Federal Mediation & Conciliation Service

In the matter of the arbitration of a grievance Between: **JESSE BROWN DEPT. OF VETERANS AFFAIRS MEDICAL CENTER, District 7** **Agency,** **and** **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 789,** **Union.**	[redacted] - Grievant FMCS Case 231215-01884 Arbitrator Case Number 02-23-471 FMCS

AWARD

ARBITRATOR: MICHAEL S. JORDAN

ADVOCATES:

UNION: VINCENT SCHRAUB
NATIONAL REPRESENTATIVE
AFGE DISTRICT 7

AGENCY: HERMAN B. BINGHAM
CATHERINE STANCLIFF
LABOR/HUMAN RELATIONS

APPOINTMENT OF ARBITRATOR THROUGH FMCS 1/20/23
HEARING: May 30, 2023 by Zoom Video
AWARD: June 3, 2023

SUBJECT OF DISPUTE: DENIAL OF INCENTIVE PAY TO GRIEVANT

ISSUES BY UNION:

1) Did the Agency violate the Collective Bargaining Agreement when it did not provide the Grievant with the 7% retention incentive described in relevant Agency documents and provided to other qualifying bargaining unit employees?

2) Did the Agency violate the Collective Bargaining Agreement when it did not notify the Grievant that there had been an error in her pay and did not advise her of procedures available to remedy the error?

3) Did the Agency violate the Collective Bargaining Agreement by failing to notify the Union of a change in working conditions when it did not notify the union of increased risk of contracting the infectious disease of COVID-19?

4) If the Agency committed the violations described above, what is the appropriate remedy?

ISSUES BY AGENCY:

Did management violate the statutes and the contract provisions cited in the Union's Step 3 grievance when, in mid-January 2022, management did not propose a retention incentive for the grievant.

BACKGROUND:

This FMCS panel arbitrator accepted the invitation to serve on January 20, 2023 and contacted the parties listed on the invitation. The listed parties referred the arbitrator to advocates Herman B. Bingham for the agency/management, the Veterans Administration, and Vincent Schraub of the union/American Federation of Government Employees Local 789/AFGE.

The process of arbitration followed after the various steps in the grievance process were satisfied, but without resolution. During the grievance process several documents were presented to the union after requests were made. After the appointment of this arbitrator, several pre hearing conferences were conducted by telephone and by zoom video hosted by the arbitrator establishing the path to the arbitration hearing. The arbitration hearing was conducted by zoom video hosted by the arbitrator. It was at the beginning of the arbitration that it was determined that this was not a class action grievance. [redacted] was the sole grievant.

Since this is a contract grievance the union had the burden of going forward and the burden of proof. Each party submitted a written opening statement prior to the hearing but read it at the start of the hearing. The union then called its witnesses: [redacted], president of the local union[redacted], the grievant; and [redacted], a respiratory therapist. Management then called [redacted], retired associate director for patient care services who proposed the 7% retention incentive for certain heath care workers to aid retention after many resignations during and after the first wave of Covid 19. The agency had a serious concern that as the patient census was on the rise, the staff was reducing and beds, units, and perhaps facilities would have to shut down depriving veterans of crucial medical services.

[redacted] brought this grievance to the union after learning that other employees having her classification and doing the work that she did were receiving a 7% bonus incentive pay to remain

on the job. The period of time for the incentive pay was January 16 to December 31, 2022. The grievant worked all during that period at the Jesse Brown VA Medical Center, 820 South Damen Avenue, in Chicago, Illinois. She was a respiratory therapist and member of the AFGE Local 789 during the entire period the incentive pay was given, but she did not receive the pay differential. Her grievance seeks to be paid the 7% difference during the period and any other benefits she would have earned as a result. The union does not seek any relief for any other employee or for the union since they identify this grievant as the only one in their bargaining unit not paid the benefit. There was another worker, [redacted], who was represented by another union.

After the evidence was presented for both sides, the matter was recessed for a short period to allow the advocates to prepare their closing statements. The statements were well organized as were the opening remarks. Each of the two advocates showed civility, knowledge of the subject matter, adherence to the rule of law, and great advocacy skills. The parties could not have been better represented. Each of the advocates took the time to record their remarks, edit them for greater clarity, and forward to the arbitrator for use in this award. The award is more comprehensive due to their individual efforts. The hearing by the Zoom Video platform allowed minimal interference to the work obligations of witnesses and to the retired witnesses not needing to attend in person. Taxpayers saved costs and other expenses as well by having Zoom Video instead of an in-person hearing.

AUTHORITY CITED BY THE PARTIES:

Article 43 and 44 of the Master Agreement

5 U.S. Code § 7106, Management Rights at (a)(2)(A), (B), & (D):

> (a) … nothing…shall affect the authority of any management official of any agency—
> (2)…
> (A) to…retain employees in the agency…
> (B) to assign work…and to determine the personnel by which agency operations shall be conducted;
> …
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

UNION POSITION:

At the core of this case is a dispute over plain language. Throughout the grievance process, the Union has consistently maintained the same position – that the Agency violated the provisions of the master agreement between the parties when it failed to provide [redacted] with the covid-related retention incentive for which she qualified. The Union demonstrated through testimonial and documentary evidence that the Retention Incentive Authorization document, included in the joint evidence file, specifically includes [redacted] by its plain language. Additionally, we have seen that the evidence introduced by the Agency (Joint Exhibit 2, p. 21) specifically refers to "Respiratory Therapy staff providing services to inpatients." Two of the Union's witnesses, [redacted] and [redacted], have provided credible testimony indicating that [redacted] repeatedly provided respiratory therapy services to

COVID-positive inpatients on 4W and other units throughout the 2022 calendar year. In the case of unambiguous language, it is proper to apply the language without the aid of extrinsic evidence. The Union believes that the result of such application can lead only to a conclusion that [redacted] should have rightfully received the retention incentive in 2022.

Even if we go outside of the four corners of the controlling document, each of the Agency's witnesses proved uncredible and frequently undermined the Agency's positions. Dr. [redacted]'s testimony concerning the meetings that led to the retention incentive was frequently self-contradictory and based on personal opinions. Crucially, Dr. [redacted]'s testimony did not align with the clear language used in the document (Joint Exhibit 2, p. 21) that the Agency called the witness to address. Likewise, while Ms. [redacted]'s testimony nearly perfectly described the grievant as the type of employee that the Agency intended to receive the incentive, and supported the Union's interpretation, the witness ultimately admitted on cross examination that her knowledge of retention incentive eligibility was limited to nursing staff and did not extend to respiratory therapists. Likewise, after much evasion, Mr. [redacted] admitted on cross examination that he had never supervised the grievant and was clearly not aware of the nature of the respiratory services that Ms. [redacted] provided to COVID patients or the frequency with which she provided those services. In fact, when faced with the fact that Ms. [redacted] was ordered to provide these services and did so repeatedly, each of the Agency's witnesses either denied knowledge of this fact or fabricated additional arbitrary qualifications not found in any evidence submitted by the Agency.

In contrast, we heard testimony from Ms. [redacted] and Ms. [redacted] that the Agency was more than willing to put Ms. [redacted] in harm's way, as she was directed to perform oxygen evaluations and other respiratory care to patients on COVID units and to COVID-positive patients throughout the hospital. We heard testimony that the oxygen evaluations (sometimes misleadingly labeled six-minute walks) required the grievant to sit with unmasked COVID-positive patients in an enclosed room for up to an hour and intentionally produce heavy breathing in order to test pulmonary function. Yet despite Ms. [redacted] selfless efforts, the Agency still refuses to appropriately compensate the Complainant, as is required by the Master Agreement between the parties.

For all these reasons, the Union respectfully requests that the Arbitrator issue an award making the grievant whole in all ways, to include retroactive compensation in the amount of 7% of her salary for the entire applicable incentive period (January 16, 2022 – December 31, 2022), and retroactive adjustments to all wage-contingent benefits (for example, retirement account/plans), and any other remedy that the Arbitrator may find appropriate.

Union's Rebuttal to Agency's Closing Statement/Positions:

1. Concerning the Agency's contention that the grievance was untimely: The Union states that the grievance was, in fact, timely and that nothing in the record indicates otherwise. The Union does not believe that the Agency's assertion -- that a Union witness stated that she learned of the existence of the retention incentive at some specific date after the grievance deadline had lapsed -- is accurate. The Union recalls that the Agency's advocate asserted that the witness learned of the retention incentive during a specific month, but that the witness truthfully stated that she could not state with any certainty the month in which she learned of the incentive.

   Further, the Agency raised its timeliness/arbitrability objection for the first time at the hearing, in violation of Master Agreement Article 43, Grievance Procedure. In the unlikely event that the arbitrator identifies such a statement in the record and determines that the grievance was not

timely filed, the Union would assert that the Agency's failure to correctly compensate the grievant constitutes a continuing violation with each deficient paycheck issued.

2. The Agency's argument that, at some point, the Union's grievance became a class action and is therefore untimely and/or inappropriate under the Master Agreement's grievance procedure is confusing and is itself untimely, as Article 43 requires both parties to raise arbitrability and grievability objections before the third step response. Even if the Agency had timely raised its untimeliness/class action argument, it would still lack merit, as the Union never submitted a new or separate grievance for this issue. Rather, the Agency's repeated failure to provide information concerning which AFGE bargaining unit employees had received the retention incentive created a situation in which the Union needed to preserve the right to add additional impacted bargaining unit employees, or else the Agency could have continued to withhold the identifying information that only it possessed, thereby limiting the Union's ability to identify and represent aggrieved members and benefiting from its own wrongdoing. Ms. [redacted] provided testimony to this effect at hearing, and the Union's Step 3 grievance and Union Exhibit 1 corroborate this point. Ms[redacted] further testified that she reserved the right to amend the grievance should new information come to light, that this is the local's custom when filing grievances, and that the Agency has never objected to such reservations and has to her knowledge never contested an amendment or addition to an AFGE grievance. Suspiciously, it was the Agency who requested that the Union provide an update to its grievance, but now seeks to frame the update as improper and fatal to the Union's claim. Finally, all of this is moot, as the Union maintained at arbitration that Ms[redacted] was the only AFGE bargaining unit member who qualified for but did not receive the retention incentive.
3. Regarding the Agency's repeated assertion at hearing that the grievant is ineligible for the retention incentive because she was not "available 24/7": The Union states that this invented requirement exists nowhere in the written record nor in any controlling document and, in fact, it contradicts the written evidence that the Agency presented at hearing.

4. The Agency asserted during its closing argument that its inherent right to manage its operation empowers it to distribute incentive or other payment based on whatever qualifications it chooses. The Union states that, while this is an inaccurate summation of the legal and contractual management rights frameworks, the Agency did in fact exercise its claimed right to determine qualifications and clearly deliberated, reviewed, drafted and executed the Retention Incentive Authorization to that end. The Agency had the opportunity to include a "24/7" availability qualification, or designate certain positions as "essential", or to specifically exclude Ms. [redacted] or others based on any number of qualifications of its own design – it did not do that, but is now attempting to do so retroactively. Had the Agency not drafted a controlling document that qualifies the grievant for the incentive by its plain language, or had it not directly ordered the grievant to provide healthcare service to patients on the 4W unit and other COVID-positive patients, this grievance would not exist. The Agency appears to have correctly compensated over 99 percent of the AFGE bargaining unit, with Ms. [redacted] being an isolated exception.

5. The Agency stated during its closing argument that because money alone could not make the grievant completely whole, the Union's requested financial remedies are therefore illegitimate and should not be granted. The Union does not contest that the Agency's actions harmed the grievant in ways that are not easily quantifiable, but requests as a remedy that which can be quantified and granted. The Agency's argument is illogical.

6. Finally, the Agency claimed during its closing argument that the Union failed to prove that the Agency did not provide the grievant with the retention incentive bonus. This is false. First, the Union alleged throughout the grievance process and at hearing that the grievant never received the retention incentive, in violation of the Master Agreement, Article 36, Section 1(a). At no point in the grievance process, including in the written record, did the Agency deny that fact. Further, both Ms. [redacted] and Ms. [redacted] testified at hearing that the Ms. [redacted] did not receive the retention incentive. Crucially, each of the Agency's witnesses also testified that they were aware that the grievant had not received the incentive and each attempted to provide rationale for that fact.

The grievance is pursuant to Article 43 of the Master agreement between the parties. By way of background, this grievance arose when the grievant, who worked as a respiratory therapist throughout the COVID-10 pandemic, discovered that she was not receiving the 7% retention incentive that was provided to her similarly situated coworkers, despite qualifying for it. The Union timely filed this grievance and timely advanced the grievance at each step of the contractual grievance process.

The Union presented facts and evidence establishing that the Agency failed to provide Ms. [redacted] with the retention incentive provided to other employees working in designated areas and providing designated services, during the designated period. The designations, by the way, were all developed by the Agency. The Union proved through testimony and documentary evidence not only that the Agency knew that Ms. [redacted] qualified for the incentive based on her working in specific COVID units, but that her managers specifically directed her to do so – in writing and otherwise – only to later deny her the commensurate incentive offered to others.

The Agency, for its part, did its best to avoid providing relevant information throughout the grievance process, focusing instead on attempts to fabricate procedural issues. The fact of the matter is that the Union alleges the same violations of the same contract provisions, impacting the same grievant, as it did when it first filed this grievance.

The Union demonstrated that the Agency violated several important contract provisions relating to notice of changes in working conditions, compensation, and others. Ms. [redacted] is the picture of an employee who should have qualified for the COVID incentive, but the Agency had other plans. The Union seeks to make Ms. [redacted] whole.

AGENCY POSITION:

I. Issue Statement

The Agency's understanding of the issue in the seven months from October 24, 2022, to May 30, 2023, was:

Did management violate the statutes and the contract provisions cited in the Union's updated Step 3 grievance when, in mid-January 2022, management did not propose a retention incentive for the grievants.

The Agency requests, if its issue statement is insufficient, that the Union be held to its issue statement made in the October 24, 2022, updated Step 3 Grievance, found at Joint Exhibit 2, Tab 2, at page 5.

The Agency contends the Union should not be allowed to use its issue of one grievant at arbitration. From October 2022, until May 2023, the Union had opportunity to tell the Agency it had again updated its issue. Instead, the Union withheld its newest update from the Agency until the day of arbitration.

II. Governing Statutes

One statute governs the decision to offer a retention incentive. Another governs the parties' grievance procedure.

First, the statutory authority for management's retention incentive during a National Emergency is given at 5 U.S. Code § 7106, Management Rights at (a)(2)(A), (B), & (D):

> (b) … nothing…shall affect the authority of any management official of any agency—
> (2)…
> (A) to…retain employees in the agency…
> (B) to assign work…and to determine the personnel by which agency operations shall be conducted;
> …
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

The Agency contends that any decision regarding this grievance must address whether 5 U.S. Code § 7106, Management Rights (a)(2)(A), (B), & (D) is applicable.

The Union provided no evidence or argument before or during arbitration to invalidate the application of the Statute. Instead, since November 17, 2022, the Union has ignored management's application of the Statute. Management applied the above-referenced statute to its retention incentive decision at its Step 3 decision. See Joint Exhibit 2, Tab 1, at page 2, paragraph 6.

Second, 5 U.S. Code § 7121(b)(1)(A) applies to the parties' grievance procedure. That statute requires the parties to design a grievance procedure that is "simple and fair." This the parties did. But the "simple and fair" provisions negotiated by the parties as found in Joint Exhibit 1 Article 43, were changed unilaterally by the Union again and again throughout this grievance process. The AFGE has made the process their own, and it is no longer "simple and fair" to both parties. At each Step and finally at arbitration, the Union changed what was at issue, who was harmed, and what harmed the grievant or grievants suffered.

The Agency contends the grievance stands alone. It is not continuous with the Step 2 or Step 3 grievances. The Agency contends the grievance is the 3rd—and surprise—instance of three separate grievances. At Step 2, there was one grievant. At Step 3 there were many. At arbitration, there was one.

The Union invoked arbitration on the basis of Step 3 arguments. Article 44 – Arbitration, at Section 1, *Notice to Invoke Arbitration*, provides that the Union "may refer to arbitration any grievance that remains unresolved…" The one-and-only unresolved grievance at Step 3 included multiple grievants. Per Article 43, Section 7, Step 3, "The Step 3 grievance must state, in detail, the basis for the grievance and the corrective action desired." So, Step 3 should have been the end of changes. Yet, at arbitration, the Union prepared to argue a grievance for just one grievant, without notifying the Agency in advance.

The Agency contends withholding this change from Step 3 is no small matter. Only the Union benefits from its flipping three grievances. The benefit to the Union is seen clearly on the day of arbitration. On May 30, 2023, the Union surprised even its local president with the change in number of grievants. That was not only a demonstration of bad faith, but contrary to the simple and fair grievance process agreed to by the parties.

III. Procedural Concerns

Several procedural defects of the grievance came to light for the first time at arbitration. While it is true that JX1 Article 43, Section 4, *Jurisdiction* requires claims of non-arbitrability to be made within the *grievance* procedure, the same is not true for *arbitration*. The parties' Agreement at Article 44 - *Arbitration* does not prohibit claims of non-arbitrability to be raised at arbitration *when new evidence is discovered*. Therefore, the Agency raises the following claims of non-arbitrability based solely on information provided by the Union for the first time at the arbitration:

1. UNTIMELINESS: Article 43, Section 7, Note 5, requires a timely filed grievance at any Step to be no-more-than 30 days from the date the grievant knew of the grieved action. The grievant testified under oath that she learned of the *retention incentive* before May. This grievance was filed on June 17, 2022, in excess of the agreed-upon 30-day limit.

2. WAIVER OF STEP 3: At arbitration, the Union unilaterally changed its Step 3 grievance for which arbitration was invoked. The Step 3 grievance makes a point to include "Respiratory Therapists who are Bargaining Unit Employees (BUEs) of the AFGE Local 789." (See JX2, Tab 2, at page 5.). The Union abandoned Step 3 when, at arbitration, it unilaterally changed the basis and scope of the grievance from many grievants to one. When the issue was raised at arbitration, the Union did not—and could not—prove that the negotiated grievance procedures allowed it to keep its core grievance unchanged while unilaterally changing its basis and scope.

3. AMBUSH: At arbitration, for the first time since its updated Step 3 (October 24, 2022), the Union unilaterally changed the grievance's issue to solely focus on activities performed by [redacted]. Unlike previous grievances (Step 2 and Step 3), the statutory and contractual violations cited by the Union were no longer applied. Instead of its Step 3 claims of harm (incorrect/delayed pay, etc.), the Union switched to the theory of "Equal Pay for Equal Work." The Agency contends the Union did not and could not prove its Step 3 claims.

   The shift to proving work done by one grievant, rather than harm suffered by many, was withheld from the Agency. From October 2022, onward, the Agency had no reason to believe the Union would abandon its Step 3 claims. As the Union prepared its arguments and evidence for one grievant, the Agency proceeded in good faith preparing for an arbitration on the Step 3 the Union used to invoke arbitration. The Agency contends the Union's withholding of its issue is no trivial matter because, in doing so, the Union abandoned its Step 3 by trying to resurrect the original Step 2 it had abandoned at Step 3.

   As late as the Pre-Hearing, the Union refused to provide a formal (one sentence) issue statement. The Union was adamant at the Pre-Hearing that its issue statement was the entirely of the updated Step 3. This was knowingly false unless the Union changed its theory in the last week before arbitration.

   The Agency also contends the Union had the benefit and advantage of preparation for a newly minted issue it. Basing its presentation on the Union's Step 3, the Agency prepared arguments and evidence common to the Step 3 Class. The Agency did not know the Union surreptitiously prepared its arguments based on evidence unique to one grievant. Although the Union had the opportunity to notify the Agency of the changes at any time prior to the arbitration, it did not do so.

4. HARM TO THE AGENCY: The Agency disputes the Union's notion that there was no harm to the Agency because [redacted] was included in both grievances and the arbitration. As stated above, Step 2 as abandoned for Step 3 and Step 3 was abandoned for arbitration. The harm to the Agency is in the Union's ability to prepare to prove an issue withheld from the Agency. The parties prepared to arbitration with different claims: The Agency prepared for an arbitration on Step 3 claims, the Union prepared something other than Step 3, the grievance used to invoke arbitration.

The Agency contends it is not trivial that the Union withheld its new (or resurrected) issues from the Agency before arbitration.

IV. Absent Authority

The Union failed to show any statutory or contractual authority by which it can combine in one grievance into another and then separate it again. The Union claimed but failed to prove abandoning the Step 3 at arbitration has "always been done before." To be "simple and fair," construction of a grievance must be available to both parties. The Union's construction of the three grievances that are the history of this case has been ever-changing. The Agency contends this case is not one continuous grievance, but two abandoned grievances (Steps 2 and 3) based on grievant(s)' harm, and a third new grievance at arbitration based on grievant work. One authority the Union neglects is the parties' Agreement at Article 43, Section 7, Step 3, There it provides that the Union "must state, in detail, the basis for the grievance and the corrective action desired." It does not allow the Union to abandon its Step 3 at arbitration.

V. Disputed Harms

The agency contends the statutes and contract provisions alleged by the Union to be violated at the Step 2 and Step 3 grievances are misapplied there. They were applied to show harms that do not exist, nor reasonably could exist.

On May 25, 2022, [redacted], asked her supervisor a very simple question, to the effect of: "Where's my 7% retention incentive?" She doesn't mention a change in working conditions, delayed pay, increased exposure, indignities. These are all rhetorical embellishments disguised in statutes and contract provisions.

It is the Union's burden is to prove management's decision should be disturbed, and that it should be disturbed for the fact that was arbitrary, capricious, malicious, or unconscionable at the time it was made. The agency has no burden to prove the decision was optimal.

VI. Disputed Claims (Detail)

The agency disputes all Union claims at Step 3 in what follows:

1. <u>THAT MANAGEMENT FAILED TO NOTIFY THE UNION OF A CHANGE IN WORKING CONDITIONS</u>

The alleged working conditions were never specified. This prevents a rebuttal of and the defense for any specific failure to notify the Union.

The Agency requests this claim be dismissed as improper to this grievance. Article 43, Grievance Procedures, Section 2 at page 228 provides, at the bottom of paragraph A provides: "The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees." The negotiated term "or" excludes other options. As this is not a grievance filed "on behalf of the Union," no claim of harm to the Union, with or without a remedy, is appropriate.

2. THAT MANAGEMENT FAILED TO ACCURATELY AND TIMELY PAY THE GRIEVANT(S) EACH PAY PERIOD

   No evidence was presented at Steps 2 & 3 of payments the grievant(s) were entitled to that were not paid. The claim seems to rely on facts not in evidence, that the grievant(s) were *entitled* to a certain pay they did not get. There's no evidence of that either.

3. THAT THE GRIEVANT(S) SUFFERED GREATER EXPOSURE TO COVID

   The Union fails to provide a period when "lesser" exposure ended, and "greater" exposure began. The Union failed to provide a reason for "lesser" exposure. The Agency contends Outpatient Respiratory Therapists had lesser exposure before the COVID Surge for two reasons: (1) they were not an essential position, and (2) the January/February 2022 COVID Surge increased the entire nation's exposure to COVID.

   Testimony from several witnesses showed no employee suffered "greater exposure" without greater personal protective equipment (PPE). Several witnesses testified to the PPE including head gear that fit over the head and rested on the shoulders, that inside the head gear, employees wore fitted N95 masks, that employees wore gowns and gloves to protect them. While the Union claimed a greater exposure of the grievant, it did not show she contracted COVID, missed any days of work, or was otherwise still suffering from long-term effects.

   Contrary to testimony, the Union postulated that wherever "INPT" appears beside the grievant's name, she was assigned to do work equivalent in the amount of time, professional skills, and face-to-face activity as Inpatient Registered Respiratory Specialists. The Union offered no proof of an equivalence. Testimony by [redacted] was that [redacted] performed different tasks than Inpatient RRT.

4. THAT THE GRIEVANT(S) SUFFERED UNNAMED WORKPLACE INDIGNITIES WITH NO CONSIDERATION OF THEIR MORALE.

   The Union provided no evidence of its claim that *"paying some Respiratory Therapists a 7% pay increase and not the Grievants causes lower employee morale and inefficiency*

by sewing division between colleagues and between colleagues and their supervisors arbitrarily and capriciously amongst though working closely together in the same department and raising questions of favoritism and discrimination."

The local AFGE president testified that no one other than the grievant mentioned anything related to "division between colleagues" before or after the grievance was filed. In any case, the indignities were not named in the Steps 2 & 3, thereby preventing management from investigating them.

> NOTE: The Union cited JX2, Tab 6, at pages 18 & 19 regarding retention "Approvals." It is significant that this document does not apply to [redacted]. The Subject of the document is "Waiver of the Exclusion of Temporary Appointments to Receive Recruitment, Relocation and Retention Incentives During the COVID-19 Pandemic." [redacted] testified she is a full-time employee, and has been for 3 years. A waiver affecting Temporary Appointments would not affect]t full-time employees.

VII. One Remedy

The Union's remedy for each of its four claims is a 7% pay increase for the grievant for 1 year. The Union failed to show, and could not show, that a remedy would restore the *status quo ante* to the grievant for any of its Step 3 claims.

The Agency contends a 7% pay increase—of even a day—is neither restorative, nor compensatory nor punitive, nor justifiable. It restores nothing that was taken away. Instead, it adds pay the grievant was not entitled to by policy. It doesn't compensate for any proved physical or emotional harm. The grievant did not testify to any such harm.

Any additional pay to the grievant would be additional compensation for work she has already been paid for, according to terms she has already agreed to. Such pay is not punitive, either, because the Union has not specified the conduct it might seek to deter. It isn't back pay because work was not denied. And even given a lump sum, what would be the justification?

VIII. Supported and Unsupported Testimonies

The documentary proof in support of management's retention incentive decision can be found in Joint Exhibit 2 at Tabs 7 and 8. The documents show management's decision was not arbitrary, capricious, malicious, or unconscionable. There is no evidence to the contrary. Testimony by

[redacted], Dr [redacted], and [redacted] all supported management's emergency need to keep essential workers so that frontline services were open, staffed, and ready for the COVID Surge.

The Union attacked this testimony. It didn't like the term-of-art "24/7 operation." It objected, saying "those words" were not in Joint Exhibit 2 documents. The Union ignored the fact that none of the specifics given by its own witnesses appeared in the file. For example, PAPR appears nowhere in the joint file. Neither does N95. The gown, the gloves, none of the personal protective equipment issued to employees was mentioned in the Joint File. Most important, there is no evidence of what duties actually performed by [redacted], only her testimony. The documentation evidence shows only where [redacted] was assigned, not what she did.

[redacted], who created [redacted]'s schedule, often supervised her, and knew Outpatient Registered Respiratory Therapist (RRT) duties, testified that Outpatient RRT and Inpatient RRT are different, performing different tasks. [redacted] testified to the same, adding that Outpatient RRT and Inpatient RRT had different skills. Dr. [redacted] testified that the knowledgeable and experienced Executive Leadership Team agreed the Outpatient RRT position was not essential to keeping Inpatient and ICU services open.

The Union attempted to diminish the impact of their testimony. The Union repeatedly trivialized testimony by asking witnesses what words meant, or for a witness's opinion. Of particular interest to the Union was to find suboptimal words used in the Authorization and Review of Retention Incentive. This was particularly exasperating to [redacted], author of the Authorization, who proposed the incentive. She was asked to explain not only the meanings of words, but the meanings of meanings of words used to obtain authorization for the incentive. Unfortunately, she didn't know when to tell the Union enough is enough. Yet it was disheartening to hear the contrast between her—and other witnesses—descriptions under oath of the real COVID 2 threat to veterans at the time versus the Union's armchair niggling at the very words used to retain essential healthcare workers.

The RRT management decided were essential are listed at JX2, Tab 8, at page 26.

The Union did not prove that Outpatient RRT should have been considered essential. Instead, the Union claimed [redacted] qualified as an employee who was entitled to be on the list of 7% retention incentive recipients. The Union did not prove management chose her to be on the list, but she was removed. It did not prove management erred in deciding Outpatient RRT, who see patients before they go home, were no essential to incoming COVID patients.

Instead, the Union offered its own interpretation of what management wanted to do with the retention incentive. The Agency contends Tabs 7 and 8 contain multiple obvious terms of art

that only experience hospital administrators would use. The Agency further contends the interpretation of words used to authorize the retention incentive does not change the decision to authorize. The decision to authorize the retention incentive is what caused of the grievant to want it herself, not the wording.

As testimony showed, the decision-makers did not see Outpatient (Homecare) Registered Respiratory Specialists as essential. Good people can disagree, but only management had the authority to make the decision in the moment.

Without documentary support, the Union relies on selective testimony. It ignores testimony that Inpatient and Outpatient procedures are different. This is unreasonable. Anyone who has spent time in a hospital knows the level of Inpatient Care. Anyone who has had an outpatient procedure knows the level of Outpatient Care. To say Outpatient Care within a hospital room is equivalent to Inpatient Care in the same room is unreasonable.

> To claim that evaluating the oxygen level of a patient about to be discharged is same work as lifting, turning, and intubating new COVID patients gasping for air is absurd.

IX. Context and Conclusion

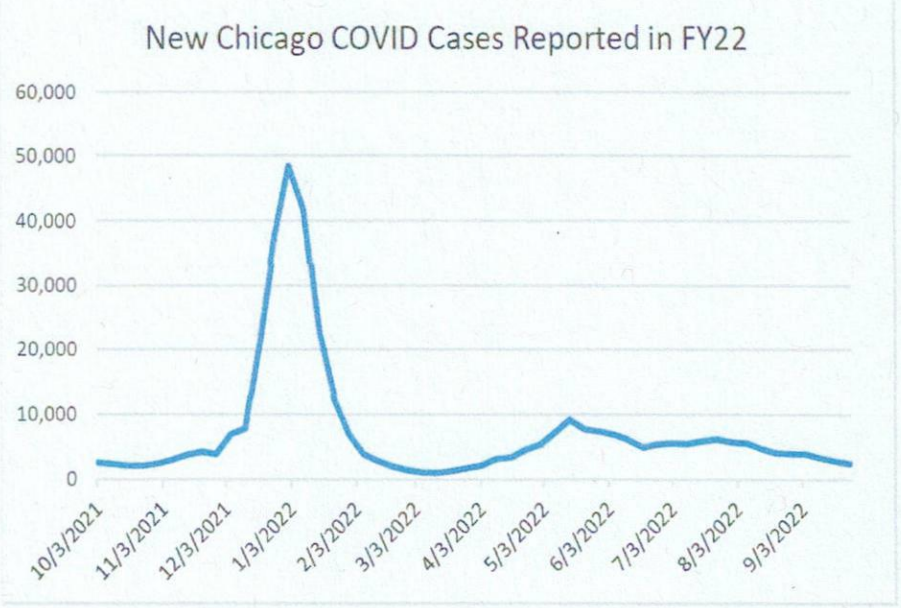
Context is obviously important. Management had to make a decision; and it was a decision only management could make. Management saw—everybody in healthcare saw—another COVID horror coming. Bigger than ever.

This award must be put in context. One must remember where they were at that time and remember colleagues, friends, and loved ones. The time is January 2022. Nine months before, the President declared a National Emergency. We were still in it. We were warned by the CDC and other Health Agencies that by December, Omicron and 33 other variants would be rampant. The National Institute of Health issued guidelines on essential workers. We all remember essential workers.

Frontline COVID care professionals were among the essential.

Remember that hospital executives were as confused and afraid as anyone else, personally, professionally. At the same time, they bore the weight of a decision that would affect patients' lives, veteran patients who it was their mission to serve. And there is no one, no one, who takes their mission to serve the healthcare needs of veterans more to heart than the other veterans in the VA.

For the medical care executives across Chicago, including the VA, the stakes could not be higher in this emergency. The testimony showed that our own executives watched seasoned frontline workers burn out, then leave for more money. They knew veterans would suffer under the second surge. Life and death decisions were made in the midst of runaway COVID variants. Here is a graph showing the difference in New Chicago COVID Cases during the Surge. The data is from the Illinois Department of Public Health. The data can be found in Joint Exhibit 2 under Tab 12.



While these are actual New Chicago COVID Cases reported during the Surge, when hospital executives were making their decisions, the Surge was only beginning. No one knew how high it would go or when it would stop.

So, to the best of their knowledge and experience, they deliberated to make an administrative decision that was expert, data-driven, reasonable, and mission-based decision.

It is also unreasonable to claim the grievant worked "repeatedly and [with] prolonged exposure" after February 3, 2022. The Surge was over.

> Offering front line, seasoned healthcare workers an incentive to stay to care for veterans was mainstream. It was smart and commendable. The deliberation and praiseworthiness of that decision has been lost in each of these grievances asking for money. You are being asked to disturb this most difficult decision—one that no one went to school to make, one made in that exhausted COVID moment getting worse, made in the face of horrifying predictions and personal and professional fears and uncertainties—the union is asking to disturb a high-stakes decision for the admirable theory of Equal Pay for Equal Work. But as [redacted] testified, management needed a strategy [not a theory] *before the work started*. And that strategy was encapsulated in its decision to retain essential workers, the only thread through all 3 grievances, a decision management could not avoid and alone had the right to make.

The parties are entitled to disagree with management's final decision. Perhaps after all this time, in the luxury of our homes, after a good meal, we all might make believe we would have done a better job, made the decision to include just one more employee. There's nothing wrong with believing that. Maybe we do know better after the fact. Who knows? But in that murky, real-time moment wrapped in uncertainty, with time running out, with lives on the line, when a decision had to be made, only hospital management could make it. None of us at arbitration had the right back then to make that decision at the moment it had to be made.

No one testified [redacted] was an essential employee. There was much testimony that her position was not essential to care for the expected surge of incoming patients[redacted]'s testimony was she was essential for outpatient, homecare duties, such as determining whether a patient needed oxygen after release. Her testimony was corroborated by [redacted], who testified Outpatient and Inpatient RRT duties are different. That [redacted] did some outpatient duties inside the hospital does not change the fact that her duties are done just prior to release, after the life-and-death care, after the healing.

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In conclusion, the agency contends, long after management's moment of decision, no justification for disturbing it has been presented. In an emergency, management decided to incentivize essential frontline healthcare professionals to stay and face a COVID surge and meet their mission to care for veterans. It decided to offer a *retention incentive,* not a *compensation obligation.* Evidence and testimony prove the decision was not arbitrary, capricious, malicious, or unconscionable. Far from it.

The agency asks that the Award not disturb management's decision at issue in this case, nor substitute it with any other, and deny this grievance.

DISCUSSION:

The agency has consistently raised several procedural objections to granting the relief sought in this grievance including the union not following the outline of procedures set forth in the master agreement, timeliness, unfairness, etc. as well as the substantive objections that management's determination should not be upset unless it was arbitrary or capricious. Neither the union, this grievant, nor this arbitrator should substitute ones' own discretion for that of management's discretion. In fact, one management witness acknowledged that while the interpretation of the bonus plan is subject to various conclusions, the determination and interpretation of management's implementation must be left to management alone. Many of the agency's theories, while creative and interesting, are themselves neither timely or persuasive. This award adopts the union's reasoning, logic, and view of the testimony.

All of the agency's objections that the union failed to establish that the incentive pay was unnecessary, ill timed, improper, etc are misplaced. The union did not pursue those lines of argument with any comment, evidence, or argument. In fact, the union clearly agreed that the incentive pay, also referred to as bonus pay and other designations, was justified and appropriate. The union's only problem with the incentive program was the lack of fairness excluding this grievant. Neither side mentions the word "disparate", but it is clear that the real issue is whether the grievant was not treated the same as others in her same circumstances. The union admits that there was one other person, [redacted], who was excluded from receiving the incentive pay, but she was in another bargaining unit. The union acknowledged, therefore, after discovery and analysis, that there was no class but only this grievant in their bargaining unit deprived of the benefits while all others in the unit doing the same work with the same classification were granted the benefits. Management suffered no detriment when the union limited their claim to only one person as opposed to many employees. There was no need to start the grievance process anew.

It is clear that management had an unfettered right to create a retention incentive program due to a national medical emergency when it did and for the period it choose to safe guard its critical staff to insure sustained care for its patients. The program created is not in issue here nor is the union's right to have had notice in advance or the employees' right to notice when their benefits changed. All that is and should be in issue is whether some employees in the same position were included while the grievant was excluded based on an arbitrary means or manner.

The document initiating the incentive program made no distinction between in patient and out patient respiratory therapists and should not be considered a basis to exclude the grievant. Those covered provided direct patient care and grievant did provide that service as part of her job. She worked in the 4 West Intensive Care Unit that was a priority to keep staffed and open during the period. She worked with covid patients and was required by management to use PPE, high quality mask-ventilators, (N-95), and use head units providing forced purified air not mixed with that of the patients' air in the room. She was also required to wear gloves as well. The forced air units were known as "Pappers". She did work elsewhere as well, but was at risk regularly, repeatedly, and for prolonged periods. Those on the incentive bonus plan would be picked on a case-by-case basis by designated staff. Here, her exclusion was made by [redacted] alone without consultation with others although the grievant had exposure in patient rooms in the intensive care unit on a repeated regular basis for prolonged periods, therefore, meeting all the criteria. [redacted], the retired associate director, in top management, testified there was no intent to exclude any respiratory therapist or anyone else; they initiated the program looking to see who they could include.

We know from the testimony that the grievant's supervisor was sometimes substituted for by [redacted] another supervisor of respiratory therapists and he determined the list of who was covered and who was not covered. While [redacted] initiated the program and had ideas about who would and who would not be included, she neither wrote the program nor determined who was included. The language of the program does suggest that for some positions in-patient service and classification was an element of coverage, but for those like grievant who were respiratory therapists, no such distinction was made between in-patient and out-patient therapists. [redacted]'s strong opinions about what was intended fall flat in the face of

plain English language and her own testimony about management's desire to include employees with direct contact with in patients on a prolonged and repeated basis. Moreover, when one party creates a document unilaterally with no input from others, the applicable document of adhesion must be interpreted in the light most favorable to the other party and not the authoring party. Here, management wrote the program without any input from the union, and certainly none from the grievant. The grievant gets the benefit of the doubt in interpretation overcoming the burden of proof the union had to overcome.

The strong direct and corroborated evidence here demonstrated that the grievant was required to be in close and prolonged contact with patients diagnosed with having Covid (even during the 14-day isolation period before a discharge would be allowed). Management required those patients to be confined to their own single bed room with the door closed to prevent spread. The patients, in their own room, were not expected to wear masks. Even when some patient did wear a mask, it was not anything more than a thin surgical mask. The grievant was expected to mask and use a respirator high quality mask and many times a special unit using an air flow from a source independent of the air in the patient's room. The grievant was expected to also wear protective equipment. It is clear management insisted on these required precautions since the patient was going to be induced to have heavy breathing to test and evaluate the patient for oxygen needs and abilities. It was not unusual for a covid patient on oxygen being taken off of oxygen before the test to require the grievant's presence for up to an hour. Certainly, the grievant was in repetitive and prolonged contact with covid patients who were in patient.

If the grievant were not the only one in the bargaining unit to be treated differently, there might be some justification gleaned from the observation; but here [redacted] was the only member of the unit treated differently while she had the same title and did the same work. Disparate treatment is not allowable regardless of the design or effort to help incentivize those employees that top management felt were the least expendable. They drew the line with grievant without any credible justification. [redacted] seemed very defensive denying evidence she had not heard that conflicted with her goals in proposing the program and Benedict seems intent on justifying his selection of the people to be included when grievant was excluded. He was fast to say how well he got along with the grievant knowing any animus on his part to her would demonstrate his bias and design to exclude her without any justification.

[redacted], president of her local union, testified that she believed the grievant learned of the disparity in treatment regarding the pay bonus in June 2022 and filed the complaint on or about June 17, 2022. The grievant was not as sure saying it was in May or June. This was a continuing violation so it does not matter if the grievant made her complaint several days or weeks before. The violation continued each day employees worked and others received the incentive pay that grievant was denied.

The grievant should be compensated for the pay differential she was wrongfully precluded from receiving, from the first day of the incentive period to the last day of the period, the full amount of the incentive she lost together with any benefits she would have been entitled to but did not receive. She should have been able to use those funds as she was paid for each pay period in 2022. Therefore, interest should be paid on the difference for each pay period from the beginning of the bonus period until the end at the statutory amount in Illinois unless there is a federal interest rate applicable that would override. The parties, of course, may agree upon a total amount for interest to avoid the need for any mathematical calculations.

No other relief was sought by the union and no other relief is granted. Based on the conclusions set forth above this matter was deemed to be appropriate for arbitration and all motions made by management to dismiss or deny any relief made by management are denied.

AWARD:

The grievance is sustained and the relief sought on behalf of the grievant is granted for this one grievant, [redacted]. She shall be paid the full amount of incentive pay from the beginning to the end of the period created by management together with interest as set forth above. Jurisdiction is reserved for 45 days to ensure full compliance with the terms of this award.

Entered this 3rd day of June 2023

Michael S. Jordan Arbitrator