
IN THE MATTER OF THE DISPUTE BETWEEN:

**AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 222 – AFL-CIO
LOCAL NO. 3956**

FMCS CASE NO. 08-59053

AND

**U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

ARBITRATION AWARD

An Arbitration Hearing Before: William M. Slonaker, Sr. Arbitrator
Union Representative: Perry Casper, Chief Steward, National Council of HUD
Locals, AFGE, Council 222 – AFL-CIO
Employer Representatives: Ofelia C. Franco, Attorney Advisor, U.S. Department of
Housing and Urban Development
Thomas G. Massouras, Attorney Advisor, U.S. Department
of Housing and Urban Development
Hearing: June 10, 11, 12, 2009
Record Closed: August 25, 2009
Award: November 9, 2009

AUTHORITY

In compliance with the Parties' agreement to bring this matter to the Arbitrator for resolution, and on the Parties' stipulation that this matter is properly in and that it proceed in Arbitration, an Arbitration Hearing was held between the Agency and the Union on June 10, 11, and 12, 2009, at the offices of the Agency, 151 North Delaware St., Suite 1200, Indianapolis, Indiana 46204-2526. The Witnesses were sworn and separated. An official record of the Hearing was made. The Parties entered testimony and documentary evidence into the Record. The Arbitrator, being duly authorized, now makes and enters the following Arbitration Award:

ISSUES (STIPULATED)

1. Did HUD violate the Collective Bargaining Agreement for Multifamily HUD employees in the Indianapolis, IN office?

2. Did HUD arbitrarily and capriciously set the number of telework days, specific telework days and other work condition requirements for teleworkers in the Indianapolis Multifamily Program Office?
3. Did HUD violate the fair and equitable treatment of employees under the Collective Bargaining Agreement with the implementation of telework in the Indianapolis Multifamily Program Office?
4. Did HUD violate statutory and contractual requirements for bargaining changes in working conditions for local Indianapolis Multifamily Program employees?

JOINT STIPULATIONS

1. The four Issues shall be as set forth above.
2. That the matter is properly in arbitration and that all prior steps, other requirements have been met. [p. 13]
3. HUD, the agency, and the AFGC HUD Council 222, the union, signed contract Supplement 3 on February 27, 1998, for the implementation of the HUD telework program. [p. 13-14]
4. HUD contractually agreed that each employee requested to participate in the HUD telework program will be fairly and equitably considered. [p. 14]
5. The documents (as relate to Step 3 of the Grievances) speak for themselves as to the involvement of Mr. John Hall. [p. 533]
6. That, other than for the Supplements to JE1 submitted by the Parties, the other Supplements (approximately 100) not submitted by the Parties have nothing to do with this Arbitration. [p. 950]

JOINT EXHIBITS

(Joint Exhibits are identified "JE__")

- JE1 [Agreement]
- Agreement Between U.S. Department of Housing and Urban Development ["Department"] and American Federation of Government Employees, AFL-CIO ["Union"] bound in a yellow soft cover book form; the Table of Contents noting the inclusion of Articles 1 through 50; and noting an Index of Appendices that includes A through G; with Appendix A identifying as included Supplements numbered 7, 17, 20, 34, 35, 39, 40, 41, 42, 43, 44, 47, and 47A – the first of said Supplements (Supplement 7) dated March 6, 1992, and the last of said Supplements dated 8-15-97. In addition thereto, the Parties added as part of JE1, separate documents as follows:
Two-page Supplement 46, dated Aug. 12, 14, 19, 2003
Two-page Supplement 67, dated June 22, 2005
One-page Supplement 67A, dated 6/23/06

One-page Supplement 67A Amended, dated 7/24/2006

- JE2 None
- JE3 [Telework – Supplement & Program]
 • Supplement 3, Subject: Telework Program, dated 2-27-98 (3 pages)
 • Telework Program, no date indicated, however first page at top notes "MA 16 '98 02:37PM HUD HUMAN RES DIV NY" (20 pages)
- JE4 [Statute]
 • Title 5 of the United States Code, Government Organization and Employees, Part III – Employees, Subpart F – Labor-Management and Employee Relations, Chapter 71, Labor-Management Relations (32 pages)
- JE5 [Telework – Policy Guide]
 • Telework Program Policy Guide; page 9 of 9 notes "Content current as of 25 November 2008" (9 pages) (taken from www.hud.gov/offices/adm/jobs/telework/telework4.cfm (accessed 5/28/2009))
- JE6 [Telework – Policy Guide]
 • Telecommuting Program Policy Guide, Telecommuting Program, page 6 of 6 notes "Last Revised: November 24, 1998 (6 pages)
 • Article 7 Telecommuting Program, not dated (5 pages)
- JE7 [Telework – Q&A]
 • Questions and Answers on Telework page 4 of 4 notes "Content current as of 10 October 2001" (4 pages) (taken from www.hud.gov/offices/adm/jobs/telework/telework2.cfm (accessed 5/28/2009))
- JE8 [Castillo Grievance]
 • Employee Grievance – Robert Castillo, dated 3-26-08 (1 page)
- | From | To | Subject | Dated |
|-------------|----------|--|-----------------|
| Mitcheltree | Castillo | Response to Step 1 Grievance dated 3/26/08 | April 16, 2008 |
| ?? | ?? | [Response] | ?? |
| Hall | Castillo | Step 3 Grievance, etc. | August 28, 2008 |
- JE9 [Gordon Grievance]
 • Employee Grievance – Mena Gordon, dated 3-26-08 (2 pages)
- | From | To | Subject | Dated |
|-------------|--------|------------------------------------|-----------------|
| Peal | Gordon | Response to Step 1 Grievance, etc. | April 14, 2008 |
| Mitcheltree | Gordon | Response to Step 2 Grievance | August 19, 2008 |

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|------|---|----------------|--|-----------------|
| JE10 | [Hatcher Grievance] | | | |
| | • Employee Grievance – Jeanette Hatcher, dated 3-26-08 (1 page) | | | |
| | From | To | Subject | Dated |
| | Memo (2 pages) | Hatcher | Your Step 1 Grievance, etc. | April 14, 2008 |
| | • Memo (5 pages – duplicate of first page) | | | |
| | Mitcheltree | Hatcher | Response to Step 2 Grievance | August 19, 2008 |
| | • Memo (2 pages) | | | |
| | Hall | Hatcher | Step 3 Grievance (8-27-08) | Sept 12, 2008 |
| JE11 | [Hines Grievance] | | | |
| | • Employee Grievance – Nadine Hines, dated 3-26-08 (2 pages) | | | |
| | From | To | Subject | Dated |
| | Memo (1 page) | Hires | Response to Step 1 Grievance, etc. | April 16, 2008 |
| | • Memo (5 pages) | | | |
| | Hinsberger | Hires | Response to Step 2 Grievance | August 5, 2008 |
| | • Memo (1 page) | | | |
| | Hires | Galvan, et al. | Step 3 Grievance Appeal | August 12, 2008 |
| | • Memo (2 pages) | | | |
| | Hall | Hires | Step Three (3) Grievance, etc. | Sept 5, 2008 |
| | • Telecommuter Agreement, Nadine Hires, dated 2/27/08 (2 pages) [Note: with the “duress” statement] | | | |
| | • Addendum To Telework Schedule, Nadine Hires, dated 3/10/08 (1 page) [Note: regarding call forwarding] | | | |
| JE12 | [Jeter-Newburn Grievance] | | | |
| | • Employee Grievance – Teresa Jeter-Newburn, dated 3-26-08 (1 page) | | | |
| | From | To | Subject | Dated |
| | Memo (2 pages) | Jeter-Newburn | Response to Step 1 Grievance | April 16, 2008 |
| | • Step 2 Grievance Appeal, dated April 22, 2008 (1 page) | | | |
| | • Employee Grievance – Teresa Jeter-Newburn, “Step 2” box checked, dated 3-26-08 (1 page) | | | |
| | • Memo (4 pages) | | | |
| | Hinsberger | Jeter-Newburn | Response to Step 2 Grievance | Aug 5, 2008 |
| | • Memo (2 pages) | | | |
| | Hall | Jeter-Newburn | Step 3 Grievance (etc.) | Sept 5, 2008 |
| | • Memo (1 page) | | | |
| | Jeter-Newburn | None | Step 3 Grievance Repeal [sic] | August 12, 2008 |
| JE13 | [Richardson Grievance] | | | |
| | • Employee Grievance – David E. Richardson, dated 3-26-08 (1 page) | | | |
| | From | To | Subject | Dated |
| | Memo (2 pages) | Richardson | Response to Step 1 Grievance dated 3/26/08 | April 16, 2008 |
| | • Memo (4 pages) | | | |
| | Hinsberger | Richardson | Response to Step 2 Grievance | August 4, 2008 |
| | • Memo (2 pages) | | | |

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|------|--|--------------------------------|---|---|
| | Hall | Richardson | Step 3 Grievance, etc. | August 28, 2008 |
| JE14 | [Jackson Memo] From • Memo (4 pages) Jackson | To Principal Staff | Subject Telework | Dated May 16, 2002 |
| JE15 | [Ramirez Memo] From • Memo (1 page) Ramirez | To Principal Staff | Subject Telework Program Implementation | Dated Mar 12, 1999 |
| JE16 | [Agency Witness List] • Agency's Witness List, no date (2 pages) | | | |
| JE17 | [Agency Amended Witness List] • Agency's Amended Witness List, no date (2 pages) | | | |
| JE18 | [Union's Witness List] From • E-mail (5 pages) Perry | To Franco, et al. | Subject Arbitration union witness list 08-59053 | Dated May 29, 2009 |
| JE19 | [Union's Additions to Witness List] From • E-mail (2 pages) Perry | To Franco, et al. | Subject attachment [Union Additions to Witness List] | Dated June 09, 2009 |
| JE20 | [E-mails to Arbitrator] From • E-mails (2 pages) Massouras Casper | To Arbitrator Arbitrator | Subject Objection to Witnesses Found on Union Witness List, etc. Objection to Witnesses Found on Union Witness List, etc. | Dated June 08, 2009 June 08, 2009 |
| JE21 | [E-mail to Arbitrator] From • E-mail (3 pages) Casper | To Arbitrator | Subject Objection to Witnesses Found on Union Witness List, etc. | Dated June 09, 2009 |
| JE22 | [RFI] • Particularized Need Request, Request for Information (RFI) from Union to Agency, dated January 22, 2009 (5 pages) From • Email (2 pages) Hatcher | To Harvey, et al. | Subject Particularized Need Request from AFGE Local 3956 | Dated Jan 22, 2009 |
| JE23 | [Response] From • Memo (1 page) Mitcheltree | To Hatcher | Subject Particularized Need Request Response | Dated Feb 13, 2009 |

- Particularized Need Request, Response to AFGE Local 3956, dated February 13, 2009 (6 pages)

JE24 [RFI]

- Particularized Need Request, Request for Information (RFI) from Union to Agency, dated May 13, 2009 (5 pages)

| From | To | Subject | Dated |
|------------------------|----|--------------------------|--------------|
| • E-mail (2 pages) | | | |
| Hatcher Harvey, et al. | | Indianapolis' Second PNR | May 13, 2009 |

JE25 [Response]

- Memo (1 page)
- Response to Particularized Need Request, dated June 2, 2009 (6 pages)

| From | To | Subject | Dated |
|--------|--------|---------|--------------|
| Harvey | Casper | [none] | June 2, 2009 |

JE26 [Organizational Chart]

- Indianapolis Multifamily Program Center, Organizational Chart With Phone Numbers, not dated (2 pages)

JE27 [Telecommuter Agreement – Roberts]

- Telecommuter Agreement, Bernard Roberts, dated 1-14-09 (2 pages)

| From | To | Subject | Dated |
|-------------------|---------|------------------------|--------------|
| • Memo (1 page) | | | |
| Peal | Roberts | New Telework Agreement | Feb 13, 2009 |
| • E-mail (1 page) | | | |
| Roberts | Peal | Telework Agreement | Jan 13, 2009 |

JE28 [Telecommuter Agreements – various]

| From | To | Subject | Dated |
|---|---------------|--|-----------------|
| • E-mail (1 page) | | | |
| Everett | Hetue | Telework Agreement | March 19, 2008 |
| • Memo (1 page) | | | |
| Hetue | Everett | Email inquiry, March 19, 2008 - Telework | March 21, 2008 |
| • E-mails (1 page) | | | |
| Everett | Hetue | Work Performed | May 15, 2008 |
| Hetue | Everett | telework work | May 19, 2008 |
| • E-mails (1 page) | | | |
| Mitcheltree | Gordon et al. | THURSDAY, AUGUST 21, 2008 WEBTA Training | August 14, 2008 |
| Everett | Hetue | THURSDAY, AUGUST 21, 2008 WEBTA Training | August 15, 2008 |
| Hetue | Everett | THURSDAY, AUGUST 21, 2008 WEBTA Training | August 19, 2008 |
| • Telecommuter Agreement, Everett, Delores, dated 9/10/08 (2 pages) | | | |
| • Memo (1 page) | | | |
| Mitcheltree | Everett | New Telework Agreement | Sept 10, 2008 |
| • Telework Agreement, Powers, Darrell, dated 9/15/08 (2 pages) | | | |
| • Memo (1 page) | | | |
| Peal | Powers | New Telework Agreement | Sept 18, 2008 |
| • Memo (1 page) | | | |
| Hetue | Stultz | Telework Agreement | March 13, 2008 |

- E-mail
Stultz Hetue Telework March 20, 2008
- Memo (1 page)
Hetue Stultz Telework Agreement March 13, 2008
- Memo (1 page)
Hetue Stultz Email inquiry March 20, 2008 – Telework March 21, 2008
- E-mail (1 page)
Stultz Hetue Telework March 24, 2008
- E-mails (1 page)
Mitcheltree Stultz Step 2 Grievance May 12, 2008
Stultz Mitcheltree Step 2 Grievance May 12, 2008
- E-mails (2 pages)
Mitcheltree Guynn Interpreter Needed May 13, 2008
Mitcheltree Ellison Interpreter Needed May 19, 2008
Ellison Mitcheltree Interpreter Needed May 19, 2008
Mitcheltree Ellison Interpreter Needed May 20, 2008
Mitcheltree Ellison Interpreter Needed May 20, 2008
Ellison Mitcheltree Interpreter Needed May 20, 2008
Mitcheltree Powers et al. Interpreter Needed May 20, 2008
- E-mails (1 page)
Stultz Mitcheltree Telework August 27, 2008
Mitcheltree Stultz et al. Telework August 27, 2008
- (duplicate) e-mail
Stultz Mitcheltree Telework August 27, 2008
- Telecommuter Agreement, Stultz, Steven, dated 9/10/2008 (2 pages)
- Memo (1 page)
Mitchell Stultz New Telework Agreement Sept 10, 2008
- E-mail (1 page)
Tursi Hetue Telework Schedule/Agreement March 14, 2008
- Memo (1 page)
Hetue Tursi Email inquiry, March 14, 2008 – Telework March 17, 2008
- Telecommuter Agreement, Tursi, Eugena, dated 9/10/2008 (2 pages)
- Memo (1 page)
Mitchell Tursi New Telework Agreement Sept 10, 2008

JE29 [Telecommuter Agreements – various]

- | From | To | Subject | Dated |
|---|----------|---|----------------|
| • Memo (1 page) Mitcheltree | Castillo | Email inquiry dated March 17, 2008 – Telework | March 18, 2008 |
| • Employee Statement [re meeting of February 14, 2008] signed by Richardson, Castillo, and Renner, dated 3/19/08 (1 page) | | | |
| • Telecommuter Agreement, Castillo, dated 2/25/08 [with “duress” statement] (2 pages) | | | |
| • Addendum to Telework Schedule, signed by Castillo and Mitcheltree, dated 3/10/08 (1 page) | | | |
| • E-mails (1 page) Peal | Gordon | [none] | Dec 06, 2001 |
| Gordon Peal | | [none] | Dec 06, 2007 |
| Peal | Gordon | [none] | Dec 06, 2007 |
| • E-mail (1page) Peal | Gordon | telework day change | Feb 14, 2008 |
| • E-mails (1 page) | | | |

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|--------|--------|---------------------------------|--------------|
| Peal | Gordon | [duplicate] telework day change | Feb 14, 2008 |
| Gordon | Peal | telework day change | Feb 14, 2008 |
| Peal | Gordon | telework day change | Feb 14, 2008 |
- Telecommuter Agreement, Gordon, Mena, dated 2/21/08 [with “duress” statement] (2 pages)
 - Addendum to Telework Schedule, signed by Mena Gordon and Edward Peal, dated 3/10/08 (1 page)
 - Memo (2 pages)

| | | | |
|------------------------|---------|----------------------|--------------|
| Mitcheltree,Peal,Hetue | Hatcher | Telework Adjustments | Feb 15, 2008 |
|------------------------|---------|----------------------|--------------|
 - Memo (1 page)

| | | | |
|-------|---------|--------------------|--------------|
| Hetue | Hatcher | Telework Agreement | Feb 22, 2008 |
|-------|---------|--------------------|--------------|
 - Email (1 page)

| | | | |
|---------|-------|--------------------|----------------|
| Hatcher | Hetue | telework questions | March 14, 2008 |
|---------|-------|--------------------|----------------|
 - Memo (1 page)

| | | | |
|-------|---------|--|----------------|
| Hetue | Hatcher | Email inquiry, March 14, 2008 – Telework | March 17, 2008 |
|-------|---------|--|----------------|
 - Telecommuter Agreement, Hatcher, Jeanette, dated 2/21/08 [with “duress” statement] (2 pages)
 - Addendum to Telework Schedule, signed by Jenny Hatcher and Franca Hetue, dated March 7, 2008 (1 page)
 - Memo (1 page)

| | | | |
|-------|---------|--------------------|--------------|
| Hetue | Hatcher | Telework Agreement | Feb 22, 2008 |
|-------|---------|--------------------|--------------|
 - Telecommuter Agreement, Hires, Nadine, dated 2/27/08 [with “duress” statement] (2 pages)
 - Addendum to Telework Schedule, signed by Nadine Hires and Eileen Mitcheltree, dated 3/10/08 (1 page)
 - Telecommuter Agreement, Jeter-Newburn, Teresa, dated 2/27/08 [with “duress” statement] (2 pages)
 - Addendum to Telework Schedule, signed by Teresa Jeter-New-burn and Eileen Mitcheltree, dated 3/7/08 (1 page)

JE30 [Emails re telework – various]

| | From | To | Subject | Dated |
|-----------------------------|---------|-------|-----------------------------------|----------------|
| • E-mail (1 page) | Terry | Peal | telework log Tuesday may 12, 2009 | May 13, 2009 |
| • E-mail (1 page) | Terry | Peal | Completed | April 21, 2009 |
| • E-mail (1 page) | Everett | Hetue | Work Performed | May 16, 2009 |
| • E-mail (1 page) | Everett | Hetue | work performed | April 14, 2009 |
| • Duplicate e-mail (1 page) | Everett | Hetue | work performed | April 14, 2009 |
| • E-mail (1 page) | Everett | Hetue | work performed | April 03, 2009 |
| • E-mail (1 page) | Powers | Peal | telework summary 5/21/09 | May 21, 2009 |
| • E-mail (1 page) | Powers | Peal | telework summary 5/4/09 | May 04, 2009 |
| • E-mail (1 page) | | | | |

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|---------------------|---------|-------|--|----------------|
| | Powers | Peal | telework summary 4/23/09 | April 23, 2009 |
| • (Duplicate) email | Powers | Peal | telework summary 4/23/09 | April 23, 2009 |
| • E-mail (1 page) | Powers | Peal | telework summary 4/20/09 | April 20, 2009 |
| • E-mail (1 page) | Powers | Peal | telework summary 4/13/09 | April 13, 2009 |
| • E-mail (1 page) | Powers | Peal | telework summary 4/9/09 | April 09, 2009 |
| • E-mail (1 page) | Gordon | Peal | telework 4/28/09 | April 28, 2009 |
| • E-mail (1 page) | Gordon | Peal | Telework summary 4-21-09 | April 21, 2009 |
| • E-mail (2 pages) | Hatcher | Peal | work items for 5/21/2009 telework day | May 21, 2009 |
| • E-mail (2 pages) | Hatcher | Peal | 5/14/2009 telework work items – update | May 15, 2009 |
| • E-mail (2 pages) | Hatcher | Peal | 5/14/2009 telework work items | May 14, 2009 |
| • E-mail (1 page) | Terry | Peal | telework log Tuesday may 12, 2009 | May 13, 2009 |
| • E-mail (1 page) | Everett | Hetue | Work Performed | May 15, 2009 |
| • E-mail (1 page) | Terry | Peal | Completed | April 21, 2009 |

JE31 [Telework schedule charts – various]

- Original [color] Schedules with 2 days with no color coding for CWS at all, Response to #6 PNR, dated none, [per Parties, final schedule as of February 14, 2008 meeting] (2 pages)
- Telework Chart #3 – includes color coding for CWS and adds Bonnie Renner, new teleworker, Response to #6 PNR, dated none (2 pages)
- Telework Chart #2 – not including color coding for CWS, Response to #6 PNR, dated none (2 pages)
- [Same three charts in black & white]

JE32 [Memo - Smith]

| From | To | Subject | Dated |
|---------------------------|-----------------|---|---------------|
| • Memo (2 pages) Smith | Principal Staff | Authorization to implement Telework Program | Sept 22, 1998 |

JE33 [Memo – Coward]

| From | To | Subject | Dated |
|---------------------------|---------------------------------------|---------|----------------|
| • Memo (1 page) Coward | Executive Board & Local Presidents | none | March 17, 1999 |

JE34 [E-mails, Memos – various]

| From | To | Subject | Dated |
|-------------------|----|---------|-------|
| • Emails (4pages) | | | |

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|---|---|--------------------|---|----------------|
| | Richardson | Hinsberger, et al. | Indy's Telework Situation | March 20, 2008 |
| | Mitcheltree | Harvey | Clarification of 2 nd Telework Response? | March 19, 2008 |
| | Mitcheltree | Richardson | Clarification of Telework Response? | March 14, 2008 |
| | Richardson | Mitcheltree | Clarification of Telework Response? | March 14, 2008 |
| • | Emails (1 page) | | | |
| | Mitcheltree | Richardson | Meeting | Feb 11, 2008 |
| | Richardson | Mitcheltree | Meeting | Feb 11, 2008 |
| • | Memo (1 page) | | | |
| | Mitcheltree | Richardson | Telework Agreement | March 13, 2008 |
| • | Employee Statement, Richardson, Castillo, and Renner, dated 3/19/08 (1 page) | | | |
| • | Memo (1 page) | | | |
| | Mitcheltree | Richardson | email inquiry, March 13, 2008 – Telework | March 17, 2008 |
| • | Memo (1 page) | | | |
| | Mitcheltree | Richardson | Response to 3/19/2008 email – Telework | March 21, 2008 |
| • | Memo (1 page) | | | |
| | Mitcheltree | Richardson | Email inquiry, March 13, 2008 – Telework | March 17, 2008 |
| • | Emails (2 pages) | | | |
| | Mitcheltree | Richardson | Request for Meeting | April 04, 2008 |
| | Richardson | Mitcheltree | Request for Meeting | April 07, 2008 |
| | Mitcheltree | Richardson | Request for Meeting | April 07, 2008 |
| • | Emails (1 page) | | | |
| | Harvey | Mitcheltree | Assignment of Step 1 Grv(4/28/08) | May 06, 2008 |
| | Richardson | Harvey, et al. | Assignment of Step 1 Grv(4/28/08) | May 06, 2008 |
| | Harvey | Richardson | Assignment of Step 1 Grv(4/28/08) | May 06, 2008 |

JE35 [Performance materials – various]

| Name | Document | Dated/Most Recent |
|-------------|--|---|
| • Powers | My Performance Information (1 page) | 09/30/2008 |
| • ?? | To Whom It May Concern (1 page) | 9/30/2006 |
| • Castillo | Performance Appraisal (1 page) | 3/14/2005 |
| • Castillo | Performance Appraisal for Robert Castillo (2 pages) | Jan 31, 2005 |
| • Castillo | Progress Review Record (1 page) | 9/10/07 |
| • Castillo | Performance Appraisal (1 page) | 11/16/2006 |
| • Castillo | Performance Appraisal for Robert Castillo (2pages) | Sept 30, 2006 |
| • Castillo | Maintain Performance Document (1 page) | 9/30/2008 |
| • Castillo | EPPES – Performance Appraisal (1 page) | 25-Nov-2008 |
| • Castillo | Performance Appraisal (1 page) | 3/22/04 |
| • | Letter (1 page) | |
| | From | To |
| | Barbour | Castillo |
| | | Subject |
| | | Prince Hall Plaza, etc. |
| | | Dated |
| | | Dec 21, 2007 |
| • | Emails (3 pages) | |
| | Becker | Jeternewburn [sic], et al. Southview Courts 073-11355 |
| | Becker | Castillo Southview Courts 073-11355 |
| | Castillo | Becker Southview Courts 073-11355 |
| | Becker | Castillo Southview Courts 073-11355 |
| | | Dated/Most Recent |
| | | Feb 12, 2008 |
| | | Feb 13, 2008 |
| | | Feb 13, 2008 |
| | | Feb 13, 2008 |
| • | Jeter-Newburn Maintain Performance Document (4 pages) | |
| • | Tursi My Information – Performance (1 page) | |
| • | Tursi EPPES – Performance Appraisal (9 pages) | |
| • | Tursi EPPES – Performance Appraisal (9 pages) | |

- Gordon Maintain Performance Document (9 pages) 09/30/2008
- Hires Maintain Performance Document (5 pages) 09/30/2008
- Hires (Duplicate) Maintain Performance Document (5 pages) 9/30/2008

JE36 [Telework – various]

| | From | To | Subject | Dated |
|--|---------|---------------------|-------------------------------|--------------|
| • Email (2 pages) | Terry | Mitcheltree | Article 5 Regarding Telework | Feb 12, 2008 |
| • Emails (3 pages) | Terry | Mitcheltree, et al. | Telework meeting | Feb 12, 2008 |
| | Harvey | Terry | Telework meeting | Feb 12, 2008 |
| | Terry | Harvey, et al. | Telework meeting | Feb 13, 2008 |
| | Harvey | Zaltman | Telework meeting | Feb 13, 2008 |
| | Zaltman | Harvey | Telework meeting | Feb 13, 2008 |
| • Union Demand To Bargain Over Management Initiated Change In The Indianapolis Multifamily Telework Policy, dated February 21, 2008 (1 page) | | | | |
| • Email (1 page) | Harvey | Terry | Request to Bargain | Feb 25, 2008 |
| • Memo (1 page) | Harvey | Terry | Union Demand to Bargain, etc. | Feb 22, 2008 |

JE37 [Reassessment – various]

| | From | To | Subject | Dated |
|--------------------|-------------|-----------------------|------------------------------|----------------|
| • Emails (2 pages) | Mitcheltree | Fattic, et al. | Reassessment | Sept 14, 2007 |
| | Terry | Tursi, et al. | Telework Assessment Memo.doc | April 10, 2008 |
| • Memo (1 page) | Mitcheltree | All Multifamily Staff | Telework | Sept 14, 2007 |
| • Emails (1 page) | Mitcheltree | Fattic, et al. | Reassessment | Sept 14, 2007 |
| | Mitcheltree | Fattic, et al. | Telework Assessment Memo.doc | Sept 24, 2007 |

JE38 [Moving papers – Grievances of the Parties – “GOP”]

- Grievance, Step 1, on behalf of “all affected teleworking employees,” dated 3/28/08 (2 pages)
 - Grievance, Step 1, on behalf of “the AFGE Local 3956,” dated 3/28/08 (2 pages)
 - Grievance, Step 1, on behalf of “the AFGE Local 3956,” dated 3/28/08 (2 pages)
- | | From | To | Subject | Dated |
|-------------------|---------|-----------------|---|-----------------|
| • Memo (2 pages) | Hall | AFGE Local 3957 | Grievance of the Parties – Response, etc. | August 12, 2008 |
| • Memo (4 pages) | Hall | Powers, etc. | Grievance of the Parties, etc. | August 12, 2008 |
| • Email (1 page) | Powers | Harvey, et al. | Arbitration notice | August 29, 2008 |
| • Email (2 pages) | Hatcher | Powers | Arbitration notice | Sept 02, 2008 |
| • Email (1 page) | Hatcher | Powers | Arbitration Notice.doc | August 29, 2008 |
- Notice of Invocation of Arbitration, dated none (1 page)

MANAGEMENT EXHIBITS
(Management Exhibits are identified "ME__")

| | | | | |
|-----|---|---|---|---|
| ME1 | [Response Step 1] From • Memo (2 pages) Hetue | To Hatcher | Subject Your Step 1 Grievance dated 3/26/08 | Dated April 14, 2008 |
| ME2 | [Meeting schedule] From • Memo (2 pages) Mitcheltree | To Terry | Subject Notice of Meeting Schedules | Dated Feb 08, 2008 |
| ME3 | [Response Step 2] From • Memo (4 pages) Hinsberger • Emails (1 page) Mitcheltree Castillo | To Castillo Castillo Mitcheltree | Subject Response to Step 2 Grievance Request for Meeting Request for Meeting | Dated August 5, 2008 4/4/2008 April 08, 2008 |
| ME4 | [Emails Gordon – various] From • Emails (2 pages) Peal Gordon Peal Gordon | To Gordon Peal Gordon Peal | Subject meeting meeting meeting meeting | Dated April 04, 2008 April 07, 2008 April 07, 2008 April 07, 2008 |

RELEVANT AGREEMENT TERMS
(JE1)

PREAMBLE

This Agreement is made and entered into by and between the United States Department of Housing and Urban Development, hereinafter referred to as "Management" and the American Federation of Government Employees, AFL-CIO, hereinafter referred to as the "Union," together referred to as the "Parties."

Management and the Union agree that labor-management relations within the Department are strengthened by the participation of employees in the formulation and implementation of personnel policies and practices relating to their conditions of employment and through constructive and cooperative relationships with labor organizations.

* * *

**ARTICLE 1
COVERAGE AND RECOGNITION**

* * *

- (4) Management and the Union agree that, in regard to the bargaining unit, they will not do anything by custom or practice that will contravene or violate this Agreement. * * *

**ARTICLE 4
EMPLOYEE RIGHTS/STANDARDS OF CONDUCT**

Section 4.01 – General. * * * Employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment, and may grieve any matter relating to employment.

* * *

Section 4.06 – Morale. Recognizing that productivity is enhanced when their morale is high, managers, supervisors, and employees shall endeavor to treat one another with the upmost respect and dignity, notwithstanding the type of work or grade of jobs held.

* * *

**ARTICLE 5
MID-TERM BARGAINING**

Section 5.01 – Mid-Term Changes at the National Level. During the term of this Agreement, Management shall transmit to the Union its proposed changes relating to personnel policies, practices, and general conditions of employment. The parties agree that it is in the interest of the Government, the public and the parties to negotiate in good faith in order to facilitate the negotiations process.

* * *

Section 5.03 – Ground Rules for Mid-Term Bargaining at the Local Geographic Area. Local Management shall give in writing to the Local or Geographic Area designated representative, as appropriate, proposed changes relating to personnel policies, practices, and conditions of employment.

- (1) Such notice shall be given to the representative according to the following procedures:
 - (a) The proposed changes shall be sent to the designated representative. * * *
 - (b) Upon receipt of Management’s notice, the Union may request bargaining . . . * * *

* * *

Section 5.04 – Information to the Union on Mid-Term Changes. The following information, if available, shall be included in the notices of proposed Management mid-term changes . . . * * *

- (1) **Change in a policy or past practice.**

- (a) Copy or statement of the current policy or practice.
- (b) A statement of the reason(s) for the change.
- (c) A copy or statement of the proposed new policy or practice.

* * *

**ARTICLE 17
HOURS OF DUTY – ALTERNATIVE WORK SCHEDULES**

* * *

Section 17.02 – Definitions

- (1) **Official Business hours.** The period of each day when a HUD office is officially open for business.
- (4) **Core hours.** The hours each day that a full-time employee must be present for work . . .

Section 17.03 – Core hours

- (1) **Standard Core hours.** Core hours for employees stationed in all HUD offices shall be 9:30 a.m. – 3:30 p.m., on all scheduled workdays.

* * *

Section 17.04 – Tours of Duty

* * *

- (3) **Compressed Work Schedules.** Full-time employees shall be permitted to work compressed work schedules, as defined in Section 17.02, subject to the following limitations:

* * *

- (b) * * * Management shall determine the scheduled day off for all employees working compressed work schedules, using the following guidelines:
 - (1) Days off shall be scheduled so as to minimize the number of employees in a work unit who are off on the same day (e.g., if a work unit has four (4) employees working a compressed work schedule, none of these employees should have the same day off).

* * *

Section 17.06 – Employee Responsibilities.

- (1) Each employee shall be responsible for ensuring that his/her alternate work schedule does not interfere with the continuing responsibility to carry out his/her assigned duties and to complete assigned work on schedule.

* * *

Section 17.07 – Management Responsibilities. Management is responsible for ensuring that the mission of the Department is carried out effectively and efficiently and for determining the operational requirements of the Department. Accordingly, Management shall have the following specific responsibilities with respect to *administering this Alternate Work Schedules program*: [emphasis added]

- (1) Management shall be responsible for promulgating rules and procedures (including forms . . .) to implement the provisions of this Article. Such materials shall be provided to the Union for review or negotiation as appropriate prior to their implementation.
- (2) Management shall be responsible for conducting employee training and orientation programs to ensure that all employees understand the rules and procedures governing this Alternative Work Schedules program.
- (3) Management shall be responsible for ensuring that offices are adequately covered and for determining office coverage requirements, in terms of both the numbers and types of employees needed and skills required, during all official business hours. These official business hours shall be not less than eight and one-half (8 1/2) hours in duration for each office.

“Official coverage” includes but is not limited to the following:

- (a) Answering phones;
- (b) Expeditious handling of inquires from the public;
- (c) Maintaining clerical, technical, and professional support of the office functions;
- (d) Providing official representation at essential meetings;
- (e) Handling occasional or recurring peak workload periods;
- (f) Meeting deadlines; and
- (g) Meeting other program needs.

* * *

ARTICLE 22 GRIEVANCE PROCEDURES

* * *

Section 22.01 – Definition and Scope. * * * A grievance means any complaint by:

- (1) Any employee concerning any matter relating to his/her employment; or
- (2) The union concerning any matter relating to the employment of any employee; or
- (3) Any employee, the Union, or Management concerning:
 - (a) The effects or interpretation, or claim of breach, of this collective bargaining agreement; or

* * *
* * *

ARTICLE 23 ARBITRATION

* * *

Section 23.04 – Arbitration Fees and Expenses. The losing party shall pay the arbitrator's fees and expenses. The arbitrator should indicate which party is the losing party. * * *

* * *

Section 23.10 – Authority of the Arbitrator.

- (1) The parties agree that the jurisdiction and authority of the arbitrator shall be confined to the issue(s) presented in the grievance.
- (2) The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement, or any supplement thereto. * * *

* * *

- (4) An arbitrator shall lack authority to determine the legality or regulatory correctness of any Management decision not impacting personnel policies, practices or matters affecting general conditions of employment.

* * *

ARTICLE 34 LOCAL SUPPLEMENTS

Section 34.01 – Scope. * * * All supplements shall be a part of and subject to the terms and control of this Agreement. . .

Section 34.02 – Ground Rules. The ground rules for negotiations contained in Article 5 [Mid-Term Bargaining] apply.

Section 34.03 – Resolution of Bargaining Disputes. If the parties at the Local level disagree as to whether a subject is to be included in the supplement, or if they fail to reach agreement on a local issue, the parties shall refer the matter to the National level. * * *

Section 34.04 – Approval. Prior to implementation, local supplements must be forwarded to the parties at the National level for their approval. * * *

Section 34.05 – Enforcement. An alleged violation of the terms of a supplement to the Agreement shall be subject to resolution under the appropriate contractual, regulatory, or statutory procedures.

**SUPPLEMENT 3
SUPPLEMENT BETWEEN THE
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222**

SUBJECT: Telework Program

SCOPE: The scope of this Supplement encompasses the implementation of the Telework Program.

1. Management agrees that each request to participate in the telework program will be fairly and equally considered. Supervisors shall not discriminate for or against any employee with respect to the approval/disapproval, or with respect to termination of a telecommuting agreement.
2. A telecommuter may terminate the telecommuting arrangement at any time. In the case of unusual circumstances warranting involuntary termination of a Telework Agreement (i.e., other than at the request of the employee . . .) Management agrees to give the employee and the local union five (5) days' advance notice, or as soon as practicable, before termination. This notice shall provide the rationale for terminating the Agreement.
3. Telecommuting work-at-home and satellite office arrangements will include a telecommuter's working a minimum of two (2) days per week in the office.

* * *

5. Decisions by Management that a work unit will not participate in the Telework Program or decisions by supervisors not to approve telework requests may be grieved under the negotiated grievance procedure.
6. A supervisor may deny or terminate a telework agreement based on safety hazards at the site . . .

* * *

10. Eligible work-at-home telecommuters may be authorized to use an agency issued phone card for official business long-distance telephone calls or be reimbursed for long distance telephone calls approved on the SF-1164.

* * *

12. Management agrees to provide a copy of all applications for telecommuting to the Union before approval/disapproval of the application.

[Date Signed 2.27.98]

**SUPPLEMENT 46
NATIONAL SUPPLEMENT
Between**

* * *

SUBJECT: Pilot for 6:00 a.m. arrival time, changes to the HUD/AFGE Agreement, Article 17, Section 17.04, "Tour of Duty".

SCOPE: This Supplement establishes a six-month pilot for bargaining unit employees to begin work as early as 6:00 a.m. * * *

1. Core hours: The core hours for all employees shall be 9:30 a.m. to 2:30 p.m.

* * *

[Date Signed August 2003]

**SUPPLEMENT 67
NATIONAL SUPPLEMENT
Between**

* * *

SUBJECT: Implementation of the nationwide 6:00 a.m. arrival time program.

SCOPE: This supplement establishes a nationwide program to allow bargaining unit employees to begin work as early as 6:00 a.m. for the period of July 10, 2005 to July 22, 2006.

1. Core hours: The core hours for all employees shall be 9:30 a.m. to 2:30 p.m.

* * *

[Date Signed June 22, 2005]

**SUPPLEMENT 67A
NATIONAL SUPPLEMENT
Between**

* * *

SUBJECT: Nationwide 6:00 a.m. arrival time program.

SCOPE: This supplement extends the nationwide 6:00 a.m. arrival time program.

1. Length of Program: This supplement extends the 6:00 a.m. arrival time program until July 22, 2009.

* * *

[Date Signed June 23, 2006]

**SUPPLEMENT 67A AMENDED
NATIONAL SUPPLEMENT
Between**

* * *

SUBJECT: Nationwide 6:00 a.m. arrival time program.

SCOPE: This supplement amends Supplement 67A which extends the nationwide 6:00 a.m. arrival time program.

1. Length of Program: Since a change in work schedule cannot occur, other than the beginning of a pay period, this supplement amends the extension date of the 6:00 a.m. arrival time program until August 1, 2009.

* * *

[Date Signed July 25, 2006]

**RELEVANT TELEWORK PROGRAM
[HUD's POLICY – NOT PART OF THE CBA]
(PART OF JE3, STARTS 4TH PAGE IN)**

* * *

COVERAGE

These policies and procedures apply to all full-time positions, including managerial and supervisory positions.

IMPACT ON WORK SCHEDULES

These policies and procedures have no impact on the current work schedule provisions governing covered employees.

DEFINITIONS

* * *

Telecommuter – an employee who performs work at an alternative work site, under a formal telework agreement . . .

Telecommuting/Work-at-Home – a telework arrangement, under a formal telework agreement, that allows the employee to perform duties during the established work hours, part of the time in the business office and part working from their home, during an agreed upon portion of their work week (two or three days per week).

Telework – describes the (telecommuting) arrangements for non-traditional work environments that utilize computers, telephones, and other technology, to enable an employee (telecommuter) to work off-site, outside of the traditional workplace.

Telework is a change in the environment, not the job, and the arrangement requires a primary focus on managing the task/process, not people.

* * *

BENEFITS

Telework is designed to benefit employees, managers and the community by

- decreasing
 - work trip vehicle miles
 - traffic/parking congestion
 - energy consumption and
 - air pollution;
- improving quality of
 - worklife and
 - performance; and
- improving morale by assisting employees in balancing work and family demands.

PROGRAM ADMINISTRATION AND EVALUATION RESPONSIBILITIES

MANAGER/SUPERVISOR RESPONSIBILITIES

Each manager and supervisor is responsible for evaluating the impact of the Telework Program for the respective office/program.

MODIFICATION/TERMINATION

An employee's off-site work must not adversely affect the organizational mission/functions.

A TELECOMMUTING AGREEMENT

If, at any time, it is determined that a telework arrangement is having an adverse impact on work operations, the arrangement may be modified or terminated immediately.

Any violation of the terms of the Agreement or the policies/procedures governing telework may result in termination of the Agreement.

GENERAL RULES

SUPERVISORY APPROVAL TO PARTICIPATE

* * * As a supervisor-approved work option, there is no automatic right of gteh employee to continue participation in the event of a change of supervisor.

VOLUNTARY WORK AGREEMENT

* * * As a voluntary arrangement between employee and supervisor, either party may terminate the arrangement with written notice. * * *

* * *

NUMBER OF WORK DAYS IN THE OFFICE

Each work agreement must provide for a minimum of two days a week in the office, to ensure that the employee is available during the week for face-to-face meetings and access to facilities.

HOURS OF DUTY

Eligible telecommuters must work tours of duty that are consistent with the established hours of the Office or the Alternative Work Schedules Program.

* * *

STAFF MEETINGS

Where practical, staff meetings should be held on days when telecommuters are scheduled to be in the office, or accessible via telephone.

* * *

| SUCCESS INDICATORS | CHALLENGE INDICATORS |
|--|---|
| * * * | * * * |
| Performance management: + People are managed based on clearly defined objectives and outputs + People are evaluated based on results, using defined measures | Performance management: - People are managed based on observation and whim - People are evaluated based on perceived levels of activity |
| * * * | * * * |

* * *

POSITION OF THE UNION

FACTS

Supplement 3 (2-27-98) is the entire bargained method for implementing telework at HUD. [p. 203] Indianapolis Multifamily employees were approved for only two days by the Director (Sly) when the program was implemented. [p. 63] The program is nationwide, as noted in a memo from the Deputy Secretary Jackson, "Therefore, I have determined that the current Department-wide HUD telework policy should be applied in like fashion in all program areas." He continued, "It is important to apply the policy carefully to each individual request." (JE 14)

On September 14, 2007, Ms. Mitcheltree, Director in Indianapolis, sent an e-mail to all multifamily staff ". . . that management . . . is . . . reassessing all telework arrangements . . ." (JE 37) There was no request of employee or union input, no notice under Article 5 of the Agreement was given. On February 14, 2008, Ms. Mitcheltree conducted three 30-minute meetings with groups of the multifamily staff who teleworked (each doing so two days each week). Each was presented with a new telework agreement reducing the two days to one day to improve "office coverage." [testimony of each teleworker] There was little or no discussion. [p. 350] The affected employees had to sign and return the new telework agreement in seven days, or they would be considered as no longer wanting to participate in the telework program. All of the employees signed the new agreements, "under duress, under protest, and with fear of retaliation."

On March 26, 2008, 13 multifamily employees filed a grievance. At the second step, all were offered a settlement that could result in two days of telework provided each agreed to a five-day, eight hours/day schedule. In other words, those on an alternative work schedule (AWS) would have to change. All settled other than: Castillo, Gordon, Hatcher, Hires, and Jeter-Newburn. (Note: Roberts settled in January 2009, and Richardson retired). Those five remaining requested their grievances be elevated to arbitration and the union agreed.

Supplement 3 is part of the parties' Agreement, it implements the HUD telework program, and paragraph 1 provides that each employee requesting to participate "will be fairly and equitably considered." Neither the National union nor the local were invited to be part of the reassessment process. Employees were not invited to participate. The Director only stated that she had an "open door" policy so the union or employees could have come to her. [examples pp. 85-86, p. 91, p. 325]

Indianapolis work goals have all been met and completed for all years. [examples pp. 511-512, p. 656, pp. 766-767, p. 861] None of the employees who testified had any unacceptable or deficient Customer Service evaluation. [examples p. 70, p. 290, p. 340, p. 830]

The parties' Agreement (JE 1) was approved March 30, 1998. Article 17.07 (3) makes Management responsible for determining office coverage requirements. HUD produced no office coverage standard. HUD produced no Indianapolis office coverage baseline that was needed to correct any perceived problem. [pp. 180-181, p. 510]

Telework is not part of Alternative Work Schedules (AWS) (JE1, Article 17.02). Thus, telework is not subject to being overridden to maintain office coverage pursuant to Article 17.07 (5). Article 17 is clear, that “upon demonstrated need” Management can address schedule changes – but not telework. Nothing in the Agreement allowed HUD to adjust approved telework agreements, or allowed supervisors to create new telework agreements. [examples p. 213, p. 268]

Supplement 3 addresses telework agreements, not “schedules.” Telework is not a “schedule.” Even Management’s “Telework Program” document (JE3, starts 4th page back) is not to impact work “schedules:” “These policies and procedures have no impact on the current work schedule provisions governing covered employees.” Management’s “Telework Program” document was not negotiated by the Parties, it is not part of the Parties’ Agreement, and it covers non bargaining unit employees. HUD has simply confused “telework” and “schedules.” Telework is about work location. From the testimony of Management’s witnesses, it is clear that HUD should have reassessed “schedules.” Telework was used as an enforcement tool and it was applied only to those employees teleworking, and no consideration or changes were made to non-teleworkers and their role in office coverage. Thus, Supplement 3 was violated because telework was reassessed, but it was based on employees’ schedules; and, because only teleworkers’ schedules were assessed, and not all workers.

Management did not demonstrate any need to change anything – not schedules, not telework agreements. [p. 817] Absolutely no report was generated that addressed need. HUD merely decided that teleworkers would have to make changes.

Ms. Anderson, HUB Director of Operations testified that she was “just shocked to see so few people there” during her once per year visit in May 2007. [p. 494] She did not consider that there had been a number of Indianapolis retirements. Pp. 98-99] She did not consider that perhaps the office had too few employees. HUD believed that coverage can only be done when in the office. [p. 508] To the contrary, phone calls can be received/answered on telework, especially considering that there are generally only one or two “cold calls” on any given day.

Ms. Anderson testified that lender Mike Petri said that “he could never reach the – anybody in asset management, because they were teleworking; they weren’t in the office.” [pp. 484-484] It is not credible that no one could be reached because of telework. Why did this not come up sooner? Why was no specific follow-up conducted? This and other second-hand comments were only assertions. HUD made no reassessment of how many employees are needed on a given day. Mr. Castillo explained that one reason phone calls are not returned is because Management does not turn off the phones of retirees. [p. 253] There is a policy problem when Ms. Anderson cannot reach the Indianapolis Director by phone. [p. 483] Why are the phones not being answered by program assistants (GS-7s)? [p. 479]

Mr. Hinsberger testified regarding “complaints” from Indianapolis office supervisors. [pp. 773-774] Generic complaints (lacking dates, times, details) provide no probative value. Complaints from outside clients not receiving timely responses is completely location neutral. Telework is a location program, and there was no justification to reassess telework based on complaints over timely production of work. HUD had daily reports from teleworkers letting their supervisors

know what work they were doing or had accomplished. [p. 892] Non-teleworkers did not have to so report. In the past, a supervisor suspended a teleworker's agreement when there was a performance issue. After correcting the problem, the employee resumed telework. Maybe the issue is one of the number of employees. HUD did not bother to assess what was creating the original concern. HUD only focused on changing telework.

Mail, including FedEx packages, was described as a problem in the office. [pp. 859-860] While there needs to be a policy on opening mail, this is not an issue regarding telework. Teleworkers are required to be in the office a minimum of two days per week, and no one in Indianapolis is allowed to telework more than two days per week.

Ms. Mitcheltree believed that the office needed someone in the office between the hours of 8:00 a.m. to 4:45 p.m. [p. 858] Not all employees have to follow that schedule since Supplement 67 allows a 6:00 a.m. start time. This means that core hours now end at 2:30 p.m. HUD did not demonstrate who was or was not in the office during those hours, or if there were too few employees in number or type of skilled employee available.

The alleged complaints regarding office coverage in Indianapolis are what made Multifamily reassess telework. Some of the complaints occurred after the reassessment. Regardless, the real issue may have been schedule changes, not telework changes. Changing teleworkers' days out of the office are not schedule changes, they are telework agreement changes. There is no policy for management to change or modify telework agreements.

There are many relevant facts that HUD failed to demonstrate, such as: which employees missed calls; what days were missed or work not done; missed calls may have been for employees in the office; work deadlines missed nor that telework was responsible; that other options were seriously considered; and many others.

ARGUMENTS

STIPULATED ISSUE 1: Did HUD violate the Collective Bargaining Agreement for Multifamily HUD employees in the Indianapolis, IN office?

Supplement 3 (JE3, first three pages) is the only negotiated process for implementing telework within HUD. (Joint stipulation 3) It does not require any particular guidelines that were not agreed to by the Parties. [p. 149] HUD's "Telework Program" (JE3, starting 4th page in) was never negotiated. Training about telework has not been provided to supervisors, and no one who negotiated Supplement 3 has advised Management in this matter. HUD's guidelines are merely Management interpretations of the contract and as long as they don't interfere with the contract the union doesn't have a problem. [p. 158]

The Director's memo of February 15, 2008, (JE29) to three employees who were unable to attend the prior day's meeting, has the subject line "Telework adjustment" and states, "and have adjusted Multifamily's telework agreements." At least 13 employees did not approve of the changes to their telework agreement and filed grievances. The changes were done without input from employees or the Union. While Supplement 3 has provision for terminating a telework

agreement, there is none for changing, modifying, altering, or adjusting. To terminate, there needs to be "unusual circumstances." The Union's witness, Ms. Federoff, provided a correct definition, "so unusual it would not have been considered in the initial application for telework." [p. 160] Office coverage should be considered when approving an agreement.

Every witness testified that all work goals were met, all performance goals by employees were met, and no testimony indicated that fewer employees created an adverse impact to HUD work or any inefficiency to the agency. There was no testimony that workloads were higher in the Indianapolis office than other HUD offices. There was no basis to believe that changing telework agreements would solve any "concern" they were trying to address.

Management's refusal to consider individual employee requests regarding telework violates Supplement 3, Section 1, "management agrees that each request to participate in the telework program will be fairly and equally considered." Article 4 of the Parties' Agreement (JE1) was violated. "Employees shall be treated fairly and equitably in the administration of this Agreement and in the policies and practices concerning conditions of employment . . ."

Article 5 of the Parties' Agreement (JE1) was violated because no notice of change to working conditions was provided to the Union. Article 5.03 states, "Local Management shall give in writing to the Local or Geographic Area designated Representative, as appropriate, proposed changes relating to personnel policies, practices, and conditions of employment." As applied and implemented in the Indianapolis office, the following changes to personnel policies, practices, and conditions of employment occurred: which days a teleworker could work; how many days a teleworker could work; how phone calls were to be taken at home; the use of cell phones (unpaid); the requirement to report daily to the supervisor of work accomplishments while teleworking.

One of two conclusions is possible: one, that there was a reassessment of telework agreements; or, that HUD was really wanting to change schedules. If the former, then they violated Supplement 3, Article 5, Article 17, were not fair and equitable as in Article 4, were arbitrary and capricious, and violated Article 34 by not bargaining locally work place condition changes. If the latter, they violated Supplement 3, Article 17, and were very arbitrary and capricious. At the very least, HUD is disingenuous with what they told employees about telework reassessment needs; at the most, HUD is trying to cover their mistakes with the new schedule needs argument that came up as a response to the grievances.

Schedules are flexiplace where you can work five days at 8 hours with adjustable start and end times each day; or, 4 days at 10 hours each; or, 5 days then 4 days (called a 549); or, a 6:00 a.m. start time that goes to 2:30 p.m.. Nowhere in the Agreement or in Supplement 3 is telework called a schedule. Teleworkers have work schedules before they are approved to telework.

Regardless of the schedule/telework failure by HUD, HUD violated Article 17.07 (5) of the Agreement because they did not demonstrate a need to have done any of what they did. HUD did not demonstrate that performance was a problem, nor did they even demonstrate that that any problem was due to the telework days, number of days, or the teleworkers' schedules. HUD did not demonstrate that they considered the elements provided for in Article 17.07 (3) as they made

no determination of the number or types of employees needed or the skills needed. Remember, no non-teleworkers were reassessed as to any element. Management has never answered the question of what is the definition of office coverage. HUD only concentrated on the number of days teleworkers could telework.

Ironically, all grievants were offered settlements that allowed for two days of telework. (JE8-13) But not all were offered the same days, and a condition for some was that they agree to different schedules. Frankly, a very simple solution may have been for Management to provide for a front office receptionist – not change the work places of Management’s most highly productive employees.

Article 18.03 (1) requires that compensatory or overtime must be available for non-exempt employees. All of these grievants are non-exempt under FLSA. There was testimony that one or more received phone calls before or after work hours and even on weekends. This is because a telework must set the phone system to forward calls to a personal phone when leaving the office before a day of telework. Ms. Hatcher testified that “they could see my number.” [p. 120] At the very least, the Union established that overtime was worked and a damages hearing could be held just for the sake of determining hours on each call. If it is found that Article 18 was violated, that overtime was worked, and Management had knowledge or should have knows, then this would also be a violation of the FLSA Settlement previously agreed to between HUD and AFGE Council 222.

STIPULATED ISSUE 2: Did HUD arbitrarily and capriciously set the number of telework days, specific telework days and other work condition requirements for teleworkers in the Indianapolis Multifamily Program Office?

HUD only reassessed options to apply to teleworkers, not any other employees. HUD started the process in an arbitrary and capricious manner, and any results will be the same. The days for telework were arbitrarily and capriciously selected. There was no discussion with employees, they were presented as take-it-or-leave-it. [p. 68] There was no demonstrable nexus between each teleworker and the actual days each should be in the office because of office coverage issues. HUD created no method for assigning days. There was never any determination of what would be enough for office coverage.

HUD was arbitrary and capricious in deciding that employees who work five days per week may work two telework days, but employees who work 4 days/week, 10 hours/day can only work one telework day. Supplement 3 allows up to three days per week to telework. Further, Indianapolis Management is not allowing telework on Fridays. Management’s creation of the agreements was arbitrary and capricious for not allowing individual fair and equal consideration, but instead being lumped into a global consideration.

STIPULATED ISSUE 3: Did HUD violate the fair and equitable treatment of employees under the Collective Bargaining Agreement with the implementation of telework in the Indianapolis Multifamily Program Office?

A fundamental underpinning of an effective civil service is both the perception and the reality of fairness and objectivity in the treatment of employees. As of February 14, 2008, Management rewrote the telework agreements in violation of Supplement 3 (1) which states that Management consider "each request . . . fairly and equally . . ." Telework is by voluntary request by an employee. Not only did HUD Indianapolis write the new agreement, they did so without employee input.

STIPULATED ISSUE 4: Did HUD violate statutory and contractual requirements for bargaining changes in working conditions for local Indianapolis Multifamily Program employees?

Article 5 (JE1) is the process for HUD to notify the Union if there are to be changes to work place conditions. Article 5.03 is titled, "Ground Rules for Mid-Term Bargaining at the Local Geographic Area." Article 34 (Local Supplements) in Article 34.02 references the ground rules found in Article 5. Disputes over an issue can be grieved (Article 34.03).

Statute and Contract both allow for bargaining:

- 5 U.S.C. 7106 (b) Nothing in this section shall preclude an agency and any labor organization from negotiating –
- (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
- (2) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

No notice was given to local Union officials on any changes to the actual provisions or additions to Supplement 3 or the telework process. Local Union officials did deliver a Notification on the need to Bargain, which was given to local Management for the purposes of starting negotiations on work place changes. HUD Local 3956 sent HUD a Union Demand to Bargain with their first preliminary proposal that nothing change until bargaining is done. This was signed as received by Ms. Mitcheltree on 2/21/2008 (JE 39, page 6). A status quo proposal is negotiable. 60 FLRA No. 34 found that a proposal on CWS to maintain status quo was fully negotiable.

Workplace changes took place. Changes to the number of days employees are allowed to telework; three days was virtually eliminated from the Agreement; days employees' telework is limited by disallowing certain days, such as Wednesday and Friday. FLRA has concluded that "We will find that a proposal is within the duty to bargain under the Statute if it (1) vitally affects the working conditions or the unit employees, and (2) is consistent with applicable law and regulations." (33 FLRA No. 68, FLRA v. HUD Council #222 and Department of HUD 0-NG-887 [22 FLRA 552] October 28, 1988) HUD simply refused to bargain, claiming that telework was already bargained and they were not changing the policy. Article 34 has been arbitrated by HUD and AFGE Council of HUD Locals #222. "2. Article 34 of the Agreement does not preclude the Union from bargaining at the local level on Union initiated mid-term bargaining proposals." (93-04d) Article 34 language is the same in JE1 as it was at the time of the arbitration decision. Telework agreement changes are working condition changes.

Local 3956 sent HUD a union Demand to Bargain with their first preliminary proposal that nothing change until bargaining is done. (JE39, 6th page in) HUD failed to bargain locally with the Union and violated Article 34, Article 5, and 5 U.S.C. 7106.

CONCLUSION

Reassessment of any program or policy can be good. However, a reassessment of a program is something that HUD should undertake, not an individual office. Indianapolis failed to fairly consider and reassess telework. They focused on telework agreements and the telework program, and nothing else. Work schedules in HUD do not include a schedule called "telework" because telework is a location environment. HUD Indianapolis reviewed schedules but changed telework agreements. It made changes based on conclusionary and anecdotal expressions of problems. The perceived problems had no nexus to teleworkers. HUD could not even justify taking the reassessment action. There is no office coverage issue. The entire agency action about reducing the number of telework days to one for telework because of office coverage needs falls completely apart on HUD's own actions of offering back the very two days just to settle the grievances.

HUD violated many sections of the Collective Bargaining Agreement, including: Article 4, Article 5, Article 17, Article 18, Article 34, and Supplement 3, as well as other law, rule, Statute and Regulation.

REMEDY EXPECTED

1. Put all teleworkers back on their original agreements that the employee submitted and had approved, pre February 14, 2008, including any employees that were forced into new agreements to get their two days back. (Back to status quo before changes.)
2. Negotiate with the Local Union any Local changes to the Contract or Supplement 3.
3. Pay employees for business calls.
4. Pay employees for cost increases when their telework agreements changed including extra driving miles.
5. Stop requiring special reporting of daily work completed for just teleworkers.
6. Stop requiring phones to be forwarded to teleworkers homes. Allow teleworkers to pick up their calls by calling into the office. Make sure time for returning calls is included in the is process.
7. Pay all employees for overtime suffered and permitted or hold damage hearings under the FLSA settlement agreement process for any affected employee.
8. Suggest that HUD train their supervisors and Labor and Employee Relations personnel regarding the contract, telework, and negotiability.

9. Do not retaliate against any employees for filing the grievances, being a witness, or for anything associated with this arbitration.
10. Require all contract [provisions to be followed.
11. Have HUD par for the entire cost of this arbitration as the losing party as noted in the applicable contract provisions.
12. After implementation of all remedies, the Union also suggests a team building session for multifamily in Indianapolis.

POSITION OF MANAGEMENT

HUD did not violate the Parties' Agreement when it implemented a revised telework schedule. The rescheduling of teleworking employees was necessary to ensure adequate office coverage. HUD is a public agency whose mission is to respond to public needs for access to the Agency. The rescheduling was necessary because the number of teleworking employees increased, the number of employees decreased through retirement and attrition, and case workload did not decrease. Prior to the scheduling change, office coverage was almost non-existent at times, creating an undue burden on employees and managers who remained physically in the office. There were adverse effects on the office and on the Agency's clients.

HUD was legally entitled to change telework schedules pursuant to the CBA, Supplement 3, and the Agency's Telework Program guide. HUD did not arbitrarily or capriciously change the number of teleworking days or work conditions, but implemented changes in scheduling to be the least disruptive to employees and to treat each employee fairly and equitably during the process. HUD did not violate any statutory or contractual requirements.

1. Did HUD violate the Collective Bargaining Agreement for Multifamily HUD employees in the Indianapolis, IN office?

The CBA was signed on February 10, 1998 and was effective on March 30, 1998. (JE1) Supplement 3 (JE3, Telework Program) was signed on February 27, 1998, and was effective in March 1998. HUD's "Telework Program" policy (JE3, starting 4th page in) was implemented in March 1998 to give guidance to HUD teleworkers. Links to the policy are on both the HUD and the Union websites. The Union has never objected to the policy, and arguably has ratified it by including the link on their website.

The telework agreement falls under the "covered by" legal doctrine that states that management does not have to engage in midterm bargaining on subjects that are already contained or covered by an existing collective bargaining agreement.

Supplement 3 states that managers have control of the office teleworking program, and if at any time it is determined that teleworking is having an adverse impact due to unusual circumstances warranting involuntary termination, the arrangement may be terminated by giving a five-day notice to the employees and to the Union, including the rationale for terminating the agreement. The Telework Program policy guide (JE3, starting 4th page in) states that, "Each manager is responsible for evaluating the impact of the Telework Program for the respective office/program." It further provides, "An employee's office work must not affect the organizational mission/functions," and, "If at any time, it is determined that a telework arrangement is having an adverse impact on work operations, the operation may be modified or terminated immediately."

Section 17.07 (3) of the CBA states:

Management shall be responsible for ensuring that offices are adequately covered and for determining office coverage requirements . . . * * *

Official Coverage includes but is not limited to the following:

- (a) Answering phones;
- (b) Expeditious handling of inquiries from the public;
- (c) Maintaining clerical, technical, and professional support of the office functions;
- (d) Providing official representation at essential meetings;
- (e) Handling occasional or recurring peak workload periods;
- (f) Meeting deadlines; and
- (g) Meeting other program needs.

Additionally, 17.07 (5) of the CBA states that:

Upon demonstrated need, Management may override, either temporarily or permanently, the work schedule choices . . . in order to maintain adequate office coverage, to meet other operational needs of the Department or because of lack of work. The determination of who shall be required to work particular tours of duty in order to need coverage or other operational requirements shall be within the discretion of Management. To the extent possible, however, personal scheduling preferences shall be considered in making such decisions. When an employee's work schedule is changed, Management shall, where work requirements permit, give the employee and the union notice of such change at least five (5) days in advance of its effective date.

Section 17.07 (6) of the CBA states:

If at any time during the period of this Agreement, the Department determines that the operations of the Department or any of its organizational components have been substantially disrupted; that the productivity of the Department or the level of services which it provides to the public have been significantly diminished; or that the Department's operating costs have increased as a result of this Alternative Work Schedule program, the Department may suspend or

terminate this program. The Union shall be notified of such action not less than ten (10) days prior to its effective date.

The Union argues that the scheduling changes were changes relation to personnel policies, practices, or general conditions of employment, and therefore should have been bargained for. (JE36) A change in a telework schedule does not fall under any of these terms, but is covered by the terms of the CBA, Supplement 3, and the policy guide that gives guidance to the Supplement, because schedule changes are within Management's discretion if coverage issues exist within a HUD office. Teleworking is a workplace privilege and an employee option, but not a right, and is treated as an option and privilege by the CBA in allowing Management to cancel alternative work schedules for reasons such as reduced office coverage. Telework policy, practice, or general conditions of employment were not changed by rescheduling these employees, but remained in place during the time these changes occurred.

During the arbitration hearing, office coverage was discussed. The Union's expert witness (Federoff) said that there is no standard. [p. 181] Likewise, Lowery said, No, there's no standard." [p. 210] HUD Management recounted the lack of coverage in the office, and the consequences of lack of coverage due to the number of teleworkers and the number of retirements in the office.

Ms. Anderson, the Director of Operations for the Multifamily HUB in Chicago, testified that on a trip to Indianapolis that she was shocked at how few people were in the office. [p. 479] She stated that this was a problem, since HUD staff are supposed to be assisting people, and that that was impossible since there was no one in the office. [p. 479]

Mr. Peal, a Supervisory Project Manager in Indianapolis, stated his frustration,

So the thing is, you know, it's creating a problem for me, you know, because when people aren't here and we're already short-staffed, then you – you're sitting there and say, "Well, you know, this needs to be done," but, you know, there's nobody to give it to. I mean, you know, you – you're playing a ball game but nobody to hand the ball to. [p. 605]

Mr. Hinsberger, Multifamily HUB Director for Illinois and Indiana, testified as to the problems in the Indianapolis office during his testimony.

. . . there were several issues. When they [PR Mortgage] would call the office, whoever they needed wasn't available to, to help and, you know, so they kind of self-medicated in a way. They would figure out who would be there and wind up calling who they would know would be there rather than going to the appropriate staff person. * * * So it was shifting where the work was supposed to be done to, to people that weren't supposed to be doing the work. * * * I was actually getting the same complaints from supervisors, you know, that they were picking up work, you know, that staff was supposed to be doing and covering because you know, they're attempting to provide the service to, you know, the client. * * * And it was similar, similar kinds of issues, you know. They [Glick Properties]

just – they just weren't getting timely, timely responses, so we knew we had to do something, you know. It wasn't so much when telework first started, but when we have – I think when you, when you take the telework with people being out two days a week but then you also couple that with, with the various work schedules, it's, it's difficult. You have to make sure that at least you've got people coming to work on a regular basis, maybe not every day, but on a regular basis so that they can deal with mail that comes in, their mail that comes in, snail mail. It's not electronic mail, so they, you know, at some point have to deal with it, or you at least you have to make sure there's backup in the office to take care of, you know, the issues that arise that need immediate resolution. [pp. 777 – 779]

Ms. Mitcheltree, the Director of Multifamily Housing in Indianapolis, stated that she was having problems with coverage issues in the office, and said,

Well obviously, when, when I had gotten to the position I was in, I came in as director, at the end of the days, days on end, sometimes I would be the only person here. Sometimes there might be another one from management here. If somebody needed something or if somebody came in from another division, there was just us to do it, to take care of whatever they wanted. If calls came in, we were the ones that had to answer the calls. * * * I – generally we took care of what needed to be done. I mean our – one of our jobs is to serve the public, so if an outside client or inside client that needed something, we would take care of it. [pp. 860 – 861]

Mr. Iwamoto, a non-union team leader of the Multifamily Division in Indianapolis who does not telework by choice and is physically present in the office five (5) days a week, testified that he would have to respond to phone calls for teleworkers not present in the office [p. 539] and that he received telephone complaints about people on telework who weren't available by telephone or didn't respond to their e-mails. [p. 540] He recounted that with one particular client, this occurred many times. [p. 549] He tried to fill in for those teleworkers not responding, and listened to customers vent about dissatisfaction with the service provided by the Multifamily Division of the Indianapolis HUD office. [p. 540]

Ms. Hetue, Chief of Contract Administration who became a manager during the height of the teleworking period, realized that there was staff available after the scheduling change saying, "And all of a sudden, this one day, it's, like, 'Wow, people are here.' It was, you know, it was like an 'Aha' moment for me, that I had – you know, there was staff available." [p. 559]

All contractual notice provisions were met by HUD Management. There was five months advance notice before the meeting, and 16 days after the meeting before the changes were implemented. The changes were pursuant to the CBA and Supplement 3.

2. Did HUD arbitrarily and capriciously set the number of telework days, specific telework days and other work condition requirements for teleworkers in the Indianapolis Multifamily Program Office?

According to Black's Law Dictionary, the term "arbitrary and capricious" is a characterization of an action or decision taken by an administrative agency or inferior court meaning willful and unreasonable action without regard of the facts or without determining principal. *Elwood Investors Co. v. Behm*, 79 Misc. 2d 910, 361 N.Y.S.2d, 488, 492.

The testimony showed that painstaking preparation and thought was made to determine the appropriate days for employees teleworking. As discussed above, office coverage was affecting the service provided to customers and affecting how the work was allocated within the office. Telephone meetings were held with HUD managers Ms. Mitcheltree, Mr. Peale, and Franca Hetue, in consultation with HR Specialist Ms. Harvey and Hub Director Mr. Hinsberger in Chicago. These meetings took place from October 2007 to February 2008. [p. 874] Detailed color-coded charts were created in order to assess teleworking and create a fair schedule for affected employees. [p. 876, JE31] Management requested options from employees [p. 801] and even suspended the whole grievance process for three weeks to give the Union the opportunity to propose a solution. [p. 803]

Management spoke weekly to HR Specialist Ms. Harvey to ensure they were in compliance with policy and the law. [p. 876] Employees affected by the change had every opportunity to speak with Ms. Mitcheltree about the proposed changes [p. 923], yet no one did [p. 930]. There was nothing arbitrary or capricious about the process, since careful thought was made to ensure teleworking existed for those that desired it in balance with the need for office coverage.

3. Did HUD violate the fair and equitable treatment of employees under the Collective Bargaining Agreement with the implementation of telework in the Indianapolis Multifamily Program Office?

"Fair and equitable" includes free from bias, fraud or injustice, is equal and legitimate, and does not take undue advantage. Section 4.01 of the CBA states that, "Employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment, and may grieve any matter relating to employment."

Although the CBA allows HUD to terminate the teleworking program if unusual circumstances arise (JE3) or if the level of services provided to the public is significantly diminished (JE1), HUD Management went out of its way to be fair and equitable to teleworking employees, and put much thought into the schedules for the employees. Management provided the staff the opportunity to have input. [p. 876] Although HUD could have terminated the Telework Agreements upon simple notice to the Union and the employees, HUD Management waned staff to continue teleworking, but understood the coverage problem in the office. [pp. 798 – 799] In the February 15, 2008, memo to Ms. Hatcher, an employee who missed the February 14th meeting, the fair and equitable treatment of the affected employees is readily apparent. The memo states in part, "The above changes allows telework to continue for everyone, which is what we wanted to be able to do, yet balance that with the needs of the office." (JE29, 12th page in) Management balanced the needs of both the employees and the office.

4. Did HUD violate statutory and contractual requirements for bargaining changes in working conditions for local Indianapolis Multifamily Program employees?

HUD did not violate any statutory or contractual requirements that it was obligated to uphold either under the Federal Service Labor-Management Relations Statute (FSLA) located at 5 U.S.C. 7101 et seq., (JE4) or the CBA (JE1) when it rescheduled local teleworking Indianapolis multifamily program employees. These employees were rescheduled due to increasing problems related to office coverage because of eighteen (18) retirements that occurred within seven (7) years in the division, and an increase in the number of teleworkers to 50% of the total number of employees within the Multifamily area. (JE13) [pp. 769, 771, 98, 99, 100]

The Union argued that the issue of telework falls under Article 5 of the CBA, and that any change in telework falls under changes related to “personnel policies, practices, and conditions of employment,” entitling the Union to bargain with HUD Management on the issue of telework scheduling and hours. (JE36) The rescheduling of teleworking days due to office coverage issues is neither a policy change, nor a change in practice, nor a change in any condition or employment. Teleworking is a workplace privilege, not a right or a condition of employment, and the CBA is quite clear that it is a revocable privilege should circumstances arise that make the teleworking option interfere with the mission and level of service. Under Section 17.07 of the CBA, Management is responsible for ensuring that the mission is carried out and for determining the operational requirements of the Department.

Section 17.07 (3) of the CBA states that “Management shall be responsible for ensuring that offices are adequately covered and for determining office coverage requirements . . .”

Section 17.07 (5) states that “Upon demonstrated need, Management may override, either temporarily or permanently, the work schedule choices . . . of individual employees in order to maintain adequate office coverage . . .”

Section 17.07 (6) states that “If at any time during the period of the Agreement, the Department determines that the operations of the Department or any of its organizational components have been substantially disrupted; that the productivity of the Department or the level of services which it provides to the public have been significantly diminished . . . the Department may . . . terminate this program.”

Supplement 3, ¶ 2 (JE3) states that “In the case of unusual circumstances warranting involuntary termination of a Telework Agreement . . . Management agrees to give the employee and the local union five (5) days’ advance notice, or as soon as practicable, before termination.”

Telework rescheduling is not a change in working conditions due to the fact that it is a privilege and a workplace option, and therefore there are no bargaining issues that exist due to office coverage mandates covered by the CBA. Therefore, the FSLA statute that deals directly with collective bargaining on a change in working conditions would not apply in this instance. All proper notice requirements were met by Management. HUD acted within all statutory and legal requirements that it is bound to follow when it changed telework schedules.

CONCLUSION AND DEMAND

Although HUD was contractually entitled under the CBA to terminate teleworking for HUD employees in the Indianapolis Multifamily Division of HUD, it maintained teleworking for those employees and sought the least intrusive solution in order to restore office coverage and improve service to clients. Each HUD Management witness was credible and Management proved they did not violate any of the four issues presented, but acted correctly and lawfully when rescheduling telework employees.

Therefore, HUD Management requests a decision and finding that it acted in full accord and satisfaction of the CBA and the law when it rescheduled teleworking employees in the HUD Multifamily Indianapolis office. Further, pursuant to Section 23.04 of the CBA, HUD Management requests that the Union pay the Arbitrator's fees and expenses in this matter as the Union is the losing party.

FINDINGS OF FACT

("QDE" = Question Direct Examination; "QCE" = Question Cross Examination)

1. It appears that the Parties have maintained a good relationship as this Arbitration is the first one for the Indianapolis office and the Local Union. [p. 10] Hopefully, the positive relationship will continue notwithstanding this dispute, Arbitration, or Award.

2. Six grievances filed by individual employees who did not settle with Management were included as Joint Exhibits: Robert Castillo (JE8); Mena Gordon (JE9); Jeanette Hatcher (JE10); Nadine Hires (JE11); Teresa Jeter-Newburn (JE12); and David E. Richardson (JE13) (Mr. Richardson retired prior to the Arbitration Hearing). All six employees grieved unilateral changes made to their respective Telework Agreements during meetings called and conducted by Ms. Mitcheltree, Multifamily Director, Indianapolis office of HUD, on February 14, 2008. All six essentially sought the same relief. The remedy sought by Ms. Hatcher (JE10) is representative:

Return to the status quo:

1. Reinstate the Division's previous Telework Policy as established by longstanding past practice.
2. Reinstate my prior Telework Schedule.
3. Negotiate with the local union prior to making any Telework Policy changes.
4. Allow me to request a Telework schedule, then discuss with me any specific changes to that requested Telework schedule, including providing appropriate rationale for any proposed changes.

[Note: some also requested reimbursement for additional commuting and some requested training for Management regarding teleworking.]

These six original grievances were not individually at issue as part of the Arbitration Hearing. Instead, they are effectively merged into what the Parties referred to as GOP-1, which was brought to Arbitration. (JE38, 1st two pages)

Also, as GOP-1 was filed on behalf of all affected teleworking employees, the grievances individually filed by the affected teleworking employees will not be individually appealed to arbitration. The matters alleged in those individually filed grievances are integrally related to and adequately raised under GPO-1 and will therefore be presented at arbitration under GOP-1. (JE38, last page, "Notice of Invocation of Arbitration," August 29, 2008)

The Union's representative confirmed that, "We included those grievances [individuals'] under 38 that are listed here. [I]t's all the same issues of telework for the same employees as the six that are listed." [pp. 952-953] The remedy sought by GOP-1 is:

Return to the status quo:

1. Reinstate all former individual telework schedules.
2. Reinstate the Division's previous telework policy and past practice, including the right of employees to request a specific schedule and give input into proposed changes thereto.

3. Compensate all teleworkers for travel and other expenses incurred due to the new schedules.
4. Require MF Management to seek and participate in training for telework in order to help understand the many benefits of the telework program. (JE38, 2nd page)

The Grievant in GOP-1 is AFGE Local No. 3956. It was filed by the Union, and received by Management, on 3/28/08. The description is as follows:

This grievance is filed on behalf of all affected teleworking employees in the Indianapolis MFH Program Office. The union is grieving the changes in the Indianapolis Multifamily telework policy.

The following is a timeline of events leading up to a massive change in the Indianapolis' Multifamily Telework Policy, the implementation of the telework policy and change in the working conditions of employees who choose to telework.

On February 12, 2008, AFGE Local 3956 President Jeff Terry issued a memo to Eileen Mitcheltree on the then "rumored" changes in the MF telework policy. Ms. Mitcheltree had issued a memo regarding three meetings to be held on February 14, 2008 to "share the results of (management's) evaluation of the telework schedules and to provide new telework schedules and agreements." The union was invited to attend. In part, the union memo to Ms. Mitcheltree requested Article 5 Mid-term bargaining over the "rumored" changes." It also "strongly urged . . . (management) to cease and desist from conducting the meeting until the provisions of Article 5 have been met."

On February 12, 2008, via email, Izella Harvey, as the Labor Relations Specialist assigned to Indianapolis, responded to the union's February 12 memo to Ms. Mitcheltree. Ms. Harvey states that Telework is governed by Article 2 of Supplement 3. In part, Ms. Harvey's response states, "(T)he union does not get to bargain on telework. This is not an Article 5 matter." This memo constructively denied the union the right to mid-term bargain over the "rumored" changes to the telework policy.

On February 13, 2008, President Terry sent additional emails to Ms. Harvey in an attempt to "informally" resolve the impending dispute over the "rumored" changes to the telework policy.

On 02/14/08, Eileen Mitcheltree, Director of the Indianapolis MFH Program Office, announced unilateral changes to the Indianapolis MFH Division's existing Telework Policy and long standing past practices. Three staff meetings were held that day for teleworking employees. Some teleworking employees were unable to attend due to illness or prior scheduled leave. Those unable to attend were never afforded the right to a face-to-face meeting with Ms. Mitcheltree. Mitcheltree hand-delivered new telework agreements to each teleworker. She announced that

each teleworker would either accept the newly assigned agreement as is or be terminated from the telework program. She told teleworkers she would not listen to or consider any individual proposals to modify anyone's new telework agreement. None of the agreement changes were discussed in advance with the teleworking employee.

The unilateral changes announced that day include: teleworker agreement, with the scheduled day of week which the teleworker would work at home are not determined solely by management and assigned, rather than requested by and with input from the employee; the number of telework days was changed from two days per week to one; a telework day now cannot adjoin a day off (either compressed or weekend); a personal telephone number must now be included in office voicemail messages when teleworking or call forwarding to the teleworker's home; and, a written summary of work performed must now be submitted after each telework day.

In addition, Ms. Mitcheltree changed the "official" HUD Telecommuter Agreement, which is found on the HUD at Work Telework Website, which is contrary to the Secretary's directive that the policy should be applied in like fashion in all program areas. Surely that would mean to use the same agreement throughout the department, the agreement provided on the HUD Telework website.

Language was added at the end of the telework agreement that states, "(T)he employee understands that flexible workplace arrangements are not a right or condition of employment. Management may end an employee's participation as a telecommuter if the employee's performance declines, if the telecommuting arrangement is detrimental to organizational needs, or if any part of the terms of this agreement are violated . . ."

The unilateral changes were made without giving the teleworker the opportunity to request a specific schedule or to give input into their schedule, which has been long standing past practice.

The employees, by not wanting to lose their bargained for right and long standing practice to telework, signed the new agreements, but signed them "Under Protest, Under Duress and In fear of Future Retaliation. The "new" telework agreements were not executed, signed by management, until the next day. Along with the supervisor signature was added the paragraph that follows: "I am accepting your signature as agreement that you want to participate in the program. There are no duress or protest or retaliation issues. Participating in the telework program is a matter of your choice that you have indicated by your signature. You have the right to terminate your participation in the telework program at any time." Despite this added paragraph, employees clearly felt there were protest, duress and retaliation issues, which cannot simply be dismissed by management adding the paragraph after the fact.

By its actions, management has violated various sections of the parties' Collective Bargaining Agreement (CBA), long standing past practice, HUD's existing national telework policy, OPM's existing telework policy, and various sections of the FLRA statute.

These changes have placed undo hardship on employees, caused serious and perhaps irreparable loss of trust and morale between management and bargaining unit members in both the changes in the policy, its implementation and the refusal to bargain or even discuss the changes prior to them taking place.

The provisions alleged to have been violated include:

Articles 3, 4 (4.06 Morale), 5 and 34, Supplement 3, HUD Program Policy Guide, Telework memo from Secretary Jackson and all other applicable parts of the CBA and its Supplements. Also, long standing past practice. Also, appropriate sections of the Federal Service Labor-Management Relations Statute.

3. GOP-2 was also brought to Arbitration. (JE38, pages 3 – 6) It was filed by the Union, and received by Management, on 3/28/08. GOP-2 resulted from the merger of two grievances of the parties that were merged into one. (JE38, 9th page in) Both begin the description of the grievance as:

This grievance is filed on behalf of the AFGE Local 3956.

Management failed to conduct mid-term bargaining . . .

The remedy sought by each are the same:

1. Publicly cancel the unilateral changes made to the former telework policy and past practice.
2. Reinstate the former telework policy and past practice.
3. Give proper notice to the Union of any proposed changes to the telework policy and past practice.
4. Meet and bargain in good faith with the Union, if requested to do so, over any proposed changes to the telework policy and past practice.
4. Reinstate all former individual telework schedules.
5. Reinstate the ability of teleworkers to request and discuss specific schedules and changes thereto.
6. Compensate teleworking employees for travel and other expenses incurred due to their schedule changes.

While the wording of each of the two merged (GOP) grievances vary, when combined, they sequentially identify events starting on February 12, 2008, and continuing through February 22, 2008. Combined, essentially the two merged grievances of the parties read as follows:

This grievance is filed on behalf of the AFGE Local 3956.

Management failed to conduct mid-term bargaining over proposed changes in the multifamily telework policy. In addition, management failed to notify the union of the proposed changes. Finally, management failed to discuss the proposed changes prior to the implementation.

On February 12, 2008, AFGE Local 3956 President Jeff Terry issued a memo to Eileen Mitcheltree on the then "rumored" changes in the MF telework policy. Ms. Mitcheltree had issued a memo regarding three meetings to be held on February 14, 2008 to "share the results of (management's) evaluation of the telework schedules and to provide new telework schedules and agreements." The union was invited to attend. The union memo to Ms. Mitcheltree requested Article 5 Mid-term bargaining over the "rumored" changes." It also "strongly urged . . . (management) to cease and desist from conducting the meeting until the provisions of Article 5 have been met."

On February 12, 2008, via email, Izella Harvey, as the Labor Relations Specialist assigned to Indianapolis, responded to the union's February 12 memo to Ms. Mitcheltree. Ms. Harvey states that Telework is governed by Article 2 of Supplement 3. In part, Ms. Harvey's response states, "(T)he union does not get to bargain on telework. This is not an Article 5 matter." This memo constructively denied the union the right to mid-term bargain over the "rumored" changes to the telework policy.

On February 13, 2008, President Terry sent additional emails to Ms. Harvey in an attempt to "informally" resolve the impending dispute over the "rumored" changes to the telework policy.

In addition, proper notice was not given to the Union prior to making, announcing and implementing these changes, nor did management bargain or offer to bargain with the Union over these matters prior to making, announcing and implementing these changes. The Union subsequently requested bargaining on these matters and management refused.

Management failed to conduct mid-term bargaining over unilateral changes, imposed by the Indianapolis Multifamily Director, to the multifamily telework policy.

On February 14, 2008, in a series of three meetings, and some subsequent memos to those unable to attend the meetings, the Indianapolis Multifamily Director, Eileen Mitcheltree, announced a series of sweeping changes to the long standing past practices and bargained for telework policy. Proper notice was not given to the Union prior to making, announcing and implementing these changes, nor did

management bargain or offer to bargain with the Union over these matters prior to making, announcing and implementing these changes.

On February 21, 2008, in a memo to Ms. Eileen Mitchelltree, the union demanded to "Bargain over Management Initiated Change in the Indianapolis Multifamily Telework Policy.

On February 22, 2008, the Demand to Bargain over the Changes was denied in a memo from Izella Harvey, Human Resource Specialist. Ms. Harvey stated in part, "there has been no change in the Telework policy." She went on to state that the changes were to the "schedules" and have been made in "accordance with existing policy." The changes, however, were far more than a change in schedules and included changes in the HUD Telecommuting Agreement itself.

These changes have placed undo hardships on employees, caused serious and perhaps irreparable loss of trust and morale between management and bargaining unit members in both the changes in the policy, its implementation and the refusal to bargain or even discuss the changes prior to them taking place.

By its actions, management has violated various sections of the parties' Collective Bargaining Agreement (CBA), long standing past practice, HUD's existing national telework policy, OPM's existing telework policy, and various sections of the FLRA statute.

The provisions alleged in GOP-2 to have been violated include:

Articles 3, 4, 5 and 34, Supplement 3, and all other applicable parts of the CBA and its Supplements. Also, long standing past practice. Also, existing OPM and HUD policies. Also, Section 7116(a)(5) and other appropriate sections of the Federal Service Labor-Management Relations Statute.

In summary, the two Grievances that are the subject of this Arbitration are GOP-1 and GOP-2. However, as a practical matter, an Award on these two will effectively, by extension, provide an answer to the six aforementioned original employee grievances.

4. Eight of the Union's 13 witnesses were then current employees, all of whom originally filed grievances and five of whom had not settled as of the dates of their testimony. One of the original six grievants, David E. Richardson, (JE13) retired prior to the Arbitration Hearing and did not testify. The following is a brief summary of some of the common points of testimony by these employees.

| NAME | POSITION | SCHED. | PRIOR TW | NOW TW | PERF. RATINGS | AV TELE | AV VISIT |
|---|--|---|------------------|----------------------|--|---|--------------------------------|
| Hatcher [starts p. 60] | Project Mgr, Asset Mgt, Multifam (15 w/MF; 23 w/Govt.) | 5 days/wk 8hrs/day | 2 days | 1 day did not settle | Last 3: Highly – Outstanding cust. serv. same | 1-2/day | 0/wk 0/mo 2-3/yr |
| Castillo [starts p. 212] | Constr Analy, Multifam (8 w/MF & w/Govt.) | 4 days/wk 10hrs/day | 2 days T & TH | 1 day did not settle | Last 3: Outstanding cust serv. Highly/satisf/ or Outstand. | Unso- licited 0-1/day | Unso- licited never |
| Roberts GS-12 [starts p.287] | Project Mgr, Multifam (21 w/MF & w/Govt.) | 5 days/wk 8hrs/day | 2 days | 2 days settled | | | |
| Powers GS-12 [starts p. 296] | Project Mgr, Multifam (19 w/Govt.) | 5 days/wk 8hrs/day [changed 6 am to 7 am] | 2 days | 2 days settled | | | |
| Tursi [starts p. 314] | Project Mgr, Contr. Adm, Multifam, (15 w/MF & 20 w/Govt.) | 5 days/wk 8hrs/day | 2 days | 2 days settled | Last 3: Outstanding cust serv. same | | |
| Gordon [starts p. 338] | Asset Mgr, Asset Mgt, Multifam (10 w/MF; 20 w/Govt.) | 4 days/wk 10hrs/day | 2 days | 1 day did not settle | Last 3: Outstanding cust serv. same | Unso- licited 1-2/day | 0/wk 0/mo 0/6 mo 0/yr |
| Hires [starts p. 382] | Project Mgr, Production, Multifam, (8 w/MF & 28 w/Govt.) | 5/4/9 8:45-6:30 9 hrs for 9 days, 1 day off | 2 days | 1 day did not settle | Last 3: Highly cust serv. same | Unsol. Slow times 0/ day, busy times 5- 7/day | 0/6 mo |
| Jeter- Newburn GS-14 [starts p. 447] | Sr. Project Mgr, Production, Multifam, (8 w/MF & 10.5 w/Govt.) | 4 days/wk 10hrs/day | 2 days | 1 day did not settle | Last 3: Highly – Outstanding | Unso- licited 1/day | 0/wk 0/mo 0/6 mo 0/yr |

5. Over the three full days of hearings, 21 witnesses testified, 13 called by the Union, and 8 called by Management. The resulting official transcript of the testimony totaled 960 pages, contained within three volumes.

Based on the testimony and other evidence introduced at the Hearing, the following Findings of Fact are presented to establish the facts of "who, what, and when" as pertain to the grievances and as are necessary to resolve the Parties' stipulated Issues. Note: "where" was the Indianapolis HUD office. (The fifth essential factual element ["why"] will be discussed in the Analysis section.) The Union bears the burden of proof. However, it will be most efficient to initially extract the "who, what, and when" from Management's case, followed by the Union's case. After all, it was Management's actions that resulted in the filing of the subject grievances.

6. The events that ultimately led to the dispute, the grievances, the Arbitration, and to this Award all started on a day in May 2007.

Management called Ms. Mary Anderson to testify. [starts p. 475] She is the Director of Operations for the Chicago Multifamily hub, having served for about 10 years. Prior to that she was in community planning; she was a multifamily Housing Rep.; Supervisor of the Housing Program; Deputy of Asset Management under Mr. Hinsberger; and, Director of Development in the Chicago office.

The witness described her visit to the Indianapolis office. ["QDE" = Question on Direct Examination; "QCE" - Question on Cross Examination]

QDE. Okay. Mary, I'm going to take you back to May of 2007. Do you recall visiting Indianapolis, Indiana, at that time? **A.** Yes, I do. And what was the reason for the trip? **A.** I went down just to - just a general visit. . . . just kind of a routine - you know, nothing special. But just seeing what's going on. **Q.** When you went to the Indianapolis office, did you have a chance to observe the office and what was happening within the office? **A.** Well, I, I walked in, and I was really, really just *shocked* at how few people were there. I was really surprised to see so few people at work. [emphasis added] **Q.** Can you describe . . . exactly what you saw? **A.** Well, Eileen, who is the director, was there. I believe her two supervisors, Ed and Franca were there. The program assistants were there, the GS-7s. On the asset management side, I remember - I think Delores Everett, who handles funding, was there. And I remember Tony Mitchell being there, and not really anybody else, almost, in asset - in the asset management side. On the production side, a few more people were there: Yiji Iwamoto, the two appraisers, and Nadine Hires, who was a housing rep, was there. But other than that, that was about it, out of, you know, what 40 people, 30 people. **Q.** Would you consider that a problem? **A.** Well, yeah. Yes. **Q.** Why would that be? **A.** [I]t's a program assistance; they're supposed to be assisting people, but how can they assist people when they aren't in the office? So what were they doing kind of thing. * * * [pp. 478-480]

QDE. Okay. Now, your, your main, your main shock at - in - when you were down to Indianapolis was coverage, right? **A.** Yes. **Q.** Okay. And you were concerned that there was no coverage because there was no one around? **A.** Right. [p. 508]

The witness only visited the Indianapolis office about once per year.

QCE. How often do you to the Indianapolis office? **A.** Probably about once a year. **Q.** Okay. And, and so, in May of 2007 was your, your visit in 2007. **A.** Uh-huh. **Q.** And you said you didn't – you were shocked by how many office spaces were empty? **A.** Right. **Q.** How many office spaces don't have employees in them? **A.** I think, down in Indianapolis, most of them are full. [p. 493]

Neither on that day, nor subsequently, did the witness determine any factual reasons whatsoever for her "shock at how few people were there." First, she talked with Ms. Mitcheltree, Director of the Indianapolis office.

QDE. Now, did you – when you witnessed all the people being gone within the office on your visit, did you ask Eileen or anybody what was going on, why so many people were out of the office at that time? **A.** Yeah. I talked to Eileen about it, and I was just – you know, I was just kind of – I was *shocked*, because apparently, a lot of people at Indianapolis – unlike in Chicago, there were a number of people who are working four ten-hour days. So if they're working four ten-hour days, they were – and a lot of them were taking – were given permission to not come in either Monday or Friday, so they weren't in either Monday or – you know. And then they were telecommuting two, two days a week. So, so maybe they were in the office two days a week, if – as long as they didn't have field work. You know, a lot of our employees, like our appraisers and our construction analysts, do a lot of field work. * * * So I was, I was just, I was just really *shocked* when I came down there and saw that – how, how it had been implemented. [pp. 481-483] [emphasis added]

QCE. The people that were not in the office the date that you were there, do you know where they were? **A.** Well, when I was there, I met with the development staff, so they were pretty much there. The asset management staff was pretty much what I'd seen two years earlier. * * * But I don't know, I assumed they were telecommuting or in the field or something. * * * **Q.** Okay. And you don't know whether they were working or not working? **A.** No. * * * **Q.** Okay. And you don't know if any of them were on leave or sick that day or anything like that? **A.** No, I don't. [pp. 494-495]

When the witness returned to Chicago from the Indianapolis office, she talked with her supervisor.

QDE. Right. Now, what did you do when you got back from Indianapolis on that trip? **A.** Well, I talked to my boss, Ed Hinsberger, about it and expressed my concerns to him. **Q.** And what did you tell him? **A.** Basically, what I just told you all * * * **Q.** And do you know if, do you know if Ed took action based on what you told him, of if something was in the works when you told him that?

A. Well, I know he started talking to Eileen, and started really researching it and getting – you know, and, and, talking about who is doing what and that kind of stuff. I know he started really becoming involved in the situation. * * * he started working a lot with Eileen and Izella and trying to figure out, you know, how to better improve service in that office. [pp. 490-491]

There was no evidence that at any time whatsoever the witness ever made any factual inquiry to either confirm or to dispel her “shock” about office coverage on the day she visited. There was no evidence that the witness ever did establish any facts concerning office coverage at anytime in the Indianapolis office. To the contrary, the witness continued to accumulate unsubstantiated allegations and anecdotal stories concerning the office.

QCE. Okay. And can you personally attest to any work that did not get done because those spaces were empty? A. No, because I don’t directly supervise them. [p. 497]

QCE. Okay. And do you supervise any of the employees – directly supervise any of the bargaining unit employees in Indianapolis? A. No. Q. And you don’t rate their performance or give them instruction on how to perform their duties, their everyday duties? A. No. [pp. 492-493]

QCE. * * * [W]ere you aware of what the telework agreements were in Indianapolis? A. What I was aware of was . . . there were a lot of the people that were not around very much. Q. Did you ever see any of the Indianapolis telework agreements? A. You mean the individual agreements with the employees? I don’t think so. [pp. 500-501]

QCE. And so you don’t know how much field work that they have to do, then; is that correct? A. That’s correct. * * * Have you ever asked the directors down here, or the supervisors * * * how many calls come in here? A. No. Q. And you don’t have any personal, first-hand knowledge of how many calls? A. No. [pp. 505-506]

The witness described that there were times when she called Multifamily for certain individuals (including the Director) and no one would pick up the phone in that office, and she said it is still happening as of the date of the Arbitration Hearing – 18 months after the telework days were changed. [p. 483]

The witness related that in Detroit a couple of weeks prior to the Arbitration Hearing, the head of PR Mortgage said that he can always reach Yuji, “but he could never reach the – anybody in asset management, because they were teleworking; they weren’t in the office.” [pp. 483-484] This anecdotal story certainly adds no factual basis for concerns about office coverage. First, because the conversation was a couple of weeks before the Arbitration Hearing, nearly two years after the telework “reassessment” started, and 18 months after the telework schedules were changed. And second, because there was no effort to determine any factual basis for the

allegation. Further, there was no explanation for how the head of the mortgage lender could identify teleworking as the reason why he could not reach someone.

Another concern of this witness was that one employee was allegedly not learning her new duties fast enough "And what I was told was that Theresa was working on draws at home . . . because she was in the office so little." [p. 485] There was no indication that the witness did any investigation to determine whether the allegation was true or not.

The witness acknowledged that the "staff have a lot of field work. So, if you add telecommuting to it, it's really hard to get them in the office to do the things – to have meetings, to talk about cases, to get things done in a timely manner." [p. 486] However, the witness gave no facts whatsoever to support her broad allegations.

The witness raised allegations regarding employees accomplishing work while teleworking without files. "And if you don't have your file with you, it's really hard to – I don't know how they work at home if they don't have the file with them." [p. 487] There was no evidence that the witness tried to learn how teleworking employees did their work without their files. There was no indication that she talked to any of the teleworking employees to learn the answer to her question. She simply assumed that they could not do their jobs without the files. "So if you – if you're, you're at home and, and, and you get a call on a case where you don't have the file, what are you going to do? You can't do anything about it until you next come into the office, or the supervisor or the person – you know, someone else in the office is going to have to pick up the slack for you." [p. 488] The witness made no attempt to find out how such situations are handled by the teleworking employees. The allegation was unsubstantiated.

The witness had no direct knowledge of the most important document concerning telework, *i.e.*, Supplement 3 (JE3, 1st 3 pages).

QCE. Right. And who developed that [Supplement 3] telework policy? **A.** I guess it was management, in conjunction with the union. **Q.** Right. That's right. It's a HUD policy; it's a HUD contract with the employees; is that correct? **A.** Well, I think – you know, I don't know if I'd call it a contract. I'd call it a privilege, not a right. **Q.** Well I, I understand that. But it's a supplement to the contract, which means it's part of the contract? **A.** Oh, the union contract? Probably. [p. 492]

QCE. Okay. Can you tell me what kind of training you have had with the HUD contract? * * * **A.** Gosh, I, I mean, I've had basic supervisory training years ago, and sometimes we get it updated. I had – you know, I don't recall the last time I had training on the union contract. **Q.** Can you tell me how much training you've had specifically on the telework program and the telework contract? **A.** I don't recall. * * * [p. 496-497]

QCE. Okay. You indicated that everybody should be in the office three days a week? **A.** That's how – that's what we – yes. * * * **Q.** Okay. If you give me just a moment, I'm going to read something to you. * * * [From Supplement

3] "The scope of this supplement encompasses the implementation of the telework program." And No. 3 on that reads, "Telecommuting, work at home, and satellite office arrangements will include teleworkers working a minimum of two days per week in the office." Were you aware of that? A. But isn't there language elsewhere that says it's management's discretion . . . [p. 499]

QCE. * * * Is there a standard of how many people we should have in the office? A. There's no written standard for that, I don't think. [p. 510]

Finally, notwithstanding her "shock" on the day of her visit to the Indianapolis office in May 2007, and her subsequent failure to identify any factual bases for her allegations that there was even a problem with coverage in the office, the witness did acknowledge that the work of the office was being accomplished.

QCE. And, and has Indianapolis made their goals? A. Yes, they have. They've done well. Q. Is there any year that you can remember that they did not meet their goals? A. Not off the top of my head. Q. So when these employees down here were, were all missing from the office in 2007, they still met their goals; is that correct? A. Yes. And they did very well on the production side, and that's because a lot of them were in – were – a lot of those guys were at the – in the office, too. Q. And how did they do on the asset management side? A. I think they did fine, as well. Q. And those were the people that were out of the office. A. Uh-huh. [pp. 511-512]

7. The next person affected by the "shock" experienced by Ms. Anderson was Ms. Eileen Mitcheltree. Management called her to testify. [starts p. 852] Ms. Mitcheltree has been with HUD 24 years, first as a nonsupervisory project manager, then (in 2000) as a supervisory project manager, and then as Director of the Indianapolis Multifamily Program Center since May 2007. Mr. Hinsberger, located in Chicago, is her supervisor. Telework was not available when she was not a supervisor. Her responsibilities include "to make sure that obviously work gets done, to make sure that there's technical, clerical, professional support, to make sure that the phones get answered, that our customer service is provided to our clients, both internally and externally, to respond to requests, do reports for headquarters and for the hub, to name a few." [pp. 855 – 856]

QDE. Do you recall a visit [from Ms. Anderson] around May 2007? * * * A. Yes. She came and initially her question to me is, "Where is everybody?" Q. What did you say? A. Well, you know, I said, "Various places," you know, and I started going through the list. Q. Did it matter, did it matter what the reason was or was it office coverage was an issue. A. Well, she said, "You don't have anybody here to do the work." Q. What if they were teleworking? A. If, if they were teleworking, they're still, they're still not here is somebody needs something internally or if somebody comes in off the street. * * * [pp. 878 – 879]

What did the witness do following the May 2007 visit? One thing she did was talk to her supervisor, Mr. Hinsberger.

QDE. What did he [Ed Hinsberger] say, if anything? **A.** Well, yeah. I mean, he was, he was in agreement we needed to do something because there would be times when he would call and nobody would be here. He'd, he'd get calls from clients or whatever that said that they would call and, and they weren't getting the – they weren't getting responses back timely. * * * **Q.** Did he tell you that people were – did he inform you that there were complaints concerning office coverage here in Indianapolis? **A.** He, he had – yes. He had mentioned to me that he had received some calls . . . * * * [pp. 877 – 878]

The witness also talked with the two supervisors who reported to her. The talks continued from sometime after May 2007 until February 2008.

QDE. So your goals were met? **A.** Oh, yes. Oh, yes. **Q.** So what did you do? What did you decide you needed to do? **A.** We needed – we decided that a change needed to be made, and we sat and we talked and we talked and we observed. We talked some more. **Q.** Who did you talk to? **A.** My two supervisors. * * * We finally decided something needs to be done. So what is the least impact for the employees? We didn't want to take away the compressed work schedule day. **Q.** And what is a compressed work schedule? **A.** That is where they either work ten [hours] four-day weeks, or they're on a five-four-nine so they work a five-day week nine hours and then a week of four days and there is one eight-hour day. [pp. 861 – 862]

QCE. When you started, and you started these months of talking and discussion, did you start with the idea that, you know, we've got to look at these agreements [telework] to see if we need to modify them? **A.** No. Looking at office coverage to see what needed to be done. [pp. 931 – 932]

There was no evidence whatsoever that the witness (on her own or with her supervisors) conducted any factual investigation or inquiry regarding the alleged deficiencies in office coverage. There was no evidence that any of them made any factual determination of office coverage requirements. There was no report of the alleged deficiencies or of their activities associated with it. The charts described by the witness were drafts of various teleworking changes that were considered. [The chart (JE31) titled "Original Schedules with 2 days" is the final product as of the February 14, 2008, meeting. (p. 947)] Other than proceeding to make changes in teleworking days, there was no factual report/paper/product or other evidence (written or oral) of any factual inquiry.

QCE. Did you create a written document to what you did in the reassessment?
A. The charts. [p. 928]

QCE. * * * [Y]ou had five or six months of reassessment, and in that five or six months of reassessment, I haven't heard any correspondence – correlation

between the actual complaints on the days that they were being made and when people were or were not in the office due to telework? A. My job was to see if there was office coverage, see when there was less impact. People were – a telework day, again, is a working day. Q. You're absolutely right. A. So it seemed like less impact to us in management to have the person who was working come into the office rather than to ask people who had a day off to give up their day off. [pp. 926 – 927]

The witness did not even solicit input from her employees or from the Union.

QCE. Did you offer an invitation to the union to come in with ideas during that time [September 2007 – February 2008]? A. The union had the same opportunity [open door policy] as the employees did to come in, to offer suggestions. [p. 930]

As did the Director of Operations, this witness could only relate allegations and anecdotal situations as justification for ultimately making the changes to the telework days of her employees.

QDE. And were you having issues with coverage? A. Yes, we were. Q. What kind of issues? A. Well, obviously, when I had gotten to the position I was in, I came in as director, at the end of the days, days on end, sometimes I would be the only person here. Sometimes there might be another one from management here. * * * Q. And where were the employees? A. They were either on leave, gone for the day, teleworking. They weren't here in the office. [pp. 860 – 861]

QCE. * * * You talked about some of the complaints. Were these complaints made to you or these were ones that Mr. Hinsberger . . . relayed to you? A. * * * [W]e thought okay, we'll ask a few people. So we contacted a couple major management agents, and basically, you know, what I got back was, "Well, we've actually learned when people are not in the office so we either work around their schedule, or if it's something we really need, we'll just call management." Q. So did they ever tell you what day that they had tried to call and couldn't reach somebody? A. I don't have a date and time. I mean, it happened periodically. * * * Q. * * * Can you tell me if that was looked at, corresponding when the complaints were coming for the days that they were actually – people were actually here – A. There was no log of calls coming, coming in either before that occurred or after that occurred, but we have so many different schedules going on, it's difficult to say okay, is it because the person is teleworking or is it because they are on an early start and they're leaving at 2:45 or is it because they're on a CWS [compressed work schedule] day or is it because when the people are calling in, they know not to call Delores at, you know, 5:00 at night or maybe 8:00 in the morning or, you know, whatever. [pp. 924-926]

The witness expressed her understanding of "office coverage." Yet, neither she nor any other member of Management had any factual basis for "determining" what coverage should be.

QDE. And on the – after paragraph 3 [of JE1, Article 17.07, p. 90] there's an area that discusses the responsibilities of management and it says coverages? **A.** Yes, I see that. **Q.** Is that your responsibility for the division here in Indianapolis? **A.** That's my responsibility to see that that is accomplished, yes. * * * **Q.** If you read on No. 3 . . . **A.** Sure. "Management shall be responsible for ensuring that offices are adequately covered and for *determining* office coverage requirements in terms of both the numbers and types of employees needed and skills required during all official business hours." * * * Our office opens at 8 to 4:45. [pp. 856 – 857] [emphasis added]

QCE. * * * [I]s it your opinion or your belief that office coverage means you have to have the person physically located in the office, the employee? **A.** Office coverage to me means everything that's encompassed in paragraph 17.07 of the AFGE agreement and it's also stated in the alternative work schedule book, and that's all of those things. And part that was is meeting other program needs, and my program needs in multifamily have to be met. **Q.** * * * [T]hose things that are in 17.07 that you talked about could be met from teleworking? **A.** Not, not all the time, no. * * * **Q.** What I'm asking, I guess, is is the demand always immediate? **A.** Not always, but sometimes it is immediate, and it is needed and the person has to – [pp. 908 – 910]

The sequence of events following May 2007 were described by the witness.

QDE. Okay. * * * Then the next page, the third page [JE37] is what? **A.** This is my September 14 [2007] memorandum to all staff advising them that management was in the process of reassessing the telework arrangements in multifamily. **Q.** Is that the first time that you actually let your employees know that you were reassessing the telework schedule? **A.** Yes. * * * **Q.** Yes. And then what happened after that? **A.** Then on September 24th I sent the second e-mail, fourth page. **Q.** And what does it say? **A.** And it says, "It's necessary to move the target date for completion of this assessment. * * * **Q.** And what happened after that? **A.** Basically, basically nothing. Nothing happened until February 2008. **Q.** Were you reassessing the schedules during that time? **A.** Oh, yeah. Well, yeah. I mean, there was nothing more heard from staff, but during that period of time, I was not only talking with staff here, but talking with Chicago and talking with Izella, you know. It's kind of like this is the situation. We need to correct it. What can we do? * * * [pp. 863 – 867]

Again, there was no evidence whatsoever that the "situation" was ever factually established. What ultimately was done is that the employees' telework days were changed, both the number and the days available for teleworking. The changes were made based on the perception that "We need to correct it" without any factual or rational basis for what, if anything, needed correcting.

QDE. Did you have those meetings? **A.** Yes, on February 14 [2008], we had those three meetings. **Q.** What happened at those meetings? **A.** We, we relayed why we were making the changes, that we were doing it for office coverage and solely for office coverage. We had prepared new schedules for them. It was basically just, just, just to relay where, where we were with the process. * * * **Q.** Did you, did you – were you – were they given the option to have you change your mind about the schedules or were the schedules already drawn? **A.** We had developed the schedules based on the final chart and provided it to them at the, at the meeting. They were given a week to look at the schedule before turning it back in if they wanted to telework, in fact the next pay period. [pp. 884 – 885]

Finally, the witness also acknowledged that the office goals were met.

QCE. Have you – as far as you know, have you met all of the requirements, goal requirements that you've had in this office? **A.** Yes. **Q.** Is there – have you met them last year and the year before? **A.** We've met – we've always met the goals. . . . [p. 934]

8. The two Indianapolis supervisors who report to Ms. Mitcheltree testified. The first, Ms. Hetue, is Chief of Contract Administration in Multifamily. [starts p. 553] She supervises eight employees. She started in September 2007 as a supervisor. Before that she was a project manager since 1991. Of her eight subordinates, three telework, and all three settled their grievances. She noted that the office had 25 employees. Her testimony confirms the nature of the "reassessment" of teleworking that transpired between the notice going out in September 2007, and the staff meetings on February 14, 2008, when the changes were announced.

QDE. So tell us about the meetings between September [2007] and February [2008], where you met here. Tell us about some of those meetings. **A.** There was meetings almost weekly, trying to, you know, schedule the folks that everyone can still telework and that the office still had coverage. I mean, it was just charts and charts that we went over and erased and, you know, subtracted. **Q.** Who, who met? Who met? **A.** Well, Eileen, myself, and Ed Peal. **Q.** Did – so what did you do at those meetings? **A.** We, we discussed how best to take care of everyone's needs and still have office coverage. We also discussed meeting times with . . . Izella Harvey, to make sure that we were doing everything correctly. **Q.** And was Izella part of those meetings? **A.** She was part of questions and answers. I don't remember her being part of the meetings. [p. 570]

Other than anecdotal comment, this witness could not personally confirm any problem with office coverage caused by teleworking.

QDE. Okay. Now, when did you realize there was office coverage problems?
A. Well, actually, I didn't see it until the schedule was changed, until everybody was changed back to one day. I didn't, I didn't notice it. And all of a sudden, this one day, it's, like, "Wow, people are here." * * * [p. 559]

QCE. Did you ever call them [teleworking employees] and they, they weren't home? **A.** No. I mean, whenever I called, I got them. **Q.** And how would you say they were performing while they were – during the time that they were on the two, two day a week telework agreement? **A.** They were performing fine. * * * Were they meeting their goals? **A.** Yes, we met our goals. **Q.** Okay. And, and do all the employees that you supervise – do they have an EPI standard or element of customer service? **A.** Yes. **Q.** And how are they rated on those? **A.** Rated excellent. [pp. 581-582]

The witness notes one perceived advantage – that she gets to see the employees, but not that there is any improvement in office coverage.

QCE. And, and how many days are they [employees supervised by the Witness] teleworking right now? **A.** Two. **Q.** And is that affecting coverage for the people . . . **A.** The, the good thing about this settlement is it's not back-to-back telework. So somebody who had a Monday and a Friday telework days, they left on Thursday, you wouldn't see them until Tuesday. Now, at least, they're, they're gone Tuesday, you see them Wednesday, you see them Monday. [p. 590]

9. The second supervisor reporting to Ms. Mitcheltree in the Indianapolis office testified. [starts p. 591] Mr. Peal worked with HUD for 23 years. Currently he is the Supervisory Project Manager, Asset Management. He has been a supervisor for 18 or 19 years, he has been with Indianapolis multifamily for seven to eight years. Currently, he supervises seven employees, five of whom telework. He noted that they have about 500 projects with which they deal.

The witness begins to describe his involvement with the process that ultimately led to the changes to teleworking.

QDE. Okay. So what did you do? Did you discuss this with Ms. Mitcheltree?
A. Yeah. She came to me * * * And, you know – so she said, "Well maybe we needs to take a look at the telework program and, you know, back off a little bit and make some adjustments." **Q.** So what did you do? **A.** Well, she talked to Ed and things like that, and they decided that maybe we need to take a look, look at the whole program and maybe, you know, gear down the number of days that are available. [pp. 606 – 607]

Teleworking was being confused and intermingled with Alternative Work Schedules (AWS), as is discussed in the Analysis section. Each is a separate program within HUD. Regardless, again

there is no indication that either was investigated to determine factually whether either was having a negative impact on office coverage.

QDE. Okay. And then what happened? **A.** * * * And, of course, we looked at the telework situation. **Q.** When you say "we," who do you mean? "We" looked at the telework situation. Who is "we"? **A.** Oh. Franca, myself, and Eileen. Of course, we talked, we talked – spoke with Ed [Hinsberger]. * * * **Q.** Okay. So then what happened? **A.** Okay. So we discussed the different issues we, we were having, you know, with people being sick, people retiring, not being able to replace staff and all this sort of thing. And, you know, we said, well, you know – and then, on, on top of that, we added the 6 a.m. arrival thing. And, you know, we just got thinner and thinner. * * * They were going home at 2:45; we still had the latter part of the day to cover. And, you know, the telework thing was rolling pretty good, but, you know, there were gaps of time where, you know, I'd get a call and, you know, it was left on me to take care of different things. **Q.** Did that happen often? **A.** Well, on Fridays was, was a big time for it. But, you know, on occasions it happened, you know, and then I would have to run out and do things. And it got, it got inconvenient. **Q.** Who, who was the employee who was sick? **A.** Jeff Terry * * * Rosalie Fetek * * * Bernie * * * myself * * * Calvin Pendelton . . . he retires * * * Bonita * * * went to another field office * * * Rosalie left . . . And, you know, we were just getting thinner and thinner. [pp. 599 – 602]

This witness also was susceptible to acting on anecdotal information.

QDE. Was customer service suffering here in the multifamily section? **A.** In my section, you know, I got a lot of calls. But, you know, then, again, you know, I got calls for some people that weren't doing the job, and, I dealt with them. You know, the, the folks that did a responsible job, no, I didn't get a lot of calls for them. But, you know, then, again, there was those times where, you know, I wish I could – had Mena there to give this thing to, but she was gone, you know. Or I wish I could have maybe had a Jenny working, that Jenny was the answer to this; but they're not there. And see, my other problem is, you know, I don't have 20 years of multifamily experience. I came down here the last seven years. It's very complicated, so I needed staff around to do some things, you know. And then the telework thing came, and it, it slowed me up big time. And then, of course, with my own health situation, you know, I have to go get a shot occasionally, so, you know, is there going to be somebody around here so I can get out of here, save my life, you know. * * * [pp.628 – 629]

At least this witness, based on his prior experience with two teleworking employees, made a legitimate suggestion that had the potential to move the "reassessment" of teleworking toward a factual inquiry and toward a legitimate method for dealing with any resulting telework problems. Unfortunately, it appears his suggestion was not seriously considered.

QDE. What do you mean when you say "abusing"? **A.** Well, we – I had to suspend a couple of people from telework. * * * **Q.** And who were they? **A.** Well, I suspended Jenny Hatcher's telework for a period of time, and Jeff Terry. * * * **Q.** So what did you do? **A.** Suspend the telework until the work got completed. **Q.** Did – how, how long did it take for the work to get completed? **A.** Well, in Jenny's case, you know, I think . . . maybe a month . . . she's a splendid employee. It's just that she had so much on her plate . . . * * * Now, in terms of Jeff, that was a different deal. He was out sick a lot . . . probably should not even be on telework to this day. [pp. 603 – 605]

QDE. Okay. Now – so what happened then, after that? **A.** Well, we kept looking at schedules and stuff like that, you know. I personally thought that we should just – certain people who weren't getting things done, just take them completely off telework. **Q.** Were there some employees who would do telework and not produce? **A.** Sure. We had some like that. **Q.** And you had others who – **A.** Yeah. We had some that just did a super job. * * * [p. 608]

QCE. What, what other options did you consider besides reducing the number of days of telework? **A.** Well, . . . I just felt that if we took all the nonperformers off, people that weren't treating telework right, that sort of thing, and just said you telework no longer, that might be the way to go, you know, just remove it for, for some folks, you know, which would probably have gotten us here a lot quicker. * * * But, then again, I look at the policy and said, you know, if our attendance is bad, if you're not professionally mature, that sort of thing, you might not need – telework might not be your game. And I think we have folks that fit that category. **Q.** I take it that option was not placed on the table and offered to employees? **A.** Well, no. We didn't – you know, we didn't discuss that. [pp. 650-651]

This witness confirmed what transpired during the telework "reassessment" period between September 2007 and February 14, 2008, meeting. There is no indication that any factually based inquiry took place. The testimony confirms that the initial preconception that teleworking was causing an office coverage problem continued unabated, full-speed ahead.

QDE. And that's [memo, JE 37] September 14th [2007]? **A.** Uh-huh. **Q.** So what – when did – so what happened after this memo was sent out? **A.** Well, to be honest with you, after this memo was sent out, the telework thing just kept getting kicked around and kicked around. And we talked – * * * **Q.** And then what happened . . .? **A.** * * * We kept talking about it, talking about it, talking about it. And then finally, you know, they said, "Well, you know, something needs to be changed." But we talked about it forever. **Q.** And then what happened? **A.** Well, then, we had meetings where we introduced the plan to scale it back to one day a week. * * * **Q.** So prior to the grievance, you didn't, you didn't discuss the telework plans with the employees, correct? **A.** Well, no. * * * **Q.** Okay. And – so what happened in that meeting in February [February 14, 2008]? **A.** Well, the meeting was kind of – it, it wasn't a

very good meeting. Q. Why? A. Because, number one, the employees were just sort of told, "This is what we're going to do." You know, I mean, we – there wasn't a lot of discussion about . . . * * * [pp. 610 – 614]

The witness did, however, give some insight into how the Indianapolis office may now, after all that has transpired, be dealing with their perceived office coverage problems. While these subsequent events do not affect the resolution of the stipulated issues, they help to frame the events that took place on which the issues are based.

QCE. And before these settlements, was there discussion from the supervisors and managers that there was office coverage problems with the people teleworking on two days? A. Well . . . I think, by the time we got to the resolution stage, we had hired more people, that we have three new people now. And we have two in asset management managers that are really good. * * *

Q. And do you know what your hub director has asked for in headquarters for more employees for you? * * * A. Yes sir. We have an announcement out there now that closes in a few days for a project manager. We have an announcement closing for a project assistant – program assistant. They're trying to get people in there. * * * Q. An option to solving part of this problem would be getting more employees? A. Yes. [pp. 653 - 655]

This witness also confirmed that teleworking had not interfered with overall performance.

Q. * * * [W]ere the employees that you had – they were all performing on telework sufficiently, fully or better? A. Their performance ratings were fully or better. * * * Q. And did your office and your employees meet the goals that you were required to for performance when these teleworkers were on two days back in 2007, '6, whenever that was? A. We have missed no goals; we have made all our goals. Q. And in 2008, you are meeting all your goals? A. Yes, sir. [pp. 655 - 656]

Finally, the witness offers an insight that might partially help explain the dispute over telework in this arbitration.

QCE. That's good. And do you recall the last training you had on telework, or, or did you receive one – any training on telework? A. Telework? Telework? Never received telework training, period. It's poor, yes. Q. Yes. A. The telework training has been nonexistent. It's terrible. It's poor. Q. Let's let's hope your managers hear that. And you'd, you'd already said you don't – you've never teleworked? A. Not in my life, no. Well, what do teleworkers do? What, what do they perform, what job? What do they do when they're on telework? A. Well, in my group, a lot of the folks write their management reviews. They access our REM system and, and enter all their data. They basically do a, a function very similar to what they do at their desk, with the exception of not having access to the files. But they do management search,

answer calls, answer complaints. They do a pretty comprehensive job on telework, the, the group I have. * * * [pp. 637-638]

10. Izella Harvey testified. She has been an employee Labor Relations Specialist since 1986, and her duties include advising Management. Unfortunately, this HR person's advice only helped to fuel the office coverage/telework "express" that was getting underway.

QDE. Sure. A. Okay. Her [Ms. Mitcheltree's] problem is that, "We've got people teleworking AWS out in the field and then we got some taking leave and I've got nobody in the office." And at that particular day, she said, "I have two express overnight packages that have come in. They've been sitting there for days because the people weren't there." And she says, "We just feel we've got to do something. We have to do something. What is our first move?" Q. Okay. Then what did you tell her? A. * * * I said, "Eileen, you're a brand new supervisor. Here is my first recommendations, that you shut everybody down." Q. What do you mean by shut down? A. Stop the telework because it allows you to do that as a new supervisor. Stop everybody from teleworking. Take your time." Q. What allowed her to stop the teleworking? A. The telework program, that a new supervisor is not obligated to adhere to the schedules of a former supervisor. They don't - she doesn't even have to allow them to continue in any kind of way per an agreement made with a previous supervisor, and you will find that in this telework program. * * * Q. Okay. Then what happened? Did she follow your advice? A. * * * Here's what she said; she said, "I'm going to reassess it. I'm going to reassess the schedule and look at everything and then I'll tell them what I need to do here." * * * Q. And did she put out a notice? A. Yeah. * * * Then I got a call from Ed Hinsberger, and he said, "Did you talk to Eileen about her need to redo the telework schedules?" I said, "Yes." [pp. 671 - 674]

Apparently the witness was referring to Management's "Telework Program" (JE3, starts 4th page in) which is not part of the Parties' Agreement and is not to be confused with Supplement 3 "Telework Program" (JE3, starts 1st page) which is part of the Parties' Agreement. Under Management's Telework Program (4th page) and under the heading "General Rules" the following appears:

SUPERVISORY APPROVAL TO PARTICIPATE

* * *

As a supervisor-approved work option, there is no automatic right of *the employee* to continue participation in the event of a change of supervisor. [emphasis added]

This provision of Management's Telework Program clearly refers to participation by an individual employee, and not to, "Stop everybody from teleworking" in the entire Indianapolis HUD office. However, it is easy to imagine that this advice could lead the Indianapolis Director (Ms. Mitcheltree) to believe that she had broad powers to do "what I need to do here."

The witness similarly misinterpreted Supplement 3, paragraph 2, (which is part of the Parties' Agreement) as granting broad authority to Management to make wholesale changes to teleworking by employees in the Indianapolis office. That paragraph is as follows:

A telecommuter may terminate the telecommuting arrangement at any time. In the case of unusual circumstances warranting involuntary termination of a Telework Agreement (i.e., other than at the request of the employee . . .) Management agrees to give the employee and the local union five (5) days' advance notice, or as soon as practicable, before termination. This notice shall provide the rationale for terminating the Agreement. [emphasis added]

Clearly, the provision is directed toward involuntary termination of teleworking for an individual employee, and not the wholesale involuntary termination of teleworking for the entire Indianapolis office. Further, in relation to this paragraph 2 of Supplement 3, substantial efforts were directed during the Hearing to establish the meaning of "unusual circumstances." However, it was not necessary to do so because, as noted, this provision refers only to the termination of a telework agreement of a single employee. Regardless, the witness' tautology was not helpful.

QDE. * * * [W]ere there unusual circumstances [JE3, Supplement 3, ¶2] that warranted a termination or change in the telework agreement? **A.** Yes.
Anything that's not usual is unusual, . . . [pp. 665 – 666] [emphasis added]

Interestingly, her subsequent testimony regarding "usual considerations" could have been helpful to Management. Unfortunately, there was no evidence that Management followed her few examples during their "reassessment" of teleworking. "They have to consider everything. That's the best way to do it." Management did not conduct any factual inquiry (e.g., each teleworking employee's performance) to even come close to a rational consideration of anything, let alone "everything."

QCE. Severity, okay. And what do you think are *unusual considerations* for a supervisor – what do you think are usual considerations that a supervisor has to consider before approving a telework agreement? **A.** Okay. **Q.** Just a few examples. **A.** Okay. It's very clear what they need to consider. They need to consider the whole, the whole aspect. First of all, they need to consider the type of work that's portable for telework. They need to consider how much of that work they have . . . They have to consider the impact of the office coverage. *They have to consider everything. That's the best way to do it.* * * * **Q.** * * * Do you think a supervisor should consider a person's performance before they allow them on telework. * * * **A.** That's one of the main things . . . * * * [p. 721 – 722] [emphasis added]

Further, due to the complete lack of any factual inquiry whatsoever, essentially no options were generated for how best to resolve any office coverage problem.

QCE. Can you give us some examples of some of the options that they were talking about? **A.** * * * One of the options was how to avoid those block of days at the same time, you know, AWS day, you're out of the office, you telework, you're out of the office, how to break that up so they could still telework two days and still, still be – and still not be out all that time. That was one of the options. That was the biggest one, I think. That was the biggest concern. [p. 729]

The witness also played an important role in the matter of the Union's request to bargain over any changes to the teleworking of the employees. Essentially, Management did not seriously consider bargaining as an option to help solve their perceived office coverage problems. Even more importantly, Management did not even consider that their wholesale changes to the employees' teleworking should be the subject of mid-term bargaining.

QCE. Any. So you understand that you would give an Article 5 ["Mid-Term Bargaining," JE1, p. 18] notice, a notice to the union that there would be a change of working conditions and they could bargain on that? **A.** Yes, if it was a change in working conditions. **Q.** Did the agency ever send out an Article 5 notice that they wanted to bargain over changing working conditions over telework issues here in Indianapolis? **A.** Okay. No. **Q.** Because you didn't think there were any changes of working conditions? **A.** No, because telework had already been bargained on, so you cannot turn around and rebargain something that's already bargained. * * * **Q.** You, you can't bargain something that's been bargained . . . do you know what was bargained at the table on Supplement 3? * * * **A.** Right. Let me explain so you know. The Supplement 3 [JE3, starting 1st page, part of the Parties' Agreement] goes along with telework program guidelines [JE3, Management's "Telework Program" starting 4th page in], okay? Get that clear. Now, . . . they cannot negotiate that because it's already covered. It's already been negotiated on. * * * **Q.** Who produced those guidelines? Who created them? **A.** I have no idea who created them. * * * **Q.** You don't care where they came from as long as – **A.** As long as I'm told this is an official document that we're using, this is the official document that we're using. And my information is that's the official document all over, that this is what we use in guidelines for our telework program. [pp. 712-715]

Note: the witness had an even stronger opinion of the role that Management's telework policy should play in the Indianapolis office.

QDE. What is HUD's guidance as far as implementation of Supplement 3? **A.** Okay. We use the telework policy. **Q.** Telework program? **A.** Yeah, telework program policy. * * * [JE3, Management's "Telework Program" starts 4th page in] **Q.** Now, is this telework program, is it widely followed as far as guidance? **A.** Yes, it is. It's been out there for years. It's the, it's the guru. It's the Bible. * * * [pp. 667 – 668]

This witness also was involved during the "reassessment" period between the September 2007, memo to the employees that Management was going to reassess teleworking, and the staff meetings on February 14, 2008, when the new teleworking days were announced to the employees.

QDE. Okay. Did she meet with the employees prior to this [February 14, 2008] meeting? **A.** No, she didn't. **Q.** Did she say that she was open to meeting with – **A.** Yeah. I asked her, I said, "Well, Eileen, you don't – you're not obligated to meet with these employees before this. * * * And she said, "They're so argumentative. They're so angry. I can't talk to them about this. I would just rather get it ready and then we talk about it." * * * **Q.** How do you – do you know for a fact that the Indianapolis employees were upset about the change? **A.** Oh, yeah, yeah, yeah, yeah. **Q.** How did you know that? **A.** First of all, I talked directly with Jeffrey . . . Terry. He was the union president at the time. * * * He called me at my house because I was home that day. * * * [pp. 681-682]

The witness describes the post-meeting environment.

QDE. Did they take it personally? **A.** Yes, they did, they took it personally. [I] sat in on every grievance meeting . . . * * * It was very clear that each one took it personally, that it was something personally being taken away from them. [p. 683]

Finally, this witness counseled Management following the filing of the grievances, including post-Step 2 meetings, when Management started trying to settle the grievances.

QDE. So other than the – after the Step 2 grievance process, what was your other involvement in this? **A.** * * * My involvement was so constant, it was a day-to-day thing. . . . However, Eileen and Ed Hinsberger, in an attempt to try to work with them, we talked and said maybe Eileen can figure out a way to still improve the office coverage and still allow another day to telework. * * * [A]nd Ed, he told Eileen, he said, "Relook at everything again. See if there's something else you can do." * * * So she and Ed, Franca, Ed Peal, all of them kind of worked up this settlement that would give these people this extra day and still wouldn't impact so much on the office coverage. And Eileen did that based on the AWS schedule. And I told her, I said, "Why don't you just change the schedule? You're the supervisor. You can shut down the AWS schedules and give them – work out a new schedule and you won't be going through all of this." And she said, "No, I want to keep the AWS days off . . . I don't want to touch the AWS schedules. I want that to stay because they might have stuff planned." I said, "Okay, fine. Then you got to do something." So that's what she did. She came up with that offer, that Step 2 response [JE11, 7th page back "Proposed Offer"]. [pp. 694 – 696]

11. Finally, we come to the Management person who may have been in the best position to have slowed and redirected the entire telework “express” toward an appropriate inquiry, and toward ensuring that any resulting actions would comply with the Parties’ Agreement. Mr. Hinsberger’s testimony starts on page 761. He has been with HUD in Chicago for 30 years and for 18 years he has been the Director of the Multifamily hub. The Chicago hub is one of 18 in the entire HUD agency, and includes two offices, one in Chicago and one in Indianapolis. He is the direct supervisor for four people, including Ms. Mary Anderson and Ms. Eileen Mitcheltree.

The witness recalled Ms. Anderson’s visit to Indianapolis on that day in May 2007.

QDE. So did you ever – did Ms. Anderson ever talk to you about a visit to Indianapolis – **A.** She did. * * * **Q.** What, if anything, did she say? **A.** She was concerned that there weren’t many people in the office when she visited. She was concerned about lack of office coverage. [pp. 772-773]

The two Indianapolis supervisors (Mr. Hinsberger, and Ms. Anderson) immediately, without any inquiry whatsoever into the facts regarding office coverage in Indianapolis, decided to reassess telework. And, as we have seen thus far, that reassessment did not include any rational factual inquiry into office coverage on the day in May 2007, office coverage between then and the meetings on February 14, 2008, nor any inquiry thereafter to the date of the Hearing.

QDE. So then what happened after, after Ms. Anderson came here and informed you – what, if, anything did she say? Do you recall what she said to you when she came back? **A.** I do. It was something, it was something like there’s no one down there or she might have said it was like a bowling alley. There was no one there. And she was – in particular she was concerned about, you know, the mortgage credit person. There was a person that we were trying to train for mortgage credit . . . The response back was she’s never in the office. * * * **Q.** So what did you do? **A.** So we decided we needed to reassess the telework scheduling, the policy. * * * We needed to make sure that everybody wasn’t off on the same day, that people were complying with the telework policy. The policy requires that if you telework, you have to be in the office two days a week, a minimum two days a week. * * * [pp. 781 – 784]

There was no evidence that Management ever “made sure” (*i.e.*, determined) whether or not “people were complying with the telework policy.” Instead, Management went directly to changing teleworking in the Indianapolis office.

QCE. Can you give me a few examples of what you considered? **A.** Well, we considered no telework. We considered one day telework. * * * In the past, we had Wednesday as our, as our day that we would have our meetings, so no one teleworked on those days. So, generally the telework was done on Tuesday and Thursday. We opened up Monday as a telework day just so we could spread it out more. And then we actually even opened it up to Friday . . . [pp. 843 – 844]

The witness, consistent with the other managers, described anecdotal incidents to justify Management's actions regarding teleworking in the Indianapolis office. Allegations were not investigated to either confirm or not, or to remedy them if true.

QDE. Who was your staff? **A.** – supervisory people. At the same time, or you know, approximately the same time that Mary talked about this, I had also gotten complaints from the supervisory staff here. **Q.** Who would that be? **A.** From Ed Peal, . . . from Franca and Eileen also. * * * **Q.** Had those complaints from the outside occurred already or did those come after Ms. Anderson's visit? **A.** I didn't track when they got complaints from the outside, . . . it was an ongoing issue. I would talk to clients . . . they're not getting timely responses . . . * * * **Q.** Now, on the telework . . . * * * **A.** * * * I know there were some early issues, complaints from, from PR Mortgage. * * * The complaints that we were getting from them, you know, were not timely service from, from our office, from my office. * * * When they would call the office, whoever they needed wasn't available to, to help . . . * * * **Q.** Go ahead. **A.** * * * I had another . . . owner, manager call who was just irate that everything that he sends down here no one answers, you know, timely. He can never get anyone to answer the phone. * * * Eileen contacted Dominion, another major property down here. The Glick Properties are major owners, similar kinds of issues, you know. They just – they weren't getting timely, timely responses, so we knew we had to do something, you know. * * * [pp. 773 – 778]

QCE. Let me ask you; were there deadlines on things that he was complaining about weren't being followed up on? **A.** Well, I don't know if you could call them deadlines, but timeliness, you know, timely responses. * * * [T]heir concern [PR Mortgage] was they would submit something through the mail or have something delivered over. The person would be teleworking or then the person would be – * * * **Q.** And if, if an employee was not timely on getting work out, their supervisor would evaluate their performance on them? **A.** It should be. It's their function. * * * **Q.** Do you know if the delay in getting back to any of the clients was based solely on being on telework? **A.** Solely on Telework? I can't answer that. [pp. 824 – 827]

QCE. Was this client [PR Mortgage] able to reach the individuals easier now? **A.** I – you know, I can't answer that. My guess is yes. **Q.** Okay. Is that due to the telephones being transferred to their homes on telework? **A.** Possibly. **Q.** So it may be that their answering their calls has nothing to do with actually being in the office? **A.** Phone calls, yeah, phones calls actually should have nothing to do with office coverage, you know. We have a system in place to make sure the phone messages or the phone calls get to where they need to get to. [pp. 834 – 835]

13. The bargaining unit members were essentially on the receiving end of Management's actions that ultimately resulted in significant changes to the employees' teleworking days. The first

indication that there was anything going on was the Director's (Ms. Mitcheltree's) memo of September 14, 2007 addressed to "All Multifamily Staff," subject: "Telework." The cover email was also September 14 (JE37, 1st page) and was addressed to the two supervisors (Peal and Hetue) and to 23 employees. The cover email did not specifically include the Union, other than it did include the then President (Mr. Terry) as one of the other employees. The memo (JE37, 3rd page in) read in its entirety as follows:

This is to advise all staff that management is in the process of reassessing all Telework arrangements of Multifamily Staff. Management is tasked with the responsibility to ensure that the needs of the office are continually met during the core hours of business. The suitability of the type of work, the quantity of work that is portable, the needs of accessibility to clients, coworkers or customers are all examples of factors that will be re-evaluated.

Our target date for completion and implementation of any changes is October 1, 2007. We will be meeting with each of you individually to review and update telework agreements.

No real, legitimate, unbiased, factual "reassessment" was ever conducted. There was no evidence whatsoever that Management ever did what they said they would do, to wit: "The suitability of the type of work, the quantity of work that is portable, the needs of accessibility to clients, coworkers or customers are all examples of factors that will be re-evaluated." Further, there was no evidence whatsoever that Management ever did what they said they would do, to wit: "We will be meeting with each of you individually to review and update telework agreements."

QDE. Okay. September, correct, September [2007]. It was five months prior to the meeting [February 14, 2008]. Was that a warning letter or was that just a notice of review? **A.** I, I took it as just a heads-up that we're looking at this [telework] and we'll get back to you, kind of like a commercial. [Hatcher, p. 122]

QDE. Did you think that there was going to be a review . . . ? **A.** I thought there would be input. I thought there would be discussion from, from all sides. [Hatcher, p. 122]

Note: the target date was changed by a subsequent email (JE37, 4th page in): "It is necessary to move the target date for completion of this assessment, therefore, please submit your current telework schedules for pay period 20 to your supervisor for approval. Thank you." There was no real opportunity for input from the employees during the period of September 2007, and February 14, 2008.

QCE. Now, five months before you had a meeting with Eileen Mitcheltree, you had an opportunity to ask any questions you wanted about this memo [9-14-07] right? You could have knocked on her door and said Eileen, what do you mean

by this, how is this going to affect me; is that correct? A. I would say no, I did not feel that that was what they were telling me. * * * [Hatcher, p. 92]

QCE. At no time between September [2007] and February [14th, 2008] did you discuss the telework reassessment with Ms. Mitcheltree? A. As I said, I was waiting for her to call me in for my individual meeting. * * * Q. So your testimony is from September to February, you didn't discuss the telework reassessment with anyone in the union? A. I didn't believe there was a problem with my performance or my telework, so I didn't feel a need to discuss. I didn't know there was a problem. * * * Q. This is only telework. Were you aware that there was an office coverage issue in the office? A. No. [Tursi, pp. 327-328]

There would be no further communication to the employees regarding the "reassessment" of telework until emails were sent telling each to attend one of three meetings to be held on February 14, 2008. A sample email is JE34, 5th page in, to Richardson, David, as follows: "Please be advised that you have been scheduled for a meeting at 2:30 PM in the 12th floor training room on Thursday, February 14, 2008. The purpose of this meeting is to share the results of our re-evaluation of the telework schedules." At the meeting, there was no "sharing of the results of our re-evaluation" because there were no results to share. To the contrary, Management (Ms. Mitcheltree) announced Management's decision to change (limit) all teleworking employees' teleworking days. All of this was done with no input from the employees, and certainly no input from the Union.

QCE. We have a letter – A. Where did I have an opportunity for open and honest discussion? There was no input requested from me or any other teleworker. Q. There was a meeting that you missed when you were selling cookies? A. There was no discussion at the February 14th meeting. * * * [Hatcher, p. 107]

QCE. Did you discuss it then [February 14, 2008 meeting]? A. That, that was – let me point out something. The president at the time asked in this negotiation. And we were – and she told us, "This is not a negotiation." That was the end of it. [Roberts, p. 293]

QCE. * * * So you actually went in and talked to Ms. Mitcheltree? A. No. We had a group meeting [February 14, 2008]. We tried to talk with Ms. Mitcheltree during the meeting. She told us that there was no discussion. This was the way it was going to be. If you wanted to continue to telework, you had to sign this new agreement. If you did not sign by a certain date, you would no longer be able to telework, even as a one day a week. [Tursi, p. 319]

The teleworking employees had no choice but to sign the new Telework Agreements that had been prepared by Management. If they did not sign, they would not have been allowed any teleworking.

QDE. * * * And you were offered a different telework agreement to approve; is that correct? **A.** Yes. * * * I could sign it [the changed telework agreement] or if – and return it by the time frame or it would be considered that I was no longer interested in teleworking. * * * **Q.** And did you feel you had any choice . . .? **A.** None. [Hatcher, pp. 66-67]

QDE. * * * How long between the time you were notified that there could be – that you were going to have a change and the time that a change actually took place, how much time was there? **A.** The meeting was February 14th [2008]. * * * My memo says that I had to accept or be – or basically no longer telework. I had to turn in . . . by the 21st . . . Is that a week? * * * [Hatcher, p. 132]

QDE. Were you given an alternative option for telework at that meeting [February 14]? **A.** No, no. It was take it or leave it. They said that they would be giving us the agreement to sign, and by not signing it, they assumed that we no longer wanted to telework and that we would be immediately taken off of telework. [Castillo, p. 219]

QCE. And is this your telework agreement? **A.** Yes. This is the one that was given to me to sign. **Q.** And did you sign it? **A.** I had no choice. [Castillo, p. 285]

QDE. So you signed the [new telework] agreement? **A.** Yes. **Q.** Why did you sign it? **A.** I signed it – I didn't agree with it, but * * * that she was, you know, telling us that we needed to sign the agreement or we would not be able to participate in the telework program. * * * [Hires, p. 385]

QCE. Now, why did that statement that was * * * **A.** * * * And the way I interpreted that was, "So I really have no intentions of talking to you. It's not your right. It's not a condition. And if you don't like it, then stop the program," And that's the reason I signed it, because at least I had one day I could keep. And that was the reason for signing this agreement. [Hires, pp. 422-423]

QDE. And on your new agreement that you signed for one day of telework, did you, did you have mutual agreement on that? **A.** No. I, I signed it, and – but there was no discussion about it, other than just to sign it. **Q.** Why did you sign it? **A.** I felt that that was basically the only choice I had * * * [Jeter-Newburn, p. 449]

Not only did the employees have no choice but to sign the new Telework Agreements (if they wanted to continue some teleworking) but they had no opportunity to discuss the new agreements with the Director of the Indianapolis office.

QDE. – or with your director? **A.** Well, I mean, I did once we had the meeting [February 14] and she made the announcement of the change, I did go into her office and did ask if it was possible to keep my original schedule, and she said

no. Q. Did she explain the reasoning behind that? A. She mentioned office coverage, and I asked her, asked her, "What exactly do you mean by office coverage?" And she would not respond. [Castillo, p. 218]

QCE. So you chose not to meet with Ms. Mitcheltree? A. Yes, because she made it clear that basically the decision was etched in stone. There was not going to be any changes. [Castillo, p. 258]

QCE. So you're saying that you asked to meet with her [Ms. Mitcheltree] after this February 14th meeting? A. Correct. Q. And she said that was nonnegotiable? A. Correct. [Castillo, p. 278]

QDE. And when you were – received this new agreement, did you discuss this new one-day agreement with your supervisor? A. I was told it wasn't open for discussion. * * * [Gordon, p. 340]

QDE. Did you try after the meeting to speak to your supervisor? A. Yes. Q. And what happened? How did you do that? A. I – if I recall correctly, I sent – I, I put in for a new schedule, the telework schedule, and it was declined via a memo to me, with no explanation, basically saying the schedule was going to stay as it was set. [Gordon, p. 341]

14. It is understandable that the teleworking employees might be somewhat bewildered following the February 14, 2008, meeting and the new Telework Agreements that were forced on them. There was a consistent concern that each had done something wrong, but in fact they had not.

QDE. And did your supervisor come to you to discuss the problems with your customer service, either the standards or elements of your performance? A. No. Q. Did your supervisor ever discuss the issue of coverage problems with you, that you weren't covering your work or doing your work or meeting, meeting with people or covering your office needs? A. No. [Hatcher, p. 71]

QDE. I just want to again get this clear. You stated your supervisor never told you there was a problem with somebody taking your work and no other employee that you know of has come to you and told you there was a problem with taking your work while you were out on telework? A. That's correct. [Hatcher, p. 83]

QDE. Has management ever told you that your clients were calling about you complaining about you're not answering their phone calls or your appointments? A. Never. [Castillo, p. 264]

QDE. Did anybody – any supervisor ever talk to you about coverage problems before they changed you to one day? A. No. [Roberts, p. 290]

QDE. Did you ever have a supervisor come to you to – and talk to you about any problems you personally had with office coverage? **A.** No. [Powers, p. 298]

QDE. Did your supervisor, at any time when you were working two days of telework, ever tell you there was a problem with your customer service, your personal customer service, in terms of answering calls or meeting with clients? **A.** No. [Tursi, p. 316]

QDE. You were, you were given new schedules. Were you told why you were being changed from two days to one day? **A.** Vaguely; something – I mean, that I – to my understanding, about office coverage or lack thereof or something. **Q.** And prior to that meeting [February 14, 2008], had your manager come to you personally and talked to you about your office coverage, whether you were performing satisfactorily? **A.** No. * * * [Gordon, pp. 339-340]

QDE. Did you have any discussions with your supervisor – did they ever come to you and tell you of any problems that you were having with office coverage? **A.** Oh, no. * * * **Q.** Did she – did your supervisor ever come to you with any complaints – **A.** No. [Hires, p. 389-390]

QDE. Has any supervisor or your director ever spoken to you about any problems with your customer service? **A.** No. **Q.** Has any supervisor or director ever spoken to you about any problems with your office coverage? **A.** No. [Jeter-Newburn, pp. 452-453]

Not only had the employees not done anything wrong, but the testimony makes it more likely than not that they were teleworking properly. They were performing their jobs. Management did not present any credible evidence to the contrary. The employees' own words offer the best description.

QDE. Can you hold a meeting with a client when you're teleworking? * * * **A.** Oh, on the phone, yes. Going to see them, not normally unless I had advance approval. [Hatcher, p. 79]

QDE. What would be the difference of taking the telephone call here in the offices or taking the telephone call, conference call at home? **A.** I don't. I don't see any. [Hatcher, pp. 80-81]

QDE. Do you think you are able to complete more of our work at home or at the office? **A.** At home . . . [I] can push through much more at home than what I can get through in the office. [Hatcher, p. 88]

QCE. Now, with asset management, can you explain for Mr. Slonaker or to us whether files are required for asset management? **A.** I would say there's a huge

portion of work that I do that does not require a file to go home. [Hatcher, p. 114]

QCE. So you think you can do your job effectively without files during your teleworking days? **A.** I'm saying that I am capable of prioritizing my workload, and on days where I have the opportunity to telework, plenty of things that can be done without benefit of entering into a file room to pull a file. [Hatcher, p. 116]

QDE. Does the telework that you do affect your personal output on production? **A.** Yes. **Q.** In what way? **A.** I feel it increases. I believe it increases my, my production, my output. [Hatcher, p. 127]

QDE. Can you tell me what the difference would be between, between working at the office and going to a staff meeting and working on teleworking and calling into a staff meeting? * * * **A.** Other than the monetary savings from not having to travel and parking, there really wouldn't be any difference. [Castillo, p. 228]

QDE. And to your knowledge, dealing with clients both internally and externally, what has changed? **A.** Actually, the only thing that's really changed is that I'm probably less accessible to clients because now we're required to be in the office two days a week, and being a construction analyst, I'm not allowed to go out and inspect when I need to and sometimes having to juggle my schedule to meet my requirements for my job responsibilities becomes extremely difficult. [Castillo, p. 229]

QCE. Now, how can that be? You said that you – **A.** Because we're required to be in the office twice a week, and I was not required to be in the office twice a week before. So I've had clients that have requested for me to go out and inspect properties and I have had to literally tell them no, I cannot go out and inspect or release funds because I have to be in the office. [Castillo, p. 237]

QCE. And you're saying here today that you could not fit one day in to go to a review? **A.** They don't all fall like – that would be a perfect world. They don't all fall that way. You might have four inspections that fall within one week, five inspections that might fall within one week, which is impossible to do. [Castillo, p. 239]

QDE. Okay. And are you – when you had two days of telework, were you meeting your production goals, the requirements of HUD to work here? **A.** yes. [Castillo, p. 272]

QDE. And are you allowed to go on inspections on days you telework? **A.** Yes. Many times I'm required. **Q.** But you're not allowed to go on inspections on days that would interfere with being in the office two days? **A.** Correct. * * *

Q. And as far as we know as of today, you've heard no complaints about office coverage now that these changes have taken place? **A.** I have never heard complaints of office coverage ever. * * * **Q.** Did they ever suggest that there were other options besides removing people from multiple days of telework? **A.** No, no other options. [Castillo, pp. 274-276]

QDE. So you work at home. When you're there, you produce the same things you would produce in the office? **A.** Yes. [Tursi, p. 330]

QCE. So is it your testimony that you could actually do the same work that you do at HUD in the office and in your home? **A.** Yes. [Gordon, p. 360]

QDE. Let me clear up some work issues here real quick. Work that you do in the office that you don't need files for is the same kind of work you can do at home that you don't need files for? **A.** Yes. [Gordon, p. 376]

QDE. Do you ever take any kind of conference calls or meetings when you're at home on telework? **A.** Yes, I have. **Q.** And do you ever do that while you're at work? **A.** Conference calls? Yes. **Q.** What's the difference between taking those calls at home and taking those at work? **A.** There's no difference; * * * [Jeter-Newburn, p. 456]

Interestingly, one of the Union's witnesses even offered a possible explanation to Management as to why some telephone calls may not be returned.

QCE. And if you go down three more lines from there [ME3, p. 2] it actually starts, "Office coverage . . ." Would that kind of give you a clue as to what office coverage is? **A.** No, because realistically the reason why clients are not getting phone calls back is because upon the departure of employees, office management is not turning off their phones and leaving them active. I have received various phone calls from clients asking me, "Is Mr. Jack Lee there? I've been trying to call him and contact him and I can't get ahold of him." And I go, "He's retired." They go, "Well, I call him and call him and leave messages and it rings and rings and he never answers." They're leaving the phones active. * * * It's not that office personnel is not responding. It's that management is not turning off phones. The same thing has occurred with Bonnie Sims and Bonita Stearn Churchill and - [Castillo, pp. 252-254]

QDE. * * * Can you tell us, were you told what the problem with the office coverage with internal, external clients was? **A.** No. To this day I still don't understand. [Castillo, p.229]

15. On February 11, 2008, emails were sent by Ms. Mitcheltree (the Indianapolis Director) to teleworking employees notifying each to attend a meeting on February 14, 2008. (Remember, this was the first communication to the employees about telework since September 2007.) The

next day, February 12, 2008, the Union President sent a lengthy email to Ms. Mitcheltree (JE36, 4th & 5th pages in). The President properly requested that Article 5 of the Parties' Agreement be followed. The email reads in full:

As you have finished evaluating the telework schedule, have you determined that there will be changes in telework for this office?

If so, Article 5 of the Agreement between HUD and AFGE clearly states that the "local management shall give in writing to the Local . . . representative, as appropriate, proposed changes relating to personnel policies, practices, and conditions of employment." Telework would clearly fall within this scope. Because you have been working on this re-evaluation since September of last year, it would be appropriate to provide the details to the union.

"Upon receipt of your notice, the union has the right to request bargaining within seven (7) calendar days by submitting preliminary bargaining proposals to Management. All proposals shall be related to the proposed changes."

After that has been submitted, the parties shall begin negotiations within seven (7) calendar days after the union submits its bargaining proposals.

I have not seen anything that resembles the proposed changes, making it impossible to request bargaining.

The only thing I have seen is a schedule to meet with individual employees to "provide new telework schedules and agreements." Your argument that you can by-pass Article 5 due to the change in Management from Will to you makes little sense. If the union contract could be by-passed every time there was a change in management, this department would have zero continuity.

If you have determined that there will be potential changes in telework for this office, I strongly urge you to cease and desist from conducting the meetings until the provisions from Article 5 have been met. If these meetings move forward without following the provisions of the contract the union may exercise any and/or all rights to address this grievance.

The Union threw Management a lifeline, but Management refused to grab hold. On that same date, Ms. Harvey responds, "Telework is governed by Article 2 of Supplement 3. Many people get this confused with Article 5 of the Agreement. The union does not get to bargain on telework. This is not an Article 5 matter." (JE36, 4th page in) On February 13, the President correctly responds:

The Preamble to the Agreement between HUD and AFGE states in part that management and the union ". . . agree that labor-management relations within the department are strengthened by the participation of employees in the formulation and implementation of personnel policies and practices relating to

their working conditions of employment . . ." Supplement 3 by its very nature becomes "a part of and subject to the terms and control of this Agreement. (see Article 34.01 Scope)" * * * By the supplement becoming a part of this contract it becomes part of the working conditions of the department and subject to Article 5 and [to] the language that discusses changes relating to "personnel policies, practices and conditions of employment," the exact same language used in the Preamble to the Agreement between HUD and AFGE. Nothing in Article 5 precludes it from applying to Union Supplements . . . Nothing in Supplement 3 states that it is not subject to Article 5.

Obviously, Management rejected this advice and conducted the February 14, 2008, meetings with the teleworking employees and distributed the new Telework Agreements that Management had prepared.

On February 21, 2008, the Union delivered to Management its "UNION DEMAND TO BARGAIN OVER MANAGEMENT INITIATED CHANGE IN THE INDIANAPOLIS MULTIFAMILY TELEWORK POLICY" Under the circumstances of this grievance, the complete demand met the requirements of Article 5, Section 5.03 – Ground Rules for Mid-Term Bargaining at the Local Geographic Area. Management's response to the demand simply indicated that, ". . . there has been no change in the Telework policy. Telework policy is governed by Supplement 3 and the Telecommuting Program Policy Guide. Changes in telework schedules have been made in accordance with existing policy." (JE36, last page) The Union's Grievances of the Parties (GOP 1 & 2) followed, as discussed in Finding 2 above.

Unfortunately, Management in this situation did not take to heart the premise in the Preamble to the Parties' Agreement that "labor-management relations within the Department are strengthened by the participation of employees in the formulation and implementation of personnel policies and practices relating to their conditions of employment and through constructive and cooperative relationships with labor organizations." (JE1, Preamble)

ANALYSIS & DECISION

(References to Elkouri & Elkouri, *How Arbitration Works*, are to the 6th ed., 2003, "E&E, p. ___.")

1. This matter is properly before this Arbitrator pursuant to Article 23 – Arbitration; by the Parties' joint stipulation; and, by submission of the grievances to arbitration by the Parties. As to the merits of the alleged breaches of the Parties' Agreement by Management, the Union bears the burden of proof. The Parties' have maintained their successful bargaining relationship for many years, and this is the first Arbitration concerning the Indianapolis office.

2. The four Issues in this dispute were jointly stipulated by the Parties, as shown on pages 1 and 2 of this Award.

3. The above Findings of Fact are incorporated into this Analysis & Decision section as if fully rewritten herein. Readers are encouraged to read the Findings of Fact before reading this Analysis & Decision section.

4. Arbitrators most often walk into a hearing room with no indication of the subject of the dispute. Perhaps they have a few words or a sentence generally indicating if the matter is a discipline or a breach/interpretation of contract. This practice is good and promotes the primary purpose of arbitration, that is, for a third-party neutral, who has nothing to do with the parties or the dispute, to hear both sides, examine the evidence, and render an Award. The practice is ancient. (E&E, p. 3) Arbitrators must work to uncover the facts from the presentations and other evidence of both sides. Facts include "who, what, when, where, and why." Facts are necessary to interpret and apply the parties' agreement, within the limits on the authority of the arbitrator. In this dispute, this Arbitrator is very cognizant of the directives in Section 23.10, paragraphs (1), (2) and (4): stay with the four jointly stipulated issues; do not add to, subtract from, or modify any of the terms of the Agreement or any supplement; and, look only to Management decisions impacting personnel policies, practices or matters affecting general conditions of employment.

The above Findings of Fact present the "who, what, when, and where" of this dispute. Extensive quotes are included so that ideally any reader not very familiar with the dispute or who has not studied the transcript of the hearing will decide these four factual elements in the same manner as does this Arbitrator. (At least the extensive quotes will help explain the bases for this Award.) The extensive quotes also are included in an attempt to highlight for readers the difficulty that this Arbitrator encountered in trying to identify the "why" factual element of this dispute. "Why" Management did what they did to the employees is important to decide the four issues in this dispute, and because Management's decisions did impact "personnel policies, practices, or matters affecting general conditions of employment." (JE1, §23.10, (4)) "Why" becomes even more important because this Arbitrator finds (relative to the four issues) that Management:

- Violated the Collective Bargaining Agreement;
- Arbitrarily and capriciously set the number of telework days, specific telework days and other work condition requirements for teleworkers;

- Violated the fair and equitable treatment of employees under the Collective Bargaining Agreement; and,
- Violated contractual requirements for bargaining changes in working conditions for local Indianapolis employees.

5. In resolving parties' disputes, arbitrators are expected to be forthright and to "call it like it is." After all, if the third-party neutral cannot, then who can? The "why" in this dispute was most difficult to winnow, or to pull from the testimony and other evidence. After weeks of careful consideration, after reviewing and re-reviewing the testimony and other evidence at length, the only logical conclusion is that there is no conventional answer to "why" in this dispute. Then what happened to cause this dispute?

It started one day in May 2007, when a high-level manager suddenly, in an instant, came to a totally emotional and irrational perception that there was a problem with office coverage in the Indianapolis office. There is simply no other way to describe the event. "Well, I, I walked in, and I was really, really just *shocked* at how few people were there. I was really surprised to see so few people at work." [p. 479] [emphasis added] The perception had no basis in fact – either on that day; after that day and through the February 14, 2008, staff meetings; or thereafter, including up to the Arbitration Hearing in June 2009. At least Management did not prove any factual basis for the perception nor did Management demonstrate any attempt to discover the facts. The consequences of the high-level manager's unfounded arbitrary and capricious perception were material and significant negative changes to the personnel policies and practices and the conditions of employment for the bargaining unit employees in the Indianapolis office. (stipulated Issue 2)

Fortunately for the bargaining unit members, the Union, and ultimately for HUD, the Parties' Agreement has provisions to protect employees from such major managerial lapses in good judgment.

Management and the Union agree that labor-management relations within the Department are strengthened by the participation of employees in the formulation and implementation of personnel policies and practices relating to their conditions of employment . . . (JE1, Preamble)

Local Management shall give in writing to the Local or Geographic Area designated representative, as appropriate, proposed changes relating to personnel policies, practices, and conditions of employment. (JE1, Article 5, §5.03)

An arbitrator shall lack authority to determine the legality or regulatory correctness of any Management decision not impacting personnel policies, practices or matters affecting general conditions of employment. [Stated in the positive, an arbitrator *has* authority to determine Management decisions that do impact personnel policies, *etc.*] (JE1, Article 23, §23.10, (4))

6. The high-level manager (Ms. Anderson, Director of Operations for the Chicago Multifamily Hub) who visited the Indianapolis office on that day in May 2007, was not the only participant in what quickly became an office coverage/telework “express” careening off the cliff of factual, legitimate, and sound managerial labor relations decision making. The visit could not have come at a more unfortunate time for the then newly promoted Director of the Indianapolis office (Ms. Mitcheltree). It is understandable that she would readily agree with the second in command of the Chicago head office, as she had just assumed her new (and highest level) position as Director in May 2007. She did not challenge Ms. Anderson’s perception, nor did she seek facts to either support or deny Ms. Anderson’s perception that there was a problem with office coverage in Indianapolis and that telework needed to be significantly changed. She appears to have immediately sided with Ms. Anderson. She jumped onboard the “express.” She was in good company as that is exactly what the top person (Mr. Hinsberger, Director of the Chicago HUB.) did as well, after speaking with Ms. Anderson following her visit to Indianapolis. He likewise did not seek facts to either support or deny Ms. Anderson’s perception, or the perceptions of those he described in anecdotal allegations of problems with office coverage due to teleworking. Along the way, both of the Indianapolis supervisors joined the group and adopted the same misperception. Unfortunately, the person (Ms. Harvey) probably in the best position to have at least slowed the “express” so that careful adherence to the Parties’ Agreement could have a chance to prevail also jumped onboard. (stipulated Issue 2)

The analogy to “express” is not meant to be glib or to make light of what occurred in this dispute. Quite frankly, it is just plain difficult to conceive of any other concise description or analogy to try to clearly describe the unique, unconventional events of this case that come closest to answering the “why” question in this dispute. Strung together and viewed as a whole, Management’s unconventional actions were arbitrary and capricious. (stipulated Issue 2) Reread the Findings of Fact.

7. Further complicating this dispute is Management’s substantial and material misinterpretation and misapplication (violation) of several provisions of the Agreement, including Supplement 3 (stipulated Issue 1).

Management relies heavily on Article 17 Hours of Duty – Alternative Work Schedules (JE1). In summary, the title of the Article says it all – “. . . Alternative Work Schedules.” These schedules (“AWS”) include “flexitime” (17.02 (2), 17.04 (1)) and “compressed work schedules” (17.02 (3), 17.04 (3)). Supplement 46 (“Subject: Pilot for 6:00 a.m. arrival time . . . Article 17. . .”); and, Supplement 67 (Subject: Implementation of the nationwide 6:00 a.m. arrival time program”); and Supplement 67A (Subject: Nationwide 6:00 a.m. arrival program); and, Supplement 67A Amended (Subject: Nationwide 6:00 a.m. arrival time program) added the possibility for an employee to start their work day as early as 6:00 a.m. (JE1) **Nothing in Article 17, or in these four related Supplements, has anything to do with teleworking.** Article 17 deals with work schedules. All employees have a work schedule – whether or not they are teleworking. An employee’s work schedule stays the same whether they are teleworking at home, or working in the office.

Unfortunately, Management relied heavily on Section 17.07 Management Responsibilities. This provision says that management is responsible for determining office coverage requirements, and gives seven examples of what is included in "office coverage." Paragraphs (4), (5), and (6) give Management significant responsibilities for "administering this Alternative Work Schedules program" (JE1, Article 17.07) – but not for administering telework because telework is not an alternative work schedule, and is not part of Article 17. The Union correctly points out that Management simply confused "schedules" with "telework." Article 17 is about alternative work schedules (not teleworking) and Supplement 3 is about teleworking (not alternative work schedules). Management should have reassessed alternative work schedules and their impacts on office coverage instead of pouncing on telework and changing all of the Telework Agreements. As employees testified, they perform essentially the same duties when teleworking as when they are in the office. Several testified that they produce more work at home than in the office; more work teleworking than if they did not telework.

HUD violated the Collective Bargaining Agreement for Multifamily HUD employees in the Indianapolis, IN office when it substantially and materially misinterpreted and misapplied (violated) Article 17 of the Parties' Agreement by applying it to teleworking. (stipulated Issue 1)

8. Supplement 3 (JE3, 1st three pages) is part of the Parties' Agreement. No one argued that it was not. It is identified in part:

Subject: ***Telework Program***

Scope: The scope of this Supplement encompasses the ***implementation*** of the Telework Program. [emphasis added]

There is nothing about work schedules (alternative or otherwise) in this Supplement. Paragraph 3 provides that a telecommuter must work "a minimum of two (2) days per week in the office." Paragraph 4 provides that the Telework Agreement must identify "the days the telecommuter will work in each work setting" (*i.e.*, home or office).

Management materially and substantially misinterpreted and misapplied (violated) Supplement 3 in several ways. (stipulated Issue 1) First, in general, some of the members of Management involved with this matter from the beginning did not seem to understand what telework is, or even that Supplement 3 is part of the Parties' Agreement. (One supervisor even lamented over the lack of any training about teleworking.) Or, if they did, they only selectively considered it in their decision making process. Management selected the following paragraph on which to hang their collective hat to arguably justify their Valentine's Day massacre of telework in the Indianapolis office (2-14-08):

2. ***A telecommuter*** may terminate ***the*** telecommuting arrangement at any time. In the case of unusual circumstances warranting involuntary termination of ***a Telework Agreement*** (*i.e.*, other than at the request of the employee . . .) Management agrees to give ***the employee*** and the local union five (5) days' advance notice, or as soon as practicable, before termination. This notice shall

provide the rationale for terminating *the Agreement*. (Supplement 3, (2))
[emphasis added]

This provision clearly is directed toward situations where a *single* employee's telework agreement needs to be terminated. It does not provide for multiple, *en masse* terminations or cessation of the telework program for an entire HUD office. One might argue that if one telework agreement can be terminated, then by implication all can be terminated. Not in this case. Paragraph 2 must be read within the context of the entire Supplement 3 document. By reading the words and sentences, and by applying their ordinary meanings, that context clearly addresses *individual* employee requests to telework – see paragraphs (1), (2), (3), (4), (5), (6), (9), (12).

While the “overarching principle of contract interpretation” requires ascertainment of meaning in light of “all the relevant circumstances surrounding the transaction,”

[c]ourts start with the assumption that the parties have used the language in the way that reasonable persons ordinarily do. . . * * *

Arbitrators give words their ordinary and popularly accepted meaning in the absence of a variant contract definition, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special colloquial meaning. Consequently, in the absence of such evidence when each of the parties has a different understanding of what is intended by certain contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail.

Arbitrators often apply their understanding of words or phrases in the contract without citing any authority. * * * [E&E, pp. 447-449]

Requests are to be dealt with on an individual basis. Any termination for “unusual circumstances” needs to be dealt with on an *individual* basis. Individual employees were not considered. They were not consulted before their individual Telework Agreements were cancelled. Their requests to be considered for different Telework Agreements were rejected. Management arbitrarily and capriciously cancelled all of the then existing Telework Agreements and unilaterally replaced them with new ones, prepared by Management, providing for one day of teleworking, with Management unilaterally deciding the day. Employees were then told to either sign the new Telework Agreements, or they would not be allowed to telework on even one day per week. (stipulated Issue 2)

Note: Management's attempt to force the employees into the appearance of acting “voluntarily” was fallacious, arbitrary and capricious. (stipulated Issue 2) When the employees signed Management's new Telework Agreements, they handwrote, “Document is signed under duress, in protest and in fear of retaliation.” (see JE11, 2nd page from end for example) Under the circumstances of the “take it or leave it” new Telework Agreements, adding such language was appropriate to document that the employees' signatures did not signal voluntary acceptance. After all, an “agreement,” a “contract” is a voluntary “meeting of the minds” which was not the

case here. Subsequently, before Management signed the new Telework Agreements, Management added to the bottom of each new Telework Agreement:

I am accepting your signature as agreement that you want to participate in the program. There are no duress or protest or retaliation issues. Participating in the telework program is a matter of your choice that you have indicated by your signature. You have the right to terminate your participation in the telework program at any time.

Further as regards Supplement 3, Management seems to have grabbed hold of the concepts of "termination" and "unusual circumstances" from paragraph (2), and then combined them with selected provisions from Management's own "Telework Program" to further try to bootstrap a right to unilaterally and totally terminate all of the then (2-14-08) existing Telework Agreements. Readers must be careful to understand that there are two documents, each with the title "Telework Program." First, there is JE3 (first three pages) which is Supplement 3 in its entirety. The "Subject" of Supplement 3 is "Telework Program" and it is part of the Parties' Agreement. Also part of JE3 (starting the 4th page in to the end) is Management's "Telework Program." The latter is not part of the Parties' Agreement. Supplement 3 was signed on 2-27-98. Management's document appears to have been prepared shortly thereafter ("Mar 16 '98" appears at the top of those pages).

Applicable to Management's attempt to force a marriage between the two documents, the Union called Ms. Carolyn Federoff to testify. [starts p. 146] She is an attorney in HUD's Office of General Counsel in the Boston Regional office. Additionally, she serves as the special assistant to the President of AFGE Council 222, which is the Council of HUD locals. She has experience with grievances involving Supplement 3 at the local and national levels. She testified that "It was clear that Supplement 3 was the controlling document." [p. 149] In the early 2000s:

At that time I was regularly meeting with the Deputy Secretary who was Alfonso Jackson, and he agreed to issue a letter to all principal staff on telework, and they agreed to make this part of the policy on the Web site which made it clear that there is only one telework policy. There are not multiple telework policies. And additionally, he agreed in this that the policy had to apply to individual requests and that individual requests had to be acted upon expeditiously . . . [pp. 150-151]

QDE. . . . you indicated that the supplement – that Supplement 3, the implementation of telework, is a standalone document. When you say that, what do you mean by a standalone document? **A.** I mean that it does not require anything else in order to be effective. The parties – by the terms of the agreement, the parties did not say and will – you know, the parties will develop further guidelines. It doesn't say management will develop further guidelines. It just – it, it stands on its own. [pp. 151-152]

The witness confirmed that there have been no changes to Supplement 3. So, what then is Management's Telework Program document (JE3, starts 4th page in)?

QDE. It's titled telework program, and what you're saying is what I faxed to you has not been negotiated? **A.** That is correct, what [Management's Telework Program"] appears on the HUD Web site has not been negotiated. [p. 153]

So, what if any impact does Management's Telework Program have on the instant grievances?

QDE. And would that be something that was agreed to by the union and its employee representatives to be the policy for HUD? **A.** It was never agreed to by the union that this [Management's Telework Program] was the policy, but basically we – where we don't get notice of a policy and an opportunity to bargain, then basically we have two choices. We either can put in a demand – we can make a presumption that it's going to adversely affect bargaining unit employees and put in a demand to bargain and argue with management until the cows come home or we can just wait for it to be applied, contrary to the contract. And typically what we have done is we wait for the policy to be applied against bargaining unit employees contrary to the contract and then we file a grievance alleging violations of the contract. **Q.** And – **A.** I mean, because the agency has a lot more than just bargaining unit union employees. They also have non-bargaining unit employees. And for all I know, the portions of this policy that are contrary to the contract, the agency only intends to apply them against non-bargaining unit employees. * * * [155-156]

* * * Ultimately I only care about how the policy is applied to bargaining unit employees and whether or not their rights under the supplement have been violated through the application of whatever policy, memo, interpretation the agency may have out there. [pp. 169-170]

The opinions of this witness are in good company.

Company issued booklets, manuals, and handbooks that have not been the subject of negotiations or agreed to by the union have been found by arbitrators to constitute "merely a unilateral statement by the Company and [are] not sufficient to be binding on the Union." However, policy manuals may have binding effect if they are within the scope of management's right to promulgate reasonable rules. Unilaterally promulgated company policies that conflict with the terms of the parties' collective bargaining agreement are, of course, nonbinding. * * * [E&E, pp. 464-465]

It is not necessary to discuss whether or not Management's Telework Program is "within the scope of management's right to promulgate reasonable rules" because as Management applied their policy in the instant dispute, the Parties' Agreement (Supplement 3) was violated. (stipulated Issue 1) Management used its policy to unilaterally terminate, *en masse*, the employees' Telework Agreements, which is not provided for in Supplement 3, and which therefore violates Supplement 3. It is analogous to Management declaring that, for no reason whatsoever, they will no longer follow any other provision of the Parties' Agreement. That

would be unacceptable, would be a violation (breach) of the Parties' Agreement, and so is Management's disregard for Supplement 3. (stipulated Issue 2)

The witness was also correct in her assessment that Supplement 3 includes the "implementation" of the Parties' teleworking agreement. The Supplement provides: "Scope: The scope of this Supplement encompasses the *implementation* of the Telework Program." [emphasis added] Supplement 3 is well-written, straight forward, and is signed by 11 persons. This Arbitrator is willing to give them the benefit of the doubt that this is what they wanted and to what they agreed. Remember, teleworking is a choice of location where job duties will be performed. It does not alter job duties, nor does it alter work schedules, nor does it add to or alter how offices are covered, nor does it provide for job performance evaluation, or for discipline. Duties, schedules, office coverage, evaluation, and discipline issues should be dealt with elsewhere, and not by twisting Supplement 3 into something it was not intended to cover.

9. As discussed, Supplement 3 focuses on the individual employee. A major provision is in paragraph (1). "Management agrees that each request to participate in the telework program will be *fairly and equally* considered." [emphasis added] Did Management's wholesale termination of all Teleworking Agreements in the Indianapolis office "fairly and equally" consider each employee? Absolutely not. (stipulated Issue 2) Further, this provision echoes Article 4 Employee Rights/Standards of Conduct, Section 4.01 General (JE1):

* * * Employees shall be treated *fairly and equitably* in the administration of this Agreement and in policies and practices concerning conditions of employment, and may grieve any matter relating to employment. [emphasis added]

Were teleworking employees in the Indianapolis office treated "fairly and equitably" by Management's unfounded wholesale termination of all Teleworking Agreements? Absolutely not. For example, Deputy Secretary Alphonso Jackson stated in his memo to Principal Staff on May 16, 2002 :

Successful, productive telework arrangements require that the supervisor and employee have a mutual understanding of their shared responsibilities. The suitability of the type of work, the quantity of work that is portable, the needs of accessibility to clients, coworkers or customers, and the experiences of the employee and supervisor demonstrating an ability to work without close supervision are all *examples of factors* that must be discussed in evaluating the appropriateness of a telework arrangement. (JE14) [emphasis added]

Were any of these or other appropriate factors discussed, determined, assessed, evaluated, or otherwise considered in any meaningful, factual, appropriate way before terminating all Telework Agreements? Absolutely not. (stipulated Issue 2) The extensive inclusion of quotes from the testimony as Findings of Fact above is intended to give the reader meaningful insights into what happened to first cause the "reassessment" of teleworking, and second, what did not happen during the lengthy reassessment period – that is, not much happened, let alone any valid, reliable,

factual, even approaching a good faith consideration of such factors as were identified by Deputy Secretary Jackson. The employees' Telework Agreements were cancelled with no consideration or recognition of any degree of just cause or fair and equitable treatment. They were cancelled and arbitrarily and capriciously replaced by Management. (stipulated Issue 2)

What happened to the employees almost can be characterized as "quasi-disciplinary." On that day in May 2007, the high-level Management person wrongfully perceived that there was a problem with office coverage. The office coverage/telework "express" quickly gained speed. The employees lost their teleworking as the consequence. Management effectively assigned fault to the employees for the perceived office coverage failures without even a scintilla of a factual investigation, fairness, equity, or just cause. The employees and their rights to telework (subject to Supplement 3) were victims of bullying by senior Management. Obviously, Management did not follow the provisions of Article 20 Discipline when they did this.

It was clear from the testimony that Management considers teleworking as a privilege, not a right. While that may be accurate in a non organized workplace, here Management's characterization of teleworking as an optional privilege, impliedly to be dispensed at Management's whim, is erroneous. Management's attitude seems to have been that the employees should be thankful for any bit of teleworking Management might chose to give them. To accept Management's characterization would imply that every provision of the Parties' entire Agreement is optional, as though Management is being magnanimous when following any provision. Supplement 3 (Teleworking Program) is as much a part of the Parties' Agreement as is any Article. The Parties have committed themselves to Supplement 3 as they have to all of the other covenants of the Agreement. The Agreement provides and protects rights and benefits to the bargaining unit members. Just as Management does not have unbridled discretion when it comes to any other provision of the Agreement, Management did not possess the unbridled discretion that it exercised in the instant dispute. It is common knowledge that a historical reason for having a unionized workplace is to protect employees from the arbitrary and capricious whims and actions of owners and supervisors – to achieve some balance for the benefit of both sides.

Supplement 3 provides an important workplace policy for the employees and the conditions under which they are employed. Even Management's Telework Program (JE3, starting 4th page in) acknowledges:

Benefits

Telework is designed to benefit employers, managers and the community by

- decreasing
 - work trip vehicle miles
 - traffic/parking congestion
 - energy consumption and
 - air pollution;
- improving quality of
 - worklife and
 - performance; and
- improving morale by assisting employees in balancing work and family demands

Another perspective confirming these and offering additional benefits of teleworking is:

Based on a number of recent studies and surveys, an employer considering telecommuting as a workplace option might expect the following benefits:

- Improves the quality of work and increases productivity. Employees concentrate on the project itself with less distraction from the office environment.
- Improves morale and reduces stress giving employees more options to balance work and family demands.
- Saves hours of commuting time, allowing the employee to spend more time on projects, completing them with a higher quality of work in a timelier manner.
- Employer/supervisor can concentrate on the outcome and quality of the project at hand rather than tracking hours an employee is present in the actual office. This enhances teamwork and communication in the office.
- Mental health concerns are alleviated through telework opportunities. The employee reduces the frustration and fatigue resulting from commuting to the official office.
- Provides a valuable tool for recruitment of new employees as well as retention incentive for experienced employees to continue with their careers instead of opting for retirement.
- Environmental issues, including traffic congestion, air quality, energy issues, limited parking availability, etc., are significantly improved by reducing commuter traffic via telework programs.
- Expands the location and availability of employees, thereby increasing access by the customer. For instance, in large metropolitan areas it may be difficult for customers to get to a central office "downtown"; however, telework centers located in surrounding suburbs are easier to access.
- May be used to provide services when the duty station office is closed. For example, after a natural disaster, inclement weather, etc.
- Extends employment opportunities to people with disabilities, including employees who have partially recovered from work-related injuries who can perform their job from a remote location.
- Accommodates employees who have temporary or continuing health problems or who might otherwise have to retire on disability.

(HRComply, retrieved 11-06-09, www.hrcompliance.ceridian.com)

Management argued that:

Teleworking is a workplace privilege and an employee option, but not a right, and is treated as an option and privilege by the CBA in allowing Management to cancel **alternative work schedules** for reasons such as reduced office coverage. Telework policy, practice, or general conditions of employment were not changed by **rescheduling** these employees, but remained in place during the time these changes occurred. (Management's Position) [emphasis added]

As discussed above, teleworking is not an "alternative work schedule." Thus, any such option to cancel (terminate) regarding AWS does not apply to teleworking. Thus, teleworking is more than a privilege or an option. It is an important right with many benefits for HUD and for the employees under the Parties' Agreement and is obviously, patently part of "personnel policies and practices relating to their [employees'] conditions of employment" (JE1, Preamble). If teleworking is not part of "personal policies and practices relating to their conditions of employment" then what workplace action could possibly so qualify? Further, employees are to be treated "fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment" (JE1, Article 4, Section 4.01). And, "Local Management shall give in writing to the Local or Geographic Area designated representative, as appropriate, proposed changes relating to personnel policies, practices, and conditions of employment" (JE1, Article 5, Section 5.03). As noted, Management did not act fairly and equitably, nor was the Union afforded the rights due it was due. (stipulated Issue 3)

In summary, telework is more than a privilege, it is an important right, provided by and subject to the terms of Supplement 3. Telework is a part of "personnel policies and practices relating to their conditions of employment." By treating it otherwise is a violation of The Parties' Agreement (JE1, Preamble, Articles 4 and 5). Finally, Management's unilateral termination of all Telework Agreements in the Indianapolis office was a Management decision that **did** impact "personnel policies, practices or matters affecting general conditions of employment." (JE1, Article 23, Section 23.10, (4)) In this situation, the impact was so significant that it prompted the first ever arbitration in the Indianapolis office. HUD violated the fair and equitable treatment of employees under the Collective Bargaining Agreement with the implementation of telework in the Indianapolis Multifamily Program Office (stipulated Issue 3).

10. The Union was correct when it tried to invoke mid-term bargaining, citing Article 5. First it threw Management the lifeline (the Union President's February 12, 2008, email) which Management rejected. (JE36, 4th & 5th pages in). Following Management's meetings with the teleworking employees on February 14, 2008, the Union properly sent its timely (February 21, 2008) "UNION DEMAND TO BARGAIN OVER MANAGEMENT INITIATED CHANGE IN THE INDIANAPOLIS MULTIFAMILY TELEWORK POLICY." (JE36, 6th page in) Management rejects the demand on February 22, 2008, and does not engage in mid-term bargaining. Incredibly, Management's reason for refusing to bargain was that, ". . . there has been no change in the Telework policy." (JE36, last page) What was Management thinking? Eight days before its response, Management had cancelled/terminated all of the Teleworking Agreements in the Indianapolis office; had passed out new ones prepared by Management; and, teleworking employees were essentially told to "take it or leave it." Employees were told there would be no discussion, that the wholesale changes were nonnegotiable. How could there have been "no change in the Telework policy?" As discussed above, Management's actions violated Supplement 3, effectively enacting a unilateral change to the Telework policy. (stipulated Issues 1, 2, 3, 4)

Article 5 of the Parties' Agreement directly addresses changes relating to "personnel policies, practices, and general conditions of employment" and provides for "good faith" mid-term negotiations. The first section of Article 5 is worth repeating here:

Section 5.01 – Mid-Term Changes at the National Level. During the term of this Agreement, Management shall transmit to the Union its proposed changes relating to personnel policies, practices, and general conditions of employment. The parties agree that it is in the interest of the Government, the public and the parties to *negotiate in good faith* in order to facilitate the negotiations process. [emphasis added]

Management failed to “transmit to the Union its proposed changes” concerning teleworking in the Indianapolis office. The ultimate changes amounted to “changes relating to personnel policies, practices, and general conditions of employment.” What happened here (in lieu of mid-term bargaining) was not “in the interest of the Government, the public and the parties.” Ultimately, the entire process (the office coverage/telework “express”) lacked good faith. Clearly, Management violated/breached Article 5, including without limitation, Section 5.01. Obviously, by rejecting the Union’s demand for mid-term bargaining, the remaining provisions of Article 5 never had a chance to be observed. (stipulated Issues 1, 4)

HUD violated statutory and contractual requirements for bargaining changes in working conditions for local Indianapolis Multifamily Program employees (stipulated Issue 4). The Parties’ Agreement was violated as discussed above. The Union correctly notes that FLRA has concluded that “We will find that a proposal is within the duty to bargain under the Statute if it (1) vitally affects the working conditions or the unit employees, and (2) is consistent with applicable law and regulations.” (33 FLRA No. 68, FLRA v. HUD Council #222 and Department of HUD 0-NG-887 [22 FLRA 552] October 28, 1988) Management’s unilateral actions “vitally affected” the Indianapolis employees, as evidenced by their testimony in this first ever arbitration at that office. Additionally, both teleworking and non-teleworking employees were affected, since the latter may wish to telework in the future and would have been limited by Management’s new policy. Several employees testified that they accomplish more work when teleworking than when they are in the office. When Management unilaterally terminated their Teleworking Agreements, limited the employees to one day of telework per week instead of two (Supplement 3 permits up to three days), and unilaterally assigned the one day of the week, the employees’ efforts to perform at the highest levels may have been made more difficult. Certainly, a major goal expressed in the Preamble to the Parties’ Agreement was not promoted by Management’s actions:

. . . that labor-management relations . . . are strengthened by the participation of employees in the formulation and implementation of personnel policies and practices relating to their conditions of employment and through constructive and cooperative relationships with labor organizations. (JE1, Preamble)

Fulfilling HUD’s mission was never in question – before or after the February 14, 2008, unilateral changes to the Teleworking Agreements. Management’s witnesses consistently affirmed that the Indianapolis office’s goals were met. Not one testified to the contrary. The employees who testified all performed at levels ranging between highly to outstanding. Considering that staffing levels in the Indianapolis office had dropped, the employees’ performance is indicative of hard-working, dedicated employees.

11. The Union raised certain arguments regarding the lack of phone cards for teleworking employees to make long distance calls when teleworking away from the office. Management countered that employees can be reimbursed if they use the proper HUD form. There was some testimony regarding whether or not Management could require teleworking employees to forward calls from their office phones to a home or cell phone when teleworking. The Union further suggested that teleworking employees are due overtime for taking calls on their home or cell phones before or after their scheduled hours, or even on weekends. There was not sufficient evidence presented at the Hearing by either Party to include such questions in this Award. Regardless, the four stipulated issues do not directly include these questions. Neither GOP-1 nor GOP-2 raise these questions. The Parties will have the opportunity to discuss these questions should they engage in mid-term bargaining. It is without prejudice that these questions are not part of this arbitration.

12. In summary, regarding the events and actions in this dispute, Management's actions were arbitrary and capricious, Management did not afford the employees fair and equitable treatment in the administration of their Agreement and in policies and practices concerning conditions of employment. Management wrongfully refused to engage in mid-term bargaining. Management violated/breached the provisions of the Preamble, Articles 4, 5, 17 (by misapplying it), 34, and Supplement 3. Readers are encouraged to read the Findings of Fact and the entire Analysis & Decision portion of this Award.

13. Management raised objections to some of the witnesses called by the Union on the basis that their testimony would be irrelevant, primarily because the witnesses were from different offices and not from the Indianapolis office. This Arbitrator accepted the testimony from all witnesses, and gave their testimony the weight, if any, that it deserved.

This Arbitrator considered the grievances, all of the testimony and other evidence (including without limitation the Parties' Agreement [JE1]), the Union's request for remedies, and the Parties' arguments as presented in connection with the Issues, even though not all have been set forth herein.

AWARD

1. The Union's Grievances are sustained.
2. The Union met its burden of proof and showed that:

HUD violated the Collective Bargaining Agreement for Multifamily HUD employees in the Indianapolis, IN office; and,

HUD arbitrarily and capriciously set the number of telework days, specific telework days and other work condition requirements for teleworkers in the Indianapolis Multifamily Program Office; and,

HUD violated the fair and equitable treatment of employees under the Collective Bargaining Agreement with the implementation of telework in the Indianapolis Multifamily Program Office; and,

HUD violated statutory and contractual requirements for bargaining changes in working conditions for local Indianapolis Multifamily Program employees.

Readers are encouraged to read the entire Award document, especially the findings of Fact and the Analysis & Decision section. In short, Management's actions in this dispute were most unconventional and constituted multiple and various violations of the Parties' Agreement, including, without limitation, the Preamble, Articles 4, 5, 17 (by misapplying it), 34, and Supplement 3.

3. So much has occurred and changed as a consequence of Management's unilateral termination of the employees' pre-February 14, 2008, Telework Agreements. Substantial time has passed since that date. However, referring to the remedies sought by GOP-1 and GOP-2, certain ones are most appropriate under the circumstances that now exist. The remedies shall be:

- (a) Management shall reinstate all former individual telework schedules.
- (b) Management shall reinstate its former telework policy and past practice, that is, return to the telework status quo that existed before February 14, 2008.
- (c) Management shall comply with the provisions of Supplement 3, including without limitation, paragraph 1, wherein "Management agrees that each request to participate in the telework program will be fairly and equally considered." Further, Management shall reinstate the past ability of teleworkers to request and discuss specific schedules and give input into any proposed changes.
- (d) Management shall comply with the provisions of Articles 5 and 34 of the Parties' Agreement, including without limitation, Section 5.03 (Ground Rules for Mid-Term Bargaining at the Local Geographic Area) should Management desire any future proposed

changes to teleworking or to personnel policies, practices, and conditions of employment related to telework.

(e) Compensate teleworkers for the additional mileage travel expenses each may have incurred, to be computed on a mileage basis using the same per mile rate as HUD's employees are reimbursed for other travel purposes.

4. This Arbitrator has the highest expectations that the Parties will work together as professionals to implement the remedies as smoothly as possible. With great reluctance, this Arbitrator will retain jurisdiction for not less than thirty (30) days following the date of this Award in case there are any questions regarding the remedies. However, please first work diligently to resolve any questions between/among yourselves; and, present any remaining questions as mutual questions.

5. Pursuant to Article 23, Section 23.04, Management (HUD) shall pay the Arbitrator's fees and expenses – *i.e.*, loser pays.

6. This Arbitrator has the highest expectations that the Parties will work together as professionals to ensure that their superior working relationship continues into the future, and that perhaps this is the one and only arbitration emanating from the Indianapolis office.

William M. Slonaker, Sr.

William M. Slonaker, Sr., JD, MBA, SPHR
Arbitrator

Nov. 9, 2009

Date