FEDERAL MEDIATION AND CONCILIATION SERVICE
HEARING OFFICER RICHARD R. RICE

American Federation of Government Employees (AFL/CIO), AFGE Local #3601,	)	
Union,	)	**OPINION & AWARD**
	)	**August 8, 2016**
v.	)	
	)	**FMCS No.: 15-53136**
Department of Health & Human Services, Public Health Service, Indian Health Service, Claremore Service Unit,	)	**ISSUE: *Contract Violation***
	)	**Hearing: February 25, 2016**
Agency.	)	**Claremore, Oklahoma**

OPINION AND AWARD

Appearances:

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For the Agency

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Arbitrator

INTRODUCTION

This hearing arose subsequent to a grievance filed by the American Federation of Government Employees (AFGE) Local 3601, hereinafter the "Union," against the "Agency," the Department of Health and Human Services, Indian Health Service, Oklahoma City Area, Claremore Indian Hospital.

The parties, subsequent to a number of previous and unrelated grievances, disagreed with one another pertaining to the practices carried out during grievances by the Agency. In sum, and by no means meant to downplay or minimize the importance of any prior grievance or dispute between the parties, the disagreement arose as to the number and type of persons participating in a Step 1 and Step 2 grievance. As a result of the disagreement between the parties, the parties entered into a *Proposed Stipulation and Settlement of Grievances-Arbitration* on September 5, 2014, hereinafter "Settlement Agreement."

The specific terms of the Settlement Agreement detailed a number of provisions to be understood and agreed to by the parties. This agreement included a provision that stated that management would not be permitted to include a "second member of Agency management" among other things. The Union maintains that this agreement represents a permanent interpretation of the Collective Bargaining Agreement (CBA) and stands for the proposition that any Step 1 or Step 2 grievance be limited to three individuals only, the Grievant, their representative, and a 1st or 2nd line supervisor from the Agency.

The Agency maintains that the agreement is specific to those two grievances and does not create a past practice or establish precedent. Further, the Agency maintains that

the agreement does not limit the number of persons present in the room during the grievance procedure but only restricts the number and type of managers present. Following additional grievance hearings, the Union protested the inclusion of Mr. Barry Farbro, the Employee Relations-Labor Relations Specialist for the Agency. The participation in any grievance hearing by Mr. Farbro was seen as a violation of the CBA by the Union as Mr. Farbro was considered to be a member of management and not necessarily a direct line supervisor.

As a result, the Union has filed the instant grievance maintaining that the Agency has violated the Settlement Agreement among other claims. The parties selected Mr. Richard R Rice as the Arbitrator and scheduled the hearing where witnesses and exhibits were presented for determination by the Arbitrator.

ISSUE

Did the Agency violate the Settlement Agreement in question and/or the Collective Bargaining Agreement when the Agency included somebody other than the 1st line supervisor, the Grievant and a Union representative during the 1st step grievance process; and if so, what is the appropriate remedy.[1]

Even throughout the process the parties had difficulty deciding between themselves what specific issues actually were being contested. It is clear that the Settlement Agreement in question was an attempt to resolve grievances related to article 9.6 of the CBA. Instead

[1] Much discussion was made throughout the Arbitration to frame the issue properly. A number of attempts to adequately articulate the issue were made with adjustments throughout the hearing. Finally, the parties settled upon the issue as framed above with the understanding that subtle nuances or collateral issues may be discussed. See Tr. 220.

of resolving those differences, the parties only created additional disagreements over the interpretation of the Settlement Agreement itself. The parties disagreed as to the permanency of the agreement; whether the agreement pertained to the number of participants in a grievance; whether the agreement pertained to those management individuals allowed to participate; and whether the participation by Mr. Farbro impacted any of the preceding questions.

The Union maintains that the Settlement Agreement merely clarifies the CBA and its "restriction" on the number participants in the grievance process. Additionally, the Union maintains that more than one management official may not participate in the grievance process. Finally, the Union asserts that Mr. Farbro is a management official, and as such his participation in the grievance process should be restricted. The Agency on the other hand argues that the Settlement Agreement is specific to two individual grievances and only mandates that the Agency will not include a 2nd level supervisor in the grievance process while a 1st level supervisor is entertaining the grievance itself.

Interestingly enough - to resolve the one issue requires an analysis of a number of questions. The parties were clear to remind the Arbitrator of his limitations and jurisdictional reach extending only to answering the issue as framed. However, to adequately answer the issue as it has been framed above, the following must be considered:

1. Is this issue one of "Management Rights?"
2. Does the Settlement Agreement interpret or modify the CBA?
3. Does the Settlement Agreement create precedent?

4. Is the Settlement Agreement specifically limited to two grievances or is it to be considered a "Memorandum of Understanding" that is applicable to the interpretation of the CBA?

5. Does the Settlement Agreement define the CBA as a specific limitation of no more than three persons at a step one or step two level grievance?

6. Are there circumstances in which more than one individual representative of management from the Agency may be present at a grievance?

7. Is there a difference between a *manager* and a *member of management*?

8. Is a Human Resource or Labor Relations specialist excluded from participation or attendance at a grievance?

9. Is the existing Human Resource Specialist-Labor Relations Specialist, Mr. Farbro, excluded in his capacity as a Specialist?

10. Is Mr. Farbro excluded from a grievance hearing if he is participating as an advocate or attorney?

All of these, and more, sub issues were raised during the hearing. Each one of the above questions do not necessarily need to be analyzed or responded to completely to provide the appropriate analysis sufficient for the resolution of the grievance; however, many of these questions need to be answered in order to support the rationale for this Order and Award.

For the reasons stated below, this Arbitrator must find that the grievance should be **SUSTAINED** in part, and **DENIED** in part.

ARGUMENTS OF THE PARTIES[2]

The Agency in this case asserts that the Settlement Agreement is limited to two specific grievances already resolved, and that any restriction in the participation of the grievance process would be on the number of managers that could participate in the process. The Agency maintains that the Settlement Agreement does not create precedent and further the agreement does not limit the number of total participants in the grievance process.

The Union asserts the Settlement Agreement clarified the CBA and permits only three individuals to participate in the grievance process; the Grievant, their representative and the first line supervisor for step one and the second line supervisor for step two. Additionally, the Union maintains that no more than one manager should participate in any step of the grievance process. Finally, the Union maintains that Mr. Barry Farbro, the Human Resources/Labor Relations Specialist, should be considered a management official-and thus, barred from participation in the grievance process.

The Agency argues that the dispute is an attack on the Agency's "management rights" and further, that the Union is attempting to modify the terms of the CBA. The Agency also argues that there is no binding precedent created by the terms of the Settlement Agreement. Conversely, the Union argues this has nothing to do with management rights

[2] The arguments, as summarized by the Arbitrator, are not intended to suggest any unstated nuance has more or less relevance than any other particular argument raised by the parties. Instead, the major points as they apply to this particular grievance will be highlighted. The specific arguments raised by the parties that establish or rebut an integral point will also be recited.

and that the Settlement Agreement is not a modification of the CBA but rather clarification of the terms contained within the CBA.

The day before the hearing, the Agency provided a prehearing brief which ultimately they articulated as something akin to a motion to dismiss or a motion for summary judgment. As a result, the Union was provided an opportunity to provide a response brief after the hearing on that particular brief. For the reasons set forth below, resolving the ultimate grievance, without additional discussion, the Arbitrator overrules the prehearing brief of the Agency.

DISCUSSION & ANALYSIS

The Agency has characterized the position of the Union as an invasion of "management rights." This is not a correct application of the term management rights. Management rights pertain to those rights retained by management in order to properly manage the employees and operate their business. The Agency's ability to manage its employees, or operate the essential function of the workplace is not altered, restricted or limited by a dispute over the interpretation of the specific procedure for conducting first and second step level grievances.

Instead, the issue at hand is one of mere contract interpretation - or better stated - contract *clarification*. Whether there was the appropriate "meeting of minds" at the time of contract formation, the parties agree to disagree as to the application of the true meaning of the language contained in Article 9.6 of the CBA. As a result of the contract dispute, a

Settlement Agreement was reached with the stated intent of clarifying Article 9.6 of the CBA.

Subsequent to the formation of the Settlement Agreement, however, the parties further disagreed as to the interpretation and applicability of the Settlement Agreement itself. The interpretation of the Settlement Agreement has created a new set of problems between the parties, hopefully resolved by this Arbitration. A ruling by the Arbitrator in favor of either the Agency or the Union has no bearing on the rights of the Agency to manage its employees. The ruling will only clarify the actual procedure to be employed during the grievance process.

From the testimony provided during the hearing is clear that the dispute has arisen from the differing understanding of the parties of the Settlement Agreement. One party believes certain limitations apply as a result of the Settlement Agreement, whereas the other party believes those limitations do not apply. Both parties agreed upon the Settlement Agreement to resolve an existing dispute over the application of the CBA. The resulting document has created confusion between the parties both insist their interpretation of both the CBA and the Settlement Agreement is correct to the exclusion of the opposing party's position.

The resolution of this dispute falls upon basic contract law on the plain meaning and interpretation of ambiguous or disputed contract language. Irrespective of the positions taken by the parties, basic contract law dictates that the contract must be viewed first according to the definition of plain language included with acknowledgment to the rest of

the document for comprehensive interpretation. In other words, you must look to the "four corners" of the entire CBA to discern the proper interpretation of this contractual dispute.[3]

The dispute before the Arbitrator is a common dispute within contract jurisprudence. The "mutual misinterpretation" issue has been around for hundreds of years in applying contract law, and there are many methods for resolving this dispute. However, in this case, the language is clear, when, taken as a whole, it is viewed in light of the rest of the CBA (and taking into account the language used in the Settlement Agreement).

As a result, to completely explain the justification for this Award, an explanation of contract law must be made first. Whose Meaning Should Prevail? This debate has raged for many, many years - and there is still no clear agreement between scholars on how to resolve this dispute. Fortunately, the parties (whether intentional or not) have landed squarely on the two common arguments for resolving this type of dispute: The Plain Meaning Standard; and The Four Corners Standard. Without using those words the Union has suggested that the plain meaning of the entire CBA renders the debate moot and that the Arbitrator ought to see the contract the way that the Union has interpreted the contract and/or the Settlement Agreement. Conversely, without using those words, the Agency has suggested the overall approach, Four Corners Standard, indicates that if it is not specifically stated it is not specifically intended.

[3] For example, contrast Article 6.3 of the CBA, and Article 9.6. Neither of them have a specific limitation on the number of employees, however, one of them is open-ended and the other identifies only three types of person that can be included in a grievance discussion. Do the Articles relate? Does one provide insight into the meaning of the other? It is the overall view of the entire CBA that can provide guidance as to the specific meaning of any particular clause or Article.

The Plain Meaning Approach

The oldest standard of contract interpretation (and formerly the most widely used) is the Plain Meaning Standard. In this approach, words are to be given their customary interpretation, with an emphasis on reading words and phrases in a clear and unambiguous fashion. Use of this method makes for a simple interpretation, leaving the party that is mistaken the unfortunate loser in a contest of English and grammar. The problem, as was seen through legal history, is "***whose*** 'Plain Meaning' should be used? The parties would constantly be left to the uncertainty of an arbitrator having an opinion of the Plain Meaning of a series of words completely different then that of the parties.

Explaining why he chose not to follow the Plain Meaning Standard, Justice Oliver Wendell Holmes, Jr., in 1918, stated:

> A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

Essentially, words taken as a whole, may mean something clearly one day - and be understood to mean something else another day - or by different people. It is difficult to assign a specific, clear, plain meaning to any set of words. There will always be different interpretations for words contained at the heart of a dispute. "If a judge simply applied his own linguistic background and experience to the words of a contract, contracting parties would live in a most uncertain environment . . .." *Mellon Bank v. Aetna*, 619 F.2d 1001, 1010 (3rd Cir. 1980). It is for this reason, that a minority of jurisdictions still utilize the Plain Meaning Standard.

The Four Corners Standard

The "Four Corners" approach, however, looks to other language within a given document (or documents) to discern what the original intent was for any ambiguous language. This approach gives the judge the sole discretion of reading the document and determining if the language is, in fact, ambiguous at all. If the judge determines an ambiguity exists, then this approach permits him to examine the remainder of the agreement to discern if the rest of the document sheds light on the true intended result.

The articulation of this approach in this case is also flawed since one or both parties presumes the disputed language to be ambiguous. Should that be the case, then the Four Corners Standard cannot be used to make the final determination in this case. Applying this test, one must determine the disputed language to be ambiguous - and then find the common intended result – if any.

Unfortunately, many reject the Four Corners Standard because it once again places within the hands of the arbitrator the determination if the disputed contractual language is ambiguous in the first place. While it does not appear that the language is ambiguous, it is clear the parties differ in their interpretations. "No contract should ever be interpreted and enforced with a meaning that *neither* party gave it." *First Restatement of Contracts*, Section 572 B (1971 Supp), Professor Corbin.

Reasonableness Doctrine

The Doctrine of Reasonableness saves us in this dispute. "Every contract imposes upon each party a duty of good faith and fair dealing . . ." *Restatement Second of Contracts*, Section 205 (1981). "The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *How Arbitration Works*, Sixth Edition, Ch. 9.3.B.iii, pg. 478, Elkouri & Elkouri, BNA Books.

Essentially this Doctrine requires a case by case analysis and determination. *Id*., at pg. 479. No decision may be rendered by an arbitrator that will leave a result as arbitrary, capricious or discriminatory. *Id*., at pg. 480. "When one of two plausible interpretations of an arguably ambiguous contract would lead to a result and the other is likely to produce a harsh, absurd, or nonsensical result, case law demonstrates, unsurprisingly, that arbitrators will select the former alternative." *Id*., at Ch. 9.2.A.xv, at pg.204 (2008 Supp.).

Therefore, using this approach it is much easier to answer the question stated above which then ultimately resolve the framed issue.

1. Is this issue one of "Management Rights?"

   No. As was discussed above a management right to exist to protect the interests of the Agency to conduct business in such a way, without interference, that will benefit both the Agency and the employees. Management rights permit the Agency to determine number of employees, job assignment, shift schedules, etc. The specific mechanism for how a grievance is conducted is not a management right-but is either seen in historical context or detailed in the collective bargaining agreement. In this case the parties had previously negotiated the procedure employed during a grievance in the CBA. A dispute over that interpretation resulted in a negotiated Settlement Agreement, which in turn, has given rise to the instant dispute. Nothing

contained in either parties' arguments seeks to limit any management right-instead, seeks to clarify the intent of the agreement of the parties.

2. Does the Settlement Agreement interpret or modify the CBA?

   The Settlement Agreement was drafted to interpret the CBA. Very specifically the Settlement Agreement states that it is not a limitation in the ability to negotiate Article 9.6 in the future. As a result, the intent is clear that the Settlement Agreement should not be seen as a modification of the existing CBA since the invitation is open for future modification. Additionally, it cannot be overlooked that the creation of the Settlement Agreement occurred as a result of a dispute over a difference of opinion of the application of article 9.6 of the CBA in the first place. As a result, settlement agreement itself can only be seen as an attempt to interpret, or at least agree upon an interpretation, of the CBA.

3. Does the Settlement Agreement create precedent?

   No. Clarification does not create precedent-it defines a misunderstanding that may have not been apparent historically. Furthermore, the agreement specifically states that precedent is not created for "future negotiations."

4. Is the Settlement Agreement specifically limited to two grievances or is it to be considered a "Memorandum of Understanding" that is applicable to the interpretation of the CBA?

   There is no way the Settlement Agreement could be limited to those two specific grievances. That argument does not, frankly, make any sense. To agree to a specific resolution or understanding as being applicable only to events that have already occurred in the past does not create a resolution or settlement. For example, the Settlement Agreement indicates that the Agency will abide by the CBA. Following the logic of the Agency-are they to suggest that the Agency no longer has to abide by the CBA now that those two particular grievances are resolved? Absolutely not. The interpretation of the CBA that gave rise to the dispute, now being clarified, will apply to the procedural application of all future grievances.

5. Does the Settlement Agreement define the CBA as a specific limitation of no more than three persons at a step one or step two level grievance?

   No. As was pointed out earlier, other sections of the CBA imply more than three individuals for the resolution of grievance related disputes. Does that mean that the prior Article controls the application of a subsequent Article? Not necessarily. In this case, common sense must prevail. For example, what about a new manager

being trained? Should they be allowed to observe? If the suggestion is more than observation, but rather participation, what if a translator or interpreter is necessary? What if the Grievant is disabled and must have a helper? What about a scrivener, a clerk, a new shop steward learning how to do their job, security, technical advisor, historian, expert, etc. There are many different examples that come to mind almost instantly of individuals that would be necessary for the inclusion in either a step one or step two grievance that would be someone other than the Grievant, first level supervisor, and the representative of the Union.

Suppose the first level supervisor was new on the job and had not yet become acclimated with all aspects of the company? The first level supervisor disciplines employee who then files a grievance. Is the new supervisor entitled to have some clerk or technician from another department to answer questions? If the dispute were about the applicability of leave or payroll-what a supervisor be entitled to have a payroll clerk present to answer questions? I believe that the testimony of the parties as well as the language of the CBA would permit this type of participation in the grievance.

Both parties acknowledge that the intent is for informal, speedy resolution at the least adversarial and acrimonious level possible. Should a supervisor not have at their fingertips all of the information necessary to make the appropriate decision, the grievance can be extended or complicated even further, which goes against the intent that was stated by the parties. Likewise, can the Union have a clerk or historian present to illuminate or illustrate the historical position taken by the Grievant and their representative that may be unknown to the supervisor in question? Of course they can.

The intent of the CBA, no different than many other agreements across the country, is to prohibit additional advocates or "decision-makers," but permit individuals that would assist in a more comprehensive and expeditious resolution. A specialist contrasted with an advocate.

6. Are there circumstances in which more than one individual representative of management from the Agency may be present at a grievance?

Yes. For the same reasons listed above, it is possible that the grievance may relate to more than one issue or that the supervisor in question must rely upon other input from different departments to form a more global response, if necessary. This is not to say that management at a higher level is permitted-but a member of management from a different department, or providing technical assistance may be permitted. Likewise, the Union may require the presence of a particular shop steward or representative, along with a member from the negotiating team from a historical

approach to help provide insight as to the applicability or interpretation of a particular clause relied upon in the contract.

7. Is there a difference between a *manager* and a *member of management*?

   Yes. Member of management suggests a person that is not a member of the bargaining unit, and has managerial or supervisory responsibilities. This does not mean somebody that is in the direct line of management over the Grievant in question. That would be a manager. A manager is somebody who is directly over the Grievant whether at the first level or higher. For example, I may work on the factory floor and answer to a construction foreman who is underneath the factory supervisor who is underneath the manufacturing director. They all are in my chain of management and all would be considered managers. The director of the finance department would also be a member of "management" for the company but not necessarily a manager to me. In the context taken above, it would be inappropriate to have a manager at any level appear in the grievance other than the first level manager at step one and the second level manager at step two. However, there may be a circumstance where a manager may need to call a member of management from another department to assist in the interpretation or explanation of the applicability of that management official's expertise.

8. Is a Human Resource or Labor Relations Specialist excluded from participation or attendance at a grievance?

   Not necessarily. In reviewing the job description of the Human Resource/Labor Relations Specialist, nothing indicates that this individual is an advocate. While they may be a representative of the Agency, there is no specific cleared definition that this person is a deciding official, a manager, or an advocate for the Agency.

   In fact, the very function of that job is to provide technical assistance, provide explanation or interpretation where necessary, assist with procedural detail, and facilitate the appropriate application of the CBA between the parties. Either side may request the Labor Relations specialist to attend the meeting for purpose of assistance to, hopefully, more expeditiously resolve the grievance.

   As stated above, this is no different than the role of a historian or member of the negotiating team to help shed light on an issue for easy resolution.

   This does not mean an attorney providing legal advice - Advocate arguing somebody's position - Or some other person participating in the decision-making other than the supervisor that is appropriate for the situation. The easy distinction is that a person who "answers questions" is generally permitted to be present to

assist; however, a person who "asks questions" is generally not permitted to be present to interfere or control. The intent of the CBA is that a dialogue exists between three individuals, the Grievant, their representative, and the supervisor in question. However, other individuals may be present to assist with the dialogue between those three.

9. Is the existing Human Resource Specialist-Labor Relations Specialist, Mr. Farbro, excluded in his capacity as a Specialist?

   No. So long as he is present only to answer questions as to the appropriate application of the personnel documents controlling the situation.

10. Is Mr. Farbro excluded from a grievance hearing if he is participating as an advocate or attorney?

    Yes. Participating by providing opinions, advocacy, influence, direction or control, enforcement-all would be inappropriate. A specialist who has a law degree is not excluded; a lawyer who shares the title as a specialist may be. While Mr. Farbro is a member of management, he is not necessarily a manager. However, when he acts as an advocate-he should not be present during those first steps of a grievance procedure. Again-he should not be asking questions in the capacity of a specialist.

    Imagine the converse-the Union appears with a representative, the Grievant, and a labor attorney to confront the first level supervisor. Of course management would object. There is no difference in the first level supervisor being accompanied by an attorney acting as an advocate on behalf of the Agency.

    The problem in this situation is that Mr. Farbro has articulated that he would like to wear both hats simultaneously removing one as necessary for the interest best suited for the Agency. That is not permissible. Mr. Farbro's testimony indicated on behalf of the Agency that it was the understanding of the Agency that the HR specialist who has been designated technical advisor to management on labor relations and employee relations could be permitted in the room without violation of the CBA.TR. p. 33, l. 10 – 13. This is consistent with the above analysis. A specialist is permitted to attend, not necessarily to participate but rather to assist as necessary. (It should be understood that this is not encouraged in every situation but only when absolutely necessary. No different than the necessity of a payroll clerk, or an interpreter. For example, Ms. Wilson was present at the Arbitration as the President of the Union. There were a number of times that the Arbitrator or an individual asked a question that she was able to interject an answer providing information although she was not testifying at the time. In that capacity she was providing historical assistance rather than advocacy.)

> However, Mr. Farbro also testified that he should not have to be subjected to examination by the Union during the Arbitration because he was the "advocate."TR. p. 46, l. 1-2. Again, inappropriate. This is exactly why Mr. Farbro has created this particular dispute by justifying his admission to a step one or step two grievance, but then denying his role as a witness at a subsequent Arbitration because he changes hats and becomes the advocate. Mr. Farbro is a specialist from the beginning to the end; or Mr. Farbro is the advocate from the beginning to the end. If he is a specialist, he appears to answer questions from the supervisor or the Union representative that are asked of him and nothing more. He cannot advise the supervisor as to a particular course of action-he cannot confront or take a stance with the Union or the Grievant-he can only respond to technical questions. *Or*, Mr. Farbro is the advocate on behalf of the Agency and must wait until the Arbitration hearing to participate having remained out of the initial grievance steps. (Of course he can advise and answer questions outside of the grievance room – just not inside.)

The intent of the parties is clear-the step one grievance procedure clearly is intended to be as informal and non-confrontational as possible, designed to resolve misunderstandings, miscommunication, or allow for a change of heart. Any interference or intimidation by lawyers or managers at a higher level will clearly interrupt that process. The intent of the CBA, and confirmed by the testimony and arguments of the parties, is that the step one grievance process is intended to be a dialogue between the Grievant, their representative, and the first line supervisor. The step two grievance process is designed to include the Grievant, they are Union representative and the next level manager.

Those three identified individuals are intended to be the participants during those steps. That does not mean that the participants are limited to three (i.e. more than one Grievant, more than one supervisor at that level, or some other participant out of necessity). However, the inclusion of any other individuals should be merely as an aid to the grievance process rather than additional soldiers for battle. The additional individuals should only be

present if they provide assistance, technical knowledge, or specialized information necessary to resolve the grievance as easily as possible.

The intent also clearly prohibits the participation of a manager that could be involved at a higher level of the grievance process. It is most likely that a manager at a lateral position would also be excluded unless that individual was solely present to answer technical or specialized information no different than a HR specialist or payroll clerk. So long as that person does not participate in the decision-making or interviewing or advocacy, that person should be allowed to respond to questions solely if it will assist the grievance process, rather than interfere with the intended conference between the parties.

Therefore, in answering the issue as it has been framed - did the Agency violate the Settlement Agreement in question and/or the collective bargaining agreement with the Agency included somebody other than the first line supervisor, the Grievant and a Union representative during the first step grievance process - the Arbitrator must answer yes in part and no in part. The Union has maintained as part of its position that no more than three individual persons may be in the room-and in that stance, the Union is incorrect in the Agency did not violate the agreement or CBA with respect to the number of bodies in the room. However, the fact that Mr. Farbro has presented himself as the advocate for the Agency, even if only at the Arbitration level, his participation or inclusion in the room at that time would have been inappropriate. In that sense-the Agency did violate the CBA.

To be clear, a manager in the Grievant's line of management other than the first level supervisor at the first step should not be present. Likewise, an advocate should not be

present (excluding the Grievant's representative from the Union). Such inclusion provides for a clear chilling effect to the process. Additionally, other persons may be present to assist, but not participate – to help facilitate the most harmonious resolution possible expeditiously. This should be seen as clarification of the CBA. Should the parties want to negotiate a different agreement from this interpretation – they are not prohibited by the terms of the Settlement Agreement from doing so.

The grievance filed by the Union articulated a violation based upon the fact that there were more than three persons present during the grievance process. Unfortunately, the number of persons in the room does not create a violation; however, the ***HAT*** each individual is wearing in the room will most likely determine whether there exists a violation or not.

AWARD

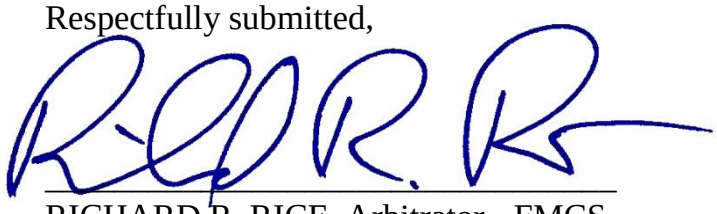
Having heard, read and carefully reviewed the testimony, evidence and arguments in this case, the Grievance filed by the Union must therefore be **SUSTAINED** in part, and **DENIED** in part. The Agency violated the CBA and/or the Settlement Agreement by inserting the advocate for the Agency into the grievance process before the time that advocates should be involved. However, the Union is incorrect that the CBA contains a strict limitation of only three individual bodies that may be present in the room during the grievance process.

It is the Order of this Arbitrator that the assistance of an individual without managerial participation shall be permitted to facilitate the resolution of a grievance at the earliest steps as expeditiously as possible. It is further the order of this Arbitrator that the participation in a step one or step two grievance by the advocate or attorney for the Agency shall not be permitted, and therefore should be excluded from the room during the step one or step two grievance process.

The Arbitrator shall retain jurisdiction for an additional thirty (30) days solely to resolve any disputes or to clarify any remaining issue related to the imposition or interpretation of the Award should those arise.

Dated this 9th day of August, 2016.

Respectfully submitted,



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