of an arbitrator. Consequently, at all times he served in a mediator/facilitator capacity. The parties were not able to reach an agreement on all the matters discussed, but the Agency agreed to provide remedies in ten matters. Eager to show its speedy responsiveness to correcting its past failures, the Agency established prompt timeframes for compliance. However, most timeframes were enlarged, at the urging of the Arbitrator to establish deadlines which did not entail a risk that they would not be achieved in a timely fashion. The actions to be taken by the Agency were set forth as "Implementing Procedures." In view of the long standing nature of these grievances and the fact that some of them reflected, prior non-compliance, the Arbitrator was requested to assume the role of arbitrating claims of non-compliance until all of the matters in issue had been fully and satisfactorily implemented. This was memorialized by this provision written not by him but by the parties (emphasis added):

The parties agree that Arbitrator Jascourt shall retain jurisdiction over the implementing procedures, and any claim of non-compliance will be forwarded to him for binding arbitration.

This provision and the Implementing Procedures were contained in an Arbitration Settlement Agreement (hereinafter Agreement) written by the parties. Although the Arbitrator signed it, he did not compel any of the provisions to contain any language, which ultimately were the terms of the Agreement. In the interest of looking to the future and not parading the sins of the past, the Agreement contained no recitation of the

grievances or other facts which preceded April 12 and 13, 1999 except those contained in the Implementing Procedures for purposes of identification.

Although not stated in the Agreement, there was anticipation that the ADR procedure would be used for another 20 to 30 outstanding grievances - as a large number of grievances were awaiting arbitration and carried with them potentially large expenditures of time and money.

2. Compliance Proceeding I

The Arbitrator conducted a compliance proceeding on May 27, 1999, on the allegations by the Union that seven of the ten cases which had been resolved in the April 13, 1999 Agreement had not resulted in compliance. The Agency stipulated that such allegations were meritorious and that the only issues to be decided were the remedies for non-compliance. The Arbitrator issued a decision the same date. In one case, he directed only expeditious payment of monies due. In four other cases, he established new timetables -after assurances by the Agency that such time deadlines were reasonable. The Arbitrator, in one case (Ralph Lucas), directed that if the Grievant did not receive by June 14, 1999 the back pay due to him, dating back to January 8, 1997, the Agency shall pay interest on the amount due and

This Arbitrator shall draft a cease and desist order for the Agency to post and which shall be signed by ... the Commander of the Agency. The order will also declare the Agency has failed to meet its obligations.

By the ADR Agreement, Joyce Wilson was to be provided by May 13,1999 with a current and accurate job description. Because this did not occur, the Arbitrator further required that if the Agency were to reclassify Ms. Wilson to a higher position, the position description would be made retroactive to May 13, 1999 with retroactive back-pay to that date, with interest. The Union had been claiming since late 1997 that Ms. Wilson should be reclassified.

In another case, the Agency instead of providing monetary compensation to affected employees, gave them a "day off." The Arbitrator directed the Agency to make monetary payment within a specified time period.

In addition, the Arbitrator provided that a further non-compliance proceeding may be invoked by the Union on an expedited basis provided that matters were consolidated into one hearing rather than being done on a piece-meal basis. Even though the April 13, 1999 Agreement conferred the Arbitrator with continuing jurisdiction, the Arbitrator noted - as was his custom - "The parties have agreed that this Arbitrator shall conduct such hearing."

In view of the nature of the cases in issue and the nature of the non-compliance, the Arbitrator found not only a violation of 5 U.S.C. 7116(a) and of the Agreement but that such non-compliance "is not an isolated incident, but is continuous."

Due to the flagrant nature of these violations, the Arbitrator further found:

The failure by the Agency to timely comply has a negative impact on employees' relationship with the Union as their exclusive representative, and constitutes interference and bad faith bargaining.

This finding is made for the purpose that the Agency will recognize the nature and extent of its violative conduct and, in the interest of effective government, will take such steps as are necessary to ensure that such conduct will not continue not only with respect to the matter recited above but also with respect to other matters which are pending or which may arise in the future.

No exceptions to this award were filed.

3. Compliance Proceeding II

a. Non-compliance Found

The Union again asserted the Agency had yet to comply with five matters. Four of these involved matters for which non-compliance was found in Proceeding I. The other case involved deadlines which occurred after the prior Proceeding.

By decision dated June 18, 1999, the Arbitrator found non-compliance in each of the matters alleged. The arbitrator noted the prolonged time period involved, the agreement by the Agency that the time taken to achieve compliance was excessive, and the nature and frequency of the cases in issue. The Arbitrator specifically found "the Agency's conduct is contrary to the interest of effective government and a gross waste of funds." He further found:

Such conduct is likely to continue unless the Arbitrator ensures that his findings are made known to the Commander of the Agency and that the Commander makes known to all employees that such violative conduct has occurred and that its continuation will cease.

b. Order to be Posted (hereinafter "Posting")

The Arbitrator further found that to effectuate this, Captain John J. Walsh should sign a cease and desist Order drafted by the Arbitrator which was to be posted and maintained in conspicuous places, including all places where notices are customarily posted and the Agency shall take reasonable steps to ensure that the notices are not altered, defaced or covered by any material.

c. Continued Role of the Arbitrator

The Arbitrator further concluded that "due to the long continued nature of the non-compliance, this Arbitrator is obliged to take a more active role than would be associated with bringing closure to these matters." To this end, the Arbitrator required the Agency to provide to him by no later than July 9, 1999 verification that compliance in the matters before him (in Compliance Proceeding II) had been achieved. Such verification was to be signed by the Union and the Arbitrator's jurisdiction on such matters would terminate, unless the parties specified his continued jurisdiction on those matters. The Arbitrator required the Union to submit by no later than July 16, 1999 its claims that non-compliance had not been achieved in those matters and the basis therefor.

The Arbitrator was to decide if a hearing was necessary to resolve the dispute. The Agency was to submit its opposition, if any, to such submission and if the Agency conceded it had not achieved compliance it was to suggest new dates and the basis therefor. The Arbitrator was to determine whether extensions of time were warranted or whether a hearing was necessary. it was the Arbitrator's hope that by now the Agency had "gotten the message" and that to the extent compliance had not been achieved it was due to matters outside the control of the Agency and, therefore, were amenable to extensions of time. At the same time, the Arbitrator tried to alert the Agency to "how the distrust, rage and hostility of the Union is reasonably increased when delay continues with no foreseeable end."

The Arbitrator, in hopes of instilling a sense of accountability reserved the right to schedule a hearing at the earliest practicable time and to require attendance by all those who have any role in achieving compliance and their supervisors, for the purpose of such supervisors determining whether discipline is appropriate. The Arbitrator also warned the Agency that he may require the Agency to provide data to show whether the processing of labor relations matters is disparate from the handling of other matters.

It should be noted that the Arbitrator asserted further jurisdiction without noting the consent of the parties since the Agreement provided him with such authority and since the nature of the non-compliance warranted such a role. No exceptions were filed to this decision.

4. Compliance Proceeding III

a. Procedure

The Agency belatedly filed the documentation required but did not file the verification notice while the Union claimed continued non-compliance. On July 16, 1999, the Arbitrator directed that a hearing be held on August 5, 1999 so that the Agency could meet the attendance and document requirements which were referred to in the prior decision. The parties agreed to Paiva being added to the proceeding for purposes of compliance. To assure that appropriate witnesses would be available, the Agency was to supply to the Union by no later than July 26, 1999 the names of such witnesses and

the Union was given three days after to request the attendance of others it deemed necessary. To this end, the Arbitrator also stated:

In view of the fact that some of the matters in issue dated back to a time which precedes the presence o the incumbent labor or human relations representatives of the Agency and appeared on the surface, to rely on the approval of management at a higher level than such representatives, the Arbitrator also requested the attendance of Captain Walsh at the hearing. Noting Capt. Walsh is the person best situated to determine if discipline or the institution of new procedures is appropriate.

Because the Labor Relations Officer for the Agency precipitously resigned the day before the hearing date, the Arbitrator allowed a postponement until August 17, 1999. Late on that day, Capt. Walsh -who had belatedly appeared but only to serve as a witness -approached the Union to try to resolve the outstanding matters. Settlement attempts continued to 12:30 a.m. the next morning. The hearing was continued to August 26, 1999. Due to further settlement discussions, that hearing concluded at 8:30 p.m. During this time, the Agency never produced the documentation requested and the supervisory personnel referred to above never attended the meetings.

b. A "New Day"

At the hearing, the Agency proclaimed it had a new team in place which was committed to fix, correct and change the course of the Agency and to effectively and timely meet compliance requirements (9/20 TR. II pp. 110). To facilitate the spirit of cooperation and to avoid a record which could present problems to the Agency or which could be used by the Union to embarrass the Agency, much of the proceeding was off the record and the Arbitrator refrained from going as far as was warranted to recite the facts establishing what the Arbitrator viewed as flagrant misconduct by the Agency. In addition, most "findings" by the Arbitrator and remedies imposed were by joint agreement of the parties, but without attributing them to such joint agreement - once more to respond to the sensitivities of the Agency and the potential that such methodology would lend itself to the new spirit of cooperativeness promised by the Agency. The promise of both parties to waive exceptions further enabled the Arbitrator to refrain from fully establishing a foundation for his findings and remedies. Even with this watered down version, the Arbitrator admonished the Union "to not use any of his description as further ammunition to bombard the Agency for its past conduct."

c. Findings of the Arbitrator not resulting in an Order

In his September 20, 1999 Decision and Award, the Arbitrator found in two cases compliance had been achieved in August 1999 - almost four months late and without justification. Due to the promise of a "new day," no remedy was imposed. Similarly, in another case compliance had yet to be achieved but no order was directed due to the promise of compliance. Compliance directives were ordered concerning four other cases.

d. Findings of the Arbitrator requiring further action

The matters discussed below are those which have a relationship to what occurred after September 20, 1999.

6) Ralph Lucas case

This case which was one those "settled" in the Agreement, dealt with the Grievant not being promoted and receiving back pay to January 8, 1997. As non-compliance was addressed in Proceeding I and again in II, this case became one of the bases for the Cease and Desist Order the Agency was directed to post.

By the time of this hearing, the Agency had yet to engage in full compliance. The Arbitrator credited on-the-record testimony of a supervisor that his supervisor, Don Burtchette, had told the responsible personnelist to not process any of the personnel actions. He further testified that Mr. Burtchette told him he would fire Grievant if he prevailed in his grievance. In addition, he testified that Mr. Burtchette asked him to falsify Grievant's desk audit. Mr. Burtchette was directed to testify but was not available when called to testify.

Because of this, the Arbitrator, in addition to issuing Orders related to the proper payment of the Grievant, directed - with the agreement of the Agency - that Mr. Burtchette at a minimum be reprimanded for his interference with compliance and for his discriminatory and retaliatory conduct toward the Grievant. The Arbitrator also directed that in determining whether more severe discipline is warranted the Agency should also investigate Mr. Burtchette's non-attendance at the hearing.

(2) Postings

In Compliance Proceeding II, the Arbitrator directed on June 18, 1999 that his Cease and Desist Order be signed by Capt. Walsh and be posted for a 60-day period. Capt. Walsh did not sign the Order until August 16, 1999 - the day before the first hearing date of Compliance Proceeding III. However, what Capt. Walsh signed and what was posted was not that which the Arbitrator had directed to be signed and posted. Instead, what was signed and posted was changed and Capt. Walsh knowingly signed it on the advice of legal staff and the human resources office. The Union further reported that of the 23 bulletin boards it checked only five contained the Order.

The Arbitrator ordered the proper Order to be maintained for a new 90-day period "in conspicuous places, including all places where notices are customarily posted." As the Agency declared that it will assume repetitious removal of the posting was not random and it will take measures to deal with purposeful conduct, the Arbitrator directed the Agency to make good on its promise.

(3) Pavia

As previously stated, this case was added by mutual consent to the compliance matters before the Arbitrator, although it was the subject of the March 29, 1999 Stipulated Arbitration Agreement which had not provided for continued jurisdiction by the Arbitrator. That agreement provided for an apology to be made to the Grievant. An apology was not given to him until August 19, 1999. In the apology given, Mr. Carrier, Grievant's supervisor, did not acknowledge that he had engaged in violative conduct and was worded in such a way as to make clear he was signing the apology only because be was directed to do so. On the basis of on-the-record testimony, including that of another supervisor, the Arbitrator found Mr. Carrier (who did not appear at either of the bearing dates) cursed the labor relations officer while announcing there was no way be would sign the apology and later told the Grievant he would resign before giving such an apology.

On the basis of agreement by the Agency, the Arbitrator ordered the Agency to investigate, for the purposes of discipline, Mr. Carrier's conduct and non-attendance at the hearing and at a minimum should issue Mr. Carrier a reprimand for his failure and refusal to sign the apology. The Arbitrator further directed the Agency - with its agreement to do so - to investigate, for the purpose of discipline, the conduct of Mr. Carrier's supervisor in assisting him in his conduct.

e. Other remedies

The Arbitrator found that the Union had been damaged by continued failure of the Agency to meet its obligations and, therefore, not only directed the Agency to cease and desist in failing to comply with the directions and orders of the Arbitrator, but also to investigate and take appropriate action "against all employees who have failed to take steps to effectuate the Arbitrator's Orders and remedies and/or who interfered with the compliance process."

In addition, the Arbitrator determined that the grievants were affected by unjustified or unwarranted personnel actions, that the services of the Union attorney were rendered with respect to remedying such actions, the Union was the prevailing party, the award of attorney fees was in the interest of justice and the fees requested were reasonable (on the basis of supporting affidavits of the market rate and experience of the attorney as well as other documentation). Paralegal fees were not awarded as the Union dropped that claim in the spirit of a new cooperativeness.

The Arbitrator further directed:

f) Capt. John J. Walsh, Commanding Officer of the Agency, shall issue and cause to be posted on all official Agency bulletin boards, electronic mail, and other areas where notices are customarily posted notice of an "all-hands" forum at which he personally will make a public statement regarding the Agency's noncompliance with the Arbitrator's findings and Orders. He shall also announce at the forum the Commitment o the Agency to meet regularly with the Union to address union issues and that the Agency is committed to a partnership with the Union. In furtherance of this, the Agency shall

consult beforehand with the Union regarding the format of the forum and shall have the opportunity to review the notice of the forum prior to its circulation. All bargaining unit members will be invited and allowed to attend the forum.

g) To the extent that full compliance is not achieved with this Decision and Award or any part thereof, additional relief and attorney fees shall be awarded except if in the view of the Arbitrator that noncompliance has been attributable to the conduct of the Union.

h) In accordance with the request of both parties, this Arbitrator shall retain jurisdiction over all matters cited herein, including all compliance awards and remedies in his March 29, 1999, April 13, 1999, May 27 and June 18, 1999 awards or related thereto.

It should be noted that because the Agency had agreed to taking specified actions by agreed upon time deadlines, many dates prescribed for Agency action by the Arbitrator preceded his September 20, 1999 decision. No exceptions to the award were filed.

5. Compliance Proceeding IV

a. Procedure

The Union filed on September 28, 1999 another motion for compliance but withdrew it upon the urgings of the Arbitrator in a telephone conference with the Agency. However, the Union filed a new motion on October 8, 1999 and another hearing was conducted on October 15, 1999. At the hearing, all evidence was produced off-the-record to meet certain concerns of the Agency and no documents were formally admitted into evidence. In essence, the entirety of the proceeding was a mediation session. Once an item was agreed to and a remedy agreed upon, the Arbitrator read to the parties his understanding of their agreement and then read verbatim into the record what was agreed upon. This effort finally concluded at 7:18 p.m. It should be noted that the resulting October 19, 1999 "Decision" of the Arbitrator does identify the absence of a formal record. To satisfy the professed needs of the Agency, he phrased his findings and remedies as if he had determined them rather than identifying that they were the Joint product of the parties.

b. Paiva

The apology, which the Arbitrator in Compliance Proceeding III directed to be given by Mr. Carrier to Mr. Paiva by September 10, 1999, was not given to Mr. Paiva until October 13, 1999. In addition, it was given to Mr. Paiva by someone other than Mr. Carrier and only upon Mr. Paiva's request. Mr. Paiva also alleged Mr. Carrier continued to engage in retaliation against him.

Because of this, the Arbitrator directed the Agency to post another Cease and Desist Order. He reiterated that the investigation of Mr. Carrier's conduct be expanded to include conduct of all parties who allowed him to engage in such conduct. He further directed that a complete copy of the record be supplied to the Arbitrator and that if the

investigation "shall conclude with a proposal of suspension of Mr. Carrier for less than 14 business day" the Agency would provide the Arbitrator (with at copy to the Union) a detailed justification for such lesser discipline. This was an attempt to be an artful way of saying that based on the evidence and prior findings of the Arbitrator, Mr. Carrier was to receive a suspension of some duration. What the Arbitrator otherwise would have made as findings was to be made part of the Agency's investigation.

In this case, as he did in the subsequent two matters, the parties agreed to a specified amount in attorney and paralegal fees subject to documentation verifying the actual expenditure of such hours. The Agency - to the surprise of the Arbitrator - agreed to needing only two days to accomplish the verification and paperwork process. Due to the agreement of the parties and the absence of a record, the Arbitrator believed he could not utter the usual declarations (such as "in the public interest") which should accompany such an award. In any event, the Arbitrator could not add to the agreement of the parties. For the same reason, he could not state that by the very nature of compliance with the prior orders for which attorney fees were awarded, the requisite wording would be superfluous. In addition, the rates or fees were based on the documentation provided in Proceeding III. In any event, as quoted above, the Arbitrator ruled in Proceeding III, and the Agency agreed:

To the extent that full compliance is not achieved with this Decision and Award or any part thereof, additional relief and attorney fees shall be awarded, except if in the view of the Arbitrator, that noncompliance has been attributable to the conduct of the Union (TR. 9/20/99, II - p. 104).

c. Postings

The Arbitrator declared:

A considerable number of sites exist in which there is no posting. There is controversy whether or not posting ever occurred or whether removal of them has occurred. Furthermore, as indicated above no investigation has been made where removal has been suspected. In some situations, posting has been effectuated, but has been covered by other material - presumably by employees authorized by the Agency. In some other situations, there is a posting of the Notice which the Agency improperly reworded and such Notice has not been replaced by the properly authorized Notice. In addition, there is disagreement over the locations where such Notices shall be posted.

Consequently, the remedies directed (and agreed upon) including that the parties promptly reach an agreement on all places where the Orders shall be posted and that all postings or re-postings should be accomplished by no later than October 26, 1999 and if no agreement is reached "such matters will be finalized ... in a proceeding before this Arbitrator." Because of the posting problems, the Arbitrator's August 18, 1999 posting was to be extended to 150 days from August 19,1999.

Due to the assumption that postings were made but were removed, the parties agreed also to the following:

A statement to all employees shall be drafted jointly by the parties, to be signed by Mary Lacey (or the Commander if more appropriate), to address in strong language the significance of problems which have occurred in posting labor relations matters. Such statement shall declare that anyone who defaces, removes or otherwise engages in activity to interfere with the legitimate posting of labor relations materials shall be immediately suspended, in view of the importance of such postings and their protected status. This statement shall be issued promptly.

d. The All-Hands Forum

In his September 20, 1999 award, the Arbitrator did not specify, a date certain for the Forum to be conducted. This time, the parties agreed that the Forum would be conducted on October 25, 1999. The parties further agreed:

The ALL HANDS FORUM shall be conducted on October 25, 1999 in a manner designed to allow all bargaining unit members to attend. Appropriate measures shall be taken to allow others who are unable to sit in the auditorium during the presentation to watch and hear it at other locations simultaneously. If other employees are legitimately precluded from watching and hearing, they will receive the opportunity to watch and hear a tape replay of the Forum at times and places agreed to by the parties.

e. Other

The Arbitrator also noted that by agreement of the parties, he "shall retain jurisdiction of all the mattes herein." In addition, he identified three other matters - two of which were designed to assist the parties change their relationship - which if the parties failed to reach agreement upon, the Arbitrator would conduct a proceeding to deal with them.

6. Exceptions Filed by the Agency

On November 3, 1999, the Agency requested the Union to supply to it by the close of business on November 12, 1999 asking the Union -not the Arbitrator - to demonstrate the statutory basis for the attorney fees as well as why they would be in the public interest. The Agency also challenged the propriety of paralegal fees and requested other information. The Arbitrator received a fax, date stamped 13:01 November 12, 1999 from the Agency of its Exceptions to this Arbitrator's October 19, 1999 Decision and Award (Compliance Proceeding IV). This was prior to the close of business on November 12, 1999 and prior to the Union's submission to the Agency. The exceptions dealt exclusively with the Award of attorney fees, citing as the basis the absence of the Arbitrator's citation of statutory authority for such an award, the absence of a finding by the Arbitrator that such an award is in the public interest and. the failure of the Arbitrator to provide the Agency with an opportunity "to respond to the Union's Attorney Fee Petition."

B. THE ISSUES TO BE DECIDED AT COMPLIANCE PROCEEDING V

Due to the circumstances of what occurred at the hearings, no agreement was reached on the issues. However, from the matters formally raised by the parties, the issues are quite clear:

1. Does the Arbitrator have jurisdiction to conduct Compliance Proceeding V?

2. If the Arbitrator does have jurisdiction,

a. Did the Agency fail to comply with prior orders of the Arbitrator in the

case of Joyce Wilson? If so, what should the remedy be?

b. Did the Agency fail to comply with prior orders of the Arbitrator with respect to posting of Orders and Notices? If so, what should the remedy be?

c. Did the Agency fail to comply with prior orders of the Arbitrator related to conducting an All-Hands Forum? If so, what should the remedy be?

d. Has the Agency engaged in such continuous and intentional violations of the prior awards of the Arbitrator that the Union has been harmed? If so, what should the remedy be?

C. THE HEARINGS ON COMPLIANCE PROCEEDING V

1. November 15,1999

After prolonged off-the-record discussions, when the hearing began, the Agency proclaimed that it was objecting to the continued jurisdiction of this Arbitrator. When questioned by the Arbitrator for the basis for the Agency's position - particularly in view of the Agency's declaration in Compliance Proceeding IV that it conferred the Arbitrator with continued jurisdiction - Counsel for the Agency persisted in refusing to explain other than repeated reference to the doctrine of functus officio (TR. I, pp. 6-59). There was one exception - Counsel also claimed that a compliance hearing could not be held because the 30-days for filing exceptions had not expired (TR. I, pp. 37-38, 40) - even though what the Agency would be excepting to was a ".decision" which consisted, in its entirety, of agreements the Agency reached with the Union.

Due to the lateness of the hour, only one witness was heard - Mary Lacey, the Technical Director of the Agency. As stated at the outset, the Union had requested a hearing to be held November 8 or 9, 1999 - consistent with the prompt scheduling of prior compliance dates. However, in a joint telephone conference with the Arbitrator, the parties agreed to defer the hearing until November 15, 1999 because Ms. Lacey, who the parties agreed was an essential witness, was not available until then. Nevertheless,

the Agency objected to the Union calling Ms. Lacey as a witness (TR. I, pp. 66-74). The Arbitrator did not sustain the objection.

The Agency repeatedly instructed the witness not to answer questions. Objections were made by the Agency which in the opinion of the Arbitrator were an attempt to interfere with examination. In fact, when the Arbitrator questioned the witness, the Agency also objected to his questions (TR. I, pp. 107-114).

Although the question of posting will be discussed tinder the section entitled "The Merits," the following is relevant to the next hearing. Ms. Lacey testified that if a posting was covered, she would call the Department head and ask him to look into the matter and to get back to her (TR. I, p. 122). The Union requested Ms. Lacey to go to Building 84 1, which was adjacent to the building in which the hearing was conducted, to view the posting there (TR. I, pp. 107, 122). Although the Agency objected, such a viewing did take place with the understanding that Richard C. Dale, II, Esq., the Agency's Counsel would stand in for Ms. Lacey.

The parties went to Building 841 and found the October 25, 1999 posting ordered by the Arbitrator in Proceeding IV was reduced in size from that provided by the Arbitrator (Jt. Exhibit 1) and that two-thirds of it was covered up by an April 1. 1999 Notice to all employees concerning eligibility for back pay due to travel related overtime (TR. I, pp. 138-141). The Notice was repositioned so that it showed in full. Because it was 6:29 p.m., the hearing was continued to December 3, 1999.

2. November 18, 1999 Notice

The Arbitrator by Notice of November 18, 1999 directed the parties to present at the December 3, 1999 hearing evidence, testimony and argument on a series of questions. The questions were designed to ensure that the Agency took into account the April 12-13 ADR proceeding and, if there were factual bases to establish that the Agency did not intend the Arbitrator to have continuing jurisdiction, the Agency would have the opportunity to do so. The questions were also designed to allow the Arbitrator to consider any factors, considerations or case law of which he was not aware. The questions posed were:

1. By the parties' April 13, 1999 Agreement, did the parties intend that the Arbitrator continue retention of his jurisdiction

a) Over compliance with directives to effectuate compliance with the original subjects or to remedy non-compliance? or

b) Was retention to continue only upon explicit consent by both parties?

2. If the intent of the parties in their April 13, 1999 Agreement is not clear, does the creation of the Agreement through the ADR process when combined with the nature of continued non-compliance:

a) confer upon the Arbitrator the discretion to determine his jurisdiction absent the mutual consent of the parties and/or

b) preclude a party, without consent of the other, from limiting the discretion of the Arbitrator to determine retention jurisdiction?

3. If the parties did intend to confer jurisdiction upon the Arbitrator to rule upon compliance with prior compliance orders or if the Arbitrator has discretion to determine his jurisdiction, what preexisting limitations are there upon his retention of jurisdiction?

4. If the Arbitrator does retain jurisdiction except when both parties agree upon cessation or limitation, at what point, if any, or under what circumstances, if any, does the effort of a party without consent of the other, to terminate or limit the jurisdiction of the Arbitrator exceed the bounds of vigorous advocacy and become contumacious conduct and/or interference with the arbitral process?

3. December 3, 1999 Hearing

Since Mr. Dale stood in for Ms. Lacey in viewing the October 18, 1999 Notice which was covered up, he was asked by the Union to testify and then directed by the Arbitrator to testify - so that he would know what action was taken to deal with those who covered up the Notice. Mr. Dale objected and refused to testify on the basis that he was the Agency's representative and his testimony would breach the attorney-client privilege (TR. II, pp. 22-34). The Arbitrator advised the Agency he was making an adverse inference. (Later Union Exhibit 17 showed that on November 24, 1999 the same notice which had been repositioned to show in full was again partially covered).

When the Arbitrator tried to move to the jurisdictional issue, the Agency claimed it had not received the Arbitrator's November 18, 1999 Notice (TR. II, p. 39). After the Agency was supplied with a copy and said it was prepared to respond to the Arbitrator's questions (TR. II, pp. 43-44), the Agency then proceeded to assert that it would stand by what it had previously claimed (TR. II, pp. 45-46). The Arbitrator advised the Agency that he believed the Agency had merely given him a slogan and that he also believed that there is a factual predicate for continued jurisdiction (TR. II, pp. 48-49). The Agency tried to avoid the Arbitrator's directive by offering to file a brief and then claiming the Union could rest without putting on a case (TR. II, pp. 55, 62). Ultimately, the hearing was rescheduled because the Agency stated it needed time to present its case (TR. II, pp. 51).

The hearing was rescheduled to December 16, 1999. It is relevant to what took place on December 16, 1999 that the Agency claimed, in response to the potential attendance of observers from outside the Agency, that any outside person needed to go to the pass desk to get on base (TR. II, pp. 89-91).

4. December 16, 1999 Hearing

It is relevant that this proceeding was conducted at a place called Ely's Conference Center, a facility of the Agency but located off the base.

The Union requested subpoenas of five witnesses, requesting two of them to bring documentation necessary to the matter of Joyce Wilson. At 4:59 p.m. December 15, 1999, the Agency faxed to the Arbitrator a motion to quash the subpoenas. The next day at the hearing, the Arbitrator denied the motion on the basis that he had the power to direct the production of evidence, which included witness testimony. He noted that the Agency based its argument, in part, on the lack of such authorization of the Arbitrator by the collective bargaining agreement (Agency submission p. 3). However, Article 11, Sec. 7b of the parties' agreement provides "the Arbitrator shall determine the procedures used to conduct the arbitration." In addition, it is basic law of the Federal Labor Relations Authority (FLRA) that the Arbitrator can rule on requests for discovery. He further questioned why the Agency relied on DOD, Pearl Harbor Naval Shipyard, 81-FLRR-2-1171 and VA Medical Center, Danville, Ill., 88-FLRR-2-1527, when in those cases adverse inferences were allowed to be made even though the arbitrators in those cases correctly viewed they did not have authority to issue subpoenas. He also alerted the Agency to his perception that the Agency has since November 15, 1999 attempted to preclude the Arbitrator from hearing witnesses. Ms. Lacey was one of the witnesses who the Union had subpoenaed for December 16, 1999.

The most astonishing event occurred after the parties broke for lunch at 2:30 p.m. to return at 3:25. The Agency representatives did not return until 3:45 p.m. (TR. III, pp. 84-85). They did not unpack any of their materials and at 4:07 p.m. departed because they viewed any proceeding on the merits to be enforcement proceedings (TR. III, pp. 204, 192).

The Arbitrator reiterated what he had told both parties on a number of occasions, that it was his usual practice, as it was with most arbitrators, to proceed with the merits and subsequently make a ruling on jurisdiction without prejudice to the claiming party on the merit issues (TR. III, p. 198). The Arbitrator offered to take a recess to judge the issue - if he could -but the Agency rejected the offer (TR. III, pp. 195-196). Instead, the Agency demanded that the case be bifurcated so that it could appeal any adverse decision on jurisdiction (TR. III, pp. 195-196). While the Arbitrator was in mid-sentence trying to further explain that the Joyce Wilson matter was directly a product of the April 13, 1999 Agreement, the Agency representatives departed (TR. III, pp. 203-205). The Arbitrator was also going to set dates for filing briefs on the jurisdictional matter, but it became apparent that what the Agency submitted was not intended to be an opening statement but its brief regardless of what the Union offered as testimony or argument.

While waiting for the witnesses whose appearance was directed, Craig Smith, who said he was responsible for the building, entered the hearing room and politely advised us that we had to leave the building as it was scheduled for use to only around 4 p.m. (TR. III, pp. 223-224). Just before this, Capt. Walsh's office made it known that he was not going to allow anyone from the Agency to appear before this Arbitrator (TR. III, p. 221).

Even though Mr. Smith was very accommodating, the Agency's conduct was reprehensible. It was obvious - in retrospect - that what occurred had been preplanned to curtail the arbitration proceeding. There was no notice given to the Union or the Arbitrator, even when discussing the lunch break (TR. III, p. 149). The time of prior proceedings have been noted to show that the parties have seldom finished by 4 p.m. and, therefore, there was no reasonable belief that the December 16, 1999 hearing would conclude by that time -particularly when the merits matters had yet to be reached on that date. Combine this with the claim by the Agency on December 3, 1999 that outsiders - which means the Arbitrator and the Court reporter - could not get back on base without a pass and at a time when the office for obtaining a pass had closed (TR. III, pp. 90-91). There was also the problem of where the proceeding could be held.

Ultimately, the hearing was resumed ex parte at the Union Hall, where other arbitration matters with the Agency had been held and both the Court reporter and the Arbitrator were allowed to go there (TR. III, pp. 92, 230)*7.

D. JURISDICTION

1. Position of the Parties

a. The Agency

Although the Agency purported to be responsive to the Arbitrator's Notice of November 18, 1999 - which was the reason for the Agency postponing its presentation to December 16, 1999 - the Agency refused to follow the format set forth by the Arbitration or to even specifically address all the matters contained therein (TR. III, p. 105). The Arbitrator tried in every way he could to make the Agency aware that he viewed the Agency as being unresponsive and that in his view the Agency was deliberately being uncooperative (e.g., TR. III, pp. 138-139). These methods failed to elicit from the Agency additional argument or explanation. The Agency declined to present testimony or other evidence (TR. III, pp. 186-189). It did present case law which purported to support its position, although it did not provide a copy of 51 Fed. Reg. 45754 (December 22, 1986) on which it bases part of its argument.*8

The argument which the Agency makes in reliance on that regulation is that an arbitrator's award is automatically stayed when exceptions to the award are filed. The FLRA's reference is made to the regulation in AFGE Council 252, Local 2607 vs. Department of Education, 50 FLRA 34 (1994) with no further elucidation. Presumably, the Agency is arguing that because it filed exceptions to the Award in Compliance Proceeding IV with respect to Attorney Fees, the whole of the award is stayed until the FLRA has ruled on those exceptions.

The Agency also cites that the Arbitrator is bound by the doctrine of functus officio, which it defines as "once an official has fulfilled the function or accomplished the designated purpose of his office, the official has no further authority." Since the

Agreement reached by the parties in April 1999 did not cover the enforcement of the Arbitrator's awards concerning the remedies, he ordered for non-compliance, such enforcement is beyond the authority of the Arbitrator. Instead, the Union must file an unfair labor practice charge or the filing of "a separate and new grievance over the issue of non-compliance with the Arbitrator" awards [providing remedies for non-compliance)."*9

Finally, the Agency states that the Arbitrator's October 19, 1999 Award in Proceeding IV "clearly states that the Arbitrator retained jurisdiction only to the extent agreed to by the parties." The Agency argues that after the Arbitrator issued remedies in Proceeding IV, he exhausted his authority absent an additional Agreement (TR. III, p. 133). Again the Agency also declared its intent to obtain a ruling on this matter from the FLRA and, consequently, the Arbitrator should stay any further proceedings.

b. The Union

The Union concedes that the FLRA has yet to address whether by filing exceptions to part of an award the entire award is stayed. However, it cites the FLRA's rules, 5 CFR 2423.40(d) which provides that any exception not specifically argued is deemed to have been waived. In addition, the Union argues that the matters in contest in Compliance V are independently derived from proceedings prior to Proceeding IV (See also TR. II, pp. 38, 90) and, therefore, could not be stayed by Exceptions to Attorney Fees awarded in Proceeding IV because exception s were not filed to the prior awards.

The Union further asserts there is no case law which supports the proposition that an arbitrator cannot enforce non-compliance and that there is no dichotomy between "enforcement" and the power to issue remedies. It cites Devine v. White, 697 F.2d 421, 438 DC (Cir. 1983) for the proposition that Federal sector arbitrators "police compliance with controlling laws and regulations." Consequently, the Arbitrator stands in the shoes of the FLRA when a matter is properly the subject of arbitration.

The Union, in any event, states the Agreement intended that the jurisdiction of this Arbitrator was to continue and extend to compliance over matters directly relevant to it and anything that flowed directly from it (See also TR. III, p. 71). The Union further characterizes the instant case as a continuum of the prior cases (TR. III, pp. 103-104). The Union adds that in Proceeding IV, the Agency agreed to continuing jurisdiction of this Arbitrator (T. II, p. 92 et. Seq.). Moreover, the Union claims that the Agency should be estopped from its claim because "the Agency formed a binding contract through its representations [in Proceeding IV] that it would in exchange for no testimony and evidence being elicited, agree to the relief as negotiated and to continuing jurisdiction by this Arbitrator" (Union brief, pp. 18-19).

2. Discussion and Analysis

a. Stay of Compliance Proceeding V

The Agency relies on the FLRA's revocation of its rule that (2429.8) when filing exceptions it was also necessary to file a request for a stay of an award. The Agency uses this proposition to mean that by virtue of filing exceptions to an award, the entirety of the award is stayed.

An exhaustive search of case law has failed to reveal any time when the FLRA has stayed a portion of an award which was not affected by the exceptions which were filed. As applied to the instant case, the Agency's filing exceptions to the Attorney Fees did not affect any of the underlying issues in dispute; namely the back pay of Joyce Wilson, postings, the All Hands Forum and damage to the union by continued non-compliance. Therefore, any ruling by the FLRA on this peripheral issue of attorney fees would have no effect on an), of the underlying issues.

In this particular case, allowing the Agency to block enforcement of prior awards by filing exceptions to the award of attorney fees would thwart, ironically, the interests of justice.

First, the exceptions to attorney fees were disingenuous. The Agency had agreed in Proceeding III that attorney fees would be awarded "except if in the view of the Arbitrator that non-compliance has been attributable to the conduct of the Union." In Proceeding IV, the Arbitrator did not make such a finding and the Agency agreed to such fees. The Arbitrator due to the absence of on-the-record testimony or evidence did not recite the magic words associated with such an award - but - due to the request of the Agency. Due to the continuum between Proceeding III and Proceeding IV, such words were superfluous since the fees were to enforce an award for which attorney fees did meet the statutory standard and to which no exceptions were filed. See DODDS and Federal Education Association, 54 FLRA 773 (1998).

Second, the Agency viewed that even if it were to prevail in its exceptions, the determination would be remanded back to this Arbitrator. Thus, all it would do is to stall for time. It adamantly refused at the November 15, 1999 hearing to put the issue before this Arbitrator. Clearly, the purpose of the Agency's exceptions was to delay the consequence of its own agreement.

Third, when the November 15, 1999 hearing did go on the record, the Agency objected to the continued jurisdiction of the Arbitrator but refrained - despite extended efforts by the Arbitrator - to explain the basis for the Agency's claim (TR. I, pp. 6-59). The Agency also contended the hearing should not be held because the 30-day period for filing exceptions had not expired (TR. I, pp. 37-38, 40). However, it did not file further exceptions. In short, it had the opportunity to file exceptions to the statement of the Arbitrator that the parties in Proceeding IV gave him continuing jurisdiction. The Union argues that 2423.40(d) provides that any exception not specifically argued shall be deemed to have been waived. Although that regulation does not address exceptions to awards of arbitrators, the concept would appear to have general applicability. It would be anomalous to allow the Agency's exceptions to attorney fees to preclude continuing

jurisdiction of this Arbitrator, when it had the opportunity to do so but refrained from doing so even after declaring that the Arbitrator had no jurisdiction.

In any event, the matter of Ms. Wilson is directly derived from the Agreement and Proceeding I. It was not the product of Proceeding V. The matters of postings were derived, in large part, from Proceedings II and Ill. There was a new posting directed by Proceeding IV, although it was to remedy continued non-compliance with the prior directives. Failure to post this notice is an issue in Proceeding V, but the Agency's conduct in this matter does not involve any issues not at the heart of the alleged non-compliance with other postings. Proceeding IV does for the first time specifically deal with a directive for the parties to agree on where postings shall be made, but this issue, too, goes to the heart of the prior matters. Similarly, the All-Hands Forum was directed in Proceeding III (actually agreed to as were all the other matters in Proceeding Ill). The issues in Proceeding V are merely a continuation of the failure to comply with the provision of Proceeding III.

Consequently, there is no basis to stay the determination of compliance issues raised in Proceeding V.

b. Enforcement

The Agency claims that an arbitrator can remedy a matter but cannot engage in enforcement. To this Arbitrator a remedy is the means by which a right is enforced or the violation of a right is prevented, redressed or compensated. There is no difference between the two terms. Of course, what the Agency is really saying is that it can agree to an arbitrator continuing jurisdiction, but when the Arbitrator actually does come back and imposes a new remedy to the non-compliance, the Agency has a unilateral right to terminate the agreed upon jurisdiction of the Arbitrator.

What this means in this case is that if the Arbitrator carries out his responsibilities he is persona non grata and the Union should have to start new proceedings. If the Union has to do so, the non-compliance can be stretched out for exceedingly long periods. In fact, just this has occurred in a number of prior cases between the parties as described below under the subsection Deterrence, which is in the section entitled Remedies.

Federal sector case law does not support this theory which would enable the Agency to delay or even impair the implementation of its responsibilities. In fact, in Veterans Affairs Medical Center, Leavenworth, Kansas, 38 FLRA 232 (199), the FLRA rejected the agency's claim that a proper remedy for non-compliance with a final order is only the filing of a new grievance by the complaining party. Instead, the FLRA upheld the Arbitrator's declaration he would "continue to retain jurisdiction of this case until full compliance is accomplished..." The Authority explained, "...retention of jurisdiction by arbitrators for overseeing the implementation of awards is not unusual and has been approved by the Authority," citing Overseas Education Association & DODDS, 31 FLRA 80, 83 (1988). See also FAA and NACTA, 55 FLRA 322 (1999) in which the

Agency unsuccessfully argued that an arbitrator can retain jurisdiction for clarification and interpretation purposes but cannot go any further than that.

C. What the Arbitrator did in Proceeding IV

The Agency claims that in Proceeding IV, the Arbitrator's jurisdiction ceased and for him to have jurisdiction for compliance of that case is dependent upon the agreement of both parties. In the Decision and Award, the Arbitrator stated (p. 7) (emphasis added):

By Agreement of the parties, the Arbitrator shall retain jurisdiction of the matters herein.

Not only is it disingenuous for the Agency to claim that the cited words did not intend to have future effect, but also the Agency used its agreement to avoid having damaging evidence to be placed on the record.

d. Effect of the ADR Proceeding

As carefully described above, the April 13, 1999 Agreement was the product of an ADR proceeding. It resulted in Implementing Procedures. The parties, in view of longstanding compliance problems associated with many of the matters discussed by them, gave the Arbitrator the role of continuing jurisdiction similar to that described of the Arbitrator in NAMC Leavenworth, supra. The fact that new remedies were needed to bring compliance after initial remedies were flaunted did not terminate this Arbitrator's role. The fact that arbitration procedures were used to effectuate remedies did not change the basic role of the Arbitrator. In fact, the same result would still apply even had the genesis been an arbitration award. In NAMC, Allen Park Michigan, 40 FLRA 160, 170, the FLRA stated "The retention of jurisdiction by arbitrators for the purpose of overseeing the implementation of remedies is not unusual and has been approved the Authority." In a subsequent Allen Park case, 49 FLRA 405 (1994), the Arbitrator did not exceed his authority by declaring that he would maintain jurisdiction to assure himself that claims were resolved and that the Agency's clean up program was completed.

Based on Authority precedent, this Arbitrator did not need to obtain the specific agreement of the parties to continue the jurisdiction conferred upon him by the Agreement. Another way of saying the same thing was that this Arbitrator had yet to fulfill the function nor accomplished the designated purpose of his office. So, even by the definition of functus officio, the role of this Arbitrator had yet to be concluded.

e. Bifurcation

In the absence of a showing by the Agency that it was harmed by hearing the merits case, there is no basis to allow the Agency to further delay a hearing on the allegations of the Union pertaining to compliance. In fact, the above recitation makes it evident that the reason why the Agency did not file exceptions to the Arbitrator's continued jurisdiction was to have an excuse to be able to file exceptions at a later time and to claim a justification for further forestalling compliance.

f. Conclusion

Based on the foregoing, the Arbitrator has continuing jurisdiction over the matters alleged in Proceeding V and beyond that, should non-compliance persist and should the Union present to the Arbitrator claims of non-compliance with matters which were directed by document signed by him. However, the Arbitrator does not believe he may on his own initiative take remedial action on matters not raised to him by the Union or by the evidence presented to him. The Arbitrator may use such matters as background to make determinations on matters before him.

Most importantly, the Arbitrator, based on the Agency's conduct and meritless arguments, views the Agency as engaging in cynical delay to frustrate the rights of the Union and those it represents. Further, the Arbitrator views the Agency as desiring the Union to tire of its efforts to obtain satisfaction through this Arbitrator and to not only incur the delay of new procedures but to also incur another disadvantage.

Because the original award and much of the subsequent Compliance Awards were based on the off the record information, the Agency can attempt to disguise what has occurred and to be able to obtain a more favorable result from a different third party. This is particularly important in this case with its nuances and complexities. In a crossword puzzle where one might not recognize the correct word or which choice of words which might fit, the proper word might be recognized once several of the letters in it are identified. In this case, someone who has not witnessed the permutations will not have the advantage of knowing those letters and may not recognize the answer. Consequently, the agency sees a benefit to obtaining a decision-maker who is unaware of what has not been disclosed on paper but which has been the foundation for the agreement of the parties. Worse yet, even what is on paper may not be fully recognized in view of the deceptions, which have been amply described and ones which are later described in this Decision and Award.

Because of these reasons as well as 1) the Agency's failure to except to the continued jurisdiction of the Arbitrator although it raised the issue prior to the expiration of the period in which to file exceptions, and 2) the Agency's effort to withhold from the Arbitrator the basis for its claim, the Arbitrator finds the Agency's argument was not made in good faith.

E. THE MERITS

1 . The Case of Joyce Wilson

In this case, because Ms. Wilson did not receive by May 13, 1999, an accurate job description, as promised by the agreement. Compliance Proceeding I resulted in the requirement that if the Agency were to reclassify her to a higher position, her position description would be made retroactive to May 13, 1999. She was to receive retroactive

back pay, with interest to that date. Ms. Wilson finally was reclassified from Grade 7 to a Grade 8 on September 26, 1999 (Union Ex. 1, 11 Agency Exhibit 1).

a. The Union's Position

Ms. Wilson not only has yet to receive back pay, with interest, but new evidence reveals that she should have been promoted in January 1, 1998.

b. Findings of Fact and Discussion

In the ADR procedure, the Agency claimed they had no records of Ms. Wilson's position description (PD). Therefore, she still needed to be classified (TR. III, p. 250). However, when in October 1999 William Milton of the Union saw the PD relied on, he recognized it as the same one he had seen forwarded to HR in January 1998 (TR. III, p. 251). The prior PD had been graded at GS-1173-09, as was the one the housing manager and the Deputy Public Works Officer had signed off on in January 1998 (TR. III, pp. 236, 241). However, HR never took action to reclassify and grade the position. Otherwise, Ms. Wilson would have been promoted in January 1998 (TR. III, pp. 236, 245). The Union requested Cynthia Gleitch to appear as a witness because as the supervisor of the staff handling the matter she would have shown not only that the PD was the one forwarded to her office in January 1998, but that it was again subsequently sent to HR in Spring 1999 (TR. III, pp. 220-223, 246-247). In addition, Agency Exhibit 1, dated November 30, 1999 clearly indicates that the-retroactive requirements had been ignored in their entirety.

On the basis of the foregoing, including but not limited to the adverse inferences due to the absence of material witnesses, the Arbitrator must conclude that Ms. Wilson should have been promoted in January 1998. Therefore, her back pay, with interest, and subsequent within grade increases, should be backdated to January 1, 1998. Moreover, in view of there being such a repetitious pattern of Agency inaction combined with the absence of remedial actions once the personnel action has been taken, one must conclude the inaction is purposeful. In fact, one of the matters in the Agreement dealt with failure to carry out a December 1997 Agreement to develop new PDs. This still had not been achieved by Proceeding II. Each of the three payment matters in Proceeding III have the same pattern as the case of Ms. Wilson who even when finally promoted still has yet to receive any back pay (TR. III, pp. 233-234). In fact, if past history repeats itself, Ms. Wilson will have a further delay in receiving interest. The remedy is stated under the section entitled Remedies. It should be noted also that Article 15, Section 3n of the parties' collective bargaining agreement allows the Arbitrator to promote an employee, but the Arbitrator lacks the requisite information to deal with the anomaly caused by Ms. Wilson's classification at a Grade 8 on the basis of a Grade 9 PD.

2. Postings

In compliance Proceeding II, based on the failure of the Agency to comply with previous agreements by it to make monetary restitution in four cases and completion of its

development of new PDs, the Agency was to post a cease and desist notice. The posting was not signed until August 16, 1999, the day before the hearing date for Proceeding III. The Agency posted a notice different than the one drafted by the Arbitrator (9/20 TR. II, pp. 332-333). On August 18, 1999, of 23 bulletin boards checked by the Union only five contained the posting (9/20 TR. II, pp. 45-46). After the Agency agreed that repetitious removal of postings will be assumed purposeful (9/20 TR. II, p.48), the parties agreed to the Arbitrator's order that the Agency "diligently take appropriate action against anyone who participates in the removal or defacing of the notice..."

Not only was there a continuation of the absence of postings, but there was disagreement over where such postings shall be made. Accordingly, in Proceeding IV, the parties were to promptly reach agreement "on all places where said Notice shall be posted". If such Agreement was not completed by October 26, 1999, the locations were to be finalized in a proceeding before this Arbitrator. This had added importance because the Agency was to post another notice in addition to re-posting the one previously ordered and because there was to be notice of an All-Hands Forum to be held to reduce the chilling effect non-compliance wreaked on unit members and their union. Because many employees did not have access to e-mail, notice of the Forum was also to be made by posting a notice. The Agency agreed to also issue a strong statement that "anyone who...engages in activity to interfere with the legitimate posting of labor relations materials shall be immediately suspended..."

a. The Union Position

The Union claims an agreement on posting locations has never been reached and that the Agency even intends to abolish certain bulletin boards. The Union further claims that many postings have either been covered up or removed entirely. In addition, some have been reduced in size by one third affecting their readability.

b. Findings of Fact and Discussion

As illustrated by Union Exhibit 23, some notices have been significantly reduced in size making them difficult to read, particularly if one does not stand within inches of it. Although the Agency argues that there was no size requirement prescribed (TR. I, P. 123), this is an obvious alteration which interferes with legitimate posting. Mary Lacey, the Technical Director, did make a statement as promised but did not refer to the words in Proceeding IV of interfering with the legitimate posting of labor relations materials. However, Ms. Lacey, who first viewed the reductions as being in substantial compliance, did promise to correct the situation (TR. I, pp. 120, 134-135).

The absence of the wording of the Arbitrator is also critical to what occurred at Building 160 as shown by Union Exhibit 18 and by testimony (TR. III, pp. 304-306) At that site there is an identifier which has on it:

OFFISHAL

ONION

BULLIETIN

BARD

In front of the board is a desk on which a flowering plant totally obscures the October 25, 1999 posting and obscures 50% of an August 18, 1999 posting.

The Arbitrator finds that the Agency never reached agreement with the Union on the location of postings, despite the Agency's declaration in Union Exhibit 13 that such an agreement did exist, and that the Agency has determined unilaterally to not post in operating areas (TR. III, pp. 318, 323-325).

Based on only the 77 sites the Agency claims are the only appropriate places on which postings shall be made, Appendix A shows the Union's random check of these sites, (which means not all sites were checked). The Appendix is based on Union Exhibits 12, 14-19, and testimony (TR. III, pp. 264-318).

It shows that problems occurred at 59 of the 77 sites, with regard to the notices for the All-Hands Forum, the August 18, 1999 and the October 25, 1999 postings. Also, 24 of these sites are not marked as official bulletin boards, according to notes by Agency representatives (Union Ex. 19, TR. III, pp. 311-314). There were 47 non-postings; 41 were at least partially covered and 38 were reduced. The largest number of non-postings were 25 All-Hands Forum, but 61 of the October 25, 1999 postings were either not posted, covered, or were reduced in size.

If one is to believe Ms. Lacey's testimony that the postings were achieved (TR. I, pp. 86-87), then something is occurring after proper postings have been made. This is reflected by the fact that on November 15, 1999, the reduced size August 18, 1999 posting at Building 841 was two-thirds covered by an April 1, 1999, posting (TR. I, p. 138). The posting was moved so that it was no longer covered. On November 24, 1999, it was again partially covered (Union Ex. 17). As stated earlier, on December 3, 1999, Agency's Counsel, Mr. Dale, refused to testify whether he notified anyone of the covering (TR. II, pp. 22-34). No one ever notified the Union of any follow-up on this matter (TR. III, p. 327).

Ms. Lacy, when the Union notified her of the absence of postings, replied that she was not going to do anything (TR. III, p. 322). The most significant thing is the absence of anything which would show that despite the pervasive interference with the postings identified and Ms. Lacey's statement in Union Exhibit 20, that the Agency has not done anything at all to follow-up these incidents. Obviously, those responsible for such actions feel undeterred. Perhaps they even feel "protected" by management in the same way that the Agency's investigation of Mr. Carrier felt protected in refraining from carrying out the obligations imposed by the agreement of the parties (See paragraph

b(2) under Remedies). The Union has previously claimed that the only items removed are labor matters (9/20 TR. II, pp. 49-50). There has never been any refutation of this.

The only conclusion possible is that the Agency not only has allowed the postings in issue to be interfered with, but also that the magnitude of such activity reflects an environment in which the perpetrators believe they can engage in illegal conduct with impunity. The duration of this situation, when combined with the alteration of wording, the reduction in size, the delay in posting, and the Agency's conduct, demonstrate that the Agency's actions have been knowing and purposeful. The Agency's one-size-fits-all answer that "things just happen," is totally unconvincing.

A further description of the Agency's conduct is necessary. As stated before, the Agency's counsel interposed himself as a substitute for Ms. Lacey to view the posting in Building 841. However, when in the December 3, 1999 hearing, he was asked to describe what he did to pursue those who were responsible for covering the posting, he claimed he could not testify because he was the Agency's representative.

He also argued a second proposition which depicts the misuse of legal concepts to obstruct compliance. He asserted attorney-client privilege. This is a concept which exists so that a client will fully divulge all the facts to her attorney. What was asked of the Agency's attorney was not to divulge confidential information told to him by his client. Instead, what was asked of him is what he told his client of activity which the Agency promised to investigate for the purpose of discipline. Even in confidential circumstances, a trier of fact may determine disclosure is in the interest of justice and, therefore, may compel disclosure. However, the Agency's attorney not only defied the Arbitrator and refused to do so, Ms. Lacey did not appear either.

In addition, the privilege does not apply to communications where its purpose is the furtherance of a future intended crime or fraud. It seems that if the communication was for the purpose of thwarting compliance, it would be a perversion of the privilege to allow such communications.

When one would think the Agency would be eager to show what it is doing to try to comply, the refusal to provide essential evidence vividly creates the impression that the Agency does not intend to comply. It further demonstrates, as in its use of the doctrine of functus officio, that the Agency is not somehow making misinformed or misguided use of legal doctrines. Instead, the frequency, type and manner of such use compels the belief that the Agency is engaging in knowing and purposeful conduct to thwart compliance.

The remedy is stated under the section entitled Remedies.

3. The All-Hands Forum

In Compliance Proceeding III, the Agency agreed that Captain Walsh will address at an All-Hands Forum the Agency's non-compliance, will voice the Agency's commitment to

meet regularly with the Union to address Union issues, and will articulate the Agency's commitment to a partnership with the Union. The aspiration was to reduce the polluted atmosphere and to lead to more effective dealings. By Proceeding IV, the Forum had yet to be held. The Arbitrator had refrained from urging the parties to set a date certain. In any event, with a few minor exceptions, the obligations in Proceeding III were those agreed to by the parties as distinguished from ones which were based on the Arbitrator's own initiative.

Consequently, the parties agreed to a date certain of the Forum, that all bargaining unit members be allowed to attend but if due to overcrowding some could not attend, they could watch it and hear at other locations simultaneously. Those that were legitimately precluded from doing so were to watch and hear a tape replay "at times and places agreed to by the parties."

a. The Union's Position

The Union claims that notices of the Forum were not posted, many employees were not notified of the time, date and location of the tape replays, the Agency unilaterally changed the location of the replays and the Agency failed to encourage managers and supervisors to attend the Forum or tape replays.

b. Findings of Fact and Discussion

Although the Forum was held as scheduled, the attendance was sparse. Usually such Forums are packed and the agreement contemplated overcrowding. In view of what has been discussed previously, the Arbitrator must conclude that the low attendance of managers and supervisors - which the record shows usually comprise the bulk of attendees - is attributable to the action or inaction of the Agency (TR. III, pp. 337, 369). Obviously, if the Forum was to indicate the Agency's commitment to cooperative dealings, such attendance was essential. In addition, a substantial number of employees were unaware of the Forum and upon reading about it in the newspaper complained to the Union about the lack of notification (TR. III, pp. 270-271, 337-338). Some employees were notified by e-mail, but the majority do not have such access (TR. III, pp. 369-370). Appendix A show that notice of the Forum was not posted at many locations. Also the Agency unilaterally rescheduled the re-showing of the tapes (TR. III, p. 323-324).

The Agency's actions in this matter appear to be equivalent to its miniaturization of the postings imposed by the Arbitrator. There was compliance but its implementation was carried out in a manner which was intended to reduce its intended effect. Once more, the Arbitrator cannot believe this just happened. This shall be remedied as set forth in the next section.

4. Harm to the Union

Based on the foregoing, it is clear that the Agency has engaged in such continuous and intentional violations of the prior Awards of the Arbitrator that the Union and those it represents have been banned. Most importantly, an atmosphere has been created that appears designed to cause the Union and future grievants to question whether the filing of grievances will be futile and/or that successful pursuit of grievances will produce results which will be illusory due to prolonged delay or refusal to comply.

F. REMEDIES

1. Considerations

a. Articulation of Remedies

Based on 20 years of experience in representing Federal agency management, this Arbitrator learned that a number of practical and administrative barriers create difficulties in dutiful compliance with remedies imposed by arbitrators. Usually Unions have not been appreciative of such challenges and often doubted their existence. Based on such experience, this Arbitrator has preferred to articulate remedies in the broadest possible way in order to allow the flexibility needed to achieve compliance. In this case, the remedies, for the most part, have been the product of joint agreement by the parties.

It is important to recognize also that the remedies are not limited to making the grievants whole. As early as Compliance I, the parties agreed that non-compliance injured the Union. The Agency again agreed to this proposition in Compliance III.

Because this round of Compliance will not consist of remedies devised jointly by the parties, it is instructive to know what this Arbitrator takes into account in being able to broadly state the remedies:

(1) Will the identification of concepts allow needed flexibility? Or will doing so lead only to other controversies?

(2) Will being too specific not only hamstring management, but also lend itself to nitpicking by the Union or to allowing management to not do something when it is not specified?

Example: The Agency claimed that reduction in size of the postings did not. constitute an alteration of the postings, because the Arbitrator did not impose any size requirements (TR. I, p. 123). When the date for the Forum was not specified, it was put off for more than a month.

(3) Will the Agency take into account basic labor relations' obligations in achieving compliance?

Example: The Arbitrator should not have to tell the Agency, as he had to in Proceeding III, that it cannot reword his order or, as in this proceeding, that taking unilateral action to determine where notices may be posted is prohibited.

(4) Will the Agency utilize his findings to achieve compliance, thereby reducing the need to have to spell out certain specific actions needed by the Agency?

(5) Will the spirit or intent of the remedy be incorporated so that requirements of law do not have to be recited in a way which would embarrass the Agency?

Example: When the Agency agreed to paying attorney fees but it did not want a declaration that it had engaged in an unwarranted personnel action, should the Arbitrator have denied the wishes of the Agency? The result, when combined with no evidence on the record for the Arbitrator to make such a declaration (other than that which is obvious from the Agency's failure to comply with prior orders of this Arbitrator) is there no finding that such payment is in the "interest of justice." The Agency used the absence of such a finding to not carry out its agreement and as the basis to file exceptions to the remedies in Proceeding IV even though the remedies were in their entirety agreed to by the Agency. Now the Agency is using those exceptions to try to stay the continued jurisdiction of the Arbitrator to which it had agreed.

b. Agency Conduct which affects Articulation of Remedies

The fact that the ADR proceeding dealt with a number of long standing non-compliance matters, the fact that this is now Compliance Proceeding V, the fact that there has been continued non-compliance with the remedies imposed when there has been non-compliance and the general conduct of the Agency in these proceedings should amply indicate that broad latitude accorded to the Agency will not facilitate effective compliance.

Unfortunately, two matters not yet fully discussed vividly provide the clearest picture of the Agency's efforts to achieve compliance.

(1) Case of Don Burtchette

a) What the Arbitrator Ordered

In Proceeding III, the Arbitrator found on the basis of testimony, which included that of a first-level supervisor, which was subject to cross-examination, that Mr. Burtchette, the second-level supervisor of Stan Lucas, delayed the processing of Mr. Lucas' promotion which had been agreed to in the ADR Proceeding. The Arbitrator also found Mr. Burtchette had threatened to fire Mr. Lucas and that Mr. Burtchette asked the first-level supervisor to falsify Mr. Lucas' desk audit. The Arbitrator directed that Mr. Burtchette be reprimanded for his discriminative and retaliatory conduct toward Mr. Lucas and the Agency shall conduct an investigation to determine whether more severe discipline is warranted. The Investigation was to investigate also Mr. Burtchette's non-appearance

as a witness at the hearing, although the Arbitrator noted such non-appearance had the possibility of being excusable.

b) What the Agency Did

(i) The Agency provided to the Arbitrator a two-page statement, dated December 20, 1999, which was not provided to the Union. It was signed by Shirley B. Scott, Director of the Human Resources Department.

(ii) The investigation was conducted by the Deputy Department Head, Weapons Systems Department, Dahlgren Division, Naval Surface Warfare Center. No finding was made concerning Mr. Burtchette's non-appearance at the hearing.

(iii) The Agency found that while Mr. Burtchette did attempt to delay the processing of Mr. Lucas' personnel actions, he acted "in what he firmly believed to be the best interest of the Agency." Also compliance was not "materially" impeded because others quickly intervened.

(iv) The Agency further found "Beyond this ... Mr. Burtchette was cleared of conducting any wrongdoing connected with the remaining allegations." Accordingly, Mr. Burtchette was to be issued "an appropriate letter of reprimand," which was not enclosed or attached, for his role in attempting to delay the processing of Stan Lucas' personnel actions.

(c) Analysis

As already indicated, there was no investigation of Mr. Burtchette's non-attendance. Second, it defies belief that Mr. Burtchette was "cleared" of wrongdoing in the face of this Arbitrator's findings. Mr. Burtchette threatened to fire Mr. Lucas, a union steward, and attempted to falsify Mr. Lucas' audit. At the very least, there would have to be extremely solid evidence to show why there was no deference given to the Arbitrator's findings -which, again, were based on testimony subject to cross-examination . In fact, since only the quoted bare statement was provided as an explanation, it is unknown whether the Arbitrator's findings were given any weight.

In addition, since the Arbitrator found that Mr. Burtchette's delay (not "attempt" to delay) of processing Mr. Lucas' paperwork was discriminatory and retaliatory, the finding that Mr. Burtchette's actions were based on the belief that what he did was in the best interests of the Agency does not excuse Mr. Burtchette. Instead, it condemns the Agency! Its implications are profound. In addition, this was a case in which Mr. Lucas should have been promoted in January 1997. Even when the Agency agreed in April 1999 to do what it should have done, the processing was apparently delayed for four months - despite the fact that the investigation found processing was not materially impeded. In fact, it was not until some point after September 1999 that Mr. Lucas received all the compensation due him.

Underlining the serious nature of what occurred here, the Agency's failure to process the papers identified is what triggered in Proceeding II the Posting which Capt. Walsh was directed to sign. This is the same posting which the Agency changed and then failed to timely post.

What this means to the Arbitrator is that by allowing the Agency to investigate the misconduct and to determine the applicable penalty, the Agency was able to overrule the findings of the Arbitrator and to so diminish the serious nature of the misconduct that future misconduct is undeterred and that the chilling effect of such conduct upon those engaging in union activity will increase rather than abate.

(2) Case of Steve Carrier

(a) What the Arbitrator and the Parties Did

On March 29, 1999, by a "Stipulated Arbitration Agreement," the parties agreed that Mr. Paiva's supervisor, Steve Carrier, had violated Article 4, on Employee Rights, of the collective bargaining agreement and had violated Section 7116(a)(1) of the Federal Labor Management Relations Statute, that Mr. Carrier will cease and desist from engaging in similar conduct and that the Department will honor a specified past practice. Mr. Carrier was also to issue a letter of apology to Mr. Paiva, citing these violations. Compliance Proceeding III was held on two separate weeks. It was not until two days after the first hearing, that on August 19, 1999 - almost four months after the Stipulated Agreement - that an apology was given to Mr. Paiva which the Arbitrator found failed to comply with that agreement.

At Proceeding III, the Arbitrator found on the basis of testimony by another supervisor, subject to cross-examination, that the delay was attributable to Mr. Carrier's refusal to sign such an apology. The Arbitrator directed - with the agreement of the Agency - that the Agency "at a minimum" shall issue a letter of reprimand to Mr. Carrier for his refusal and failure to comply with the Stipulated Agreement and that the Agency investigate for purposes of discipline Mr. Carrier's conduct and his non-appearance at the hearing. The Arbitrator directed - also with the agreement of the Agency - that the investigation also include the conduct of Mr. Carrier's supervisors in assisting him in such conduct. The Agency also agreed that the investigative record shall be supplied to the Union.

In Compliance Proceeding IV, transmittal of the apology had yet to be properly effectuated and Mr. Paiva claimed Mr. Carrier was continuing to retaliate against him. Because there was no on-the-record testimony, the Agency agreed:

The Agency shall expand its investigation of Mr. Carrier's conduct to include any and all conduct by him subsequent to March 29, 1999 and of all parties who allowed him to engage in improper conduct.

It was understood that Mr. Carrier was to receive a suspension for some period of time, but if the suspension was for less than 14 business days, the Agency was to supply to

the Arbitrator and to the Union a detailed justification for such lesser discipline. Also "a complete copy of the record shall be supplied to the Arbitrator."

(b) What the Agency Did

The Agency supplied to the Arbitrator a statement, dated December 20, 1999 which was a little over two pages in length signed by Ms. Scott. It included some enclosures, a large portion of which was "sanitized." The investigation was performed by a Labor Relations specialist of the Human Resources Department of the Naval Air System Command. A copy of the Investigation record was supplied to neither the Union nor the Arbitrator.

Ms. Scott stated the "investigative report resulted in no substantive findings against Mr. Carrier" and, therefore, there is no sufficient justification to initiate disciplinary action against him. She adds, "...the record appears to exonerate Mr. Carrier from specific wrongdoing."

In her seven-page Report, the Investigator in effect finds that no past practice existed. She later concludes that there should not have been a settlement. She further found Robin Morey, Mr. Carrier's supervisor, "was reluctant to force Mr. Carrier to issue a letter he did not feel was justified." Mr. Morey directed no action should be taken until the Human Resources Office (HRO) directed him to do so. In turn, she finds Mr. Carrier "believed his chain of management would direct him to issue the letter when and if the time came to actually do so." The Investigator concluded (emphasis supplied):

As Mr. Carrier's actions were condoned by his management chain, I cannot find that he deliberately failed to comply with the arbitration agreement.

This conclusion is later buttressed by the conclusion that prior to August 16, 1999, Mr. Carrier's knowledge of the March 29, 1999 settlement agreement "appears to have been general at best" and he never received a copy of the March 29, 1999 agreement. In any event, he was told by management they would work with HRO "to try and change the settlement." Mr. Morey also said no one ever told him to have Mr. Carrier sign the apology.

The Investigator also found that Mr. Carrier did not act inappropriately toward the union but that Mr. Carrier's anger was focused on the Labor Relations Officer (LRO), who was also "'admonished' by the other members of the management chain." She also found that it was not surprising that Mr. Carrier was angry but that there was no proof that his anger "went beyond what would be expected or accepted."

As for Mr. Carrier's non-appearance at the hearing, the Investigator finds he was never ordered to appear when he spoke to members of management such as Ms. Scott. As for his not testifying by phone, the Investigator states this was due to Mr. Carrier's distrust of the entire arbitration process. She concludes, "I do not find that this example by itself is an indication of a "disregard for labor management relations statute!"

The Investigator found also that Mr. Carrier has worked with both Mr. Paiva and Jerry Yates (another unit member who was discriminated against for union activity according to the Agreement) during the period March 29, 1999 to October 13, 1999 without incident - although Mr. Carrier stated he avoids them unless it is necessary to speak to them about work.

Finally, the Investigator found that Mr. Carrier, despite his reluctance, did take action every time he was "actually" ordered to do so. She explains that because management had strong feelings that he should not have been made to sign a letter of apology, Mr. Carrier felt he was "protected" by management. Ultimately, she concludes in the only one of the five paragraphs not blacked out in its entirety:

I cannot recommend a disciplinary action for Mr. Carrier's behavior in delaying compliance with the agreement as his non-compliance resulted directly from upper management's actions.

(c) Analysis

Notwithstanding the belief by the Investigator that the settlement resulting in the Stipulated Arbitration Agreement should not have occurred, it did occur at a scheduled arbitrator hearing. The Arbitrator must presume that had he conducted a hearing, he would have found that Mr. Carrier violated an existing past practice and the contractual and statutory rights of Paiva. Had this occurred, the Arbitrator's findings of fact could not have been successfully challenged. In fact, the Arbitrator in Proceeding III made findings of fact (which in essence where agreed to be the Agency) that Mr. Carrier engaged in statutory violations. This was not excepted to (recognizing the difficulty in excepting to one's own agreement). What this "investigation" does is to wipe out the Stipulated Agreement and later findings of the Arbitrator. It finds no misconduct occurred prior to May 29, 1999. The Agency agreed to at least a reprimand of Mr. Carrier (it actually agreed to more than that). The investigation rescinds that. The Investigator finds that Mr. Carrier's distrust of the arbitration process justifies his failure to testify when the Arbitrator cannot believe that the Agency would not discipline an employee who used such a basis for refusing to participate in an disciplinary interview.

The parties agreed to the expansion of the investigation to those who aided Mr. Carrier in his conduct. This was because of the very strong appearance that Mr. Carrier could not have done what he did were it not for the active (not passive) participation of management, The Investigator found that Mr. Carrier's non-compliance "resulted directly from upper management's actions." In fact, she explicitly found Mr. Morey directed that no actions be taken until HRO directed him to do so and nothing happened while HRO did not tell him to do so. Not only Mr. Carrier, but also management officials, "admonished" the LRO for agreeing to the settlement. Despite the Arbitrator directing the Agency to command Mr. Carrier's testimony before him, the Investigator found Mr. Carrier was justified in believing he was not compelled to appear. She found Mr. Carrier did act when ordered to do so - which means the months of non-action was because he

was not ordered to do so. Moreover, she further found Mr. Carrier felt "protected" by management.

Despite this astonishing indictment of management, there are no findings of misconduct by management! And because Mr. Carrier's conduct was attributable to management, he was exonerated.

The two "investigations" - assuming they deserve such a descriptor - not only defy belief, but they also show the Agency's inability to police itself. Worse yet, the "investigations" were used as the basis to negate the Agency's prior agreements and findings of the Arbitrator.

C. Deterrence

In addition to making Grievants whole, another permissible remedy is deterrence of future violative conduct Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 444-45 (1990). The foregoing descriptions of the Agency's conduct should require no further elucidation to demonstrate a crying need in this case for remedies to have a deterrent effect or goal. Again, sadly to say, there is more which shows that non-compliance by the Agency has not been limited to the cases before this Arbitrator - which, of course, includes non-compliance with awards of other arbitrators.

The Union provided six other examples:

1) Through an Arbitration Settlement Agreement, Jerome Grey was to be made whole, but the Agency did not corn ly for nine months. The Union filed an unfair labor practice (ULP) charge. Compliance did occur five months later (TR. III, p. 343).

2) The Agency excepted to an arbitrator's award of overtime pay to William Rob, but when the Agency's exceptions were denied, compliance still did not occur. Fortunately, when the Union threatened to try to include the case in the matters before this Arbitrator, the case was resolved (TR. III, pp. 340-44).

3) In the case of Mike Swailes, the Agency in an arbitration settlement agreement agreed to provide back pay with interest. When the Agency did not implement its agreement, the Union filed another grievance which the Agency denied. When the matter went to a new arbitrator, the Agency admitted non-compliance (TR. III, pp. 343-44).

4) In the case of Kim Blake, the Agency did comply when the Union filed a ULP when Mr. Burtchette refused to comply with an arbitrator's remand to the Agency to re-evaluate her position (TR. III, p. 344).

5) A settlement was signed in September by the Agency for retroactive promotion and back pay of George Butler. This has yet to occur (TR. III, p. 341-42).

6) The same thing is occurring in the case of Margaret Tomkiewiez (TR. III, p. 342).

d. Non-Traditional Remedies

The Authority has sanctioned the use of non-traditional remedies when they are designed to recreate the conditions and relationships that would have been head there been no ULP. F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA 149 (1996). The same standards apply to arbitrators. See NTEU and FDIC, Washington, DC, 48 FLRA 566 (1993). It should be obvious that even extraordinary remedies are applicable in this case as the usual traditional remedies have failed to be sufficiently successful.

2. The Effect of the Jurisdictional Claim on Remedies

a. As stated previously, the Arbitrator views the claims of the Agency with respect to the continued jurisdiction of this Arbitrator to be in bad faith, pretextual and intended to delay compliance with and implementation of remedies directed by this Arbitrator and agreed to by the Agency. Nevertheless, reality dictates that if the Agency were to submit to the Authority a claim that the Arbitrator lacked jurisdiction to hear and issue awards on the claims of non-compliance - even though each originates in Proceedings prior to Proceeding IV - the Agency should use as the commencement point for each of the remedies below five business days after receipt of the Authority's disposition, assuming that the Authority has ruled the Arbitrator had jurisdiction to issue the remedies in issue. If no appeal of jurisdiction is made by the Agency, commencement of all actions shall be within five days of the receipt of this Decision and Award, unless otherwise stated.

b. Time deference is not intended in any way or manner to allow the Agency to defer any of the actions previously dictated by the Arbitrator or agreed to by the Agency prior to Compliance Proceeding V. For example, Ms. Wilson's retroactive back pay and interest to May 13, 1999 shall not be further delayed. In fact, any further delays must be presumed to be acts of retaliation. Another example is that the Agency previously agreed to maintain postings and to suspend anyone responsible for interfering with such posting. The Agency is not relieved of doing so. Additional remedies are articulated below in order to ensure compliance.

c. In recognition of the potential for damage to the Union and those it represents by the time-deference allowed, even though it permits the Agency's goal of delaying meaningful compliance, the Union may submit to the Agency documentation of any such damage it has suffered by the delay. If the Agency fails to respond promptly or provides the Union an unjustifiable response, the Union may submit such claims to the Arbitrator. Due to the fact that such claims, if any, will be proffered on the basis that the Union or its members have suffered damage as a result of the delay, the Agency shall be obliged to participate meaningfully in a compliance hearing on such date as the Arbitrator may establish. However, if claims of the Union are not found by the Arbitrator to be meritorious, the Union shall bear all costs of such proceeding.

3. Remedies in the Case of Joyce Wilson

Based on the foregoing findings that the Agency failed to properly compensate Ms. Wilson and further that it had the proper basis on January 1, 1998 to reclassify and to promote her to Grade 8 and based on the Agency's failure to comply with a 1997 agreement to develop new position descriptions for other employees, the Arbitrator finds that such conduct by the Agency was purposeful. He, therefore, orders:

a. The Agency shall retroactively promote Joyce Wilson to Grade 8 Housing Management Assistant, with back pay, with interest and such other emoluments associated with such to January 1, 1998.

b. The actions necessary to achieve such promotion, back pay and interest shall be made in the most expedited way possible. Documentation of such efforts shall be provided promptly to the Union, with identification of the maker of any communications and the recipients of such communications.

c. Because Ms. Wilson had been denied her proper position for almost two years and because of the circumstances associated with such deprivation, the Agency shall post for a period of 60 calendar days the Notice in Appendix B. Further aspects of this are explained in Paragraph 2 and 4.

d. Because of the continued pattern of "oversights" by the Agency and the finding o this Arbitrator that inaction by the Agency has been purposeful, the Remedy stated in Paragraph 6 shall take into account the case of Ms. Wilson.

4. Postings

a. Any postings cannot be effective unless they are placed where employees, managers and supervisors can see them over an extended period of time. Essential to this is the sites where these postings will be made. The Arbitrator has directed that certain postings be made on all official bulletin boards and all other areas where notices are customarily posted. The Agency has failed to reach an agreement identifying all such locations.

Therefore, the Arbitrator ORDERS:

(1) Within five business days from the receipt of this Decision, the Agency shall reach a written agreement with the Union on such locations where notices required by this Decision and Award shall be posted.

(2) If such written agreement is not achieved within such time, the Arbitrator within seven business days shall make a determination of such locations for the notices in issue.

(3) Posting of the Notice in Appendix B shall be made within three business days after agreement is reached or the Arbitrator's determination of sites for postings, unless the parties agree otherwise.

b. As explained in great detail, there has been flagrant interference with the continued postings required of the Agency which has been exacerbated by the failure of the Agency to engage in its promised investigations of such interference. In order to bring an end to such activities which violate both this Arbitrator's awards, agreements of the parties and statute and which frustrate remedies to unwarranted personnel actions, the Arbitrator ORDERS:

(1) When each posting is made, a videotape recording shall be made showing the posting. The tape shall be time and date stamped. The posting shall also be verified in writing by an agent of the Agency and the Union, who shall be allowed official time for this purpose. The Agency shall be responsible for finding a mechanism to comply with security regulations to allow someone acceptable to the Union to serve as a witness in locations affected by security regulations. A copy of the tapes will be promptly provided to the Union.

(2) This process shall be repeated once a week for the following seven weeks to determine whether any removal, covering, etc. has occurred. Any re-posting or uncovering shall be similarly videotaped and authenticated.

(3) Since timeliness affects apprehension of anyone who has engaged in removal or other interference, the Agency shall investigate such activity within the following 24 hours, excluding holidays and non-business days, of such discovery or of notification by the Union that such activity has occurred.

(4) Weekly reports shall be made to the Union on whether any removal or interference has occurred, of what the Agency has done upon such occurrences, and of the actions taken toward anyone found to have engaged in such activity.

(5) To assist in identification, the notices shall be printed in bright red ink and shall not be reduced in size. Because of the passage of time, the Arbitrator shall not require a re-posting of the prior postings. Also the wording of Appendix B encompasses the purpose of the prior postings.

c. Because of the prolonged continuation of problems associated with postings, the Remedy stated in Paragraph 6 shall address this matter.

d. The Agency shall purchase a glass enclosed bulletin board which can be locked for any locations where removal or other interference has occurred but where no one has been found responsible for such activity.

5. All-Hands Forum

As found above, the All-Hands Forum agreed to in Proceeding III was not conducted until after Proceeding IV. At the latter proceeding, escape valves were built in because of the concern that not everyone would be able to fit in the space allocated for it. This was based on the assumption that almost every employee, manager and supervisor would attend except if special work requirements or absence precluded them. In other words, it was not an event anyone "could" go to. It was to be an event everyone was supposed to go to. Evidence shows that there was sparse attendance and that a sizable number of unit members were not even aware of it. In addition, the additional escape valve of tape replays were not effectuated since they were not done at agreed upon times. To allow replays of an October 25, 1999 meeting to be viewed at least three months later obviously loses its impact and purpose and does not assure that it will be seen by those who should see it. Moreover, an order now to show replays will hardly convey the message that there is an Agency intent to fix, correct, and change the course the Agency has found itself in - to use the words of the Agency (e.g., 9/20 TR. I, p. 15; TR. II, p. 110). In fact, to now do so would convey the opposite message. Therefore, in order to achieve the original purpose and to maximize attendance, the Arbitrator ORDERS:

a. Within three weeks of the Agency's receipt of this Decision and Award, the Agency shall conduct two identical All-Hands Forums at places and times to be agreed upon with the Union.

b. At the All-Hands Forum, Captain John J. Walsh, the Commanding Officer of the Agency, will explain the Agency's commitment to the precepts of the Federal Labor Management Relations Statute, including that labor organizations and collective bargaining in the civil service are in the public interest. The Captain will describe, on the basis of information provided by the Union, 1) the dollar amount of money the Agency has had to pay as the result of decisions by the Federal Labor Relations Authority or by arbitrators or settlements arising out of grievances, ULPs and the like, since AFGE Local 1923 became the exclusive representative in 1997, and 2) the number of cases filed by the Union during that time and the number won by the Agency. The Captain will explain what the Agency intends to do to decrease this litigious atmosphere, and to ensure that the rights of unit members will be respected.

c. At this same Forum, the union will be allowed a period to not exceed five minutes to address these concerns and its commitment to assist the Agency to increase its capability of delivering the highest quality services to the American people.

d. The Agency shall make every effort to ensure that the maximum number of employees, managers and supervisors attend the Forums and that those who are not able to do so will have the opportunity to see tape replays at times and places agreed upon with the Union.

e. Since the prior Forum and other events have been the subject of newspaper articles, to ensure the accuracy of the proceeding, the Union shall be allowed to videotape the Forums and to provide unedited copies to the media.

f. The provisions of Paragraph 4b (Postings) under Remedies shall apply to postings of notices of the Forum except that weekly videotaping shall cease upon the conclusion of showing tape replays.

6. Discipline

The Union has vehemently expressed its view that individuals responsible for these continued violations be appropriately disciplined. The Arbitrator will not respond to claims that the Agency intends to destroy the Union, to justify significant reductions of civilian personnel, or to justify even closing the base. However, the prolonged period during which the Agency has flouted the determinations of this Arbitrator and other arbitrators and has disregarded its own agreements strongly indicate that such actions are purposeful. This conduct has persisted despite the self-determined departure of two successive labor relations' officers during a relatively short period of time.

The Arbitrator does not believe he is positioned to impose discipline. In addition, it is not clear whether or not violative activity is attributable to other than the ostensible actor, just as the Agency found Mr. Carrier's behavior "resulted directly from upper management's actions." At the same time, there is no indication that this studied effort of the Agency to disregard its responsibilities will abate until someone at a level high enough to compel action and to discipline violators is aware of the facts and is willing to act on them.

In other words, an investigation of the Agency is essential. However, the "investigation" of the cases of Mr. Carrier and Mr. Burtchette demonstrate that an investigation within Navy would not be reliable or credible. Since an investigation for the purposes of determining who has been responsible for the repeated misconduct, which have characterized the six proceedings before this Arbitrator and those which were the predicate for the original ADR proceeding, for the purpose of imposing discipline and other corrective actions, and for designing mechanisms to promote effective labor management relations is imperative, the Arbitrator ORDERS:

a. Option A - The parties within 30 days from the date of this Decision and Award shall agree on who shall perform an investigation for the purposes stated above, its format, and to whom the investigation shall be presented. If the Agency does not indicate to the Union within five days of receipt of this Award its commitment to reach such an agreement or if such an agreement is not reached within said 30 days, Option B shall be invoked - unless the parties mutually agree otherwise.

b. Option B - The Agency shall request an investigation, which meets the purposes set forth above, be conducted by a source outside the Defense agencies such as the General Accounting Office, the Office of Personnel Management, or the Collaboration and Alternative Dispute Resolution Program of the Federal Labor Relations Authority. If the Agency within five business days from the opportunity to invoke Option B does not notify the Union it intends to invoke Option B, then Option C will apply. Option C will

apply also if the Agency does not within 30 days thereafter submit such request. If Option B is invoked, a copy of the request shall be submitted also to the Union and the Arbitrator, who within 10 business days shall have the opportunity to make comments to the investigative entity about the proposed investigation. The costs of the Arbitrator shall be borne equally by the parties. If the entity requested to investigate declines to do so or if there is no response within 60 days - unless the Union agrees to an extension of time or the submission of a request to a different entity -Option C will be invoked.

C. Option C - Within 10 days after Option C is invoked, an arbitrator shall be chosen to conduct the investigation. The arbitrator shall be chosen from the Regular Arbitration Panel under Article 11 of the parties' collective bargaining agreement in the same manner as an arbitrator would be chosen for the next case to be arbitrated. The parties shall have the reasonable opportunity to make comments on the products produced by the investigation. The arbitrator shall determine to whom (which can mean more than one entity) the final report, accompanied by the comments of the parties, shall be delivered. In order to promote the appearance of a fair process, the costs of this investigation shall be borne equally by the parties.

d. Both Options B and C - shall note also any efforts which the Agency has commenced subsequent to this Decision and Award to improve the situation, including but not limited to team building efforts, facilitated meetings, successful products from partnership meetings, etc.

7. Attorney Fees

Because the denial of pay to Ms. Wilson constituted an unwarranted personnel action and the postings and All-Hands Forum, which were remedies to unwarranted personnel action, were not complied with because each also constitute statutory violations, because the Union was prevailing party in each of these compliance matters, the award of attorney fees in this case are in the interest of justice. Therefore, the Arbitrator ORDERS the Agency to promptly pay reasonable attorney fees to the Union's Legal Defense Fund upon the Union's submission of proper documentation verifying the rendering of services in these matters.

8. Costs

Because of the egregious and prolonged nature of the failure to comply with prior directives of the Arbitrator, including the Agency's own agreements, the Agency shall pay full costs of the Arbitrator and the Court Report in this case.

9. Retention of Jurisdiction

Because the matters herein are derived from the ADR proceeding, because of the nature of the continuing violations described, and because of the need to assure compliance is fully and meaningfully achieved, the Arbitrator shall retain jurisdiction of all matters herein, unless specifically noted otherwise, as well as all other matters which

involve compliance with the orders and agreements in the ADR Proceeding and the five Compliance Proceedings. However, the Arbitrator's jurisdiction shall cease on those matters upon which the parties have provided the Arbitrator their signed mutual agreement that compliance has been achieved. If after such mutual agreement has been reached, a later claimed breach will not be within the jurisdiction of the Arbitrator absent the mutual consent of the parties or unless it coincidentally occurs that he is to be the Arbitrator because of the sequence of his position on the parties' arbitration panel.

10. Other Remedies

The Union has requested that the Agency report, on a daily basis and in writing, to this Arbitrator on the status of further compliance. The Arbitrator hopes that the measures he has designed will be sufficient. In any event, a daily monitoring role goes beyond the scope of what this Arbitrator may impose.

The Union has also requested the Arbitrator make findings of contempt by certain named individuals. Hopefully, the investigation remedy in Paragraph 6 will address such matters.

The President's October 28, 1999 Memorandum (Memorandum) reaffirming Executive Order 12871 (Order) requires agencies to report to the President, through the Office of Management and Budget, the progress being made toward achieving the goal of the Memorandum and the directives set forth in the Executive Order. Such reports are to be prepared with the involvement and input of the unions.

Since the labor management relations climate at the Naval Surface Warfare Center significantly impacts on the goals of the Memorandum and the Order, the Agency with the input of the Union is directed to address the matters involved in this Proceeding and the proceedings upon which it is based.

The Arbitrator shall retain jurisdiction over the implementation of this directive. However, the Arbitrator shall not review the phraseology of the resulting report except to the extent that either party claims that the opinion or award of the Arbitrator have been misrepresented. The Arbitrator's jurisdiction is so limited and shall not deal with any other aspect of the process under the Memorandum or Executive Order except as otherwise addressed above.

The Arbitrator finds also unnecessary that postings be hand delivered to each bargaining unit member, with a signed receipt of delivery.

FOOTNOTES:

*4 Transcript references for this proceeding are denoted as TR. I.

*5 Transcript references for this proceeding are denoted as TR. II.

*6 Transcript references for this proceeding are denoted as TR. III.

*7 The Arbitrator engaged in extensive questioning to ensure the integrity of the testimony produced as illustrated by TR. III pp. 244-252, 364-367, 379-380.

*8 Actually, the Agency does not rely on the regulation but says, without referring to a specific case: "once an exception to an award is filed, and the authority case law is clear, that entire award is stayed pending the Agency's decision on that appeal" (TR. III, p. 28).

*9 Actually, the Agency phrases its contention thusly "What is now being conducted is an enforcement proceeding and that is more properly addressed in the Unfair Labor Practice arena. You can remedy non-compliance and that's clear," but "you are precluded from devising a remedy for failure to comply with a remedy" (TR. III, pp. 30, 118-119).