In the Matter of Arbitration:

U.S. DEPARTMENT OF LABOR	ARB-ESA-05-04-054
and	RSOL NO. 0500-04-001087
NATIONAL COUNCIL OF FIELD LABOR LOCALS, AFGE, AFL-CIO	Removal; William "Doe"

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Department:

Suzanne F. Dunne, Esq., Attorney

For the Union:

Dennis P. DeMay, President, AFGE Local 648

STATEMENT OF THE CASE

An arbitration hearing was held in this matter on January 31, February 1, July 1, July 5, July 6 and August 17, 2005. A transcript was prepared of the hearing that was agreed to constitute the official record of that hearing. The Parties filed post-hearing briefs in December 2005 and agreed to waive the deadline for the issuance of this Opinion and Award.

The issue in this case is whether the removal of the Grievant from the federal service was for such cause as would promote the efficiency of the Service and, if not, to determine the appropriate remedy.

On January 14, 2005, shortly before the first day of hearing, the Department raised an objection to the arbitrability of this matter, asserting that the Grievant's

"voluntary retirement" precluded his challenging his removal. The Parties argued orally at the January 31st and February 1st hearings regarding that motion and developed a sufficient record that, following supplemental briefing, an Interim Award was issued on that question that found the grievance arbitrable. A summary of the reason for that holding is summarized later herein. Based upon the finding that the grievance was arbitrable, the hearings continued in July and August 2005.

The Department also filed a Motion in Limine shortly before the start of hearings seeking to exclude evidence that the Grievant was removed for reasons of discrimination and/or reprisal. The Motion was denied. While I found that independent claims of discrimination and/or reprisal were not presented herein for decision by the grievance, I found that proof of discriminatory intent and/or motivation to engage in reprisal was relevant to the issue of such cause as will promote the efficiency of the Service.

The Proposed Removal and Decision in this case contained a larger number of specifications than has been presented in any other case heard by the Arbitrator. The large number of specifications triggered, in large measure, the unusually lengthy hearings in this matter. The need to address each one factually has resulted in this unusually lengthy Opinion accompanying the Award in this case.

In removing the Grievant, the Department cited four reasons: 1) uncooperative behavior; 2) unprofessional behavior, 3) absence without leave ("AWOL"); and 4) failure to safeguard his government computer. The Department advanced 13 numbered Specifications in support of Reason 1; 3 numbered Specifications in support of Reason 2; a single Specification in support of Reason 3; and 2 numbered Specifications in support of Reason 4.

The burden rests with the Department to prove any Reasons and Specifications used to support the Grievant's removal by a preponderance of the record evidence. A summary of the pertinent evidence related to each of the 19 specifications relied upon in support of the Grievant's removal, as well as rulings upon whether and to what extent each of those specifications was proved factually, are provided below.

For the reasons discussed at some length in this Opinion and Award, I find that the Department has not established by a preponderance of the evidence that the Grievant was removed for such cause as would promote the efficiency of the service. Only 2 of the 13 Specifications cited in support of the first Reason given for the removal decision (Uncooperative Behavior) are found to be factually supported. None of the Specifications cited in support of the second, third, and fourth Reasons (Unprofessional Behavior, AWOL, and Failure to Safeguard a Government Computer) are found to be factually supported. The record did establish that the Grievant was not the easiest employee to supervise and that he frequently questioned authority when asked to perform various tasks. At times, his questioning was repeated and inappropriate. The record also established, however, that management inappropriately seized upon a number of incidents, often many months after the fact, to construct a claim that the Grievant had acted unprofessionally or uncooperatively and, in connection with the AWOL and Failure to Safeguard Charges, acted in a manner that suggested a lack of good faith in even charging the Grievant with those acts of misconduct in the first instance. (The same observation appeared to apply with respect to a number of the specifications cited in support of the claims of Uncooperative and Unprofessional Behavior on the part of the Grievant.)

For reasons discussed later herein, I find that a much lesser penalty would promote the efficiency of the Service and conclude that the removal action should be reduced to a suspension of five (5) days, the maximum reasonable penalty for the two proven Specifications of Uncooperative Behavior.

BACKGROUND

The Grievant's Employment History

As of the date of his removal, the Grievant had been a federal employee for many years. The Grievant worked as an Investigator for the Department's Employment Standards Administration ("ESA") of the Wage and Hour Division ("WHD" or "Division") from 1971 to 1979. He then moved to a similar position with the Equal Employment Opportunity Commission ("EEOC"). In July 1997, he returned to the Department as an Investigator in the Division's Los Angeles District Office.

In July 2000, the Grievant transferred to the Minneapolis District Office. That transfer was the result of a settlement of an employment discrimination charge, alleging discrimination based on age, sex and veterans status, that he had filed against the Department. One of the allegations that the Grievant made in this charge was that the District Director ("DD") for the Department's Minneapolis District, Denise Scharlemann, told him that she would not consider him for employment because she only used the Outstanding Scholars Program for selecting employees. The Grievant also alleged that the last six hires in the Minneapolis District and the person promoted to the Assistant District Director ("ADD") position were all young females and that the Outstanding Scholars Program had the effect of discriminating against veterans, against men, and against older applicants.

The Grievant testified that, when he transferred to Minneapolis, Timothy J. Reardon, the WHD Regional Administrator (and the Deciding Official on the removal action), told him that Ms. Scharlemann did not want him in the office, but that he "went to bat" to effectuate the transfer. Similarly, Jayne Thompson-Meier, a former Wage-Hour Investigator in the Madison office and a Union Representative, testified that, sometime in the late summer of 1997, Ms. Scharlemann vehemently stated that she did not want the Grievant in the office.

The Grievant's job title during the relevant period was Wage and Hour Compliance Specialist, GS-12 ("Specialist"). (The Specialist position is also referenced as the job of Investigator. The GS-12 is the Journeyman level for that job.) According to the job description, the Specialist is responsible for investigating and seeking compliance with alleged employer violations of the Fair Labor Standards Act ("FLSA"), including its minimum wage, overtime, and child labor provisions. The Specialist conducts investigations which entail: analyzing and determining the validity of complaints; resolving coverage and exemption issues; interviewing employers and employees; collecting and analyzing data; performing legal research; identifying violations and resolving contested issues; preparing investigation reports; and determining appropriate post-investigation actions, i.e., case closure, litigation, penalty assessments.

The Specialist works under the general supervision of the DD and/or the ADD for the District Office. The job description states that the Specialist independently analyzes issues, plans and initiates appropriate actions and makes decisions with little supervisory guidance during investigative activities. However, the Specialist's completed work is reviewed by the supervisor and the Specialist may seek confirmation

of recommendations or conclusions. The job description further states that the Specialist is supposed to apply guidelines set forth in the Department's Field Operations Handbook ("FOH" or "Handbook"), WHD directives and pertinent reference and regulatory materials.

In May 2001, the Grievant received a performance appraisal covering the preceding one-year period. Terri Walls, the ADD for the Minneapolis District Office was the Rating Official and Ms. Scharlemann served as the Reviewing Official. The Grievant received a summary rating of "Effective," which represented the middle rating of three possible ratings (i.e., "Superior," "Effective," or "Unacceptable").

Ms. Scharlemann testified that, in May 2001, she and Ms. Walls had a counseling session with the Grievant about his performance. She stated that in the course of this session, the Grievant stated that he "couldn't get along" and "didn't like" either of them.

In July 2001, the Grievant sought and obtained a transfer to the Eau Claire, Wisconsin Field Office, which at the time was under the jurisdiction of the Madison, Wisconsin District Office. The Grievant was the sole employee at the Eau Clair office and reported directly to George Victory, the DD for the Madison office. In about January 2002, Mr. Victory transferred to the Columbus, Ohio Area Office. Shortly thereafter, the Department merged the Minneapolis and Madison District Offices, so that all of Wisconsin and Minnesota fell under the jurisdiction of the Minneapolis District Office. Ms. Scharlemann continued to serve as the DD for this District after the merger. Thus, six months after his transfer to Eau Claire to escape the supervision of Ms. Scharlemann, the Grievant was back under her supervision.

At the time of the office merger, the ADD position in Madison was vacant.

The Grievant and Ms. Thompson-Meier testified that management told them that the position would be assigned to the most senior GS-12 employee in the Madison office. Ms. Thompson-Meier was the most-senior employee and Jim Brescia was the second most senior employee. Ms. Thompson-Meier was assigned to the ADD position, but only on an acting basis. In March 2002, Michelle Lenkaitis became the ADD on an acting basis (and, therefore, the Grievant's direct supervisor); she was permanently assigned to the ADD position in June 2002.

Ms. Thompson-Meier testified that, with the changes in management, the working atmosphere in Madison worsened. She stated that the new managers mistrusted the employees, and would make spurious accusations of misconduct against them, such as stealing copy paper or postage stamps. She further testified that, in October 2002, there was a meeting in Madison of all of the representatives with Ms. Lenkaitis, Ms. Scharlemann, and an EAP counselor to discuss management style and mistrust issues. Ms. Meier-Thompson stated that Ms. Lenkaitis got very defensive at that meeting.

Ms. Lenkaitis testified that, from the time that she first became the ADD, she encountered problems with the Grievant's performance. She stated that she had numerous conversations with him about his performance, particularly with respect to the problems that she perceived with his attitude and lack of cooperation.

In December 2002, the Grievant received a performance appraisal for the period of May 2001 to September 2002. Ms. Lenkaitis served as the Rating Official (despite having formally supervised the Grievant only three months out of that seventeen month

period) and Ms. Scharlemann served as the Reviewing Official. Again, the Grievant received a summary rating of "Effective."

Ms. Lenkaitis testified that, in December 2002, she and Ms. Scharlemann counseled the Grievant concerning what she described as "uncooperative and unprofessional behavior." According to a written script that Ms. Lenkaitis testified she used at the meeting, and which was introduced into evidence, the counseling session addressed what Ms. Lenkaitis viewed as the Grievant's lack of respect toward her and failure to follow Ms. Scharlemann's and her directives. In pertinent part, the script stated:

> This meeting is being held to discuss some areas of concern that I have regarding your conduct. Although I am particularly concerned with your tone of voice and the language that you used with me during our telephone conversation on 11/26, I am equally concerned about the lack of respect that you have shown towards me in previous conversations as well as your failure to follow directives from me and DD Scharlemann.
>
> First, I want to address the comments that you made during our telephone conversation on 11/26. Those comments, such as
>
> - I am disgusted with you
> - I don't trust you
> - I don't respect your or Scharlemann
> - You can just shut up
>
> were both disrespectful and unprofessional. Although you may disagree with me at times, you can communicate that disagreement in a more effective and professional manner. . . . You must be careful in regard to the tone you use and the words that you choose.

According to the script, Ms. Lenkaitis then proceeded to provide six examples of communications made by the Grievant where she thought that he was disrespectful. The script then states:

> These types of responses from you are not only combative and confrontational but also unprofessional and disrespectful. When you are asked to provide additional information or a respond to a question, I expect your full cooperation and for the information to be delivered in a civil and timely manner. . . .

At the meeting, Ms. Lenkaitis also counseled the Grievant concerning the manner in which he completed his travel vouchers. In this regard, the script states:

> . . . [Y]ou have been instructed on numerous occasions on how to correctly complete your travel voucher and have been provided with copies showing your continuing errors. Training has been provided to you on an individual basis and in a group setting, and yet each month, the errors persist. Your failure to correct these errors is not simply a performance issue but a conduct issue since you have been instructed again and again to complete this form properly.

Ms. Lenkaitis then addressed what she regarded as Grievant's failure to comply with her instructions in completing investigations. The script states:

> [W]hen I return cases to you that need additional work, I expect you to change the current file so that it complies with my directions and to avoid making the same mistakes on future case files. I do not expect you to make comments to me that I am "picky," that you do not like the management style in the office or that you moved away from Minneapolis to escape managers like me. Not only is that information immaterial, it is disrespectful and inappropriate. All employees are expected to follow supervisory instructions even though they may disagree with them. Your disagreement with my instructions regarding your work does not justify your failure to comply with my directives.

According to the script, Ms. Lenkaitis concluded the meeting with the following statements:

> In your interactions with me, DD Scharlemann, and ADD Walls and in communications with higher level managers, you are expected to maintain a respectful and professional manner in voice and action. Nothing less will be tolerated.
>
> Failure to conduct yourself in a proper manner as discussed above could result in disciplinary or adverse action, up to and possibly including your removal from the federal service.

Ms. Lenkaitis testified that the Grievant's behavior did not improve after the counseling session. Indeed, she stated that the behavior at issue in this arbitration is identical to the behavior that she counseled the Grievant about in December 2002.

In April 2003, Ms. Lenkaitis issued a Notice of Proposed Suspension, proposing to suspend the Grievant for 21 days, for numerous instances of Uncooperative Behavior and Unprofessional Behavior during the prior 6 to 7 months. (The events cited in the Notice of Proposed Suspension took place between October 23, 2002 and April 7, 2003.)

The Uncooperative Behavior charge was based on multiple specifications alleging that the Grievant: was belligerent and unresponsive during an inquiry questioning certain excessive postage charges; disregarded Ms. Lenkaitis' instructions concerning the completion of the weekly time report; sent to Ms. Lenkaitis multiple and unnecessary e-mails arguing over his leave approval; persistently questioned Ms. Lenkaitis over whether she had a certain case file, after she had advised him that she was awaiting instructions regarding the case from the Wage and Hour counsel; failed to abide by and argued over Ms. Lenkaitis' instructions that he make certain changes in the Wage and Hour Investigative Support and Reporting Data Base System ("WHISARD"); failed to submit a case for management review properly via WHISARD; and failed to follow Ms. Lenkaitis' instructions to conduct employee interviews in one of his cases.

The Unprofessional Behavior charge was also based on multiple Specifications including that the Grievant: circulated an e-mail message to co-workers that was highly critical of Ms. Scharlemann; responded to an e-mail message from Ms. Lenkaitis in a disrespectful and sarcastic way; and rudely interrupted Ms. Lenkaitis when she was responding to his request for assistance on certain overtime calculations and accused her of yelling at him.

The Grievant testified that when he met with Mr. Reardon about the proposed suspension, Mr. Reardon told him that if you disagree with the supervisor's instructions, you are supposed to follow them. There were also discussions at about this time of the possibility of the Grievant transferring to another location, although it is unclear whether the Grievant then formally applied for a transfer. The Grievant testified that he spoke to

Mr. Victory about a transfer to Toledo, an office under his jurisdiction where there was then a vacancy. The Grievant stated that Mr. Victory replied that, while he would "love to have him," the decision was up to Ms. Scharlemann. The Grievant stated that Ms. Scharlemann told him that any transfer was up to Mr. Reardon. The Grievant further testified that "[t]ransfer is done all the time," and he gave several examples of employees who transferred from one location to another.

Brent Barron, a Regional Representative for the Union who represented the Grievant on the proposed suspension, testified that he discussed the possibility of a transfer for the Grievant with Mr. Reardon when they met on the grievance that was filed over the Notice of Proposed Suspension. Mr. Barron stated that he told Mr. Reardon that there were about six states to which the Grievant would be willing to transfer. He further stated that Mr. Reardon indicated that the Grievant could apply, but did not indicate whether the application would be approved. Mr. Barron testified that he did not know whether the Grievant applied for a transfer and when the Grievant was asked whether he formally applied, he stated, "I filed official transfer, I think, on the Toledo job"; his testimony was unclear on whether he followed the procedures set forth in Article 33 of the Agreement concerning interstation transfers. No documentation was submitted into evidence confirming that the Grievant formally sought transfer to Toledo or anywhere else.

Mr. Reardon acknowledged that there was an opportunity for the Grievant to transfer to Toledo and Mr. Victory was willing to take him. But he testified that he (Reardon) decided to deal with the matter at hand, which was the suspension, and to see

whether the Grievant's behavior improved after the suspension; if the behavior had turned around, then he might have been receptive to approving the Grievant's transfer.

In May 2003, Ms. Lenkaitis gave the Grievant his 2003 Mid Year Review. A section of the form called upon the supervisor to comment on the employee's demeanor and conduct. Ms. Lenkaitis wrote on the form, "Constant argument when asked to do and/or correct something on a case, report, etc." Ms. Lenkaitis testified that when she discussed this evaluation with the Grievant, she told him that his constant arguments were inconsistent with one of the performance standards, i.e., that the investigator display tact, competence and courtesy. With respect to the performance standard addressing written and oral communications, Ms. Lenkaitis told him that his narratives were poorly written and sometimes difficult to follow. (The Grievant did not receive a final performance review for 2003, because in conjunction with an aborted settlement agreement which, among other things, called for the Grievant to retire and for the suspension to be negated, the Grievant asked that he not receive the evaluation.)

On June 27, 2003, Mr. Reardon issued a Decision on the Proposed Suspension sustaining the Reasons and the Specifications in the Proposal in full and determining that suspension would promote the efficiency of the Service. In his decision, Mr. Reardon pointed out that employees must follow their supervisor's instructions, unless doing so would endanger an employee's health or safety, and may grieve the matter later.

In view of what Mr. Reardon described as the Grievant's 19 years of satisfactory federal service with no disciplinary history (the Grievant must have had a break in service since, as noted above, he first began to work for the Department in 1971), Mr. Reardon

reduced the length of the suspension from 21 days to 18 days. But he warned that "[s]hould further misconduct occur, I will not hesitate to decide on more severe action, up to and possibly including your removal if warranted." The decision concluded with a suggestion that if the Grievant was experiencing personal problems, then he should contact the Employee Assistance Program ("EAP").

The Grievant served the suspension from July 7 through 24, 2003. He returned to work on July 25, 2003, but in mid-August went out on an extended sick leave. He returned to work briefly on a reduced schedule for a few days in late September (on official time performing work in preparation for a scheduled MSPB hearing on his 18 day suspension), but in early October went out on sick leave again, and did not return to work until January 12, 2004.

The Grievant appealed the 18 day suspension to the Merit Systems Protection Board ("MSPB"). On October 8, 2003, the Department and the Grievant entered into a Settlement Agreement, purporting to resolve various complaints and grievances the Grievant had filed against the Department. The Settlement Agreement, which was signed by the Grievant, Mr. Reardon, Mr. DeMay (NCFLL Representative), and DOL Attorney Leonard Borden (Department Representative), provided, among other things, that:

1) the suspension would be cancelled and the Grievant would be paid back wages for the period of the suspension and his Official Personnel File ("OPF") would reflect that he was in full pay and duty status during the period of suspension;

2) the Grievant would have retired on February 2, 2004;

3) the Grievant would provide required retirement paperwork to Mr. Reardon within two days of the signing of the Settlement Agreement and keep those forms current;

4) there would be no reference in the OPF regarding the suspension and the OPF would indicate that the Grievant was voluntarily separated and reference requests would be answered to that effect;

5) one month prior to the effective date of the retirement, the paperwork would be processed by the Department's Regional Human Resources Office in Chicago;

6) no performance appraisal would be issued for the period ending September 30, 2003 and the Grievant waived any claim to a performance award for that period;

7) any unused annual leave exceeding the maximum 240 hour carry forward would be forfeited;

8) the Grievant "has submitted a SF-71, Request for Leave and Approved Absence, requesting approved leave during the period September 29, 2003 to February 2, 2004";

9) if the Grievant attempted to retract his leave requests or his retirement application, the suspension would be reinstated, his OPF "corrected" to reflect the 18 calendar day suspension, and he would repay the Department for the back pay he received when the suspension was previously cancelled;

10) the Grievant agreed not to seek employment with the Department in the future;

11) the MSPB appeal would be dismissed;

12) the Settlement Agreement was agreed "not to serve as a precedent for resolving any other complaints that have been or may be filed by the appellant [Grievant] or any other person"; and

13) the Grievant was given seven calendar days to revoke the Settlement Agreement in accord with the Older Workers Benefit Protection Act ("OWBPA").

Despite the wording of the Settlement Agreement, the record reflected that:

1) the Grievant never followed through with his planned retirement; during the period he was out on sick leave, the Grievant did apply to retire, but the paperwork was returned to him and he declined to resubmit that paperwork, instead opting to return to work;

2) the Grievant did not formally revoke the Settlement Agreement;

3) the Department never complied with its obligations to cancel the suspension and make the Grievant whole noted in the Settlement Agreement; and

4) the MSPB case was dismissed and there was no evidence of any attempt made by the Grievant to reopen the matter.

On January 7, 2004, Ms. Scharlemann wrote to the Grievant responding to his inquiry of December 11, 2003, confirming that:

1) the suspension would not be cancelled since the Grievant "breached" the Settlement Agreement;

2) the Grievant's AWOL for November 10-14, 2003 would stand; the provisions of the Settlement Agreement stating that the Grievant has submitted SF-71 for the period September 29, 2003 to February 2, 2004, was stated to be "premised on the submission of appropriate leave requests" and "made the assumption that you would act in good faith

and submit those requests"; the response concluded that the Grievant had "failed to do so";

3) the failure of the Department to send the Grievant e-mail while he was out on leave was defended as District Office practice; and

4) the refusal to permit the Grievant to attend retirement planning seminars offered in November and December of 2003 (as he had requested) was justified based upon the failure of the Settlement Agreement to reference those seminars, the failure of the Grievant to submit retirement paperwork, as promised, the fact that he was on approved sick leave and ineligible to attend such training, and the fact that the seminars were full and there were asserted to be long waiting lists.

As will be evident from the discussion below, the majority of Specifications relied upon by the Department in this case are based upon events that occurred between the time that the Notice of Proposed Suspension was issued in April 2003 and before the final decision on the suspension was rendered. A few of the incidents occurred between the Grievant's return to work from the suspension on July 25, 2003, and the Grievant's return to work on January 12, 2004, during either the relatively brief period of time that the Grievant worked in August or while he was on extended sick leave. Only 2 of the 19 incidents upon which the specifications are based occurred after the Grievant returned to work from his leave in January 2004, and the evidence established that the Department began to work on the proposal to remove him soon after he returned to work and before the second of these two incidents occurred.

The Specifications Relied Upon to Remove the Grievant from Federal Service

The following is a summary description of the incidents upon which the Reasons and Specifications cited in the Decision to Remove the Grievant are based. To place the reasons and specifications in context, the incidents are generally described in chronological order (recognizing that there is some time overlap between the incidents, as some of them spanned a number of weeks or months in duration). Cross-references to the numbered Reasons and Specifications in the Notice of Proposed Removal and the Decision Letter are provided. No discussion is contained herein on the two Specifications that were contained in the Proposal that were rejected as unproved by Mr. Reardon (as to which there was very limited record evidence in any event).

Damage to the Grievant's Computer – Reason IV, Specification 1 (April 2003)

In April 2003, the Grievant reported that his Department-issued laptop computer was not working properly. Ms. Lenkaitis testified that the Grievant told her that he would try to fix the computer himself. The Grievant denied making that statement. He testified that he told her that he would seek help from a data processing employee who worked for the Bankruptcy Court (which was located in the same building).

The computer was sent to the Chicago Regional Office for inspection. Ms. Lenkaitis testified that Brian Mohr, the Manager of the Regional Computer Support Office, told her that someone tried to remove the hard drive and that the inside clips were bent, and that the damage appeared to be intentional. But, according to an e-mail from Steve Wenzel to Tracy Meyer, a computer specialist in the Madison office, the problem with the computer was not a hard drive failure but that the "Mother Board (sic) is dead."

Ms. Lenkaitis testified that Mr. Mohr did not document his opinion that the damage appeared to be intentional. Further, the Department did not introduce into evidence any report from the manufacturer or Mr. Mohr or any other documentation regarding the nature of or the cause of the damage to the computer. Nor did Mr. Mohr testify regarding the damage or the basis for any belief that the damage was intentional in nature.

Ms. Lenkaitis did not discuss the issue with the Grievant in April 2003. The Grievant testified that he was not accused of damaging the computer until 13 months later when he received the Notice of Proposed Removal.

Failure to Correct Errors (County Market) – Reason I, Specification 2 (April 2003)

On April 9, 2003, Ms. Lenkaitis issued a "Performance Standard Advisory" ("Advisory") to the Grievant with respect to his work on an investigation of alleged child labor violations by County Market. Ms. Lenkaitis explained that an Advisory is issued when the Director who is reviewing the Investigator's work determines that performance standards have not been met. The Advisory explains how the work is deficient and what needs to be done to correct the deficiencies. The Advisory that Ms. Lenkaitis issued to the Grievant on the County Market case indicated that there were numerous errors and omissions in his report and the notice to the employer concerning, among other things: the failure to include all of the violations; the failure to provide sufficient details on the violations found; errors on several of the dates of birth for the minors listed; the type of coverage involved; the justification for certain of the employer's exemption decisions; and the steps the employer would be required to take to ensure compliance. The Advisory also indicated that the Grievant failed to conduct sufficient interviews.

Ms. Lenkaitis asked the Grievant to make the necessary changes on the report and the notice to the employer. She returned the report to him with her notations on the revisions needed.

On April 21, 2003, the Grievant sent an e-mail to Ms. Lenkaitis stating that he would like one of the clerical employees to enter the corrections into WHISARD. He stated that the work involved was voluminous and that it would take him a long time because he lacked access to an ISDN line. (The Grievant's access to the system, via the internet, was by way of dial-up access and, due to the slower connection, it took far longer to input data and update the system.)

Ms. Lenkaitis responded by e-mail, later that day, stating that it was his responsibility to enter the corrections. She testified that she had previously directed the Grievant to make the changes and it was not appropriate for him to ask the clerical staff to do his work. She explained that the errors were substantive and only the Grievant had enough information to do the necessary corrections and that there were some shortcuts he had previously used which should reduce the time it would take to make the changes.

Ms. Lenkaitis further stated that that some of the corrections she made regarding the Grievant's child labor violation findings were base on a "de minimis" chart that Ms. Scharlemann had distributed to the Minneapolis staff. Ms. Lenkaitis stated that she assumed that the Grievant had the chart because he previously worked in the Minneapolis office, but that if he did not, he should let her know and she would send him one.

The Grievant sent an e-mail to Ms. Lenkaitis stating he was uncertain about the chart to which Ms. Lenkaitis referred. He further complained about Ms. Lenkaitis' denial of his request for clerical assistance. The e-mail stated:

> . . . [T]here are no substantive changes that you made. Also I don't understand why you are not asking Janice to do the changes. . . . [W]ith in excess of 60 kids in violation, and the failure to provide a computer where I can use the ISDN - it will take an inordinate amount of clerical input.
>
> I'm disappointed with your responses. . . .
>
> I made a few changes through the telephone line, and watched the hourglass for a minute or so each change.

On April 22, Ms. Lenkaitis sent an e-mail response to the Grievant stating, among other things, that the child labor violations require knowledge that only the Investigator had and that the errors he had made were not clerical in nature and that, therefore, he needed to personally input the changes. She further stated that she was surprised that the Grievant was not contrite about all of his errors.

Also on April 22, Ms. Lenkaitis sent an e-mail to all of the Investigators in Wisconsin, including the Grievant, stating that she was attaching the de minimis chart that had been provided to her by Ms. Scharlemann.

Ms. Lenkaitis testified that the Grievant's e-mails appeared to be argumentative, and that, rather than apologize or take responsibility for his mistakes, he wanted someone else to correct them.

The Grievant testified that the report did not actually contain a large number of errors. He acknowledged that he did have some typos and made a few mistakes on dates of birth. He stated that, in Wisconsin, the practice had been not to verify dates of birth provided by the employer unless the ages of the employees were challenged. Further, he stated that, prior to receiving Ms. Lenkaitis e-mail of April 21, he had never heard of the de minimis chart and that the guidance in the chart and Ms. Lenkaitis' determinations of what constituted de minimis violations were inconsistent with Departmental regulations and the FOH.

With respect to his request for clerical assistance, the Grievant testified that the practice had been that, in big cases involving a lot of data input, clerical assistance often would be provided. He noted that it was not cost-effective (given the difference between his GS-12 rate of pay and the pay of clerical support staff) for him to be inputting the data. He stated that when he worked in other offices, clerical assistance was provided.

The Grievant resubmitted the County Market case to Ms. Lenkaitis. She testified that he had corrected some of the errors, but that the interviews were still not adequate. On July 16 (while the Grievant was on suspension), Ms. Lenkaitis sent a memorandum to the Grievant indicating that she had reviewed the case again and that she was still unable to assess a penalty against the employer because of various deficiencies or discrepancies in the employee statements. She asked the Grievant to revise the form again.

Ms. Lenkaitis signed a Civil Money Penalty ("CMP") demand letter that was sent to the employer on December 5, 2003. There was no documentation offered by either Party that shed light on the amount of work, if any, that was done by the Grievant after July 16th and prior to December 5th. For much of that period of time, the Grievant was out of work on sick leave status. It was unclear as to whether, at some point, Ms. Lenkaitis reassigned the case to herself and sent out the CMP demand letter.

The charge of uncooperative behavior, however, appears to be grounded in the tone of the Grievant's April 2003 e-mail exchange with Ms. Lenkaitis relative to this matter.

Failure to Complete Items on a Report the Grievant Submitted in the Arby's Case - Reason I, Specification 4 (April 2003)

On April 24, 2003, Ms. Lenkaitis sent a Memorandum to the Grievant concerning his work on a case involving Arby's, in which she returned the case file and instructed him to complete nine specific tasks, including to: conduct additional interviews; discuss the violations more specifically; verify the employer's legal name; identify the responsible person; number the exhibits; and provide Main Office/District Office ("MODO") information. Ms. Lenkaitis testified that these were substantive changes. She explained that if the responsible person is not properly identified, then only the corporation may be cited.

The Grievant resubmitted the Form WH-103, but Ms. Lenkaitis stated that he only completed three of the nine items that she asked him to address and that she had to complete the work on the case herself. The Grievant testified that he made most of the changes listed in Ms. Lenkaitis' April 24 memo, i.e., he interviewed the minors, changed the legal name, and gave a more complete description, but "maybe didn't do enough to the quality of what she wanted . . . ." He stated that he made some changes in WHISARD, but they were not picked up. With respect to not identifying the responsible person, the record shows that, although the Grievant did not identify the responsible person by name, he stated in his report that the CMP letter should be sent to the employer's Vice President and Attorney.

On July 2, 2003, the last day before the Grievant's suspension, Ms. Lenkaitis wrote a memo detailing areas that the Grievant still had not satisfactorily completed in this case. On July 10, 2003, a CMP letter was sent out in this matter.

On July 24, 2003 – two weeks after she had sent out the CMP letter over her signature – Ms. Lenkaitis sent the Grievant an e-mail stating that the Department was unable to assess CMP because he had not identified the responsible person. The Grievant was still on suspension on that date.

The Grievant acknowledged that he had still not numbered the exhibits as instructed.

At some point, Ms. Lenkaitis apparently reassigned the case to herself and fixed any remaining errors in the WHISARD system. The record did not reveal the date of that action.

The Grievant stated that he did not receive any further communications from management about this matter until eight months later when he received the Notice of Proposed Removal and saw this item listed as a specification.

Problems with the Grievant's Travel Vouchers – Reason I, Specification 3
(April through June 2003)

One of the Specifications supporting the Uncooperative Behavior charge related to the Grievant's alleged failure to follow instructions in completing his travel voucher for April 2003.

On April 16, 2003, the Grievant traveled to Chicago to attend a meeting at the Regional Office. The next day he sent an e-mail to Ms. Lenkaitis asking how he should record his time and mileage for April 15th-17th. His e-mail stated that on April 15th, he drove from the Eau Clair office to his home in Mounds View, MN (a distance of about 90 miles); on the morning of April 16th he drove from Mounds View to the Minneapolis-St. Paul Airport ("MSP") (a distance of about 20 miles), flew to Chicago, and returned home

that evening; and that on April 17th, he planned to drive to Hudson, MN to complete his work on the County Market case.

Ms. Lenkaitis responded by e-mail later that day advising the Grievant that he could claim mileage for his roundtrip from his home in Mounds View to MSP, but that he could not claim mileage for his trip from the Eau Claire office to Mounds View because that represented normal commuting, which is not compensable under the travel regulations.

The Grievant explained that he drove from Eau Claire to Mounds View to facilitate his flying from MSP to Chicago, allowing him to travel round-trip to and from Chicago in one day, thereby saving the government hundreds of dollars in air fare and hotel and per diem costs. He felt that his actions had resulted in overall the most efficient and least costly means of travel from Eau Claire to Chicago and back and believed that he was entitled to be paid his mileage from Eau Claire to Mounds View on that theory under the travel regulations.

The next day, April 18, the Grievant sent an e-mail to Ms. Scharlemann stating that he was going to "hold up" his time sheet and complete it on the next business day. He asked her to send him any documentation upon which she was basing her statements about work time and mileage and stated that "[w]hen I go the extra mile to save the government money, I don't feel I should be penalized." A few minutes later, Ms. Scharlemann sent an e-mail to the Grievant stating: "You are to complete your time sheet as I have directed you."

On May 5, 2003, the Grievant sent his travel voucher for April to Ms. Scharlemann, rather than to his direct supervisor, Ms. Lenkaitis; normally, travel

vouchers are submitted by the Grievant to his immediate supervisor for review and processing. Despite Ms. Lenkaitis' directive that he could only seek reimbursement for mileage for the roundtrip from his home in Mounds View to MSP, he sought reimbursement for the mileage for a roundtrip from the Eau Claire office to MSP. The Grievant admitted at the hearing that he did not actually make this trip on April 16 (having traveled to MSP by way of Mounds View instead). He also recorded mileage for travel on April 17th from the Eau Claire office to Hudson in connection with an investigation, even though he actually traveled on that day from his home in Mounds View to Hudson. Ms. Scharlemann sent an e-mail to the Grievant stating that his supervisor is responsible for approving his voucher and that she was, therefore, forwarding his voucher to Ms. Lenkaitis.

On May 7, Ms. Lenkaitis sent an e-mail to the Grievant regarding his travel voucher. She reiterated that he could not claim mileage from the Eau Clair office to MSP because travel between home and the duty station is not compensable. Further, with respect to his trip on April 17th to Hudson, Ms. Lenkaitis stated that he could only claim mileage from his home to Hudson, because he did not actually travel from the Eau Claire office to Hudson. In her e-mail, Ms. Lenkaitis instructed the Grievant to revise his travel voucher accordingly and to fax it to the Madison office by the following morning.

On May 7th, the Grievant submitted a revised travel voucher reflecting his actual mileage for April 16th, i.e., his roundtrip from his home in Mounds View to MSP. In an accompanying e-mail to Ms. Lenkaitis, the Grievant stated that he was still awaiting a response from her or from Ms. Scharlemann on his request to speak to a resource person regarding the travel regulations.

Later that day Ms. Scharlemann responded to the Grievant by e-mail stating that several Department officials (meaning herself and Ms. Lenkaitis) had already explained to him how to account for his travel costs and suggesting that he review the regulations on the Department's Intranet site. Later that day, the Grievant sent an e-mail to Ms. Lenkaitis, stating: "I've given up on you and DD Scharlemann being of any assistance. I'll do my own research."

On May 8, Ms. Lenkaitis sent an e-mail to the Grievant stating that: he was instructed to send his revised travel voucher to Madison, but he instead faxed it to Minneapolis, and that she wanted him to explain his trips from Eau Clare to Hudson on April 24, 28 and 30. She stated that he only showed one direction of travel and that she wanted to know where the trips started as well as ended.

On May 12, the Grievant sent a memo to Ms. Lenkaitis purporting to respond to her questions about his travel to Hudson on April 24, 28 and 30. (The memo is dated May 13, but Ms. Lenkaitis testified that she received it on May 12.) Ms. Lenkaitis replied via e-mail, stating that the Grievant had to redo his travel voucher for April because it still did not contain all of the necessary details, i.e., it did not explain to where he traveled on April 24 and April 30 after he went to Hudson. She explained that this information was needed to determine whether normal commuting costs should be deducted. (Section 1-2.3(a)(5) of the travel regulations states that "where the location of the first worksite is other than the employee's official duty station…and the employee also works at the official duty station sometime during the day, the employee's claim for reimbursement must be reduced by . . . normal commuting costs.") Ms. Lenkaitis testified that she faxed the travel regulations to the Grievant.

The Grievant testified that he thought he was entitled to claim the extra mileage because he minimized the Department's expenses by driving from his home in Mounds View to MSP. This is because had he flown from Eau Claire to Chicago, the airfare would have been considerably higher than the fare he paid for the roundtrip from MSP. Further, because of the flight schedule, he would not have been able to complete the trip in one day had he flown from Eau Claire, necessitating the expense of a hotel for an overnight stay and per diem.

The Grievant stated that he spoke to an official in OASAM regarding the travel regulations, who sent him a portion of the regulations (Chapter 1, General Travel Regulations, Part 2, Transportation Allowance), which he thought justified his position. Section 1-2.2 of those Regulations states: "If actual transportation costs are lower than the costs computed on a comparative basis, the traveler normally will be fully reimbursed." Although the Grievant did not charge mileage based on "actual transportation costs" (because contrary to what he recorded on his voucher he drove to MSP from Mounds View, not from Eau Claire), he received input from an official in OASAM with knowledge of the travel regulations to the effect that so long as he charged less than the price of a round trip air ticket from Eau Claire to Chicago, he could claim mileage from his duty station to the airport.

Ms. Lenkaitis testified that by June 4, 2003 she still had not received a corrected travel voucher from the Grievant for his April travel. On that day she sent him an e-mail stating that he had previously told her that he spoke to someone in OASAM about the voucher who disagreed with her and Ms. Scharlemann's interpretation. She stated that

she had not received from him any information about this other interpretation. She further stated that the Grievant was required to submit the travel vouchers for April and May by no later than noon on June 6th and that his failure to do so may result in disciplinary action.

Later that day, the Grievant faxed a revised travel voucher to Ms. Lenkaitis, in which he changed the mileage charge again, back to what he showed on his original voucher, i.e., to reflect a roundtrip from Eau Claire to MSP. At about the same time the Grievant sent an e-mail to Ms. Lenkaitis in which he referred to Section 1-2.2 of the Travel Regulations.

Ms. Lenkaitis testified that the Grievant' travel vouchers were still incorrect, both with respect to the mileage charge for the round trip from Eau Claire to MSP and his failure to provide the clarification she asked for regarding his travel to Hudson. On June 20 she sent a memo to the Grievant instructing him to return the corrected travel vouchers by June 23 so that she would receive them on the 24th. The Grievant submitted a corrected voucher on June 24th on which he changed the mileage charge as requested, to reflect his round trip from his home from Mounds View to MSP. When the voucher did not have all of the corrections that Ms. Lenkaitis requested, she made the remaining changes herself and submitted it.

Ms. Lenkaitis testified that the office was adversely affected by the Grievant's failure to follow instructions in submitting the travel vouchers. She explained that Investigators are supposed to submit their travel vouchers by the fifth business day after the end of the month and that there is a due date each month for the submission of all of the Office's travel expenses to the Regional Office. She stated that the Grievant's delay

in submitting his corrected travel vouchers impacted the office's ability to submit its overall travel expenses to the Regional Office.

In his testimony, the Grievant denied that he was being uncooperative. Rather, he asserted that he questioned his supervisors on their interpretation of the travel regulations because it did not seem logical, and he wanted to be referred to someone with the requisite expertise, and that such referral was never made. Further, he stated that he was not made aware until nine months later, when he received the Notice of Proposed Removal, that he may be subject to discipline or termination as a result of this matter.

Problems with the Grievant's Work on the Fantastic Sams Case – Reason I, Specification 5 (April 2003 through September 2003)

One of the Specifications supporting the Uncooperative Behavior charge concerned the Grievant's investigation of Fantastic Sams, and particularly his failure to cease the investigation once being notified that the Complainant had retained an attorney.

On April 24, 2003, Ms. Lenkaitis issued an Advisory to the Grievant with respect to his work on this case, involving alleged violations of the Family and Medical Leave Act ("FMLA"). She testified that the most significant issue was that the Grievant continued the investigation after becoming aware that the Complainant had an attorney. She explained that it is the Department's policy – and what she described as a "basic tenet" which she expected the Grievant to know – to cease its involvement in an FMLA case once the Complainant retains an attorney.

The Advisory also listed various problems with the Grievant's narrative report on the case including that: rather than make his own determinations, he included statements from the Complainant's attorney regarding her interpretation of the FMLA; the exhibits

were not numbered correctly and were not placed in the appropriate places in the file; and portions of the narrative report had to be changed.

Ms. Lenkaitis testified that she attached to the Advisory the "WHISARD Compliance Action Report" (a report that may be printed from WHISARD after the information is entered into the system) and hand-wrote on it the corrections that needed to be made, and gave it to the Grievant.

On April 28th, the Grievant sent an e-mail to Ms. Lenkaitis stating that he had understood that, in FMLA cases, the Department does not end its involvement merely because the Complainant has retained an attorney, but only when litigation is initiated. Further, he stated that he thought it was important to continue his involvement because the employer did not have an FMLA policy and he wanted to ensure its compliance.

Later that day Ms. Lenkaitis responded by e-mail. She referred to the Department's FMLA Training Book, which she claimed stated that it is the Department's policy not to get involved in FMLA cases when a Complainant has retained an attorney. Ms. Lenkaitis testified that she doubted that this policy is set forth in any regulation and she was unable to provide a cite as to where it may be found in the FOH. In any event, she explained that the Department does not conduct an FMLA investigation for the sake of doing a policy review, and that, once the Grievant learned that the Complainant had an attorney, he should have submitted the case for management review or discussed it with her. However, the Grievant testified that the Training Manual supported his interpretation because it stated that if the Complainant decides to obtain an attorney and pursues her private rights, then the WHD will not take any action on the complaint; in

this case, there was no indication that the complainant had taken any action to pursue her rights beyond seeking the assistance of the Department.

The Grievant and Ms. Lenkaitis continued to argue about the matter in an exchange of e-mails on April 29, with the Grievant insisting that they had discussed the fact that the Complainant had an attorney before he continued his investigation and whether it was appropriate to do a policy review under the circumstances. Further, the Grievant told Ms. Lenkaitis that he always thought that pursuing one's private rights meant that one had filed a lawsuit. Ms. Lenkaitis disagreed, and responded that it is not necessary for someone to file an action in court to have exercised a private right of action.

Ms. Lenkaitis testified that the Grievant resubmitted the file on about July 17th (he was on disciplinary suspension at the time), but that he did not make the requested changes. By memorandum dated July 17th, Ms. Lenkaitis advised the Grievant that he had not revised the file narrative as directed nor amended the WH-51 (Compliance Report) and that she was returning the file to him to make the necessary corrections. On July 31st (shortly after he returned from suspension), the Grievant resubmitted the file.

Ms. Lenkaitis sent another memorandum to the Grievant stating that he still had not made the necessary changes and that she had directed him on numerous occasions to number the file exhibits. She concluded by stating that she expected the changes to be made and the file returned by August 11th.

On August 11th, the Grievant sent an e-mail to Ms. Lenkaitis stating that he had tried to reach the attorney that day and had no response. Ms. Lenkaitis responded by

e-mail stating that she had returned the case to him so that he would make the required changes, not so that he would contact the attorney, and reminded him that he was supposed to have resubmitted the case that day.

On September 16, 2003 (during a period when the Grievant was out of work on extended sick leave status), Ms. Lenkaitis sent a Memorandum to the Grievant regarding his work on the Fantastic Sams case, stating:

> On April 24, 2003, I returned this case to you for additional work. You resubmitted the case to me in July 2003, and I again returned it to you on July 17 and July 31 as you had not made the necessary corrections. Since you have been on extended absence, I have made the necessary changes to the file and have concluded it in WHISARD. However, I do want to know that I am thoroughly disappointed in your lack of responsiveness to my directions. In attempting to close this case, I was once again dismayed by your failure to obtain coverage information from the employer and to instead include documents from the Complainant's attorney in the C Exhibits as proof of coverage. . . .

The Grievant testified that, in his experience working for other DDs, the practice was to deal with counsel on FMLA cases. He also claimed that he revised the narrative report pursuant to Ms. Lenkaitis' instructions to the best of his ability.

When Ms. Lenkaitis was asked to describe what was uncooperative about the Grievant's work on this case, she testified as follows:

> This case was submitted to me in April, and it was very poorly put together, and I instructed Mr. "Doe" to make the changes. The changes were fairly easy, delete items in the narrative, clarify a few things, make some changes in WHISARD and resubmit the case. He resubmitted the case two other times without making even one of the changes that I had instructed him to make and, finally, I had to do it myself and assign myself to it as an investigator.
>
> This was a very simple case. A non GS-12 would have known immediately not to be involved if the Complainant had an attorney and certainly not to make recommendations or conclusory statements in the narrative that were made by an attorney that was representing the Complainant. . . .
>
> [H]e argued with me on at least three or four occasions as to specifically what Wage and Hour's position was in terms of a continuing a case once a Complainant had exercised their right to private action and specifically what that was. It didn't seem to make any difference that I explained to him at least three times what it meant to retain – or to exercise your right of private action.

Ms. Lenkaitis stated that if an employee wanted to work with someone in a positive manner, then the employee could not continue to argue with respect to directions that they were given.

The Grievant testified that he did not learn until eight months later, when he received the Notice of Proposed Removal, that this matter might be a basis for termination.

Conduct During a Conference Call and Sending a Follow-Up E-Mail – Reason II, Specification 2 (May 2003)

On May 7, 2003, Ms. Scharlemann conducted a conference call with the Minnesota and Wisconsin staff to discuss topics addressed at a recent annual national manager's meeting that she had attended. She testified that, during the conference call, the Grievant repeatedly questioned one of the changes that the Department was contemplating making, namely, how it defined low wage employees.

The next day, the Grievant sent an e-mail to Ms. Scharlemann to which he attached a note criticizing the fact that an agenda was not distributed before the call and the changes that were being made. The memo stated:

> It would have helped to have some type of agenda that gives the staff a chance to prepare for the meeting. In addition, you discussed some monumental changes that will add greatly to the data input-clerical nature of the job. There was little explanation as to the necessity for this information other than to justify our budget. Also, you were not able to provide any explanation as to what was the course for the low wage data. I inquired whether it was based on BLS data, was it county by county, or what, and you did not have the answer, and in fact seemed to take umbrage that I would raise the question.
>
> . . .
>
> This is in the nature of a constructive suggestion. I would appreciate a response.

Ms. Scharlemann testified that she thought the Grievant's conduct was unprofessional in that during the call he repeatedly asked questions and when he was not satisfied with the answers, he seemed to be trying to provoke an argument; then, he

followed up with an e-mail that, in the guise of making suggestions, just raised the same questions again.

The Grievant testified that the changes discussed at the meeting would have posed a significant extra burden on the investigators, who would have been required to input every employee's rate of pay, and claimed that he was just trying to make constructive suggestions.

There was no notice to the Grievant until the Notice of Proposed Removal, approximately ten months later, that this behavior might lead to disciplinary or adverse action.

Grievant's Conduct in Connection with the Investigation of Mell's Manufacturing – Reason II, Specification 3 (May – June, 2003)

One of the Specifications concerned the Grievant's alleged Unprofessional Conduct while conducting an investigation of Mell's Manufacturing. In the course of the investigation, the Grievant had a discussion with a company official, Gary Mell.

The Grievant testified that Mr. Mell advised him that the mother of one of the student workers was upset that the Grievant had spoken to her child without advising her first. When Mr. Mell asked the Grievant for his supervisor's name and telephone number, the Grievant gave Mr. Mell the name and direct dial telephone number of Ms. Lenkaitis without advising her. The Grievant testified that he assumed that the allegedly agitated parent was the individual who wished to speak with Ms. Lenkaitis.

Ms. Lenkaitis testified that, on May 22, she unexpectedly received a call on her direct dial line from Mr. Mell. She stated that Mr. Mell complained about the Grievant, in that he: had asked for information that would be too cumbersome and time-consuming to produce; told him that he would "make an example" of the company and publicize the

investigation; and stated that his supervisor was "on his back" to complete the investigation. Ms. Lenkaitis testified that these were not appropriate comments and she was concerned that the Grievant may have been intimidating the employer, although she was not sure that that the Grievant actually made the comments attributed to him by Mr. Mell and did not accuse the Grievant of having made those statements. (The Grievant denied having made these comments.) With respect to the information request, she asked Mr. Mell to fax her some time cards so that she could see the extent of the violations.

Ms. Lenkaitis testified that, when she received the information, she telephoned the Grievant to discuss the matter, but she did not reach him and left a voice mail message; she stated that the Grievant did not return her call. The Grievant testified that he just received a general message from Ms. Lenkaitis asking him to call, and not a message specifically informing him that it was about Mell's Manufacturing or that she had asked the company to send her information directly.

Ms. Lenkaitis testified that she does not believe she previously ever received a call from an employer on a case without advance notice from the Investigator. She stated that Investigators do not regularly give out the supervisors' direct dial numbers, although she did not think that she ever specifically instructed the Grievant not to do so. The Grievant testified that he has never had a supervisor at the Department who told him not to give out his or her direct dial number. No Department directives were cited that would prevent the disclosure of anyone's direct dial telephone number.

On May 27, the Grievant e-mailed a note to Ms. Lenkaitis (which was dated May 26), in which he indicated that he had spoken to Mr. Mell, who told him that he had provided certain information to Ms. Lenkaitis. On May 27, 2003, Ms. Lenkaitis sent an

e-mail reply stating that she would have appreciated a "heads up" that Mr. Mell might be calling so she could have familiarized herself with the case. The e-mail also stated that she asked Mr. Mell to send her some sample time cards because he indicated that they could not provide the information that the Grievant requested.

Ms. Lenkaitis testified that, in a telephone conversation that she had with the Grievant on June 3, she tried to discuss the matter with him, in order to advise him how to deal with Mr. Mell so as to complete work on the case in a timely way. Specifically, the Grievant had told Mr. Mell that there was a potential for civil money penalties for repeat violations. Ms Lenkaitis explained to the Grievant that because this was the first investigation of Mell's, civil money penalties would not be an issue; she, therefore, suggested to the Grievant that it might be a little intimidating to raise the prospect of such penalties in an initial meeting and that it may be more productive to raise it at the final meeting as an effective way to remind the Company to remain in compliance. She stated that the Grievant responded in a defensive and condescending manner and said, "Yes, Michelle." She further testified that the Grievant accused her of "beating him up" for not telling her that Mr. Mell might be calling. She responded that doing so would have only been appropriate so that she would have been better prepared.

Ms. Lenkaitis testified that the conversation continued to deteriorate. She stated that, at some point, she got up and closed her office door because the conversation "was getting loud." The Grievant testified that Ms. Lenkaitis screamed at him. Ms. Lenkaitis denied doing so, but acknowledged that her voice was raised, explaining that she was trying to "talk over" him. Ms. Lenkaitis testified that she terminated the conversation by

telling him to call her back when he calmed down and hanging up; the Grievant testified that he hung up on Ms. Lenkaitis because she continued to scream at him.

Following this telephone conversation, the Grievant and Ms. Lenkaitis exchanged a series of heated e-mail messages on the matter. The e-mail chain started with an e-mail that the Grievant sent to Ms. Scharlemann on June 3 complaining about Ms. Lenkaitis' supervision. He complained that Ms. Lenkaitis did not inform him that Mell's Manufacturing had sent the information that he had requested to her and that he only found that out from the Company. He concluded the e-mail by stating: "I am concerned about her supervision, her tone of voice, her yelling, and her condescending manner."

Later on the same day, Ms. Lenkaitis sent an e-mail to the Grievant advising him of Mr. Mell's complaints and indicating that she wanted to speak to the Grievant about the issues. In the e-mail, she indicated that she was doing so to support him against the employer's allegations. However, she stated that the Grievant became defensive and perceived it as criticism. She concluded the e-mail by demanding that the Grievant not interrupt her when she is speaking.

The Grievant responded to Ms. Lenkaitis by e-mail on June 5. He stated that he would appreciate it if she would tell him when an employer contacts her and she requests information. He further stated that he would appreciate it if she would not yell at him and become defensive when he pointed out what the statute or regulations provide, and that fellow employees heard her yell at him, which he stated was demeaning to him and disruptive to the office.

Ms. Lenkaitis responded by e-mail on the same day, indicating that she had spoken to Mr. Mell and told him that he (the Grievant) would be contacting him to make an appointment to meet with him to review the records. Although Ms. Lenkaitis in her e-mail refrained from commenting on the other statements in the Grievant's e-mail, he sent her another e-mail complaining about her involvement in the case and her alleged yelling. This e-mail stated:

> In the future, again, if you have asked employers to work with you on a case, it would help to give me a heads up. . . . I think its common courtesy. . . .
>
> I still have not had a satisfactory response from you and/or DD Scharlemann as to what local management's feeling is about a supervisor yelling, to even the distraction of others, at an employee. In addition, when I do have concerns about what I perceive is misconduct, should I go to the employee's supervisor. I did on yours, and it is still not clear to me what action DD Scharlemann has taken. Should I request any memos concerning this be placed in your working file.

Ms. Lenkaitis responded by e-mail later that day, in which she made the following points: that it would have been courteous for the Grievant to have let her know that he gave out her direct phone number so she may have been prepared for the conversation with Mr. Mell; that immediately after her conversation with Mr. Mell in which she asked him to supply certain information pertinent to the investigation, she called the Grievant to advise him and only had Mr. Mell send certain timecards so she might understand the issues; and that she was responsible for the cases under her supervision and would, therefore, appreciate it if when she asked him for information about a case, he provide it instead of arguing.

Later that day, the Grievant sent another e-mail message to Ms. Lenkaitis asserting that she had not told him that she had asked Mr. Mell for information and that he did not know that Mr. Mell would call her. The e-mail stated: "In the management world of ADD Lenkaitis, one is damned if one does, and damned if one doesn't."

Ms. Lenkaitis testified that she thought the Grievant's behavior on this matter was unprofessional: 1) by giving out her direct dial number without warning her, and 2) by becoming condescending and argumentative when she asked him about the case in order to support his investigatory efforts. She stated that he showed a lack of respect for her on both a professional and personal basis. She testified as follows:

> He never did anything that I asked him to do. Everything was an argument. He constantly required me to prove that what I asked him to do was within my rights as his supervisor, and he continually instructed me on how to do my job.

The Grievant testified that he did not become aware that this incident might serve as the basis for termination until March 2004 when he received the Notice of Proposed Removal.

Delay in Returning Spare Computer - Reason I, Specification 1 (May – June 2003)

One of the Specifications supporting the Uncooperative Behavior charge involved the Grievant's alleged delay in returning a spare computer that had been loaned to him.

In mid-May, the Grievant received back his regular laptop after the manufacturer had repaired it. Ms. Lenkaitis testified that she spoke to the Grievant at that time and instructed him to return the spare computer that had been loaned to him as soon as possible. He testified that he did not return the spare computer immediately because he had numerous personal documents on the hard drive, including documents pertaining to a grievance he had filed and communications with his attorney, which he needed to delete or copy onto a disk. He stated that he spoke to Tracy Meyer, the Department's computer specialist in Madison, who offered to assist him in mid-June when they were both scheduled to be at the same location at a training conference.

Ms. Lenkaitis testified that, about two weeks later, on May 28, she received an e-mail from the Grievant stating that he needed to transfer documents from the spare

computer and that he would try to do so by mid-June when he attended the training conference. Ms. Lenkaitis responded via e-mail on May 29, stating that: waiting until mid-June to return the spare was unacceptable; the Grievant was told a couple of weeks earlier to return the computer; he had been provided with disks on which to back up his computer; and that if he needed assistance he should contact Ms. Meyer. Ms. Lenkaitis concluded the e-mail by stating that she expected the Grievant to send the computer that day to be received in the Madison office on the next day. Although she explained that the spare needed to be available for use by Investigators in the office who might experience problems with their assigned computers, she acknowledged that, at that time, there was no one in the office who needed the computer. She also stated that there is a national database listing all of the laptop computers and, at any time, there might be a request to send a spare computer to another office.

The Grievant and Ms. Lenkaitis continued to argue via e-mail over the return of the laptop. Later that day, the Grievant sent an email to Ms. Lenkaitis stating that he was unable to comply with her request that he return it immediately because he did not have the disks or CDs on which he might copy his files from the hard drive. The Grievant's e-mail asserted that this was the first "ultimatum" he had received and that he was previously told that there was no hurry. Later on the same day, Ms. Lenkaitis replied via e-mail stating that she had previously told him to return the computer by a date certain and that she expected it to be returned that day. It further stated that the Grievant could contact Ms. Meyer for assistance with transferring documents. Later that day the Grievant responded by stating that he did not believe she had given him a date certain for returning the computer and that he was "tied up" that day and would work with Ms.

Meyer the next day to get the computer on its way. The Grievant did return the computer on the next day, May 30.

The Grievant testified that he is "technically challenged"; that he did not know how to transfer the personal files he had on the computer; and this was the reason why he did not return the computer sooner. Further, he stated that he did not think he acted inappropriately under the circumstances and that Ms. Meyer had told him there was no rush on returning the computer and would help him in mid-June.

Ms. Lenkaitis testified that the Grievant seemed unwilling to work with her regarding the return of the laptop and instead just argued about it. Further, although she recognized that the Grievant was not technically adept at working with computers, she stated that transferring or copying files is a basic skill that should not take long. She further stated that she would not have expected him to have a substantial number of files on the spare laptop because he only had it for three weeks and most of the Investigators' work is done on a national database.

The Grievant was unaware that this behavior could lead to disciplinary or adverse action until he received his Notice of Proposed Removal approximately 9 months later.

Damage to the Spare Laptop Provided to the Grievant – Reason IV, Specification 2 (June 2003)

One of the Specifications supporting the Uncooperative Behavior charge was based on damage to the spare laptop computer that was loaned to the Grievant while his regular computer was being repaired at the manufacturer.

Ms. Lenkaitis testified that, in early June 2003, when the Grievant's spare laptop was returned to the Madison office, Ms. Meyer told that her that it was damaged. Specifically, she reported that the top could not be closed because the alignment was off,

there were scratches all over the computer, and the piece used to eject cards from the card slot was missing. Ms. Lenkaitis testified that Ms. Meyer informed her that the damage did not appear to be normal wear and tear. Further, Ms. Meyer told Ms. Lenkaitis that she packed the computer to be shipped to the Grievant originally and believes that she packed it properly, and that when it was returned it appeared to have been packed properly. Thus, that she did not think the damage occurred in shipping.

On June 4, 2003, Ms. Meyer sent a memo to Ms. Lenkaitis addressing the damage to this computer that was discovered when it was returned.

> The . . . computer was returned via Fed Ex . . . with the front right compartment "sprung" meaning it appears to be bent and does not align with bottom of the laptop. There are also scratches on the bottom and the part that ejects cards . . . from the left side of the computer is missing. I don't recall these defects to exist prior to shipping on April 9, 2003. No damage should have occurred in the shipping process as it appeared the computer was packaged properly each time it was shipped.

Ms. Lenkaitis testified that she asked Ms. Meyer to include in her memo the last sentence about the packaging and shipping of the computer. Ms. Lenkaitis also admitted that she was unaware that Ms. Meyer had received any technical training regarding computer hardware maintenance or repair or had any knowledge in those areas beyond what she may have learned on the job (and Ms. Lenkaitis lacked knowledge of what that may have been); the only training or expertise of which Ms. Lenkaitis was aware related to Ms. Meyer's completion of word processing or spreadsheet software courses.

The Grievant denied damaging the computer, and stated that it worked while he had it and that he did not know how it was damaged. He testified that he did not drop the computer, but it may have fallen off the desk because of cords that were on the desk; he did not think that any fall caused the damage.

The Department did not introduce any direct evidence of the damage, such as photographs, diagrams or any report from the manufacturer who repaired it. Nor did Ms. Meyer testify regarding her apparent conclusions. Ms. Lenkaitis admitted that the spare computers were not in "mint condition." She explained that they were getting somewhat old (having been originally assigned in 1999) and received a lot of use and wear from employees who formerly used them.

Further, Ms. Lenkaitis admitted that management did not ask the Grievant about the alleged damage when it was discovered and he testified that he only became aware of the claim that the computer was damaged and that the damage was his fault when he received the Notice of Proposed Removal approximately 9 months later.

Assigning Work to Another Investigator - Reason II, Specification 1 (June 2003)

One of the Specifications supporting the charge of Unprofessional Conduct concerned the Grievant's action in asking another Investigator (who was fluent in Spanish) to interview a Spanish-speaking employee in one of his cases.

The Grievant was the Lead Investigator assigned to a case involving China Buffet. Ms. Kristin Tout-Nava was an Investigator who had been assigned to the case the prior year for the purpose of interviewing a Spanish-speaking employee. Mark O'Brien, a Wage-Hour Investigator ("WHI") in the Minneapolis District Office and a Union Steward, testified that typically Lead Investigators assign work to the other Investigator(s) on cases without management involvement.

About a year earlier, Ms. Tout-Nava did limited work on the case when she interviewed a Spanish-speaking employee. Although she did not have any more recent involvement, WHISARD still showed her as assigned to the case. On June 5, 2003, the

Grievant sent her an e-mail, a copy of which he sent to Ms. Scharlemann, asking Ms. Tout-Nava if she could interview a Hispanic employee. According to Ms. Scharlemann, an interview of this nature would probably take a couple of hours to complete.

Later that day, Ms. Scharlemann sent an e-mail to the Grievant stating: "You do not assign work to investigators. You tell your supervisor what you need and we assign work." The Grievant promptly responded with the following e-mail to Ms. Lenkaitis: "A rather discourteous response. Kristin had been assigned to this case, and had previously interviewed a Spanish speaker. Once assigned, I thought she helped on the case." Ms. Scharlemann responded by e-mail, stating: "As I said Bill, you do not assign work and Kristin was assigned to do that one task about a year ago."

Ms. Scharlemann explained that the Department has a limited number of staff members who are able to conduct interviews in Spanish, that there was an increasing need for Ms. Tout-Nava's services, and that it was her (Scharlemann's) job as supervisor to determine how to use those limited resources. Further, Ms. Scharlemann stated she needed to evaluate whether Ms. Tout-Nava had time for this assignment because she was otherwise busy and was expected to leave shortly on an extended maternity leave.

Ms. Scharlemann testified that she thought that the Grievant behaved unprofessionally both in assigning work to another investigator and in responding to her instructions by accusing her of having been "discourteous."

The Grievant testified that he did not learn that this matter may become the basis for disciplinary or adverse action until approximately nine months later, when he received the Proposed Notice of Removal in March 2004.

Failure to Follow Instructions in Shipping Computer to the Manufacturer - Reason I, Specification 7 (June 2003)

One of the Specifications supporting the charge of Unprofessional Behavior concerned the Grievant's actions in purportedly not following instructions in completing the shipping information for sending his computer for repair to the manufacturer and for having the computer returned once the computer was repaired.

As discussed above, in June 2003, the Grievant's computer needed to be repaired. Ms. Lenkaitis sent to the Grievant a pre-prepared Federal Express shipping form for him to use to ship the computer to the manufacturer in Virginia and a label for the manufacturer to use to send it back after it was repaired to the Minneapolis office.

The Grievant made two changes to these documents. First, he changed the return label so that the computer would be shipped back to him at the Eau Claire office, rather than to Minneapolis. The Grievant telephoned Ms. Lenkaitis from the Federal Express office to tell her that he made this change and she instructed him to change it back, explaining that the Department wanted to check the computer after the manufacturer's repair to make sure it was operating properly. According to Ms. Lenkaitis, the Grievant responded: "Why Minneapolis and not Madison? It just seems like more harassment to me."

Despite that view, however, the Grievant complied with Ms. Lenkaitis' direction and changed the return delivery slip to the Minneapolis office.

The second change that the Grievant made was to check the Saturday delivery box on the Federal Express form, although he did not sign the form authorizing delivery without a signature. The Grievant did not notify Ms. Lenkaitis about this change;

he testified that the Federal Express agent asked him about the delivery date after his phone conversation with Ms. Lenkaitis. Federal Express delivered the computer on Saturday. The repair facility was closed and the computer apparently was left outside the door without signature. For a few days the computer was believed to be missing. It turned out that another tenant had held it for safe keeping and it was returned to the repair facility.

Ms. Lenkaitis learned on the same day that she spoke with the Grievant about the situation that the computer had been located and was being repaired. The record indicated that the computer was repaired on July 1st (the Tuesday after the Friday on which it had been shipped).

The Grievant testified that he thought it made sense to have the computer delivered on Saturday because there was a rush to have it repaired, and he assumed that the repair facility would be open.

Ms. Lenkaitis testified that the Grievant neither apologized nor took any responsibility for his actions, which she said was characteristic of his conduct on many occasions.

The Grievant testified that he did not become aware until approximately nine months later, in March 2004 when he received the Proposed Notice of Removal, that this was a matter that might lead to disciplinary or adverse action.

The Grievant's Return to Duty Before the Time Requested - Reason I, Specification 8 (July 2003)

One of the Specifications cited in support of the charge of Uncooperative Behavior concerned the Grievant's action in returning to work from his suspension before the time specified by management.

The Grievant served his 18 calendar day suspension from July 3 through 24, 2003. He was scheduled to return to work on July 25, and was told to report to the Minneapolis office. Neither the suspension notice nor any other communication from the Department (except for the July 24th telephone message described below) specified the time of day that the Grievant was expected to report on July 25th.

According to the Grievant's testimony and Ms. Lenkaitis' notes (which were introduced into evidence), on the morning of July 24th the Grievant telephoned Ms. Lenkaitis (who, although based in Madison, would still be his supervisor while he worked in Minneapolis) and told her that he was planning to report to work the next day between 7:00 a.m. and 7:30 a.m. Ms. Lenkaitis responded that she would ask Ms. Walls when she would be available to meet with him. Ms. Lenkaitis testified that she believed, although she did not inform the Grievant, that a manager needed to be present to assign work and return his computer. Ms. Walls told Ms. Lenkaitis that she would prefer that the Grievant not arrive before 8:30 a.m. and that, in no event, should he arrive before 8:00 a.m. At about 12:00 p.m., Ms. Lenkaitis telephoned the Grievant and left a voice mail message to that effect and indicated that he should call her back if he wanted to arrive before 8:30 a.m.

Ms. Lenkaitis left the office at 3:30 p.m. Soon afterwards, the Grievant telephoned her and left a voice mail message. According to a transcript of the Grievant's telephone message prepared by Ms. Lenkaitis the next day, the Grievant stated that he was planning to arrive between 7:00 a.m. and 7:30 a.m. and that he was on flexitime and suggested that perhaps his e-mails could be photocopied if he was not going to have access to his computer immediately so that he could look them over. (Pursuant to

Article 27.F. of the Agreement, employees on flexitime are generally permitted to choose their work hours between the hours of 6:00 a.m. and 6:00 p.m. Management retained the ability to limit those hours, however.) The Grievant testified that he assumed that Ms. Lenkaitis received the message. Ms. Lenkaitis acknowledged that it would have been reasonable for the Grievant to make that assumption. The Grievant also stated that the managers had a practice of informing the staff if they were going to be leaving early, but that the Grievant did not receive such notice.

The Grievant arrived at work on July 25th before 8:00 a.m. and retrieved his computer from Ms. Walls' office. According to a Memo to File prepared by Ms. Walls, when she asked him about his early arrival and his having taken the computer from her office, he stated that he did not know that he was not permitted to take his computer and that he had to start early because he had a medical appointment at 4:00 p.m. that day.

The Grievant testified that because he was on flexitime he thought he had the latitude to report earlier, although he acknowledged that management had the right to set the hours. He stated that because he left Ms. Lenkaitis a message stating that he would be in between 7:00 a.m. and 7:30 a.m. and had not heard back from her, he believed that it was permissible for him to report at that time. Further, he stated that he assumed that Ms. Lenkaitis' concern was that he may not have enough work if he reported before 8:00 a.m. (since she had not indicated any other reason), but that he had plenty of work catching up on e-mail and other matters.

The Grievant testified that he did not learn until approximately nine months later, in March 2004, when he received the Notice of Proposed Removal, that this matter might serve as a basis for disciplinary or adverse action.

Tardy Request for Sick Leave - Reason I, Specification 9 (July 2003)

One of the Specifications supporting the charge of Uncooperative Behavior concerned a sick leave request that the Grievant made near the end of the work day on July 30, 2003, for that same day.

On July 30, 2003, at about 4:00 p.m., the Grievant sent an e-mail to Ms. Lenkaitis asking her to put him on sick leave for that day. The next morning, she responded by e-mail stating that she would grant the request, but cautioned him that employees on flexitime are normally required to contact their supervisor by 10:00 a.m. to request sick leave. The Grievant responded by e-mail stating that he had told Ms. Lenkaitis the day before that he was ill and did not realize that he had to call in each day of sick leave. Ms. Lenkaitis replied by e-mail stating that, although the Grievant had told her that he was ill on July 29 and left one hour early, he did not indicate that he would not be working on July 30, and that employees must ask for leave each day unless the original request is for an extended leave. She testified that it is not unusual for an employee to call in each day and that there would have been no way for her to know that he was sick on July 30th just because he went home ill the day before.

When Ms. Lenkaitis was asked whether sick leave had ever been approved in the Wisconsin District Office if requested after 10:00 a.m. for that day, she responded that she could not recall such a case.

The Grievant testified that he did not learn that this incident might save as a basis for disciplinary or adverse action until nine months later when he received the Notice of Proposed Removal.

Failure to Number Exhibits - Reason I, Specification 12 **(**August 2002 to August 2003)

One of the Specifications cited in support of the Uncooperative Behavior charge concerns the Grievant's alleged failure to number file exhibits properly and to obey repeated direction from Ms. Lenkaitis that he do so.

On August 11, 2003, Ms. Lenkaitis sent the Grievant an e-mail stating that he was repeatedly neglecting to number the file exhibits and, although she had reminded him to do so many times, there had not been any improvement. The Grievant responded by e-mail on the same day, stating that he thought he was numbering the exhibits correctly and that "[i]t was good enough for the other [Directors]" and that he did not understand how he was not following the FOH.

Ms. Lenkaitis replied by e-mail later that day. Her e-mail stated that what other managers required was immaterial because she was his supervisor now, that the FOH required exhibits to be numbered in a specific way, and that the Grievant was simply putting tabs on some exhibits and leaving others identified and not numbering supplemental exhibits. The Grievant responded by stating that he was frustrated by what he perceived as a difference in treatment.

Ms. Lenkaitis sent the Grievant a Memorandum on August 15, 2003. In this Memo, Ms. Lenkaitis denied that she was treating the Grievant differently and attached a copy of an e-mail she sent to the Madison staff in August 2002 with instructions on the proper numbering of file exhibits. She stated that she provided the Grievant with a copy of this e-mail again in January 2003 because he was not abiding by the instructions. Further, Ms. Lenkaitis attached twenty-one memos and e-mails she sent to the Grievant between August 2002 and July 2003 reminding him of the requirement to number file

exhibits and in many instances returning case files to him to complete this and other tasks. She asserted that when he returned these files, the exhibits were still not numbered. The Memorandum further stated that the subject of numbering file exhibits was discussed during his mid year progress review in May 2003.

Ms. Lenkaitis testified that it was important that exhibits be numbered properly, with each page of the exhibit being numbered, so that if the file were separated, it would be possible to reassemble it. She stated that her instructions regarding exhibit numbering were consistent with the FOH. She explained that she thought the Grievant was being uncooperative because he refused to follow her directions on a simple and basic task required of every investigator. She further stated she has had many discussions with staff about numbering exhibits and has returned cases to other investigators who have failed to do so. Finally, she stated that having to remind the Grievant repeatedly about exhibit numbering was very frustrating.

The Grievant testified that: he thought he did the tabs correctly; none of his previous supervisors had any concerns with how he tabbed exhibits; although many of the memos or e-mails from Ms. Lenkaitis on this subject were sent before his suspension, this issue was not mentioned in her suspension proposal or in his counseling sessions; he was not aware of any other investigators being disciplined because of how they tabbed exhibits; Ms. Lenkaitis never explained to him what specifically he did that was deficient; he asked Ms. Lenkaitis to give him examples of case files where the tabbing was done correctly, but she never did; and he is still unclear on how she wants the exhibits numbered.

The Grievant's Allegedly Contentious Attitude in Responding to Request for Medical Documentation of Illness - Reason I, Specification 10 (August to September 2003)

One of the Specifications supporting the charge of Uncooperative Behavior concerns the manner in which the Grievant responded to a request for a medical certificate to support his leave of absence requests for August 12 through September 19, 2003.

The conflict over this issue began on August 11, 2003, when the Grievant sent an e-mail to Ms. Lenkaitis stating that he would be taking sick leave for a four day period – i.e., August 12 to August 15. Ms. Lenkaitis responded by e-mail stating that he would need to submit a doctor's note upon his return. She testified that typically management asks employees who are going to be on sick leave for four or more days for medical documentation. (Article 40 does not affirmatively require that an employee furnish proof of illness if absent for four or more consecutive days, but states that employees are not required to furnish such proof for absences due to illness of shorter duration. Article 40 does not specify what information will constitute acceptable employee proof of illness.)

On August 12, the Grievant sent an e-mail to Ms. Lenkaitis asking if she needed more than the information from Earl Nolting, Ph.D., a psychologist to whom the Grievant had been referred by the EAP. On August 13, Ms. Lenkaitis (who testified that at the time she did not have any information from Dr. Nolting) e-mailed a Memorandum to the Grievant stating that she would approve the sick leave request for August 12-15 pending receipt of the supporting medical documentation. She further stated that the Grievant must provide a medical certificate from a treating medical practitioner, who must be a medical doctor ("MD"), physician's assistant ("PA"), or a nurse practitioner ("CNP"), and that the certificate must specify, among other things, the nature of the medical

condition causing the incapacitation, and the estimated duration of the incapacitation. She instructed the Grievant to provide the medical certificate by August 21, and stated that if he failed to do so, then his absence would be charged as AWOL.

On the same day, August 13, Ms. Lenkaitis received a "Treatment Summary" prepared by Dr. Nolting. It stated:

> . . .
>
> At our initial meeting, several physical complaints and symptoms were discussed by Mr. "Doe" Referral to specialist(s) for further medical evaluation was discussed at that meeting. Information was also presented about what was described as high levels of stress relating to his work. . . . [C]onflicts were regularly occurring over differences – both small and large – between Mr. "Doe" and his supervisors.
>
> The focus of brief treatment thus far has been focus on the work stress and anxiety, which has intensified following his return to work after and 18 day suspension was completed. I recommend further consultation with medical specialist(s) to rule out physical causality and to assess the need for medications for stress and anxiety.
>
> Mr. "Doe" returned to work on a full-time basis on Friday, July 25, 2003. Given the level of personal stress and anxiety reported on July 31, after 5 work days have been completed, it is likely that he will request change of work assignment to another region or type of duty. Alternatively, Mr. "Doe" may also need to request use of accumulated sick leave, longer-term medical leave, or a part-time assignment as a reasonable response in dealing with his current health situation. He understands that he will also need to follow up on a recent general physical examination, that will likely involve consultation with one or more specialists to confirm his medical-emotional condition.

Ms. Lenkaitis testified that this Summary was insufficient because: 1) Dr. Nolting did not meet the definition of a "medical practitioner"; 2) the Summary did not identify a medical condition causing the incapacitation; and 3) the Summary did not state that the Grievant was currently incapacitated or provide an estimated duration of incapacitation. Later in the day on August 13, Ms. Lenkaitis sent the Grievant an e-mail setting forth this position and stating that documentation would have to be provided by another source. The Grievant responded with an e-mail asking Ms. Lenkaitis to be provide all of the regulations, policies, or directives addressing the information needed. Ms. Lenkaitis

promptly replied that the memo she sent him was the standard letter used when employees ask for four or more days of sick leave and that the regulations are available for review on the LaborNet web site.

The Grievant replied by e-mail, stating that he viewed this as "continuing harassment" and that he did not appreciate Ms. Lenkaitis' "continuing threats." In her testimony, Ms. Lenkaitis denied that she was seeking to harass or threaten the Grievant and asserted that she was just trying to get information in order to document the sick leave.

On August 18, the Grievant sent Ms. Lenkaitis an e-mail, in which he made the following points: 1) that Dr. Nolting was recommended by his insurance carrier and that his recommendations should be given weight; 2) that Dr. Nolting gave him a referral to a medical doctor, and the earliest appointment he could make was August 21; and 3) that he could find no information on credentials of medical personnel at the LaborNet site so that he was again asking that she provide this information.

Later that day, Ms. Lenkaitis e-mailed a Memorandum to the Grievant restating the reasons why she contended that the medical certificate was not adequate. Ms. Lenkaitis also stated that if the Grievant was seeking leave beyond August 17, then he needed to complete an SF-71 and supply appropriate medical documentation. She warned that the failure to submit the required information would result in the absence being charged as AWOL.

Later that day, the Grievant sent two e-mails to Ms. Lenkaitis in which he: reiterated his belief that Dr. Nolting met the definition of a medical professional; noted that Ms. Lenkaitis did not supply him with the information he requested; and suggested

that they follow the definition of "health care provider" contained in the Department's Family and Medical Leave Act ("FMLA") Regulations, which expressly includes "clinical psychologists." 29 C.F.R. §825.118(b)(1). Ms. Lenkaitis testified that the cited regulation was inapplicable because it did not apply to federal employees and because the Grievant was not seeking an FMLA leave.

The Grievant and Ms. Lenkaitis continued to debate the matter via fax and e-mail. On August 21, the Grievant faxed to Ms. Lenkaitis two SF-71 forms. The first form requested sick leave for August 12 through August 19 and referenced Dr. Nolting's Summary. The second sought sick leave for August 20 through September 19 and referenced a note from Daniel J. Albee, M.D., a psychiatrist the Grievant had consulted with, and which stated that the Grievant "[s]hould remain off work from 8/20/03 to 9/20/03."

On the same day, Ms. Lenkaitis e-mailed a Memorandum to the Grievant stating that the leave for August 12-September 19 would be conditionally approved, pending receipt of the appropriate medical documentation consistent with her prior instructions, and that such documentation must be supplied by September 5. On August 22, Ms. Scharlemann sent a Memorandum to the Grievant which was to the same effect (and which also corrected an error in Ms. Lenkaitis' memo about the Grievant not having submitted the SF-71 forms for the entire period of time for which he was seeking leave).

On the due date for the medical documentation, September 5, the Grievant sent a memorandum to Ms. Lenkaitis stating that he had asked Dr. Albee to provide additional information for the period of August 20 to September 19. With respect to the August 12 to August 19 time period, the Grievant asserted that the documentation provided by Dr.

Nolting should be sufficient because it outlines his medical condition and stated that he may need to request use of accumulated sick leave and long term medical leave to deal with his current health situation.

With respect to whether Dr. Nolting met the requisite qualifications for supplying a medical certificate, the Grievant stated that his federally funded health insurance carrier referred him to Dr. Nolting. The Grievant reiterated that Ms Lenkaitis had not provided him information regarding the definition of health care provider and again cited to the FMLA regulations, which includes "[a]ny health care provider from whom … the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits." 29 C.F.R. §825.118(b)(4). The Grievant stated that because he was not able to get an appointment with Dr. Albee until August 20, other than Dr. Nolting's letter, he had no other documentation to provide with respect to the August 12 to August 19 time period.

On September 5, Ms. Lenkaitis sent a letter to the Grievant stating that she had not received the additional information from Dr. Albee regarding the absence from August 20 through September 19. She indicated that she would extend the due date for receipt of this information to September 12. With respect to the issue of whether Dr. Nolting could supply the required medical certificate, she again stated that the FMLA regulations the Grievant cited were not applicable to federal employees.

On September 11, 2003, Dr. Albee faxed a letter dated August 28 to Ms. Lenkaitis regarding the Grievant's condition and need for leave. Dr. Albee stated in the letter that he diagnosed the Grievant as having an adjustment disorder and that the estimated duration of incapacity was at least one month. On the next day, September 12, the

Grievant sent an e-mail to Ms. Lenkaitis stating that he believed he had now provided all of the necessary documentation to support approval of all of his sick leave, including for the August 12 to August 19 time period. The Grievant also stated that Dr. Albee advised him that, when he returned to work on September 22, he should only work two days a week and, if successful, work up to a full-time schedule, and take sick leave for the other days. With respect to the Department's position that Dr. Nolting did not have the necessary credentials, the Grievant again asserted that Ms. Lenkaitis had not produced any documentation defining a medical professional. He further stated that the MOU referenced by Ms. Lenkaitis had not, according to Union President Dennis DeMay, been in effect for nine years.

Ms. Lenkaitis testified that Dr. Albee's letter met the requirements for medical documentation. Leave was granted retroactive to August 12 even though Dr. Albee's prior note stated "[s]hould remain off work from 8/20/03 through 9/20/03." On September 15, Ms. Lenkaitis sent a letter to the Grievant outlining the documentation she would need to support his request to work a reduced schedule.

With her September 15 letter, Ms. Lenkaitis enclosed a copy of the MOU which she stated became effective on August 1, 1994 and was still in effect and is included in the collective bargaining agreement. The MOU identifies the "subject" as "leave restriction." Further, the MOU itself does not address what credentials the health care provider supplying the medical certificate must possess. However, Ms. Lenkaitis also supplied the Grievant with a document purporting to set forth the bargaining history with respect to the MOU. This document stated, in pertinent part:

> . . . A memorandum of leave restriction may include a stipulation that any use of sick leave may be approved only by administratively acceptable evidence; that is, a medical

> certificate issued by the treating medical practitioner. . . . [F]or this purpose, a medical practitioner may be a doctor, physician's assistant (PA), or Nurse Practitioner. . . .

Ms. Lenkaitis acknowledged that the document does not state that it applies to all sick leave requests, but she testified that she was told by OASAM that, for consistency purposes, this language was not just used for employees on sick leave abuse programs. She further testified that she was told that the only medical practitioners who could provide appropriate documentation in support of a sick leave request were medical doctors, nurse practitioners, and physician's assistants. When she was asked, by way of example, whether a note from a dentist indicating that an employee was absent because he or she had to have wisdom teeth removed would suffice, she stated it would not, because a dentist is not a medical doctor, nurse practitioner or a physician's assistant. Mr. Reardon was posed a similar question at the arbitration and testified that he did not know if a note from a dentist under those circumstances would be adequate, but stated that such a position probably made sense.

On September 18, the Grievant sent an e-mail to Ms. Lenkaitis stating that, in response to her request for medical documentation, Dr. Albee would be writing to her. He asserted that she was misinterpreting the MOU. He further stated that he would return to work on September 22 and that, during the first two weeks, he would be working two days per week.

On September 21, 2005, Ms. Lenkaitis sent an e-mail to the Grievant stating that he would need an additional medical certificate from Dr. Albee indicating that the Grievant was still incapacitated and explaining why he could only work two days a week and including his (Albee's) estimate as to the time period that such limitation would last.

Further, she stated that the Grievant was required to complete SF-71 forms for the absences.

On September 22, Ms. Lenkaitis received a letter dated September 19 from Dr. Albee, stating that there had been some improvement in the Grievant's anxiety condition sufficient for him to return to work on a part-time basis and recommending that, starting September 22, 2003, the Grievant work two days a week and then advance to four days a week for two weeks, with anticipated return to full time thereafter.

On or about October 2, Ms. Lenkaitis received another letter from Dr. Albee stating that the Grievant's return to work has been unsuccessful, as he experienced an increase in his symptoms of anxiety and distractibility, and that "[i]t would be in his best interest … to remain off work for the foreseeable future and anticipate this will last at least 2-3 months."

Ms. Lenkaitis testified that she spent hours working on this sick leave issue with the Grievant and that there were e-mail exchanges virtually every day for a two-week period. She also stated that she spent time discussing the matter with OASAM, reviewing regulations and that the Grievant continued to argue that he provided the documentation appropriately. Ms. Lenkaitis testified that she found this to be incredibly frustrating and distracting, and that it kept her from working with other employees.

Prior to his receipt of the Notice of Proposed Removal in March 2004, there was no notice that the Grievant's behavior in questioning what he believed to be harassment and inappropriate threats to curtail what he believed to be legitimate use of earned sick leave could lead to disciplinary or adverse action.

The Grievant's Delay in Returning Laptop and Case Files While on Sick Leave – Reason I, Specification 11 (August 2003)

One of the Specifications of allegedly Uncooperative Behavior concerns the Grievant's alleged lack of cooperation in making arrangements to return his laptop and case files while he was on extended sick leave in August 2003.

Ms. Lenkaitis testified that when employees were on extended absences it was common practice to have their computers and case files returned. On August 21, she e-mailed a letter to the Grievant instructing him to return the laptop and case files that he had at home to the Minneapolis office by 10:00 a.m. the following day, August 22, and that if he could not, to contact Ms. Scharlemann immediately to arrange another time.

Ms. Lenkaitis testified that, on August 22nd, the Grievant neither returned the computer and files nor contacted her to advise that he would not be returning them. The Grievant testified that because he was out on sick leave, he is not sure whether he received Ms. Lenkaitis e-mail on the day it was sent it (August 21st). On Friday, August 22nd, Ms. Scharlemann telephoned the Grievant and left a message to the effect that he should bring his computer in on Wednesday August 27, because she and Ms. Walls were going to be out of the office on Monday and Tuesday, August 25th and 26th.

On August 26, 2003, the Grievant sent an e-mail to Ms. Lenkaitis stating that he would appreciate it if the office would not telephone him during his leave. On the same day, Ms. Lenkaitis responded by e-mail stating that the Grievant had a duty to respond to inquiries regarding official business and that, if he had followed her instructions regarding his leave requests and the return of his laptop and the files he had at home, such contact would not have been necessary. She stated that it was imperative that the items be returned and that, if he could not do so by Wednesday August 27, as he had been

instructed, then he should let her know and she would make arrangements to have them picked up at his residence.

Later that day, the Grievant responded by e-mail to Ms. Lenkaitis, stating that he had previously told her that he would be bringing his computer in on August 28th. He explained that he did not receive instructions to bring anything to the office until mid-afternoon on Monday the 25th, and was advised not to bring it in on Monday or Tuesday, but rather to do so on Wednesday, the 27th.

Ms. Lenkaitis testified that she regarded the Grievant's conduct with respect to returning the computer and case files to be uncooperative because he did not follow any of the instructions to contact management to schedule a convenient time, or respond to Ms. Lenkaitis' suggestion that if he could not bring it in earlier the office would arrange to have the items picked up from his home. Further, he did not ask whether it would be convenient for the Department if he were to bring the items in on August 28th, he simply did so. The Grievant pointed out that he was never asked what day or time would be convenient for him.

Ms. Lenkaitis explained that it was important to get the Grievant's computer and case files so that the Department could safeguard the computer and she could review the files to determine whether to reassign certain cases to other Investigators. The record contained no evidence of any case reassignments or when they might have occurred.

The Grievant did return the items on August 28th. He testified that he probably could have brought the items in on August 25th or 26th, but the message from Ms. Scharlemann indicated that those days would not be convenient for her.

The Grievant stated that he was not aware that this matter could be the basis for disciplinary or adverse action until seven months later when he received the Notice of Proposed Removal.

AWOL – Reason III (November 2003)

One of the Specifications concerns the Grievant's absence in mid-November, for which he purportedly submitted his sick leave request form late and was charged with being AWOL. As noted previously, the October 8, 2003 Settlement Agreement stated that the Grievant "has submitted" SF-71 forms seeking sick leave for the period of September 29, 2003 through February 2, 2004 (the date on which Grievant had agreed to retire).

On October 10, 2003, the Department approved sick leave requests that the Grievant had submitted covering the time period of September 22 – November 7, 2003. As of November 10, however, the Grievant had not submitted a request for sick leave for the period of November 10 – February 2, although management had the letter of September 30th from Dr. Albee stating that he anticipated that the Grievant would need to remain off work for at least two to three more months.

The Grievant did not report to work during the week of November 10-14, 2003. Ms. Lenkaitis testified that she had no notice that the Grievant would be out that week until November 14. The Grievant testified that, on November 10, he mailed SF-71 forms to Ms. Lenkaitis requesting sick leave for November 10 and for November 12 through 26. He did not ask for sick leave for November 11 because it was Veterans Day, a federal holiday. The Grievant's testimony as to when he mailed these SF-71 forms was corroborated by the November 10 postmark on the envelope in which he mailed the

forms. According to Ms. Lenkaitis and the "rec'd" stamp on the forms, the forms were received in the Madison office on November 14.

On November 18, Ms. Lenkaitis sent an e-mail to the Grievant stating that the sick leave request form for November 12-26 was late. She indicated that, according to the Settlement Agreement, the Grievant was supposed to have submitted the sick leave request forms within two days of signing the agreement – i.e., October 10. (In point of fact, however, the Settlement Agreement only required that the Grievant submit his retirement and certain other forms within two days. As previously mentioned, with respect to the sick leave requests, the Settlement Agreement stated that the Grievant "has submitted" an SF-71 requesting leave till February 2, 2004.) Ms. Lenkaitis further stated in her e-mail that she was charging the Grievant with 35 hours of AWOL for November 10 through 14, 2003. These hours included the holiday on November 11, for which Ms. Lenkaitis stated the Grievant would not be paid because he was AWOL the entire day before and the entire day after the holiday.

Ms. Lenkaitis testified that she previously told the Grievant to submit timely leave requests and that, if he failed to do so, then he would be subject to being charged with AWOL. She further stated that she decided to charge him with AWOL for the entire week, including the holiday, explaining that if an employee does not work and is not on paid leave the day before and the day after the holiday, then he or she is not paid for the holiday. Even if the Grievant was properly denied pay for the Veterans' Day holiday, the Department never explained how the Grievant could have been deemed AWOL on a day when there was no work scheduled or available for him to perform even if he had been medically capable of doing so.

When asked at the hearing, Ms. Lenkaitis was unable to provide any authority supportive of the decision to charge the Grievant with being AWOL on the Veterans' Day holiday. Further, she acknowledged that, prior to November 10th, she had the medical documentation to support the sick leave request for the period November 10 through 14 (i.e., Dr. Albee's letter).

In his e-mail response of November 19, the Grievant told Ms. Lenkaitis that he mailed the SF-71s on November 10 and stated that she knew at the time that he was on sick leave. Further, the Grievant testified that sick leave may be approved after the fact. For example, the sick leave requests for September 22 to November 7, 2003 were not approved until October 22, 2003.

The Grievant grieved separately the decision to treat him as AWOL. That matter was denied by Mr. Reardon. The Grievant was unaware prior to receiving the Notice of Proposed Removal that he was also subject to disciplinary or adverse action for those days of AWOL.

Mr. Reardon acknowledged that sick leave is often granted for short-term sick leave without a SF-71 being filed and that there is no requirement that such a form be filed in order to be eligible for sick leave. Mr. Reardon also testified that he viewed the AWOL as particularly significant in terms of his decision to uphold the Grievant's removal. Mr. Reardon also stated that, if he determined that Ms. Lenkaitis had reason to believe that the Grievant was not going to be at work during the period November 10-14, 2003, and the only problem was the missing SF-71 form, then he would not have upheld the charge of AWOL.

Grievant's Questioning and Alleged Lack of Compliance with District Office Guidelines for Conciliating Cases - Reason I, Specification 13 (January 2004)

One of the Specifications of allegedly Uncooperative Behavior concerned the Grievant's alleged failure to accept and comply with the District Office Guidelines for conciliating cases that he received when working as the Officer of the Day ("OD") in the Minneapolis DO in January 2004.

The Grievant's leave was scheduled to expire on January 9, 2004. Mr. Reardon testified that he was prepared to give the Grievant a "fresh start." However, Mr. O'Brien testified that, in late December 2003, when the managers learned that the Grievant was returning to work, they were outraged. Ms. Scharlemann told him that it was "unprecedented" that an employee could renege on an agreement to retire and return to work.

There was conflict between the Grievant and management virtually immediately upon his return to work in January 2004. Mr. O'Brien stated that the office was very tense and that there was shouting and door slamming on a daily basis. (There was no evidence that any of the shouting or door slamming was done by the Grievant; if it were, it is inconceivable that they would not have been cited as part of the removal in this case.) Ms. Scharlemann and Ms. Lenkaitis testified that work began on the Notice of Proposed Removal by late January or early February.

The first incident that occurred after the Grievant returned to work which became a basis for one of the Specifications of allegedly Uncooperative Behavior arose out of the Grievant's detail to serve in the capacity of OD and instructions he was given regarding the conciliation of cases and his alleged failure to follow the instructions.

Upon the expiration of the Grievant's leave, the Department detailed him to the Minneapolis office to serve as the OD for about sixty days. Ms. Scharlemann testified that the Department assigned the Grievant to this detail so as to have a chance to observe his conduct when he returned to work, and to avoid having him handle investigations because of the prior problems. She further stated that, to maintain continuity, it was decided that the Grievant would still report to Ms. Lenkaitis (who was located in Madison). Ms. Scharlemann explained that the practice is to not to change the employee's supervisor for a temporary assignment.

Mr. Reardon testified that the Department intended to "eventually" return the Grievant to his investigator position in Eau Claire. No steps were taken, however, to return the Grievant to Eau Claire or to assign him non-OD investigative duties. Rather, shortly before the expiration of the 60 day period he was assigned to serve as the OD, the Department proposed his removal.

The OD is responsible for responding to telephone inquiries from the public and walk in traffic. It is normally a position that is rotated; each Investigator performs the function for a day prior to being rotated back to the Investigator's normal duties. Mr. O'Brien testified that it was unusual for anyone to be assigned to the function for more than two consecutive days. Further, he testified that he thought it was unusual that a Journeyman Grade 12 Investigator like the Grievant would be confined to OD duty.

There was evidence to the effect that the OD position is a stressful and arduous assignment. Ms. Scharlemann testified that the OD fields many calls in the course of the day, and many of them are lengthy because they involve complicated matters. Similarly, Mr. O'Brien testified that it is a challenging and fatiguing job, involving responding to

multiple phone calls and entering a considerable amount of information. Because only the District Offices use ODs, the Grievant had not served that function for about two-and-a-half years since the time that he had last worked in Minneapolis, when he performed the function about once every other week.

On the first day of the Grievant's return to work (January 12, 2004), Ms. Walls and Ms. Scharlemann met with him to discuss work expectations. Ms. Scharlemann testified that they gave him a copy of a document entitled "Guidelines on Taking Complaints," and discussed those Guidelines with him. The Guidelines had been in effect since October 2000, so that they would have been in effect when the Grievant last worked in Minneapolis. One of the issues that the Guidelines addressed was when cases should be conciliated. Ms. Scharlemann testified that, to preserve its limited resources, in certain cases the Department opts to conciliate rather than investigate. She stated that cases appropriate for conciliation typically involve nonpayment of a final paycheck or overtime where a full investigation is not warranted. The OD is responsible for determining when a case should be conciliated. Ms. Scharlemann further testified that she and Ms. Walls explained the conciliation process to the Grievant and told him that conciliations had to be completed within 15 days. Ms. Walls sent the Grievant an e-mail attaching information distributed previously concerning the conciliation process. Ms. Scharlemann testified that she told the Grievant that if he had questions he could raise them with her or Ms. Walls.

The Grievant testified as to his belief that, in a number of areas, the Guidelines conflicted with the FOH. For example, he testified that the Guidelines called for any case involving six or fewer employees to be conciliated on behalf of the Complainant and

future compliance sought from the employer. The Grievant expressed his concern that when a case is conciliated, the Complainant's name is revealed to the employer, which violates a core tenet of the WHD not to invade the privacy of the Complainant when conducting an investigation. However, he acknowledged that the FOH provides that the DD or the ADD can accept or reject a complaint based on the circumstances of the office at the time. The Grievant further stated that, although the Guidelines indicated that they were discretionary, Ms. Scharlemann treated them not as Guidelines, but as absolutes and did not permit any deviations.

Ms. Scharlemann testified that the Grievant was argumentative and repeatedly asked questions without referring to the materials he was given or the FOH and without doing his own research; when his questions were answered, he did not accept the answers. For example, despite being told on January 12th that it was the OD's job to decide whether complaints should be conciliated or investigated, on January 20th he sent her an e-mail stating that he was unclear on whether to conciliate minor matters without turning them into her.

The Grievant's objections to the Guidelines became the grist for an exchange of e-mails between the Grievant and Ms. Scharlemann dated January 20 through 24, 2004. In those e-mails, the Grievant indicated that he needed further guidance as to when conciliation was appropriate and on conciliation procedures. Ms. Scharlemann would respond that she had already given him such guidance and that, if he needed additional information, then he should consult the Guidelines and the FOH.

For example, on January 20, the Grievant sent to Ms. Scharlemann an e-mail stating that he was not clear on how to handle conciliations and that, in one particular

case, he asked the Complainant for certain documentation before contacting the employer. Ms. Scharlemann responded by e-mail advising the Grievant that conciliations are supposed to be quick and that, in most cases, it is unnecessary to ask the Complainant for documentation. She further stated that he should follow the instructions in the materials that she and Ms. Walls had previously provided. The Grievant responded by e-mail stating, among other things that, "I am happy to conciliate these cases, however, it is helpful to have documents in front of me." Ms. Scharlemann responded by e-mail stating, among other things, that the Grievant needed to follow the instructions provided. The Grievant retorted, in a reply e-mail, that Ms. Scharlemann had stated at a recent meeting that the Investigators should be taking more complaints and that there was a lack of clarity as to what is supposed to be conciliated. Ms. Scharlemann and the Grievant exchanged several more e-mails in this vein on the matter before the dialogue was finally concluded.

Ms. Scharlemann stated that the Grievant did not follow the process that was explained to him by neglecting in many cases to make the determination that a case should be sent for conciliation. She testified as follows as to why she thought the Grievant's behavior on this matter was unprofessional:

> . . . [H]e repeatedly asked questions without referring to the Field Office Handbook or the materials he had been given. He would ask these questions without doing any research on his own. . . . [W]hen answers were given to him, he did not accept the answers. … He would ask the same or a very similar question again so to me, he's not accepting the first answer he's been given. . . .

The Grievant testified that he informed Mr. Reardon that he disagreed with how Ms. Scharlemann was handling these cases and that he believed that she was doing so in a way that was contrary to the statute, regulations, and the FOH. Pursuant to Mr.

Reardon's request, the Grievant provided that information in a detailed letter sent to him (Reardon) on February 9, 2004. In that letter, the Grievant made the following points: 1) that the policy of conciliating when six or fewer employees are involved is contrary to the statute and the FOH and results in waiving the confidentiality of the Complainant, violating a basic tenet of the WHD; 2) that "[t]he bullying and harassment by . . . Scharlemann and . . . Lenkaitis, is detrimental to employees' health"; 3) that, on February 3, he was "chewed out" in front of his co-workers for putting a complaint in the wrong folder; 4) that he had previously discussed with him Ms. Scharlemann's and Ms. Lenkaitis' "anti male" comments; and 5) that Ms. Scharlemann and Ms. Lenkaitis routinely yell at employees and that, while she abuses most employees, "some of us are more the recipients of her abuse than others. . . ." The Grievant concluded the letter by suggesting that, at the end of his detail, he be transferred or detailed to another location where he would be assigned to report to another DD.

Mr. Reardon did not acknowledge his letter. Mr. Reardon testified initially that he did not recall the letter. There was no claim, however, that the letter was not received. Mr. Reardon later testified that he asked Shirley Gardner, Deputy Regional Manager, to look into the matter (along with other allegations raised by other employees in the office of managerial abuses by Ms. Scharlemann and Ms. Lenkaitis), but claimed that she never provided him with any findings relative to her informal investigation. No explanation was provided for Mr. Reardon's claimed failure to have learned the results of an investigatory inquiry that he requested into allegations of serious and pervasive managerial abuses in the treatment of subordinates.

In his testimony, the Grievant gave several examples of cases that he worked on as the OD (which were not the subject of any specifications) in which he received instructions from Ms. Lenkaitis which were contrary to the FOH.

Grievant's Alleged Uncooperative Behavior in Making Corrections to the Data in the WHISARD system in the Wackenhut case – Reason 1, Specification 14 (March 2004)

The final Specification of allegedly Uncooperative Behavior involved an incident that preceded the issuance of the Proposal to remove the Grievant by a mere six days. That Specification grew out of his actions in following up with his supervisor in completing a WH-51 (a compliance action report automatically generated by WHISARD that summarizes the case) in connection with his work on the Wackenhut case.

On March 1 and 2, 2004, Ms. Lenkaitis and the Grievant exchanged a series of e-mails over alleged deficiencies in the WH-51 that the Grievant submitted to her in a case involving Wackenhut. The Grievant was still assigned to work as the OD in Minneapolis at this time. The dispute concerned a case that had been worked by the Grievant for which he logged a total of one hour. The Compliance Action Report, dated 2-12-04, prepared by the Grievant, revealed that the case involved a claim that an individual did not receive overtime pay during the Christmas and New Years period, but that the employer claimed to have paid the proper required overtime and produced pay stubs to verify that claim. Administrative closure was recommended.

The chain began with two e-mails from Ms. Lenkaitis in which she indicated that she could not complete her review of the report because it had "fatal errors" and other problems and that he needed to correct these and submit a new WH-51. Ms. Lenkaitis explained that a "fatal error" occurs when WHISARD automatically finds that the data entered into the system is insufficient to conclude or go the next step. The Grievant

testified that he knew that there was no fatal error when he submitted the form since otherwise the system would not have accepted it. The Grievant explained that sometimes WHISARD does not pick up information that has been entered, saves data that is different than what has been entered, or because of a system update shows that there is a fatal error. Ms. Lenkaitis did not dispute that the fatal error may have arisen after the Grievant submitted the report.

Ms. Lenkaitis testified that it would have been easy to correct the errors and that it should have only taken a few minutes. The Grievant asked Ms. Lenkaitis for a copy of the original WH-51 that he submitted for review. Ms. Lenkaitis testified that he did not need the document because all of the pertinent information was in WHISARD so that he could call it up on the computer, which would indicate the nature of the error, and that he could print the document from the computer. The Grievant testified, however, that the document in the original format that he sent to Ms. Lenkaitis could not be printed from WHISARD (since his original information was obviously not saved by the system as reflected by the presence of fatal errors) and that he wanted to see the errors in the original. The Grievant acknowledged that he could have printed information from WHISARD which would have shown the errors and permitted him to correct them; it would not, however, have shown whether those errors were initially his fault (as asserted by Ms. Lenkaitis) or were the fault of the system.

The Grievant and Ms. Lenkaitis exchanged several e-mails the gist of which was that he persisted in asking her to fax him the original WH-51 and she continued to decline to do so stating that he could print the report from WHISARD. In one of his e-mails on this matter, the Grievant stated:

> . . . It is my belief when the 51 were sent to you, there were no fatal errors, and all information was filled out. You delayed in reviewing the conciliation as you were on AL. Again please fax to me. It is rather easy, I imagine, to fax two pieces of paper. I want to see what the original submission to you looked like.

Ms. Lenkaitis responded as follows:

> The WH-51 does not show whether or not there were fatal errors It may be that the fatal error appeared after it was submitted as you would normally not be able to even submit an action for management review with a fatal error. Nevertheless, the case now has a fatal error which needs to be corrected.
>
> Additionally, you did submit the case with other missing information. . . . I do not need to fax you a copy of the WH-51 for you to observe this fact. You should be able to print the WH-51 from WHISARD now and see that there is missing information.

Ms. Lenkaitis acknowledged in her testimony that faxing the WH-51 would not have taken more time than composing the e-mails. She also acknowledged that, occasionally, WHISARD does not save the data the way it was inputted by the employee; it is, therefore, possible that the hard copy would be different than what is on the screen.

The Grievant did not send the revised WH-51 by 10:00 a.m. and the argumentative tone of the e-mails escalated. At 11:39 a.m., the Grievant sent an e-mail to Ms. Lenkaitis, which stated:

> Again, please provide the WH51. I do want to see what it looked like. I am up to my rear in complaints, and don't have time to address a conciliation. . . .

At 11:50 a.m., Ms. Lenkaitis responded as follows:

> The actions that you have been asked to complete would take you very little time. Instead, you have sent me four e-mails over the course of three and a half hours. I have no doubt that in the time it has taken you to send me these e-mails, you could have corrected the errors on this conciliation and faxed me a new WH-51. . . .
>
> I would also like to remind you that you were told to complete these tasks by 10 a.m. You did not notify me until 11:39 a.m. . . . that you were unable to do so. I fully expect that you complete the required actions prior to COB today.

At 4:28 p.m., the Grievant sent an e-mail to Ms. Lenkaitis indicating that he was faxing the revised WH-51, and stating:

> It is my belief the paperwork was turned in correctly and that had you reviewed the 51 timely, there would have been no problems with the original submission. The fact

> that you continually have refused to provide the copy of the 51 (2 pages of paper) further leads me to believe that you have something to hide.

On March 3, 2004, Ms. Lenkaitis issued the Grievant a Performance Standards Advisory for his work on the Wackenhut case. She testified that she initially had no intention of doing so because of the fatal errors. However, because the Grievant did not comply with her instructions, and argued over the matter in multiple e-mails over the course of several days and questioned her honesty, she thought that his conduct was unprofessional.

Six days later, this incident was included as part of the Notice of Proposed Removal.

The Department did not offer any retraining or opt to place the Grievant on a Performance Improvement Plan ("PIP"), which, Ms Lenkaitis testified, is used by the Department when an employee is not meeting performance standards. Ms. Lenkaitis explained that this step was not taken because the problems regarding the Grievant's failure to follow directions were deemed more significant than the performance issues. Further, Mr. Reardon testified that, at that juncture, he no longer considered the possibility of transferring the Grievant to another office. Mr. Reardon conceded that Mr. Victory had indicated that he would take the Grievant in his District; Mr. Reardon speculated, however, that Mr. Victory may not have been apprised of the recent problems with the Grievant's performance and testified that he (Reardon) did not want to impose the Grievant on another office.

The Proposal to Remove

On March 9, 2004, Ms. Lenkaitis issued to the Grievant a Notice of Proposed Removal. As discussed above, the proposal was based on four Reasons and multiple Specifications were cited in support of three of the reasons. The Reasons and Specifications were as follows:

Reason I – Uncooperative Behavior

This Reason was based upon the following Specifications: 1) the lack of cooperation and delay in returning the spare computer that was loaned to the Grievant in April 2003; 2) the failure to follow instructions in correcting the numerous problems with the WH-103 form that the Grievant submitted in April 2003 in the County Market case; 3) the Grievant's persistence in arguing over the instructions he was given concerning his April 2003 travel voucher; 4) the Grievant's failure to complete numerous items in the report he submitted in April 2003 in the Arby's investigation, as instructed; 5) the Grievant's failure to follow instructions in revising the reports he submitted in April 2003 in the Fantastic Sams investigation, and his failure to number exhibits as instructed and cease the investigation once being notified that the Complainant was represented by an attorney; 6) the Grievant's argumentativeness over a sick leave request he made in June 2003 (this specification was not sustained in the final decision and, therefore, will not be referenced further herein); 7) the Grievant's lack of cooperation, argumentativeness, and failure to follow instructions in sending his computer for repairs to the manufacturer in June 2003; 8) the Grievant's failure to abide by instructions as to the time at which he was supposed to report to work on his first day back on July 25, 2003; 9) the Grievant's uncooperative behavior and failure to follow instructions concerning the belated sick

leave request he made on July 30, 2003; 10) the Grievant's contentious attitude in responding to the request that he submit appropriate medical documentation in support of the request for extended sick leave that he made in August 2003; 11) the Grievant's unwillingness to promptly return the computer and case files that he had at his residence when he went on an extended leave in August 2003; 12) the Grievant's failure in August 2003 to follow instructions on the numbering of exhibits and the sarcastic and disrespectful manner in which he responded thereto; 13) the Grievant's persistence in repeatedly asking questions – which had already been answered - about the handling of conciliations, when he returned to work in January 2004; and 14) the Grievant's uncooperative behavior in March 2004 in addressing the problems that Ms. Lenkaitis advised him of on the WH-51 he submitted in the Wackenhut case.

Reason II – Unprofessional Behavior

This Reason was based upon the following Specifications: 1) the Grievant's unauthorized action in assigning an investigator to conduct an interview in the China Buffet case, and his characterization of Ms. Scharlemann's instruction that he not do so as "discourteous"; 2) the Grievant's conduct at the May 7, 2003 staff meeting in which he repeatedly asked the same questions, and then followed up the next day with an e-mail message to Ms. Scharlemann criticizing the meeting in an apparent effort to provoke an argument; 3) the Grievant's interactions with Ms. Lenkaitis regarding the Mell's Manufacturing case in May 2003, in which, among other things, he gave her direct dial phone number to the Company without notifying her and manifested a belligerent attitude towards her guidance; and 4) the Grievant's conduct in arguing with management about instructions it had given to an employer regarding certain back wage computations

(because this last specification was not sustained in the final Decision, it will not be referenced further herein).

Reason III – AWOL

This Reason was based on one Specification, namely, the Grievant's failure to report for work from November 10 – November 14, 2003 without submitting a leave request until November 14.

Reason IV – Failure to Safeguard a Government Computer

This Reason was based upon two Specifications: 1) the damage to the computer that had been given to the Grievant, discovered in April 2003; and 2) he damage to the spare computer that had been loaned to the Grievant, discovered in June 2003.

Ms. Lenkaitis' Notice of Proposed Removal, after discussing the reasons and specifications, reviewed the history of warnings and disciplinary action taken against the Grievant. In particular, she listed: three warnings the Grievant received between December 2002 and February 2003 to the effect that his behavior was unacceptable and that continuation of that behavior could result in potential disciplinary action, up to and including possible removal from the federal service; three warnings to a similar effect that she issued to the Grievant in June 2003; the warning contained in Mr. Reardon's decision upholding the suspension, in which he stated: "Should future misconduct occur, I will not hesitate to decide on a more severe action, up to and possibly including your removal if warranted. …;" and; a warning she gave to the Grievant on August 15, 2003 (three weeks after he returned from his suspension) of potential adverse consequences that could result from his continued unacceptable behavior.

Ms. Lenkaitis made the following ultimate conclusion in her Proposal:

> It is quite alarming that your unacceptable behavior continued to occur both after you had receive your notice of proposed suspension and after your return to duty form your 18 day suspension. It appears that your lengthy suspension has not had its desired corrective effective, and that you have not taken the agency's concerns seriously. Rather, it is quite clear that your uncooperative and unprofessional behavior have not only continued but they have been joined by other instances of errant behavior. I have no faith that you can effectively and efficiently carry out the duties of your position or that you have any rehabilitative potential. Therefore, I firmly believe that this proposed removal is warranted and would promote the efficiency of the service.

The Grievant's and the Union's Response to the Proposal to Remove

On March 26, 2004, the Grievant sent a letter to Mr. Reardon (the Deciding Official on the Proposal to Remove) constituting the initial reply to the Proposal. In his letter, the Grievant made the following points: that even if the reasons and specifications could be substantiated, they do not constitute collectively an offense so serious that removal is warranted; that removal is inconsistent with sanctions imposed on other employees for behavior which was similar or more egregious; that his health had been a factor and that, rather that being provided with reasonable working conditions, he had been treated in a degrading manner; that his positive work record over twenty years of federal service, including service under seven different DDs and ADDs, would indicate that what has been alleged to be "Uncooperative Behavior" is more in the nature of a personality conflict; and that the discipline was imposed as a result of his questioning hiring patterns along with his filing of an EEO complaint which included allegations regarding Ms. Scharlemann's hiring and promotion decisions.

On April 9, 2004, Ms. Thompson-Meier submitted a written response on the proposal to Mr. Reardon on the Grievant's behalf. In her response Ms. Thompson-Meier stated that the Grievant had worked for the federal government for twenty years, for both male and female supervisors, and had always received "meets" or above on his

performance evaluations. He did not receive any disciplinary actions until the past two years, when he was supervised by Ms. Lenkaitis and Ms. Scharlemann, and such actions were taken after the Grievant successfully settled an EEO charge against the Department based upon the actions of Ms. Scharlemann.

Further, Ms. Thompson-Meier asserted that the atmosphere and working environment in the Wisconsin office worsened when, in July 2002, the office was combined under the jurisdiction of the Minneapolis District Office and Ms. Scharlemann became the DD and Ms. Lenkaitis became the ADD. It was alleged that Ms. Lenkaitis made spurious accusations against employees and management made comments and jokes at the expense of male employees. In October 2003, the employees of the Madison office discussed the problems with the working environment at a meeting with Ms. Scharlemann, Ms. Lenkaitis and an Employee Assistance Plan representative. Since that time, the negative working environment has caused four employees to take leaves due to stress and four employees quit or retired.

The Grievant bore the brunt of the worsening situation in the office because of the charge he previously filed naming Ms. Scharlemann. Ms. Scharlemann, at one time, stated that she would not allow the Grievant to be employed in her office.

Further, Ms. Thompson-Meier pointed out in her response that the facts involved in most of the reasons and specifications occurred before Mr. Reardon's decision to uphold the proposal to suspend the Grievant. Thereafter, the Grievant sought to learn how to address the negative relationship with management, as reflected by the fact that he contacted the EAP for professional assistance in coping with job stress and attended a course on conflict management, on his own time and at his own expense. But

management would not accept the recommendations of the EAP psychologist on the theory that he was not qualified, a proposition which is not supported by any law or regulation.

Ms. Thompson-Meier further stated that many of the reasons and specifications are inaccurate and incomplete. In several instances, the Grievant raised legitimate concerns over the differences between the office's policies and those set forth in the FOH and yet was charged with uncooperative and/or unprofessional conduct.

Ms. Thompson-Meier responded specifically to each of the specifications. The following is a summary of these responses.

Reason I, Specification 1 – The Grievant needed to transfer his files from the spare to his regular computer and he was not adept at operating computers. He was not given any date certain by when he was supposed to return the spare and Ms. Lenkaitis waited a month before asking him to send it back. His e-mails were not argumentative, but rather, represented an attempt to explain the reasons for the delay.

Reason I, Specification 2 – The Grievant was willing to make the changes, but reasonably sought clerical assistance because of the enormous amount of time it would have taken him to do so given the lack of a high speed network connection. To the extent that there were errors with respect to the inclusion of certain child labor violations, this was attributable to the fact that the Grievant did not have the de minimis chart. The Grievant's behavior was not shown to have been uncooperative.

Reason I, Specification 3 – The Grievant is the main person to suffer if his travel vouchers are not completed correctly in a timely manner because reimbursement is delayed and his performance evaluations may be prejudiced. The Grievant received

conflicting information from OASAM regarding the recording of certain expenses and he was just seeking clarification. The Grievant did drive from Eau Claire to his residence in Mounds View, MN and then to the airport. The Grievant's position regarding reimbursement was, in fact, correct under the travel regulations.

Reason I, Specification 4 – It is unclear from Ms. Lenkaitis' notes whether the Grievant actually failed to complete most of the items. For example, Ms. Lenkaitis asserts that the Grievant failed to follow her instructions to identify the responsible person. But in his revised report, the Grievant identified the Vice-President as the responsible person and, in fact, the Department issued a letter seeking CMPs and listing a responsible person prior to Ms. Lenkaitis' complaint about the Grievant's actions.

Reason I, Specification 5 – The Grievant was not uncooperative, but merely sought to understand the instructions and the policies that apply in an FMLA investigation. He reasonably relied upon his decades of training and the language of the FOH and applicable law and regulation.

Reason I, Specification 7 – The Grievant made the changes on the Federal Express form for the sake of expediting delivery because he thought the computer needed to be repaired as soon as possible. For this reason, he changed the form to request a Saturday delivery, but did not sign the block which would have permitted a delivery without signature. Thus, if the repair facility was closed and there was no responsible employee available to sign for it, Federal Express should not have made the delivery.

Reason I, Specification 8 – The Grievant was anxious to return to work and had a medical appointment that required him to report to work when he did.

Reason I, Specification 9 – Other employees have been permitted to take leave even if they were late in requesting it and the Grievant had told Ms. Lenkaitis the day before that he was ill.

Reason I, Specification 10 – Management failed to demonstrate that the documentation needed to be from a medical doctor. The MOU only applies to leave abuse restrictions and, therefore, is not applicable in this case. Further, the bargaining history for the MOU defines "medical practitioner" as a "doctor," physician's assistant or nurse practitioner; it does not state that the "doctor" must be a medical doctor. Earl Nolting, Ph.D., who supplied the documentation, is a licensed clinical psychologist, who would be deemed to be a "health care provider" under the FMLA regulations. Further, to comply with the directives, the Grievant consulted with a psychiatrist as well, while at the same time rightfully continuing to inquire as to why Dr. Nolting's credentials were not adequate, as no rule, law, or regulation was provided in support of the Department's position. The Department was seeking to make it difficult for the Grievant to take leave and was harassing him.

Reason I, Specification 11 – Because the Grievant was on sick leave, he was not monitoring his work e-mails, so it is not surprising he did not respond immediately to the e-mail of August 21, 2003 asking him to return the items the next day. He did respond promptly after he received the e-mail and promptly returned the computer as requested.

Reason I, Specification 12 – The Grievant was treated differently on this matter than others who are similarly situated. The Union still had not received information it had requested of the Department in order to more fully answer this specification.

Reason I, Specification 13 – The Grievant was not being uncooperative, but was raising legitimate concerns and seeking guidance about the policies on conciliations. It had been a considerable period of time since the Grievant last served the OD function. Moreover, when he returned to work, management encouraged him to ask questions if he had any.

Reason I, Specification 14 – There were no fatal errors in the original report that the Grievant submitted. Changes must have been made in WHISARD between the time that he submitted the report and when Ms. Lenkaitis closed the file, causing the fatal errors, for which Ms. Lenkaitis chose to blame the Grievant. The information the Grievant sought form Ms. Lenkaitis was for the purpose of completing the report pursuant to her instructions.

Reason II, Specification 1 – The Grievant did not direct Ms. Tout-Nava to work on the case, but only asked her to provide translation assistance, something she had done in the past on that same case, and simultaneously notified Ms. Lenkaitis of his request. Ms. Tout-Nava had previously been assigned to conduct an interview in Spanish in this case and Ms. Lenkaitis had instructed the Grievant to assign work on this file to other employees.

Reason II, Specification 2 – The Grievant was only making suggestions because of his concerns over the impact that the changes that Ms. Scharlemann discussed at the meeting would have on investigators.

Reason II, Specification 3 – Ms. Lenkaitis yelled at the Grievant over this issue and, if the Grievant behaved in a defensive manner, it was provoked by Ms. Lenkaitis' behavior.

Reason III, Specification 1 – The Grievant did request leave on time. The envelope in which he sent the SF-71s is postmarked November 10, 2004, the date on which the requested leave was to begin. Further, leave requests have been approved retroactively in the past.

Reason IV, Specification 1 – The Grievant did safeguard and use his computer properly. Because he is so reliant on his computer to do his work, he would have no motive to damage it.

Reason IV, Specification 2 – The e-mail that Ms. Lenkaitis sent to Ms. Meyer, instructing her to add a statement to her memo indicating that the computer was packaged properly when it was shipped and returned so that no damage could have occurred, demonstrates that management was looking to blame the Grievant rather than conduct a fair investigation. There is no evidence that this statement is actually true.

Ms. Thompson-Meier further noted in her Memorandum the Grievant had repeatedly asked to be transferred away from the supervision of Ms. Scharlemann and Ms. Lenkaitis, at his own expense, but that such requests were denied.

Ms. Thompson- Meier concluded her letter with the following statements:

> . . . Without objective standards of uncooperative behavior and/or unprofessionalism, the characterizations are in the eyes of the beholder (Denise Scharlemann and Michelle Lenkaitis).
>
> The eyes of the beholders are jaundiced because Mr. "Doe" successfully challenged Denise Scharlemann by way of an EEO complaint, because Michelle Lenkaitis understandably wishes to achieve Denise Scharlemann's approval and because both Denise Scharlemann and Michelle Lenkaitis thinks men are inferior as employees (again refer to the e-mail sent recently to you by John Langenfeld.)
>
> Mr. "Doe" alleged malfeasance is in fact explained not as a good employee gone bad, but as biased supervision gone amok.

Ms. Thompson-Meier's reference to an e-mail sent by John Langenfeld is to an e-mail he sent to Mr. Reardon on April 8, 2004, complaining about management's treatment of employees in the Wisconsin Office. The e-mail stated that five people left the office in less than two years, including one employee who did so because Ms. Lenkaitis shouted at her repeatedly. With respect to the Grievant, Mr. Langenfeld's e-mail stated:

> I have seen Bill "Doe" falsely accused of theft, mercilessly attacked and subsequently cited for his responses to these unrelenting attacks. Now I understand he will be fired. I do not know how any human being could retain their composure and arrive for work. This man has been singled out and persecuted because he dares to question what he believes to be proper protocol. I've personally witnessed this at meetings and conference calls. The practice is to criticize without relent until this man becomes so frustrated that he responds out of frustration and this response is cited.

Further, shortly before Mr. Langenfeld sent this e-mail to Mr. Reardon, he sent a separate e-mail message to Ms. Scharlemann on the subject of "Observed Sexism in Wisconsin." In this e-mail, Mr. Langenfeld leveled the following complaints against Ms. Lenkaitis: that, during his review in April 2004, she stated that males do not hear as well as females and have difficulty processing information; that she once told him that he was not able to multi-task as well as females because of his "hunting and caveman past"; that two employees indicated that Ms. Lenkaitis brought in a sexist e-mail cartoon that was degrading, disgusting and embarrassing; that there was an incident that occurred in early 2003 when he was working in the back room at the Milwaukee Field Office and speaking to Ms. Lenkaitis on the telephone when, in response to his mentioning that the lights were too hot, she stated that he should "work on [his] tan and 'take off' [his] shirt and trousers."

The Decision on the Proposed Removal

On May 4, 2004, Mr. Reardon issued his Decision on Proposed Removal. Mr. Reardon sustained all of the Reasons and Specifications contained in the Proposal, except for Reason I, Specification 6 and Reason II, Specification 4, and determined that the Grievant's removal would promote the efficiency of the Service. The following discussion summarizes Mr. Reardon's testimony as to his rationale for sustaining the Reasons and Specifications.

Reason I, Specification 1 – Mr. Reardon concluded that the Grievant had resources available, if he needed assistance in transferring his files, which would have enabled him to return the computer in a timely manner, despite his not being adept at computers. But the Grievant failed to return the computer for more than a month and then only after sending several argumentative e-mail messages on the matter. Mr. Reardon found that the number and the tone of the messages established that the Grievant was uncooperative.

Reason I, Specification 2 – Mr. Reardon rejected the Grievant's contention that he was only seeking clerical assistance in inputting the child labor violations, because performing that task required knowledge that only the Investigator possesses. Further, contrary to the Grievant's assertion, the errors were substantive, not clerical.

Reason I, Specification 3 – Mr. Reardon acknowledged that, although it was true, as the Grievant had asserted, that he would be the primary person to suffer if he was not promptly reimbursed for expenses, the failure to submit accurate vouchers has a negative impact on the Department's ability to reimburse employees promptly and monitor its

travel budget. Further, Mr. Reardon stated that the Grievant failed in multiple ways to follow the instructions he had been given regarding the travel voucher.

Reason I, Specification 4 – Mr. Reardon concluded, based on his review of Ms. Lenkaitis' instructions, that the Grievant did not complete all of the items he had been requested.

Reason I, Specification 5 – Mr. Reardon stated that he was sustaining this specification because the Grievant failed to correct the report and number the exhibits as instructed.

Reason I, Specification 7 – Mr. Reardon sustained this specification because the Grievant admitted changing the return label and the shipping form. Further, he found that there was no basis for the Grievant's assertion that instructing him to return the computer to Minneapolis instead of Madison constituted harassment.

Reason I, Specification 8 – Mr. Reardon stated that the Grievant's e-mail messages established that he planned to ignore the instructions he had been given not to report to work before 8:00 a.m. Although the Grievant was on flexitime, management may still instruct him to report to work at a particular time when necessary. Further, Mr. Reardon found that the Grievant was not being credible in stating that he reported to work early because he was "anxious to return to work," as this conflicted with his statement at the time that he reported early so that he could leave early for a dental appointment.

Reason I, Specification 9 – Mr. Reardon believed that the Grievant's behavior in going home early the day before because he was ill did not put Ms. Lenkaitis on notice that the Grievant would be taking sick leave the next day. Further, because the Grievant's

duty station is a considerable distance from Ms. Lenkaitis' office, she would not know the Grievant was absent unless he contacted her.

Reason 1, Specification 10 – Mr. Reardon stated that even though Ms. Lenkaitis specifically listed for the Grievant the information that would have to be included on the medical certificate to support the sick leave request, the Grievant submitted a certificate (the letter from Dr. Nolting) with missing information. Specifically, there was no indication in Dr. Nolting's letter that the Grievant was incapacitated and unable to work, nor did it indicate the nature of any incapacitation. With respect to whether Dr. Nolting had the necessary credentials to supply the medical certificate, when Mr. Reardon was asked at the hearing whether the MOU, listing only four types of medical practitioners from whom a medical certificate may be obtained, applied to sick leave requests regardless of whether an individual was on a sick leave restriction, he stated that he did not know. Further, Mr. Reardon stated that the Grievant's e-mails on the matter were argumentative and that he believed that the Grievant sought to provoke an argument from Ms. Lenkaitis and intimidate her so that she would drop the matter.

Reason I, Specification 11 – Mr. Reardon stated that, in response to Ms. Lenkaitis' memorandum of August 21 clearly instructing the Grievant to return the items the next day, the Grievant's August 26 e-mail message reflects that he was angry because Ms. Scharlemann telephoned his residence. However, her telephone call would not have been necessary if the Grievant had contacted Ms. Lenkaitis earlier as instructed. Further, as of August 26, the items had still not been returned.

Reason I, Specification 12 – Mr. Reardon testified that the Grievant's allegation that he was being treated differently with respect to this issue was not supported with any

evidence. Rather, the evidence reflects that in August 2002 all of the investigators under Ms. Lenkaitis' supervision were reminded of the importance of numbering the exhibits in case files. Further, the evidence reflects that the Grievant had been instructed on numerous occasions to number exhibits, but continued to fail to do so. Finally, the Grievant's e-mail messages regarding this issue show that he replied to Ms. Lenkaitis with disdain and contempt. Mr. Reardon testified, however, that he is not aware of any other employee being disciplined for how they numbered case file exhibits.

Reason I, Specification 13 – Mr. Reardon stated that he disagreed with the Grievant's contention that he was raising legitimate concerns about the policies on conciliations. Rather, Mr. Reardon found that the Grievant did not need to continue to make the same inquires about an issue he could have researched himself by reviewing the material that had already been provided along with the FOH.

Reason I, Specification 14 – Mr. Reardon stated that, contrary to the Grievant's assertion, Ms. Lenkaitis did not blame him for the fatal error, as one of her e-mails acknowledged that it might have appeared after the Grievant submitted the information. Further, the Grievant was uncooperative in repeatedly asking Ms. Lenkaitis to fax to him the original report he submitted, because, as she explained, he did not need the report to correct the errors.

Reason II, Specification 1 – Mr. Reardon stated that the Grievant acted unprofessionally in assuming he had the authority to determine the allocation of agency resources by asking Ms. Tout-Nava to interview a Spanish-speaking individual, as it had been a year since she had worked on this case. With respect to the Grievant's contention that he was only asking Ms. Tout-Nava if she would do the interview and told Ms.

Scharlemann that he was doing so, Mr. Reardon stated that he should have discussed the matter with his supervisor first. Mr. Reardon also found that the Grievant was unprofessional when he responded to an e-mail message from Ms. Scharlemann by referring to it as a "rather discourteous response."

Reason II, Specification 2 – Mr. Reardon stated that, according to the evidence, the Grievant repeatedly asked the same questions during the conference call, even after Ms. Scharlemann had responded. With respect to the Grievant's claim that he was just making a suggestion, the contents of his message to Ms. Scharlemann reflect that he had made only one suggestion – i.e., to distribute an agenda before the meeting – and that the remainder of the message contained no other suggestions. Mr. Reardon testified that the e-mail sounded "smart-alecky, sarcastic."

Reason II, Specification 3 – Mr. Reardon determined that the Grievant was unprofessional in providing Mr. Mell with Ms. Lenkaitis' direct dial telephone number, and by complaining that she had spoken to him without him (the Grievant). Mr. Reardon acknowledged, however, that anyone could probably reach the manager by obtaining the office phone number from the web site and calling and asking to speak to the manager, and that the person will probably be put through.

Mr. Reardon rejected the Grievant's contention that Ms. Lenkaitis failed to inform him of her contact with the Company, as she did leave the Grievant a telephone message about the matter. Further, he found, the Grievant, without first speaking to Ms. Lenkaitis, contacted the employer, which further confused the situation. Mr. Reardon testified that the incident was damaging to the Department's credibility, because it gave the impression

to the employer that Department officials were not communicating with one another and misunderstood the role of the Investigator versus the role of the Manager.

Further, Mr. Reardon stated that the Grievant's snide response of, "Yes, Michelle," his accusation that she was verbally "beating him up," and his rude and belligerent demeanor when speaking to Ms. Lenkaitis about the matter on June 3 are identical to the unprofessional behavior that gave rise to the Notice of Proposed Suspension. Mr. Reardon did not address the claim of the Grievant that Ms. Lenkaitis yelled at him in the course of their June 3rd discussion regarding this matter.

Reason III, Specification 1 – Mr. Reardon stated that the Grievant's sick leave request for November 10 through 14, 2003 was late because it was received in the Madison office on November 14. Further, Mr. Reardon stated that Ms. Lenkaitis warned the Grievant on July 31, 2003 of potential AWOL charges if he did not submit leave requests timely. This should have put the Grievant on notice that he needed to at least telephone his supervisor or send an e-mail to alert her that a written request was in the mail. Mr. Reardon testified that, although there was no departmental rule requiring the submission of an SF-71 form to request leave, and he is not aware of that being a procedural requirement in the Minneapolis office, he would still expect there to be some contact from the employee. He stated that if the supervisor knew that the Grievant would be absent, then he would not have considered it to be AWOL on the basis of the failure to submit the form. Further, he testified that he was not aware that the Grievant had given any indication that he might return to work sooner than the medial documents indicated.

Mr. Reardon testified that the fact this incident occurred in the midst of a long extended absence exacerbated the situation because, particularly in view of the fact that

the Grievant reported to a supervisor in a distant location, management had no information as to whether he would be returning to work. He also testified that he was not sure why the holiday time was included in the period of time for which the Grievant was charged with AWOL.

Mr. Reardon stated that he found the facts surrounding this specification to be "particularly serious."

Reason IV, Specification 1 – Mr. Reardon stated that Mr. Mohr, who inspected the computer when it was received in the Regional Office, told Ms. Lenkaitis that the damage appeared to be intentional. He also noted that the evidence showed that, on the same day that the Grievant received the Notice of Proposed Suspension, he told Mr. Mohr that he would fix the computer himself.

Reason IV, Specification 2 – Mr. Mohr reported to Ms. Lenkaitis that the damage – which included a bent compartment and scratches – were not the result of normal usage. Mr. Reardon rejected the Grievant's allegation that the fact that Ms. Lenkaitis asked Ms. Meyer to add to her memo that the computer was properly packed so that the damage should not have occurred in the shipping process, demonstrated that a fair and investigation was not done. He reasoned that Ms. Meyer had previously discussed the damage with Ms. Lenkaitis and it was, therefore, reasonable for Ms. Lenkaitis to request a clearer explanation of the damage.

In his decision, Mr. Reardon also rejected the Grievant's claim of retaliation based on the claim he filed against Ms. Scharlemann, in view of the following facts: that the EEO Complaint was filed seven years before the Proposed Removal and the Complaint was settled four years earlier; and that it was Ms. Lenkaitis, and not

Ms. Scharlemann, who proposed the Removal.

In concluding that Removal was warranted, Mr. Reardon stated in his Decision:

> In determining the appropriate penalty in this case, I considered that neither your supervisors nor I have any confidence in your ability to perform your duties satisfactorily. Besides your incessant, argumentative, uncooperative and demeaning e-mail messages, you do not seem to be able to follow simple direction or exhibit a professional demeanor. In addition, your misconduct has been frequently repeated despite numerous counselings, warnings, and a prior 18 day suspension for the same unacceptable behavior. I also note that in some instances you intentionally attempted to provoke an argument with and/or intimidate Ms. Lenkaitis to refrain from performing her supervisory duties. I also firmly believe that you intentionally engaged in misconduct because you did not agree with your supervisor's instructions and guidance.
>
> The counseling and disciplinary action you have received clearly put you on notice of the agency's expectations concerning your behavior, as did the warnings that Ms. Lenkaitis and I issued to you concerning the consequences of continued misconduct. You were suspended only seven (7) months prior to this current proposed removal (July 7 through July 24, 2003), and I had sincerely hoped that your suspension would result in a correction of your improper behavior; however, you obviously did not take this matter seriously, because your prior unacceptable behavior not only continued but escalated. Finally, it is quite disconcerting to note that you have expressed no remorse or regret for your unacceptable behavior. You cannot even acknowledge that you have engaged in any misconduct. Instead, you have repeatedly blamed your supervisors for the difficulties you are experiencing when, in fact, each instance of your misconduct reflects a conscious decision on your part to ignore the advice and guidance you have received from them. I have, therefore, concluded that you have no rehabilitative potential.
>
> In reaching my decision concerning your proposed removal, I also considered your 20 years of federal service and your last three (3) performance appraisals, which were all "Effective." However, your past appraisals and length of satisfactory service do not outweigh the devastating impact your actions have had on the efficient operation of the Madison Area Office and the Minneapolis District Office by your prolonged, relentless, unacceptable behavior.

When Mr. Reardon was questioned at the hearing about his Decision, he testified that he did not see any changes in the Grievant's behavior after he returned from his suspension in July 2003; that he was concerned about the fact that the Grievant worked independently at a Field Station, where he was removed from direct day-to-day contact with supervisors and colleagues; that the Grievant occupied a position of high responsibility, where predictability and reliability were essential, and that his behavior cast doubt over his ability to function at the necessary level; that he was very concerned about the "battle of wills" that occurred over virtually every communication; that the

Grievant seemed intent on resisting any supervisory direction; that he lost confidence in having the Grievant serve as the representative of the Department to the public; that he considered the prior warnings and disciplinary suspension; that he considered the Grievant's potential for rehabilitation, and concluded that it was low because he never heard the Grievant acknowledge that he did anything inappropriate; that he could not think of any mitigating circumstances; and that he considered the Grievant's length of service, but as a negative factor, explaining that because the Grievant knew how to be a good Investigator, his behavior must have been conscious.

Mr. Reardon testified that he did not know why the Grievant was not put on a PIP, but noted that such a plan would not have corrected the Grievant's reaction to instructions and guidance.

Mr. Reardon's ultimate conclusion was that the Grievant's removal would promote the efficiency of the Service because of the disruption and time diversion that his behavior caused.

The Grievance and Grievability

The effective date of the Grievant's removal was May 6, 2004. Employees have thirty days from the date they leave the Department to file an application to retire, and the employee is able to select the retirement date. On June 4, 2004, the Grievant chose to retire retroactively, effective on the same day of the removal, May 6, 2004. (If he chose a date after the date of removal, he would not have been able to continue to receive insurance benefits.) The Grievant stated on the form that his retirement request should not prejudice his right to pursue an arbitration.

The Grievant testified that, in discussions with Susan Robson, an Employee Relations Specialist with OSASAM, and Florida Cook, a Supervisory Human Resources Specialist, he indicated that he intended to file a complaint over his removal. According to the Grievant, Ms. Robson did not advise him that his retirement application would foreclose his right to challenge his removal. To the contrary, the Grievant testified that Ms. Robson advised him that she thought he could file a grievance. The Grievant also testified that Ms. Cook told him several times that she thought that he should be able to challenge his removal if he retired retroactive to May 6th and also collect the life and health insurance benefits that a May 6th retroactive retirement date would provide.

Ms. Robson testified that, although she was aware that the Grievant was concerned about being able to challenge his removal if he retired, she did not advise him that if he retired retroactive to May 6th, then he would be unable to grieve his removal. Ms. Robson further acknowledged that OASAM officials were aware that the Grievant was concerned when picking his retirement date that he continue to be able to challenge the removal action – which had become final as of May 6th.

Ms. Cook was not called to testify and the Department did not challenge the accuracy of any of the testimony from the Grievant or Ms. Robson relative to retirement.

There was no dispute that, on May 14, 2004, a SF-50 (Notification of Personnel Action) was processed by the Department, that noted that the Grievant had been removed, effective May 6, 2004. The reasons for the removal contained in the Remarks section (block 45) were: 1) Uncooperative Behavior; 2) Unprofessional Behavior; 3) Absence without Leave; and 4) Failure to safeguard your government computer.

The Grievant was advised by Ms. Cook that, if he chose to retire retroactive to May 6th, then his Official Personnel File ("OPF") would contain the following notation: "Retired after receiving Decision to Remove for: (1) Uncooperative Behavior; (2) Unprofessional Behavior; (3) AWOL; and (4) Failure to Safeguard a Government Computer." Nothing was said about losing his right to challenge his removal if he chose to retire, retroactively to May 6th, to qualify for life and health insurance benefits. When the actual paperwork was cut, however, no such notation was made.

On June 1, 2004, the Grievant filed a grievance alleging a violation of Article 14 of the Agreement and asserting that he was terminated for reasons which do not promote the efficiency of the Department and that the reasons and specifications were not accurate. The record does not contain any Department response to the grievance. On June 2, 2004, the Union invoked arbitration.

On June 4, 2004, the Grievant returned signed paperwork seeking that his retirement be made retroactive to May 6, 2004, in order to qualify for the life and health benefits coverage. He had no intention of waiving his right to challenge his removal and testified that he would not have retired if he had not been removed.

The record reflects no evidence that, at any time prior to January 2005, the Department asserted that this matter was not arbitrable due to the "voluntary" retirement of the Grievant allegedly canceling the removal action.

The Department moved to dismiss the grievance on the basis of its position that the Grievant's "voluntary" retirement, effective May 6, 2004, effectively cancelled the pending removal and, therefore, left no appealable adverse action. The Motion to Dismiss was filed on January 14, 2005. The Union responded on January 21, 2005.

On January 25, 2005, I issued a ruling that deferred ruling on the Motion to Dismiss, based upon my belief, following the initial filings, that record evidence was required concerning the circumstances surrounding the retirement of the Grievant. Testimony was provided, as a threshold matter, on the initial day of arbitration concerning the Grievant's retirement. At the conclusion of that testimony, the Parties renewed their positions.

I then advised the Parties that the Motion to Dismiss would be taken under advisement, that we would continue with the hearing on February 1st since the day was reserved and we were present and ready to proceed, and that a ruling would issue prior to holding any additional needed days of hearing. An opportunity was provided for the filing of supplemental argument after receipt of the transcript. During an April 15, 2005 conference call held following receipt of those supplemental briefs, I advised the Parties that the Department's Motion to Dismiss was denied and noted that I would confirm that ruling and a brief explanation for that ruling in this Opinion. Further hearings on the merits were then scheduled.

The facts surrounding the Grievant's removal and retirement are not in material dispute. The Decision that removed him from federal employment was issued on May 4, 2004, was effective May 6, 2004, and was received by the Grievant on or about that date. Thereafter, the Grievant, who was retirement eligible, spoke with Ms. Robson, Ms. Cook, Ms. Scharlemann, and others. In each of those conversations, the Grievant made clear that he was appealing his removal to a third party. He also sought guidance and information regarding retirement benefits, health and life insurance benefits, accrued leave, and the like.

The Grievant was advised that he enjoyed a 30 day period after his removal to apply for retroactive voluntary retirement and that, if he made the effective date of his retirement on or before the date of his removal, then he could also qualify for receipt of post-retirement health benefits. At no point did anyone from the Department ever advise the Grievant, despite his repeated statements of intent to challenge the removal action (and the pendency of the grievance), that applying for retroactive retirement to May 6, 2004, which would qualify him for post-retirement health benefits, would have the result of legally canceling his removal action or eliminating his right to challenge his removal.

There are two reasons why I am persuaded that, in this case, the retirement of the Grievant did not render his removal action a nullity or nonappealable.

First, in Mays v. Department of Transportation, 27 F.3d 1577 (Fed. Cir. 1994), the Court of Appeals for the Federal Circuit relied upon 5 U.S.C. §7701(j), and found that the Merit Systems Protection Board ("MSPB") erred in dismissing an appeal from a removal action due to lack of jurisdiction where an employee retired in lieu of removal for unacceptable performance. 5 U.S.C. §7701(j) states:

> In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

The Court of Appeals noted that the MSPB had interpreted Section 7701(j) to allow an appeal of a removal action only when an employee retires after the removal is effective. The rationale then used by the MSPB was that until effective, a removal was only proposed and there was no right to appeal from proposed adverse actions. The Court of Appeals disagreed, relying upon the plain language of Section 7701(j), as well as Legislative History that stated that the purpose of the section was to "protect the appellate

rights of employees who retire during the pendency of their disputes" and overturn Court of Claims precedents which had found that retirement after the effective date of removal actions mooted out appeals from those actions. The Court also noted that no argument could be made that the removal of Mays was only a proposed removal, based in part, upon the fact that a final decision that removal was warranted had been issued to Mays. Like the instant case, the removal in Mays was effective on the same day that her retirement was made effective. Further, the Court found that the agency "does not dispute that Mays would not have retired when she did if it had not been for the removal action."

See also Francisco Tizol-Coimbre v. U.S. Postal Service, 70 M.S.P.R. 382 (1996) (approval by OPM of retroactive retirement application did not divest MSPB of jurisdiction to adjudicate the merits of a fully-effected removal; stating that "the timing of the action of the agency, rather than the timing of the grant of retirement" was key and "as long as an agency effects an action prior to the grant of retirement, the Board has jurisdiction over an appeal of the action, regardless of the effective date of the retirement"); and Krawchuk v. Department of Veterans Affairs, 94 M.S.P.R. 641 (2003) (reaffirming that retirements resulting from misinformation, deception or coercion are not voluntary and further reaffirming Mays and recognizing that where an employee retires when faced with an agency's final decision to remove him, the matter is appealable to the Board).

This case falls squarely under the rationale and holding in Mays. Like the situation in Mays, the Grievant's removal action had been perfected and became final prior to his filing for retirement. In fact, his removal had been effective for almost a

month and had already been grieved and arbitration invoked when he opted to retire retroactively.

Despite several subsequent unpublished decisions by the Court of Appeals for the Federal Circuit that seem to follow a different approach (see, e.g., Graham v. Department of the Treasury, 178 F.2d 1313 (Fed. Cir. 1999), and cases cited therein), I find Mays persuasive. None of those decisions purported to overturn or even limit Mays. Moreover, as unpublished decisions, they may be given only limited precedential effect.

The line of cases finding that retroactive disability retirements, accompanied by a rescission of the underlying removal, render appeals from the removal action moot [see, e.g., Cooper v. Department of the Navy, 108 F.3d 324 (Fed. Cir. 1997)] are distinguishable from the instant case. Unlike the Grievant, individuals who are disability retired are medically unable to work in the jobs from which they were initially removed and thus are collecting benefits on the basis of a finding that they could not have performed the job to which they were seeking reinstatement.

There is a second reason why the Department's Motion to Dismiss in this case should be denied. The record does not reveal that the Grievant's retirement was "voluntary" as that term is defined in applicable case law. The facts revealed that the Department effectively misled the Grievant with respect to whether his retirement retroactive to May 6, 2004, would extinguish his right to grieve and render his prior removal a nullity. The Department knew that the Grievant was concerned about maintaining his ability to challenge his removal. The Department also knew that the Grievant was relying upon its personnel to advise him concerning the consequences of retirement on particular dates.

It is not necessary in this case to determine whether, given the other evidence of animus towards the Grievant shown with respect to the merits, the Department intentionally misled the Grievant or whether the Department simply failed to provide the Grievant with accurate information relative to the effect of his retiring retroactive to May 6, 2004, the same day as his removal was effective. The effect on arbitrability is the same – the Grievant's retirement was not "voluntary" (as that term is recognized in applicable case law) and cannot bar an adjudication of his removal. See O'Clery v. U.S. Postal Service, 95 F.3d 1166, 1996 U.S. App. LEXIS 11907 and 41415 (Fed. Cir. 1996) (and cases cited therein). This was more than the Department failing to fully delineate options available to the Grievant. The Department withheld information that it had regarding the effect of retirement as of May 6, 2004, on the Grievant's ability to challenge his removal and knew that the Grievant was relying upon the Department's views in that regard.

In Williams v. Department of the Army, 44 M.S.P.R. 449, 451 (1990), the MSPB stated that:

> A retirement need not be coerced to be involuntary. It is also involuntary if obtained by agency misinformation or deception. Scharf v. Department of the Air Force, 710 F.2d 1572, 1575 (Fed. Cir. 1983). The crucial inquiry is whether the employee made an informed choice. "A decision made 'with blinders on,' based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." Covington, 750 F.2d at 943. We have stated that the principles set forth in Scharf and Covington "require an agency to provide information that is not only correct in nature but adequate in scope to allow an employee to make an informed decision. This includes an obligation to correct any erroneous information that it has reason to know an employee is relying on." Kolstad v. Department of Agriculture, 30 M.S.P.R. 143, 145, rev'd and vacated on other grounds, 809 F.2d 790 (Fed. Cir. 1986).

Stated somewhat differently, based upon the facts in this case, the presumption that the Grievant's retirement was "voluntary" has effectively been rebutted. Free choice cannot be exercised where resignation is premised upon misinformation provided by a

Departmental official that is reasonably and materially relied upon by the Grievant to his detriment. See Bergman v. United States, 28 Fed. Cl. 580, 1993 U.S. Claims LEXIS 83 (1993); Heaphy v. United States, 23 Cl. Ct. 697, 1991 U.S. Cl. Ct. LEXIS 365 (1991).

For all of these reasons, the matter was held to be arbitrable on its merits and the Department's Motion to Dismiss for lack of jurisdiction based upon the Grievant's retirement was denied.

Relevant Provisions of the Collective Bargaining Agreement

Article 14, Adverse Actions, states, in pertinent part, that:

Section 1 – General

C. No bargaining unit employee will be the subject to an adverse action except for reasons which will promote the efficiency of the Department.

Article 15, Grievance Procedure, states, in pertinent part, that:

Section 2 – Coverage and Scope

C. Issue of Grievability

If Management declares a grievance non-grievable or non-arbitrable, the original grievance shall be considered amended to include this issue. Whenever the issue of grievability is raised before arbitration is invoked, the issue will be referred to the NCFLL Chair of the Arbitration Committee and the Department's Labor-Management Relations Center for resolution.

Section 7 – Procedures, Employee Grievance

C. Statement of Grievability

Management agrees to furnish the NCLL a final written statement of grievability/arbitrability of a grievance at the earliest Step possible but no later than 45 calendar days before the hearing.

Section 8 – Failure to Meet Requirements

C. Failure on the part of Management to meet any of the time requirements of this procedure will permit the aggrieved employee . . . to move to the next Step.

Article 16, Arbitration, states, in pertinent part, that:

Section 7 – Grievability/Arbitrability Decisions

The arbitrator shall have the authority to make all grievability and/or arbitrability determinations. The arbitrator shall make grievability and/or arbitrability determinations prior to addressing the merits of the original grievance.

Article 25, Hours of Work, states, in pertinent part, that:

Section 1 – Workweek

B. Rescheduling Authority

. . . The basic workweek for rescheduling authority shall be five, eight-hour days. . . . The eight hours of duty may be rescheduled daily according to work requirements by employees or their supervisors.

Article 27, Flexitime, states, in pertinent part, that:

F. Hours of Work

1. Employees assigned to work in the office for the day may begin work as early as 6:00 a.m. and may work as late as 6:30 p.m. . . .

Article 33, Interstation Transfers, states, in pertinent part, that:

Section 1 – General

A. Interstation transfer may be used by the Department . . . .

Section 2 – Procedures

A. Filling of a Vacancy by Interstation Transfer

1. Any bargaining unit employee who wants to be transferred to another duty station may file a request for transfer with the Regional Personnel office(s) that serves the duty station(s) to which the employee wants to be transferred. . . .

2. Requests for transfer will be kept on file by the Regional Personnel Office for a period of six months from receipt.

3. In the event that Management elects to fill a vacancy by transfer, management will first give consideration to the employees who have filed a request for transfer, with the personnel office that services the vacant position, in accordance with Subsection 1. above.

A. Selection for Transfer

Management will consider volunteers form among employees for the position to be filled and for which the volunteer is qualified and meets any special requirements.

Article 40, Sick Leave, states, in pertinent part, that:

> **Section 2 – Approval and Notice**
>
> A. Approval of sick leave will be granted to an employee who is incapacitated to do his/her job or for any related reason, such as dental, optical or medical examinations and treatment. . . .
>
> B. An employee who becomes ill is responsible for notifying his/her supervisor normally within two hours after normal reporting time. If the . . . employee's remote duty station prohibits compliance with the two-hour limit, the employee will report his/her absence as soon as possible. An employee on Flexitime should normally notify his/her supervisor no later than 10:00 a.m.
>
> **Section 3 – Proof**
>
> Employees will not be required to furnish proof of illness of a sick leave period of less than four consecutive workdays. . . .

CONTENTIONS OF THE DEPARTMENT

The Department renews its position that the Grievant's voluntary retirement, retroactive to May 6, 2004, operated as a matter of law to rescind his proposed removal and renders the matter not arbitrable. Having cancelled the removal action, there is no longer an appealable action providing the MSPB or the Arbitrator with jurisdiction to adjudicate anything.

Even assuming, however, that the Arbitrator adheres to his earlier ruling regarding arbitrability, the Department has proved that the charged misconduct occurred, that there is a nexus between that misconduct and the efficiency of the service, and that the penalty of removal was reasonable under all of the relevant facts and circumstances of this case.

The Grievant does not dispute the underlying facts of the Specifications. The facts, which are largely set forth in the exchange of e-mails between the Grievant and his supervisors, shows that the Grievant constantly questioned and challenged management's directions and often made disparaging or sarcastic remarks about his supervisors and

managers. As reflected by the volume of e-mail traffic between the Grievant and his supervisors, dealing with the Grievant distracted supervisors from doing their work and impeded their ability to carry out the Department's mission.

The Grievant claimed that he was not being uncooperative, but rather, was simply questioning the validity or propriety of what he was being instructed to do, and/or expressing concerns that the directions conflicted with the Department's regulations or its FOH. But, as was explained to him repeatedly, he was required to follow the instructions from his supervisors regardless of whether or he agreed with them (unless doing so involved illegal or immoral conduct or placed him in physical danger), and that he could grieve later. See Gragg v. U.S. Air Force, 11 M.S.P.B. 546 (1982). The Grievant was not entitled to disregard instructions with which he disagreed or to insist, prior to following those instructions, that he be provided with the authority for those particular directions.

The Grievant did not file a grievance challenging the correctness of any of management's instructions. The record reflects that the Grievant challenged instructions just for the sake of it; he did not do so in good faith. In addition to his challenges, the record is replete with examples in which the Grievant simply refused to comply with directives from supervision without any legitimate basis.

The Grievant's behavior did not consist of isolated events, but rather formed a clear pattern of disruptive and Uncooperative and Unprofessional Behavior. There was a substantial negative impact on his working relationship with his supervisors and managers and they lost all confidence in the Grievant's ability to function as a GS-12

level Investigator. Significant resources were devoted to attempting to correct the Grievant's behavior, to no avail.

The Grievant's misconduct continued even after he was verbally counseled about similar misconduct in December 2002, received a proposed notice of suspension in April 2003, and served that suspension in July 2003.

The case for removal is particularly strong because of the number of valid Specifications supporting three of the four Reasons (I, II and IV). Even if some of the Specifications are not sustained, proof of even a single valid Specification is sufficient to sustain a charge. Moreover, in this case, the decision to remove may be sustained by even a single proved charge. See Burroughs v. Department of the Army, 918 F.2d 170 (Fed. Cir. 1990); and Bree v. Department of Health and Human Services, 40 M.S.P.R. 68 (1991).

The standards for determining whether a removal will promote the efficiency of the Service are set forth in Curtis Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981) ("Douglas").

In this case, the most pertinent Douglas factors are the seriousness of the conduct, past disciplinary record, potential for rehabilitation and any mitigating circumstances. Disrespect toward supervisors is particularly serious as it undermines management's ability to maintain employee discipline; the Department need not tolerate such conduct. See, e.g., Cormier v. U.S. Postal Service, 22 M.S.P.R. 112, 115 (1984), aff'd, 765 F.2d 162 (Fed. Cir. 1985). The Grievant told Mr. Reardon that he did not respect his supervisors and he thought that they were frequently wrong. The Grievant's continued Uncooperative and Unprofessional Behavior in demanding justifications for supervisory

instructions, after repeated warnings and disciplinary actions, is very serious misconduct that justifies his removal. See Kirkland-Zuck v. Department of Housing and Urban Development, 90 M.S.P.R. 12 (2001), aff'd, 48 Fed.Appx. 749 (Fed. Cir. 2002). Further, he showed no remorse or understanding that his behavior was inappropriate, and there was no indication that he intended to try to modify this behavior, thereby demonstrating that there was no rehabilitative potential.

The Department has established the nexus between the Grievant's conduct and the efficiency of the service. The nature of the Grievant's misconduct, i.e., Uncooperative and Unprofessional Behavior, AWOL, and the Failure to Safeguard Government Property, affects the Department's ability to carry out its mission. See 5 U.S.C. §7513(a); Young v. Hampton, 568 F.2d 1253, 1257 (7th Cir. 1977).

None of the Union's witnesses had any direct knowledge of the facts involved in any of the Specifications. Ms. Thompson-Meier and Mr. O'Brien had their own personal conflicts with Ms. Scharlemann and Ms. Lenkaitis. Ms. Lenkaitis was chosen for the supervisory position over Ms. Thompson-Meier and Mr. O'Brien's conduct was under investigation at the time of the arbitration.

The Department requests that removal be found to have been issued for such cause as will promote the efficiency of the Service that the instant grievance be denied in its entirety.

CONTENTIONS OF THE UNION

The removal in this case reveals a number of violations of the Grievant's rights to industrial due process and, as a result, must be found to have been imposed improperly. The Department violated the Grievant's right to due process by charging him with a series of offenses that spanned almost a year prior to his removal and as to which he had no prior notice could result in discipline. Many were not even revealed to the Grievant at the time for him to respond to. That action both prejudiced the Grievant and revealed a lack of good faith on the part of the Department.

The Department's action in this regard also undermines the claim that it provided the Grievant a "fresh start" after he returned to the job in January 2004. The Department assigned the Grievant, who had just returned from a long-term sick leave due to excessive workplace stress, to a highly stressful position in which it was easy to criticize his behavior, subjected him to improper and fairly constant criticism, and then began paperwork to remove him from employment after he was back at work only two weeks or so. This action must be viewed in the context of Ms. Scharlemann's public outbursts complaining that the Grievant should not be permitted to return to work after having agreed to retire.

The Department's handling of the Grievant's retirement in this case also violated his due process rights and underscored the lengths to which the Department was willing to go to remove the Grievant, including offering him retirement under circumstances that concealed the fact that, if he accepted, he might jeopardize the ability to challenge his removal.

Further, the Grievant's removal constituted a prohibited personnel practice. It was a violation of merit principles to exhibit bias, fabricate baseless complaints to trigger the Grievant's removal, refuse his request to transfer, and rely upon personality ("chemistry") problems to trigger his removal. The record does confirm serious personality problems between the Grievant and Ms. Lenkaitis and Ms. Scharlemann, but there can be no dispute that supervision bears significant responsibility for that situation. It plainly cannot be used to support the removal of a long-service employee who has not engaged in any serious wrongdoing.

Even assuming arguendo that the facts contained in the Specifications are accurate (a matter hotly contested by the Union), the alleged wrongdoing does not rise to the level justifying the removal of a senior employee with twenty years of service with good work performance, including an above average rating on his latest performance appraisal in 2002.

Further, the Department did not properly consider and apply the Douglas factors. Although Mr. Reardon stated that he considered all of the twelve factors, a review of the decision reflects that he only considered past performance and the Grievant's twenty years of service. With respect to past performance, the five appraisals that the Grievant received following his return to WHD in 1997 were all positive. With respect to length of service, Mr. Reardon improperly considered that as a negative, rather than a positive, factor in terms of retaining the Grievant in federal Service.

The Grievant was never placed on a PIP nor in any sense afforded a "fresh start" after his suspension, as claimed by the Department's witnesses. Neither at the time that the Grievant returned to work from his July 2003 suspension (when he worked only six

days before taking sick leave) nor upon his return from sick leave in January 2004, did the Department make any effort to work with him to cure his alleged performance problems. Instead, the Department changed the Grievant's reporting location to Minneapolis and required him to perform OD duties for an extended period of time – despite the fact that this function was typically rotated. Further, within two weeks of his return, management was consulting with Human Resources to terminate his employment. In fact, Ms. Scharlemann had expressed her strong opposition to having the Grievant return to work in the Minneapolis District before he ever returned to duty.

The Grievant made good faith efforts to raise concerns over certain policies being followed by the Minneapolis District Office and sought to inform management of discrepancies between these policies and the regulations, FOH, and the National Office Wage Hour directives. The Department responded to these efforts by treating the Grievant even more harshly.

Mr. Reardon did not adequately consider the Grievant's potential for rehabilitation. The fact that the Grievant contacted the EAP and received treatment from a psychologist it recommended, Dr. Nolting, reflects that he has the potential to be rehabilitated. See Buniff v. Department of Agriculture, 79 M.S.P.R. 118 (1998), 98 FMSR 5246 (1988) (Attending meetings with an EAP counselor to discuss personal problems indicates potential for rehabilitation.) Further, in February 2003, the Grievant recommended that he and Ms. Lenkaitis attend a training on dealing with difficult people; at the April 2003 grievance meeting, he volunteered for training; and in January 2004, he took a course on conflict resolution on his own time and expense. These actions also show his potential for rehabilitation.

The Grievant was denied due process. The Department failed to inform the Grievant what constituted "Uncooperative Behavior" or "Unprofessional Behavior," the two reasons that accounted for the vast majority of the specifications. Moreover, the Grievant was not uncooperative or unprofessional by raising concerns that local management was not following the law or national policies – the crux of the incident that led to Reason I, Specification 13, one of only two specifications that occurred after the Grievant's return to work. Further, the incidents surrounding most of the specifications occurred before the Grievant's return from suspension on July 25, 2003 and some took place 11 months before the Notice of Proposed Removal. The Department did not inform the Grievant about many of these Specifications until it issued the Notice. The delay in taking action against the Grievant for most of the incidents or informing him that they would be the basis of discipline, and the failure to notify him what conduct was expected, constitute due process violations.

In removing the Grievant, the Department treated him differently than it did other employees. Examples of this difference in treatment include the following: although Ms. Lenkaitis expressed her concern about how employees were tabbing exhibits, the Grievant was the only employee disciplined for the manner in which he did so; although other investigators apparently erred in neglecting to identify to whom a CMP letter should be sent, the Grievant was the only employee disciplined for such an error; the Grievant was the only employee disciplined for not following the "de minimis" guidance in child labor cases; whereas Mr. Langenfeld was not disciplined for making what were allegedly untruthful statements in his "Sexism in Wisconsin" e-mail, the Grievant was disciplined for raising concerns at a staff meeting and then following up with a critical

e-mail. The Department is required to present evidence to support its difference in treatment. Woody v. General Services Administration, 6 M.S.P.B. 410, 81 FMSR 2033 (1981). The Department has not done so in this case.

Mr. Reardon failed to consider a variety of mitigating circumstances. First, as documented by Dr. Nolting and Dr. Albee, the Grievant was experiencing a significant amount of stress at work. In this regard, the incidents involving two of the specifications (Reason I, Specifications 5 and 12) occurred on August 11, the last day the Grievant worked before taking extended sick leave due to stress. Job tension may be a mitigating factor. Barry v. Department of the Treasury, 71 M.S.P.R. 283 (1996). There is no indication from Mr. Reardon's decision that the Grievant's stress was taken into account as a mitigating factor.

Second, the Department acted in bad faith. In this regard, as reflected by Mr. Reardon's remarks to the Grievant immediately before his transfer to Minneapolis after settling the EEO claim (that he "went to bat" for him with Ms. Scharlemann), Ms. Scharlemann was predisposed against him because she was forced to employ him in that office because of the EEOC settlement. The due process violations identified earlier also strongly suggest bad faith. The fact that many of the Specifications were factually baseless and/or were cast in a biased fashion to attempt to portray the Grievant in the worst possible light also reflects bad faith. Due to this animus, a number of relatively routine and not very significant errors or communications problems were viewed as uncooperative and/or unprofessional behavior. There was no proof of any deliberate failure to try to comply with legitimate supervisory directives – a fact that likely

influenced the Department not to charge the Grievant with insubordination (a charge that they knew they could not prove).

Third, the anti-male remarks that Ms. Scharlemann made, that Mr. Langenfeld testified and referred to in his "Sexism in Wisconsin e-mail, and the Department's failure to work with the Grievant proactively when he returned from his extended sick leave, reflects a biased mindset. Evidence that the Deciding Official is predisposed against the employee is a mitigating factor. Eichner v. U.S. Postal Service, 83 M.S.P.R. 202 (1999).

The Department should have pursued some other avenue in lieu of removal. It might have provided the Grievant with training and/or transferred him to a position where he would not be working with Ms. Lenkaitis or Ms. Scharlemann. With respect to the possibility of a transfer, the evidence reflects that transfer is common in the WHD. Examples include two lateral transfers by Ms. Lenkaitis when she was a Wage-Hour Investigator, Mr. Victory's transfer from the DD position in Madison to the DD position in Columbus, Ohio, the transfer by Dan Dunchack because of what Mr. Reardon described as "conduct concerns," the transfer of Mr. Langenfeld after he sent his "Sexism in Wisconsin" letter to the Chicago Regional Office, so that he would to report to a different supervisor in the Minneapolis office, and the transfer of Mark O'Brien from reporting to Ms. Walls in Minneapolis to Ms. Lenkaitis, even though his physical location did not change.

Despite having requested a transfer on more than one occasion to separate himself from Ms. Scharlemann and Ms. Lenkaitis, the Grievant was not afforded that opportunity. In fact, when he was temporarily detailed from Eau Claire to Minneapolis in January 2004, he continued to report to Ms. Lenkaitis, even though she was in Madison.

The Union requests that the Arbitrator uphold the grievance and grant the following relief: 1) enter a finding that the removal of the Grievant was not for such cause as will promote the efficiency of the Service; 2) overturn the removal; 3) direct that the Grievant be reinstated and made whole, in accord with the Back Pay Act, for all lost wages and benefits, including an FY 2003 performance award; and 4) award any other relief deemed appropriate.

DISCUSSION AND OPINION

After careful consideration of the entire record, I find that the discharge of the Grievant was not for such cause as will promote the efficiency of the Service. Accordingly, the grievance in this matter will be sustained. A summary of the principal reasons for this holding follows.

The Department's objection to the arbitrability of this matter is denied. As noted during the April 15, 2005 conference call, and for the reasons set forth earlier herein at pages 94-102, I am unpersuaded that the Grievant's retirement after his removal had been fully implemented and become final, and after the grievance had been filed, had the effect, in this case, of mooting out the removal action and eliminating the Grievant's ability to challenge that action. Nor was there a showing in this case that the Grievant's retirement was "voluntary" as that term is used in applicable case law.

With respect to the Grievant's claims that he was the victim of discrimination and/or reprisal, those independent claims are not properly submitted for decision. To the extent proved, however, they have some weight in terms of the adjudication of the claim that properly is before this tribunal – i.e., whether the removal of the Grievant was for

such cause as will promote the efficiency of the Service. Also, to the extent proved, those claims may be significant in terms of credibility matters.

Turning to the central question in this case, after careful review of the entire record, I find that the vast majority of the Specifications in this case were not proved by a preponderance of the evidence. In fact, a number were so utterly unsupported factually, that they suggest animus towards the Grievant on the part of the Proposing and Deciding Officials. The few specifications that were supported by a preponderance of the evidence were wholly insufficient to provide grounds to terminate the employment of the Grievant, a long-service employee, with a discipline-free record prior to his coming under the supervision of Ms. Lenkaitis and Ms. Scharlemann. A proper application of the Douglas factors with respect to those specifications that were proved would have resulted in a maximum reasonable penalty of a suspension of five (5) days.

The testimony of the Department's witnesses that they treated the Grievant as beginning with a "fresh start" after his return to work in January 2004 is not credible. Rather, the clear preponderance of the record evidence established that: 1) the Department was upset at the Grievant's decision not to retire, as he originally promised, in early February 2004; the testimony that established that Ms. Scharlemann was complaining loudly in the office about that change in position is credited; 2) when the Grievant's plans to continue in active employment became known, the Department assigned the Grievant exclusively to OD duties – an assignment that had been rotated in the past – and complained when he attempted to follow the FOH and established procedures relative to protection of the identity of Complainants; viewed in context, it is clear that the assignment to the OD job full-time was due to the fact that Ms. Lenkaitis

and Ms. Scharlemann intended to seek to remove the Grievant; in lieu of his prior assignment, he was placed in a highly stressful position (despite returning from stress-related leave) in which his work was carefully scrutinized on a daily basis; in fact, the record evidence regarding many of the Specifications, further demonstrated animus towards the Grievant and a predisposition to "pile on" large numbers of wholly or near baseless charges as part of efforts to support or effect his removal; 3) despite the claim that the Grievant was reinstated with a "fresh start," paperwork to propose the Grievant's removal began to be prepared only two to three weeks after his return to work; during that period, only one very minor act of allegedly uncooperative behavior had occurred; the Department seized upon that incident (and one other that occurred in early March 2004) and combined them with a large number of "incidents" that had taken place during the prior 11 months which were never deemed sufficient to merit corrective or disciplinary action when they occurred to create grounds for the proposed Removal of the Grievant; and 4) when the Grievant and others complained to Mr. Reardon about allegedly sexist behavior and other allegedly inappropriate behavior by Ms. Scharlemann, the testimony of Mr. Reardon (if truthful) suggested that the complaints were disregarded without any legitimate inquiry by him into whether or not the allegations had merit.

A discussion of the adequacy or inadequacy of the record evidence regarding each Specification follows.

Reason IV – Failure to Safeguard a Government Computer

The charges that the Grievant failed to safeguard his regular government computer and the loaner provided to him while his regular government computer was being repaired were wholly unproved and must be dismissed.

The gravamen of Specification 1 in support of this Charge (Reason IV) was a claim that the Grievant's laptop computer had clips bent internally resulting from an attempt to improperly remove the hard drive. The only evidence to that effect offered by the Department was the hearsay account of Mr. Mohr provided by Ms. Lenkaitis. However, despite having sent the computer for repairs, no repair records were introduced confirming any inappropriate handling of the machine by the Grievant (or anyone else) or revealing the precise nature of any damage. An e-mail by Mr. Wentzel, the only documentation of any problems with the Grievant's computer, identified a motherboard problem, made no mention of any bent clips, and did not speculate that the damage was intentional. Nothing was said to the Grievant at the time of the matter. Eleven months later, the Department charged the Grievant with failure to safeguard his computer, factually asserting that he was responsible for the damage to his computer despite the lack of *any* evidence in support of that charge. Perhaps most significant, not only did Ms. Lenkaitis have no problem proposing the Grievant's removal, in part, on the basis of this "charge," but Mr. Reardon had no problem sustaining that charge despite the total lack of any proof that it was factually accurate. The burden to prove wrongdoing rested with the Department, not the Grievant. The inclusion of this specification speaks loudly to a general lack of good faith or diligence on the part of the Department and to the possession of animus towards the Grievant by Ms. Lenkaitis and by Mr. Reardon. (Other significant evidence of bias also was introduced and will be discussed later herein.)

The second listed Specification cited in support of this Charge was also wholly unproved and is dismissed. The Grievant was charged with damaging the spare computer

by way of scratches that were asserted not to have been on the computer prior to it having been provided to the Grievant. The computer was an old machine and was a loaner, had been used by a number of Department employees, and was not in "mint" condition when received by the Grievant. Even Ms. Meyer's e-mail memorandum (which was uncorroborated hearsay) established nothing more than her failure to recall the scratches on the bottom when she had last seen the machine some months earlier. No evidence of the number or depth of the scratches was provided. No reports or pictures of the allegedly damaged computer were introduced. The evidence of the "piece" used to eject PCMCIA cards was equally undetailed and vague. Was it simply a plastic cover that was missing or was the plastic cover to the "pin" that was used to eject cards missing or was something else broken? Again, no photos or reports documenting that damage was introduced.

No reports from any repair facility were introduced. Nothing was said to the Grievant about the matter until nine months later when he received the Notice of Proposed Removal. In sum, this charge, too, is wholly unsubstantiated by *any* facts. When viewed in the context of other evidence strongly suggestive of improper animus, the decision to charge the Grievant with this Specification appears frivolous and indicative of bad faith behavior on the part of the Department. It certainly cannot be deemed proved evidence of misconduct sufficient to support the imposition of disciplinary action of any type, much less the removal of a long-service employee.

Reason III – Absence Without Leave (AWOL)

The Department's charge of AWOL must also be rejected for a number of reasons. This charge, too, is wholly unsupported by credible record evidence and is reflective of a lack of good faith on the part of the Department towards the Grievant.

While Ms. Lenkaitis had requested that the Grievant submit SF-71 paperwork in advance, the Department did not discipline the Grievant for being uncooperative or failing to follow instructions in connection with that paperwork. (That charge, too, would not have been factually supportable for a number of reasons, but since the Department did not charge the Grievant with such conduct, there is no need to delve further into that matter.) The question, in terms of Reason III, is whether the Grievant was properly disciplined for being absent without leave. If the Grievant was not properly treated as AWOL, it follows that this Reason must be rejected in its entirety as a basis for the Grievant's removal or for the imposition of lesser disciplinary action.

The reasons that the Department's charge of AWOL is rejected include the following:

1) there was no dispute that the Grievant was legitimately unable to work for stress-related medical reasons and the Department knew that fact before November 10th; the medical certification of inability to work was provided by Dr. Nolting and accepted as valid by the Department to excuse absences both before November 10 and after November 14;

2) the Department's prior behavior towards the Grievant (even after advising him of the need to timely file SF-71 paperwork) included approval of sick leave request forms on a retroactive basis; no notice was provided to the Grievant that there would be a

change in this approach; it is inconsistent with the "such cause as will promote the efficiency of the Service" standard to change the ground rules for employee behavior, without prior notice, and then discipline the employee for not following those changed ground rules;

3) even if prior notice had been provided to the Grievant (which, as noted, it was not), there was no Department rule or regulation conditioning sick leave upon completion and prior submission of SF-71 paperwork; the Department has not shown that it had a legitimate legal basis for refusing to allow the Grievant to use his earned, accrued sick leave, to cover periods that he was disabled from working due to legitimate, documented medical reasons;

4) the terms of the Settlement Agreement precluded the Department from acting as it did towards the Grievant's absence during the week of November 10-14, 2003; the Settlement Agreement confirmed the submission of the SF-71 forms and the continuation of the Grievant on sick leave status through his planned retirement in February 2004; and

5) unlike many other cases, the Department was under no uncertainty about the Grievant's status; it knew that he was not going to be reporting to work that week; no work was prepared for him to accomplish; no release for him to return to work from his long-term leave had been submitted; additionally, while the filing of a SF-71 was not shown to be a condition of receipt of sick leave imposed by the Agreement or any other cited rule, regulation, or policy, the fact remains that the Department had received the SF-71 by November 14th – prior to submission of the time and attendance sheets for the pay period that included the week of November 10-14.

As further evidence of the manner in which the Grievant was charged with being AWOL without any legitimate basis, the Department apparently did not even appreciate that one of the days with which the Grievant was being charged with being AWOL was November 11 – the Veterans Day holiday – a day on which the Department was not open for business and a day on which the Grievant would not have been permitted to work regardless of his medical situation. The Department's witnesses were wholly unable to explain how the Grievant could be absent without leave on a day when there was no work available for him to perform and he was not scheduled to work.

Additionally, the Decision Letter relies upon Ms. Lenkaitis' "warning" to the Grievant on July 31, 2003 about potential AWOL charges for failure to submit timely leave requests in the future, but ignores the effect that the Settlement Agreement and the approval of sick leave charges retroactively both before and after that time had upon the Grievant's understanding as to his obligations.

Several additional reasons also preclude upholding this specification. The MSPB has recognized that 5 C.F.R. Part 630, states that compliance with Department sick leave procedures "is not . . . a condition precedent to the agency's duty to grant sick leave when presented with proper evidence of illness or injury." So long as "an employee has provided administratively acceptable proof of incapacity prior to the agency's decision to remove him on sick leave charges, the agency must grant sick leave, regardless of the employee's failure to timely comply with the agency's sick leave procedures." Atchley v. Department of the Army, 46 M.S.P.R. 297, 301 (1990). In this case, the Department had administratively acceptable proof of incapacity prior to November 10th – the same

medical certification that explained the Grievant's absence from work the week of November 10th had been provided to the Department weeks earlier and was deemed an acceptable basis to grant him sick leave for the periods immediately before November 10th and immediately after November 14th.

Stated differently, the Grievant could not be found to be Absent Without Leave when he sought and was eligible to use accrued, earned Sick Leave.

In addition, Mr. Reardon testified that if the Grievant had made Ms. Lenkaitis aware in advance that he would not be at work the week of November 10th, then he (Reardon) would not have approved the AWOL charge. The record contained compelling evidence, however, that there was no basis whatsoever to presume that the Grievant would be at work during the week of November 10th. The facts that make this clear include the following: 1) the Grievant had been out of work for three months on sick leave at that point and had not announced any intention to return to work; 2) the Settlement Agreement provided for him to be absent for several additional months after the week in question (and including that week); 3) Ms. Lenkaitis testified that, prior to being permitted to return to work, the Grievant would have to provide an appropriate medical release certifying his ability to return to work; no such certification was provided; 4) the only medical evidence in the record indicated that the Grievant would be out of work for medical reasons for the week in question and a significant period thereafter; 5) the Grievant made no contact with Ms. Lenkaitis or anyone else in the Department suggesting that he might be returning to work on the week of November 10th; and 6) there was no evidence that the Department expected the Grievant to return to work; there was no coordination of a return date/time (as was the case with respect to

July 25th or January 12th); no evidence of any planned work assignment to the Grievant was introduced and it is inconceivable that if the Grievant were believed to be late returning to work that Ms. Lenkaitis would not have contacted him at some point during the week of November 10th regarding that fact.

The clear weight of the record evidence, therefore, made plain that: 1) Ms. Lenkaitis did not expect the Grievant to return to work; 2) she proposed the AWOL despite no legitimate question as to the Grievant's being out of work due to illness and solely due to his failure to timely provide forms that he was not required to submit as a condition to receiving sick leave; and 3) Mr. Reardon's testimony regarding his rationale for sustaining the AWOL charge is either: a) not truthful; or b) if true, was done on the basis of erroneous facts and reflects a failure to even attempt to learn the true facts surrounding the Grievant's absence and the AWOL charge in the context of the removal decision (and also, presumably, in the context of the separate AWOL grievance which was denied as well by Mr. Reardon).

While no pay for the improper week of AWOL may be directed since that question was the subject of a separate grievance that is not presented herein for ruling, the removal of the Grievant for being AWOL is before this Arbitrator and must be vacated.

For all of these reasons, I find that the AWOL charge was wholly unsupported factually and must be overturned. The fact that the Deciding Official testified that this unproved charge was a very significant charge, in his judgment, supports further the "bottom line" ruling in this case that the removal be overturned as not for such cause as will promote the efficiency of the Service.

Reason II – Unprofessional Behavior

This reason was supported by three Specifications. Like Reasons III and IV, discussed above, I find that none of the three Specifications are factually supported. Thus, neither this Reason nor any of the three supporting Specifications are sustained as legitimate bases to effect the removal of the Grievant.

Reason II, Specification 1, was not proved by a preponderance of the evidence. The underlying dispute consisted of the Department's characterization of the Grievant's behavior as an assignment of work and an inappropriate assumption of supervisory prerogatives. The record fails to support this view of the Grievant's behavior. The Grievant was serving as a Lead Investigator on a large investigation, believed that he needed a Spanish speaking individual, and according to the WHISARD system, Ms. Tout-Nava (who had performed those duties for that investigation about a year earlier) was still assigned to that Investigation as available for that purpose. The assistance needed by the Grievant was relatively modest in scope and time. The Grievant sent Ms. Tout-Nava an e-mail requesting her assistance for a telephone interview "if there is any way possible" and copied Ms. Lenkaitis on that e-mail (which was sent on June 5, 2003 at 9:59 a.m.). The Grievant was not trying to hide his behavior or to exercise supervisory prerogatives. As Lead Investigator, he was permitted to request assistance from others who were assigned to the case.

Twenty-four minutes later, Ms. Scharlemann, wrote to the Grievant stating: "Bill, You do not assign work to investigators. You tell your supervisor what you need and we assign work. We will get back to you on the need for a Spanish interview."

Ms. Lenkaitis was copied on that response. Presumably, Ms. Lenkaitis, rather than speak to the Grievant about the matter, opted to forward the Grievant's e-mail to Ms. Scharlemann and complain about the Grievant's behavior.

Six minutes after Ms. Scharlemann's e-mail, the Grievant replied: "A rather discourteous response. Kristin had been assigned to this case, and had previously interviewed a Spanish speaker. Once assigned, I thought she helped on the case."

This exchange failed to establish any impropriety on the part of the Grievant, much less behavior that could reasonably be characterized as "Unprofessional Behavior." Nor was it shown to be "indicative of [the Grievant's] contempt for supervisory authority," as set forth in the Decision letter. It is obvious that the Grievant's reply evidenced frustration at Ms. Scharlemann's response to what he believed was a legitimate and benign request. Moreover, the fact that the Grievant's second-level supervisor sent him an e-mail that appeared to have jumped to an incorrect assumption and gratuitously "put him in his place," may well explain the Grievant's reaction. In sum, the content and tone of Ms. Scharlemann's response and the other difficulties between the Grievant and Ms. Lenkaitis and Ms. Scharlemann in that time period, make it plain that the Grievant's response was not inappropriate and certainly cannot be viewed as "Unprofessional Behavior."

Reason II, Specification 2, was based upon the charge that, by confirming in an e-mail the Grievant's concerns about a proposed change in data collection and recordation procedures he had voiced in a teleconference the prior day, he was engaged in a "propensity to badger people when you do not receive the answer that you are seeking, which is truly unprofessional." The record, viewed as a whole, and including

the Grievant's behavior throughout the protracted arbitration hearings in this matter, demonstrate clearly that the Grievant has a tendency to request authority for action with which he does not agree, rather than simply accepting the response he was provided. One can easily understand how this could lead to frustration with the Grievant on the part of others. I cannot find, however, that the Grievant's e-mail message which did little more than document his concerns from the prior day's conference call, was sent only to Ms. Scharlemann (and was not part of some attempt to build a case or embarrass her in front of others) was motivated by an intent to badger or otherwise rose to the level of unprofessional behavior. The record is replete with e-mails by the Grievant to others and from Ms. Lenkaitis and Ms. Scharlemann to the Grievant and to others that serve to memorialize comments, views, or the like that were previously noted orally. There is no basis to conclude that sending confirmatory e-mails is somehow Unprofessional Behavior.

The Grievant's email to Ms. Scharlemann attempted to succinctly summarize his concerns about the need and burden of the discussed changes. His comment about the lack of an agenda for the staff meeting affecting the ability of staff to prepare for the meeting, while impolitic, cannot be viewed as Unprofessional Behavior, particularly given the fact that agendas are generally sent out in advance of such meetings and the fact that the statement was true and was not shown to have been included in the Grievant's brief e-mail for inappropriate reasons. The Grievant's observation that Ms. Scharlemann "seemed to take umbrage" at his questions during the prior day's conference call also cannot be found to be evidence of Unprofessional Behavior; the testimony of Ms.

Scharlemann reflects that, in fact, she did appear to be upset at the Grievant's questioning during the prior day's conference call.

For these reasons, Reason II, Specification 2, also is dismissed as unproved and is not sustained.

Reason II, Specification 3, was also not proved. During a final conference in late April or early May 2003 in which the Grievant hoped to get some additional information and resolve an outstanding matter involving Mell's Manufacturing, Mr. Mell asked the Grievant for the name and telephone number of his supervisor. The Grievant complied with that request and gave Mr. Mell the name and direct-dial telephone number for Ms. Lenkaitis.

On Thursday, May 22, 2003, Mr. Mell called Ms. Lenkaitis and, following discussion between the two regarding the case (based upon characterizations of the case and conversations with the Grievant made by Mr. Mell that Ms. Lenkaitis testified she did not necessarily believe), Mr. Mell faxed certain information to Ms. Lenkaitis.

On May 27, 2003, the Grievant wrote to Ms. Lenkaitis attempting to summarize the status of the investigation (including information requests that were outstanding), and noted that he had been informed by Mr. Mell that he had provided certain data to her and he (Grievant) would appreciate it if Ms. Lenkaitis could keep him informed as to what was going on. He also asked if she wanted the file sent to her, asked if Performance Advisory time frames were tolled, and asked whether they were in the management review phase of the case given Ms. Lenkaitis' involvement. Given Ms. Lenkaitis' direct assumption of case processing and investigatory responsibilities, those inquiries appear to have been legitimate on the part of the Grievant.

On the morning of June 3, 2003, Ms. Lenkaitis and the Grievant had a heated telephone conversation in which the Grievant claimed that Ms. Lenkaitis had yelled at him and became defensive. The Grievant complained about his treatment by Ms. Lenkaitis to Ms. Scharlemann. The matter also was raised by the Union to Mr. Reardon in the days that followed.

The Grievant's claim that he had been yelled at by Ms. Lenkaitis is credited for several reasons. First, in the series of e-mails sent over the next few days, there was no denial of the Grievant's claim that Ms. Lenkaitis had yelled at him so loudly that she went over and closed her office door and then began yelling at him again. The e-mails focused upon both the meeting between Ms. Lenkaitis and the Grievant, "ground rules" for future discussions, and questions regarding how to complete the investigation of the Mell's Manufacturing matter. Second, no reason was shown for Ms. Lenkaitis to have stopped the conversation and closed her door if the yelling had been by the Grievant; if he raised his voice, it would not have been sufficiently loud over the telephone earpiece to have required closing the door to Ms. Lenkaitis' office. Third, the fact that the Department, despite obtaining knowledge of the fact that Ms. Lenkaitis publicly yelled at the Grievant, refused to acknowledge impropriety and charged the Grievant with Unprofessional Behavior in connection with the dispute underscores much of the problem in this case. While the Grievant plainly has shown himself to be somewhat challenging to supervise and direct, particularly where he believes that law, departmental policies, practices, or regulations support his position, the record showed without question that the Grievant was not treated appropriately by Ms. Lenkaitis, Ms. Scharlemann, or Mr. Reardon and that Mr. Reardon simply accepted, as true, any

allegations by Ms. Lenkaitis and Ms. Scharlemann about the Grievant, without the need to scrutinize carefully any proof of those allegations. Whether out of animus towards the Grievant or out of a desire simply to end the organizational disruption created by the friction between the Grievant and others, it is clear that Mr. Reardon rejected out of hand any complaints from the Grievant about supervision or work practices. Were they taken seriously, it is inconceivable that the Grievant's claims that the directives of Ms. Scharlemann conflicted with the FOH and the claims by the Grievant and others that Ms. Scharlemann and Ms. Lenkaitis exhibited a variety of openly sexist behavior at work would not have been looked into by Mr. Reardon; his testimony that, following those complaints, he asked Ms. Gardner to look into the matter and did not follow up when he received no findings (either corroborating those complaints or rebutting them) makes little sense and cannot be credited.

The Department's charge that the Grievant was guilty of Unprofessional Behavior by providing Mr. Mell with Ms. Lenkaitis' direct dial telephone number is also rejected. No restriction was shown to exist – in policy or regulation or by way of prior instruction to the Grievant or others – that would preclude providing a supervisor's direct-dial telephone number in response to an inquiry for the name and telephone number of his supervisor from an employer representative. Moreover, the record revealed that the direct-dial telephone listing was publicly available on the Department's web-site, among other places. The Grievant's action in providing that public telephone number cannot be found to have constituted an act of unprofessional behavior.

Nor did the Department prove that the Grievant was required to have advised

Ms. Lenkaitis of Mr. Mell's request for her name and phone number. There was no showing that every time a member of the public appears dissatisfied with an approach taken by an Investigator during the course of an investigation and seeks the name, title, or telephone number of that Investigator's supervisor, it is normal or expected for that Investigator to report the matter to supervision. There was no showing that the problems the Grievant was encountering with Mell's Manufacturing were of a nature that he was expected to have brought them to the attention of Ms. Lenkaitis in advance of any contact from Mr. Mell. (In fact, one would expect that a significant number of requests from employers for name and contact information of an Investigator's supervisor would never result in any contact at all.) If the goal was to ensure that the Department spoke with a single, informed voice relative to Mr. Mell, then it would have been easy for Ms. Lenkaitis, upon her initial contact from Mr. Mell, to have simply obtained information from him, refrained from any discussion of merits issues, and then conferred with the Grievant about the matter prior to seeking documentary information about the subject of the investigation from Mr. Mell. She chose a different course. While that was her right, it was Ms. Lenkaitis' behavior, not that of the Grievant, that caused the Department to appear to be speaking with a multitude of voices. Nor did Ms. Lenkaitis' decision convert the Grievant's prior actions into Unprofessional Behavior.

The follow-up conversations and e-mails between Ms. Lenkaitis and the Grievant regarding Mell's also failed to evidence Unprofessional Behavior on the part of the Grievant. With the benefit of hindsight, both Ms. Lenkaitis and the Grievant were to blame in terms of contributing to the feeling on the part of the other that they were "blind-sided" by the other's failure to have more fully communicated their contacts with

Mr. Mell. There was no showing, however, that the Grievant's communications, viewed in context, went beyond the bounds of professional interaction with his supervisor. The Grievant's conduct in stating "Yes, Michelle" in a manner that Ms. Lenkaitis viewed as "snide," and in commenting that she was "beating him up" failed to rise to the level of Unprofessional Behavior, particularly given Ms. Lenkaitis' treatment of the Grievant in connection with this issue, which included yelling at him under circumstances where others in the office could overhear and treating him as if he were unable to employ good investigative technique when gauging the most effective way to handle a particular case.

For all of these reasons, Reason II, Specification 3, is also dismissed as unproved.

Having found that each of the three Specifications relied upon in support of Reason II were unproved, it follows that Reason II cannot be sustained and cannot be support of the imposition of any disciplinary or adverse action, much less support the removal of the Grievant.

Reason I – Uncooperative Behavior

Of the 11 Specifications of allegedly Uncooperative Behavior that were sustained by Mr. Reardon and relied upon by the Department in effecting the Grievant's removal, only 2 (Specifications 1 and 3) are found to have been proved by a preponderance of the record evidence. The remaining 9 Specifications are dismissed and are not sustained due to a lack of proof that the Grievant was shown to have been guilty of Uncooperative Behavior. Accordingly, while it is found that the Grievant was shown to have been guilty of Uncooperative Behavior, the proven misconduct is far less than that relied upon by the Proposing or Deciding Official in this case and far less than the level needed to support the removal of the Grievant.

Reason I, Specification 1 is sustained. The preponderance of the record evidence established that the Grievant was repeatedly directed by Ms. Lenkaitis to return his loaner laptop and that he failed to do so. The fact that there was no demonstrated urgency to have the laptop returned by the requested date is irrelevant. The Grievant both failed to comply with the directives to return his loaner laptop and wrote a number of e-mails that were properly viewed by the Department as uncooperative in tone and content.

Nor did the Grievant provide legitimate reason for not complying with the directive that he return his laptop earlier as requested. He bore responsibility for deciding to place confidential documents on his Department computer that was only a loaner for a brief, but indefinite period. He was responsible for taking steps to copy those files to disk or other media and deleting them or e-mailing them to himself and then deleting them if he was concerned about the Department looking at those files. At a minimum, he was required to request additional time to return his loaner computer, rather than simply presuming that it was acceptable to return it in June when he would see Ms. Meyer in person and obtain assistance in removing those files.

The Grievant's behavior in this regard appears reflective of raising various roadblocks to avoid his complying with the directive. Viewed in context of his other actions (including those that resulted in his receiving his 2003 suspension), the Department properly treated his behavior in failing to comply with directives to timely return his loaner computer as Uncooperative Behavior. Specification 1 is, therefore, sustained.

Reason I, Specification 2 is dismissed. The record revealed that the Grievant sought clerical assistance, partially for reasons related to his lack of a DSL high speed

network connection, and partially for other reasons, and that the Grievant made what was deemed to be an excessive number of errors in the WHISARD case management system report on the County Market case. There was no showing, however, that the Grievant's errors in the WHISARD system were deliberate or anything more than performance problems or that his requests for clerical support constituted uncooperative behavior. Any problems with his job performance needed to be handled by other appropriate means and processes. The Department chose not to charge the Grievant with poor performance and did not follow any of the procedures for attempting to document and correct performance problems. The request for clerical assistance to input changes to the case information was made in a respectful fashion and was a legitimate job-related request. It was within the discretion of management to grant that request, deny that request, or to grant it to a limited degree. The Grievant's efforts to persuade management to provide him with that assistance after the initial rejection of the request was not shown to have been excessive or to have involved language that established or evidenced Uncooperative Behavior. Not every disagreement between an employee and a supervisor as to how to best accomplish a particular task constitutes Uncooperative Behavior. The mere fact that the Grievant may have been found guilty of Uncooperative Behavior in the past by Ms. Lenkaitis and Mr. Reardon did not convert his request for assistance in this case into Uncooperative Behavior. Reason I, Specification 2 is not sustained.

Reason I, Specification 3 is sustained. This specification relates to the Grievant's handling of his travel vouchers for April and May 2003. The record clearly indicated that the Grievant and supervision had a difference of opinion concerning his entitlement to receive reimbursement for various travel expenses. The Grievant repeatedly sought that

management provide him with authority for its position, explained his position concerning his entitlement to receive particular reimbursements, and declined to honor a variety of deadlines set for submission of his travel vouchers. He even testified that he wanted something a little more authoritative prior to his filing his voucher and he couldn't understand why the Department did not provide the support for its interpretation of the Travel Regulations to him.

The short answer is that the Grievant was obligated to have submitted the vouchers, as directed, and then processed supplemental vouchers and/or grieved or otherwise challenged the failure of the Department to pay some of his requested reimbursements. His behavior in repeatedly stating his position and deliberately failing to meet the stated deadlines to submit his travel voucher and documentation was properly viewed by the Department as Uncooperative Behavior. The Grievant simply did not understand that he was obligated to obey a valid directive from supervision and grieve if he believed that directive to be in error. The fact that the Grievant may have been correct in terms of his understanding of the travel regulations is no excuse for his failure to have been more cooperative when faced with repeated instructions to complete travel vouchers by particular dates and in particular prescribed fashions. Reason I, Specification 3 is sustained.

Reason I, Specification 4, is not sustained. The record evidence established that the Grievant made efforts to correct the "errors" identified by Ms. Lenkaitis in the Arby's WHISARD file (other than numbering the exhibits to her satisfaction) and submitted the WHISARD file for management review within three weeks of Ms. Lenkaitis' initial

request for additional information and within days of the Grievant's receipt of additional information from the employer's representative. The Department introduced virtually no documentation whatsoever concerning the Arby's investigation. It is unknown if Mr. Reardon examined any documentation prior to simply accepting Ms. Lenkaitis' representation that the Grievant's performance was both substandard and so egregious as to have been presumably deliberately uncooperative. (Mr. Reardon denied having examined any documentation other than that which accompanied the Notice of Proposed Removal.) The documents introduced by the Union, however, paint a somewhat different picture. Ms. Lenkaitis sent the Grievant a memorandum, dated April 24, 2003, seeking certain changes in the WHISARD record and raising a number of questions. The Grievant submitted his Compliance Action Report on May 16, 2003, two days after receiving narrative information from Arby's outside counsel. Ms. Lenkaitis prepared handwritten notes of shortcomings in the WHISARD file on July 2, 2003 – the last day prior to the Grievant's suspension and a month and a half after she had received the Grievant's report – and included in that listing a failure by the Grievant to list the responsible individual for assessment of a CMP. There was no evidence that those perceived shortcomings were then shared with the Grievant or that he was asked to correct anything. The WHISARD record did, however, list the Company's Vice-President and General Counsel (who was also named) as the responsible person and, on July 10, 2003, Ms. Lenkaitis, on behalf of the Department, sent out a CMP letter for child labor violations in the case. On July 24, 2003 – the last day that the Grievant was still on suspension – Ms. Lenkaitis sent the Grievant an e-mail complaining about a number of items not completed, including the following criticism: "2. You still did not identify the

responsible person. Thus, I am unable to assess CMPs against an individual on this case." The e-mail did not indicate that it was for informational purposes only, but noted that Ms. Lenkaitis had assigned the case to herself, thereby leaving it ambiguous as to whether she expected the Grievant to make further corrections to the WHISARD file. The Grievant replied on July 25, 2003, at 9:52 a.m., asking to have the case returned. Ms. Lenkaitis then replied, fifteen minutes later, that she "[was] not going to return the case to you and do not know why you want it. The CMPs have been assessed and the case is now in Active Followup." Ms. Lenkaitis also criticized the Grievant's observation in his e-mail about the length of time that Ms. Lenkaitis took to review his submission.

The record evidence failed to establish how the Grievant's behavior in connection with this investigation could legitimately be deemed "uncooperative." The record evidence demonstrates, at most, modest problems with the Grievant's work performance (whether legitimate or not cannot be discerned based upon this record), but falls far short of proving a deliberate failure to cooperate in completing work assignments as instructed. Further, Ms. Lenkaitis' charges of Uncooperative Behavior by the Grievant – which were upheld in their entirety by Mr. Reardon – included charges that the Grievant failed to identify a responsible party for purposes of imposition of civil monetary penalties despite the fact that the CMP letter had been already issued by the Department. This strongly suggests that Ms. Lenkaitis blamed the Grievant falsely for poor performance when he had, in fact, performed the particular requirement, and that Mr. Reardon simply sustained many of Ms. Lenkaitis' assertions of fact without any legitimate consideration of the

Grievant's claims that he was being unfairly accused or whether Ms. Lenkaitis' assertions were factually accurate.

For all of these reasons, Reason I, Specification 4, is not sustained.

Reason I, Specification 5, is also not sustained. This, too, was an example of an attempt to convert relatively modest charges of inadequate performance in terms of record keeping and investigatory technique into a charge of Uncooperative Behavior. The evidence introduced by the Department as to the Grievant's WHISARD entries plainly established that he failed to do many of the things that one would expect of a GS-12 investigator, preferring instead to record claims by the parties' representatives as to the underlying facts, rather than underlying facts themselves. The matter began as a complaint of an FMLA violation by an individual employee, who had legal counsel, but who took no other actions to pursue a private cause of action. The Grievant conducted a policy review as part of his investigation and also was involved in facilitating a potential resolution of the individual's complaint.

There was no basis to infer that the performance issues were deliberate or were intended to be uncooperative by the Grievant. The Grievant and Ms. Lenkaitis did exchange e-mails in which Ms. Lenkaitis criticized the Grievant for not dropping the entire matter once he learned that the Complainant had legal counsel. The Grievant replied that mere retention of counsel did not constitute pursuing her private rights of action under the FMLA. Ms. Lenkaitis disagreed and cited an August 2000 FMLA Training Book in support. A copy of the cited portion of the Training Book was introduced in the record and states simply that: "If the complainant decides to obtain an attorney and pursue her private rights, WH will not take any action on their complaint."

No support whatsoever was provided by the Department or Ms. Lenkaitis for her apparently mistaken belief that retention of counsel, without more, constituted pursuit of private rights. The Grievant's behavior in attempting to clarify the issue for the future and in setting forth his understanding (which the record suggests was correct on that point and consistent with the FOH and the Training Book), cannot be deemed Uncooperative Behavior. Not every legitimate act of questioning the validity of a supervisory directive and citing authority in support of one's views constitutes "Uncooperative Behavior." Nor was the tone of his e-mails on this subject so inappropriate as to constitute Uncooperative Behavior. The Grievant acted properly in attempting to discuss a matter of concern with his supervisor relative to his legal responsibilities as an Investigator.

Reason I, Specification 5, is rejected as factually unproven and is not sustained.

Reason I, Specification 7, also is not sustained. The record evidence revealed simply that the Grievant changed the Federal Express mailing label to provide for Saturday delivery. He had not been instructed not to order that additional service. He did not know that the repair facility would not be open on Saturday and did not sign to authorize delivery without signature. There was nothing about his behavior that objectively may be viewed as Uncooperative Behavior.

In fact, not only was this behavior by the Grievant relatively benign and well within his discretion as an experienced GS-12 level Investigator, but there was no harm to the government as a result of the change. The computer was received and was being repaired before Ms. Lenkaitis even learned of the changed delivery slip. Long before the decision was made to cite the Grievant for Uncooperative Behavior, the Department knew that no harm resulted from his modest action. There was absolutely no record

evidence to support the belief of Mr. Reardon that the Grievant's change to the Federal Express form was not a sincere effort on the part of the Grievant to improve matters.

The Grievant's discussion with Ms. Lenkaitis about where the computer should be returned was also well within the bounds of normal, cooperative behavior. He proposed making the change in the return address on that form from Minneapolis to Eau Claire to expedite the return of his computer, not for reasons of being uncooperative or other improper reason.

Not only was this Specification unproved, but its inclusion in the Removal process months later, as well as its being sustained by Mr. Reardon, contributes to the belief that the Department was motivated to remove the Grievant for improper reasons and simply chose to "pile on" a large number of unproven Charges and Specifications to bolster an obviously improper removal action. Reason I, Specification 7, is rejected due to a lack of proof that the Grievant engaged in Uncooperative Behavior and is not sustained.

Reason I, Specification 8, is also not sustained. This Specification relates to the decision of the Grievant, who was working on a flexible work schedule, to report to work on the first day back from his suspension between 7:00 a.m. and 7:30 a.m. The testimony of Ms. Lenkaitis, as well as the documentary evidence, however, made the following facts clear beyond dispute: 1) Ms. Lenkaitis telephoned the Grievant on July 24, 2003, and left a message that it was preferred that he report at 8:30 a.m. the following day, and not to report prior to 8:00 a.m. (apparently Ms. Walls was not going to be present until that time and she wanted to personally provide the Grievant with his computer and assignments); Ms. Lenkaitis chose not to share any reason for restricting the Grievant's

reporting time, but in an earlier telephone conversation with the Grievant, she discussed the desire of Ms. Walls to personally be there when the Grievant arrived; 2) the Grievant had legitimate reasons for reporting to work when he did on July 25th; he had a medical appointment that afternoon at 4:00 p.m., and desired to provide a full work day if possible; 3) the Grievant believed, in good faith, that since he was returning from several weeks off work and he was on an approved flexible work schedule, he could get started reviewing e-mails and other matters without the need to receive instructions or directions from supervision; 4) in response to Ms. Lenkaitis' initial contact suggesting that he report to work at 8:30 a.m., the Grievant did not simply ignore her suggestion and resort to self-help, but telephoned her and left a message of his status on flexitime and his need to report earlier; when he received no response, he appropriately assumed that his early report was permissible; and 5) while it is assumed that the Grievant's right to report early on July 25th could be overridden by management determination, the totality of the communications, including their timing, failed to provide the Grievant with clear prior notice of that determination.

The record evidence, viewed in its entirety, failed to establish that the Grievant's report to work prior to 8:00 a.m. on July 25, 2003, was part of some effort to deliberately refuse to honor supervisory directives or prerogatives, or otherwise constituted Uncooperative Behavior. At most, it was the product of miscommunication and a legitimate desire by the Grievant to work a full day on July 25th.

Reason I, Specification 8, was not proved and is not sustained.

Reason I, Specification 9, is also not sustained due to lack of proof of Uncooperative Behavior by the Grievant. The Grievant left work one hour early on

July 29th because he was not feeling well. He did not request sick leave separately for July 30th until the afternoon of July 30th. The Grievant testified that he did not appreciate that he needed to request sick leave each day he was out. There was no evidence, however, that the Grievant advised Ms. Lenkaitis in their discussion on July 29th of the fact that he might still be out on July 30th. On July 31st, Ms. Lenkaitis approved the Grievant's sick leave for July 30th, but cautioned him that requests for sick leave normally were required to be made by 10:00 a.m. While the Grievant should have provided clear, timely notice of his need to be out of work on sick leave, there was no evidence whatsoever that he deliberately failed to follow the expectations of Ms. Lenkaitis or that he was guilty of Uncooperative Behavior in connection with his belated request for sick leave for July 30, 2003. Rather, he acted in good faith and there was no evidence that Ms. Lenkaitis was even aware of the Grievant's absence on July 30th prior to his afternoon request for sick leave; there plainly was no motivation to cause Ms. Lenkaitis or the Department any harm.

Reason I, Specification 9, is not sustained.

Reason I, Specification 10, relates to the Grievant's behavior in challenging the requirement that he provide medical certification from a medical doctor, physician's assistant, or nurse practitioner, and the rejection of the report from Dr. Nolting because he was a Licensed Psychologist, but not an MD, a PA, or a CNP. The notion that the Grievant was guilty of Uncooperative Behavior in this instance borders on the bizarre. The Grievant was referred to Dr. Nolting by the Employee Assistance Program. The credentials of a seasoned Licensed Psychologist are greater than those of a PA or a CNP relative to the condition for which the Grievant was being treated. The Department chose

to ignore the definition of a health care provider contained in the FMLA regulations and, instead, apparently relied upon an MOU between the Department and the Union relative to Leave Restriction – a matter wholly different from that facing the Grievant. Moreover, that MOU says nothing about refusing to recognize a diagnosis made by a Licensed Psychologist. The "Bargaining History" referenced by the Department contained a notation that a "treating medical practitioner" included a doctor, a PA or a CNP; that history did not state that those types of practitioners were exhaustive. Such an approach would reject a dentist as a valid treating medical practitioner for a root canal, and would reject a physical therapist or laboratory certification of absence. Chiropractors and Doctors of Osteopathy – often the medical practitioners in greatest supply in certain geographic areas – would likewise be deemed insufficient because they were not Medical Doctors. Such an approach is plainly unreasonable and it is inconceivable that it would honestly be held and applied to other employees. (The record contained no evidence of such restrictive application to anyone other than the Grievant.) The Grievant's bewilderment at this position, which was taken by Ms. Lenkaitis and others, and his repeated efforts to persuade them to adopt a more sensible approach cannot be deemed to be Uncooperative Behavior. He was doing little more than explaining (albeit repeatedly and harshly in response to repeated demands from his supervisors for different medical information) the sufficiency of what he had provided and the problems he was encountering getting an appointment with a Psychiatrist. The Department's characterization of the Grievant's attempts to persuade the Department to accept his certification as "combative" is rejected as contrary to the weight of the evidence.

The Department's questioning of the content of Dr. Nolting's reports as sufficient to excuse the Grievant from work, and the Grievant's responses to those inquiries, failed to demonstrate Uncooperative Behavior on the part of the Grievant. Ultimately, those reports, along with the reports of Dr. Albee, a treating Psychiatrist, were deemed sufficient to warrant granting the Grievant extended sick leave.

For all of these reasons, Reason I, Specification 10, is rejected as factually unproved and is not sustained.

Reason I, Specification 11, is also not sustained. While the Grievant was on sick leave for stress, the Department asked that he return his laptop computer and some case files that he had at home. The Grievant did so within a few days of being initially contacted. The initial contact occurred sometime on August 21st (the record did not reflect the time that the e-mail was sent, but the record did reflect that the Grievant saw Dr. Albee on that date and faxed certain forms to the Department) and directed that the Grievant bring those items into the office on August 22nd at 10:00 a.m. The Grievant testified that he did not believe he even saw that e-mail until after he had received a follow up telephone call from Ms. Scharlemann advising him not to bring the items into the office on August 25th or 26th, but to do so on August 27th. The Department advised the Grievant that, if he could not bring in the items on August 27th, the Department would send someone to his home to pick them up. There was no evidence that the Grievant was aware of the request to return his computer and files prior to August 25th. The Grievant was further advised not to bring in the computer or files on August 25th or 26th. His decision to bring those items in on August 28th, rather than schedule a pick-up at his home on August 27th, cannot be deemed Uncooperative Behavior.

The Grievant e-mailed the Department and complained about being contacted daily while on stress-related sick leave. The Grievant e-mailed Ms. Lenkaitis on August 26th, advised that he planned to visit the office to return the items between 8:00 a.m. and 9:00 a.m. on August 28, 2003, and stated in that e-mail that "if this is not an adequate response, please advise." The Department did not advise of any problems, did not send someone to pick up the items on August 27th at the Grievant's home, and introduced no evidence that there was any operational significance to having those items returned on August 28th instead of on August 27th. Moreover, nothing was said about this situation until more than five months later when it was included as a Specification in the Proposal to Remove the Grievant and was characterized as an instance of Uncooperative Behavior.

As noted, the record failed to establish that the Grievant was uncooperative in the timing of his return of the computer or files or in his communications to the Department. To the extent that he asked that the Department's constant stream of telephone contacts on various issues cease and that he receive communications by e-mail and/or first class mail, that was not shown to be Uncooperative Behavior; rather, it appears to have been an effort to reduce the stress related to his work-contacts. After all, he was on extended sick leave as a result of a diagnosed stress disorder related to his perceived treatment at work.

Reason I, Specification 11, is dismissed as unproved, and is not sustained.

Reason I, Specification 12, is also not sustained. The issue of whether the Grievant's method of numbering exhibits (apparently he was tabbing the exhibits instead of marking them on the lower right corner and was not numbering all supplemental exhibits) was sufficient appears to be little more than a performance issue (and a

relatively minor one at that). While one cannot help but wonder why the Grievant did not take greater care to follow the repeated directives of Ms. Lenkaitis in that regard, the record failed to establish that the Grievant deliberately refused to follow the instructions provided by Ms. Lenkaitis. His e-mails of August 11, 2003, noting that his method was "good enough for the other DD's, ADD's acting, and otherwise"; that he did not understand where he was not following the FOH; and where he expressed "frustrat[ion]" at what he perceived to be a difference in treatment, was not shown to constitute Uncooperative Behavior. Rather, those WHISARD reports entered into the record, contain many corrections of a repeat nature by Ms. Lenkaitis directed at numerous small details (such as spelling, as well as numbering). While arguably evidence of sloppy work by the Grievant (at least in terms of his entry of report information in WHISARD), the record does not support an inference that the Grievant understood what was required of him, but obstinately refused to change out of some desire not to cooperate with supervision.

Nor may the Grievant's e-mail of August 11, 2003, be deemed proof of Uncooperative Behavior. The Grievant complained about what he perceived to be disparate treatment and noted that he came to work while ill to try to complete some old cases and exhibited frustration at being criticized for his numbering of exhibits. His comment that he believed that "a more experienced supervisor would have handled [the matter] differently," while impolitic, was neither insubordinate nor unprofessional in tone, and did not evidence a refusal or failure to cooperate with supervision. The Grievant's comment that he believed that he was numbering exhibits correctly, did not understand where he was deviating from the FOH, and that his exhibit numbering was

"good enough" for other DDs and ADDs in the past, was not proof of Uncooperative Behavior. This comment was a direct response to an inquiry from Ms. Lenkaitis complaining about the Grievant's numbering of file exhibits and asking the Grievant "What do you perceive the requirement to be in this regard?"

For all of these reasons, Reason I, Specification 12, is dismissed as unproved, and is not sustained.

Reason I, Specification 13, is also not sustained. The charge that the Grievant was guilty of Uncooperative Behavior by sending a series of e-mails in late January seeking clarification of when he was expected to engage in conciliations and how to handle those conciliations is unsupported by the preponderance of the record evidence. Rather, fairly viewed, the District Office Guidelines were ambiguous, as written, and even less certain, as applied by management, in terms of when and how to conciliate. The Grievant was assigned to work as OD on a full-time basis and had not done so for some time. His attempts at obtaining clarification, particularly given the continuing prior and current criticism of his performance by management, so as to avoid greater problems, was mere ordinary prudence and cannot be deemed Uncooperative Behavior. Further, his actions in identifying areas where he felt uncomfortable compromising Complainant confidentiality was not Uncooperative Behavior. Both in tone and in content, the Grievant's January 2004 e-mails were legitimate questions designed to clarify matters that he was expected to address on a daily basis from that point forward.

There is no question that the Grievant believed that the Guidelines on Taking Complaints, which state that they "are guidelines only" and employees may "use your discretion and judgement to make exceptions" were contrary to the FOH and

Departmental law and regulation. Specifically, those District Office Guidelines, which were apparently created by Ms. Scharlemann, provide that if there were six or fewer employees potentially due back wages, then the Investigator was to conciliate for the Complainant and seek future compliance from the employer. The Guidelines also stated that Complaints should not be taken from "high wage earners" (further defined by the Guidelines as those earning more than $15.00 to $20.00 an hour or more than $500 to $600 per week) unless involving potentially large cases affecting many employees and that, failing to qualify as a large case, the Investigator should provide to the Complainant notice of the individual's Section 16(b) rights, conciliate for the Complainant where appropriate and provide the information to the Investigator's supervisor as a lead where appropriate. The Guidelines also provided that Complainants must provide certain records and sign a "permission to use name slip" or the Department might decline to investigate. Further, the Guidelines direct that no complaint be taken from anyone who quit working for the employer more than 6-9 months earlier because the Statute of Limitations (which is either two or three years) had "run too much" and the "information is dated"; in those cases, the Guidelines provide that the Investigator is to send the individual the Section 16(b) notice and, as in the case of "high wage earners" conciliate and/or give the matter to a supervisor as a lead "when appropriate."

In practice, it appears that the DO Guidelines, as applied, required the Grievant to conciliate cases that did not meet the Guidelines standards for mandatory conciliation. The record contained notes from Ms. Scharlemann to the Grievant directing him to conciliate two cases – one involving seven employees where it says "send letter to C [Complainant] requesting pay stubs and PTUN [permission to use name]. If no PTUN,

we cannot pursue as only 7 affected" and a second involving 25 employees in which the allegation was failure to pay overtime and failure to pay for time worked and the Grievant was instructed to "conciliate for C only. Discuss future compliance as best you can based on limited information in complaint."

Although provided with a copy of the Guidelines on January 12, 2004, prior to being assigned as OD, the Grievant raised a number of questions and objections to the Guidelines in the days that followed. The Grievant e-mailed Ms. Scharlemann and Ms. Lenkaitis posing certain questions about the Guidelines and whether he should wait for the documentation prior to conciliating and prior to the time standards beginning to run. Ms. Scharlemann replied by email, dated January 20, 2004, at 4:59 p.m., as follows:

> The letter we use to request pay stubs, PTUN and other written documents from employees filing complaints is not to be used in conciliations. You assign the conciliation to yourself the day you take the complaint.
>
> Conciliations are a quick in and out process that should be done in 2 to 3 hours maximum. You will not need anything from the complainant in the vast majority of these cases. By the time you hang up the phone with the complainant you should have a basis for coverage and have estimated the back wages based on the information provided by the C so you are ready to call the employer. The employer always has the right to go through their own records and calculate the back wags more exactly but most deal with you with your estimate. If the ER says they RTP you 16b the C and move on.
>
> Terri sent you an e-mail on 1/12/04 with instructions that had been sent to all WHIs regarding processing conciliations.

The Grievant replied by e-mail, dated January 21, 2004, at 9:02 a.m., as follows:

> I did revisit Terri's E-mail of last week, however, it did not address the questions I asked you earlier in the day on Tuesday.
>
> My concern is, before I ask an employer to pay wages, I want to have some idea if documentation exists to support the employees claim, i.e., pay stubs, an employee calendar as to hours worked, or what. I am also unclear as to what you want conciliated or you want an investigation of a company practice set up. For example, Peter Kallavig, an ex-employee of Work Connection – a temp help service. Low wage industry-low wage employee. If it is a company practice that they do not combine hours in a workweek when a temp service employee works at 2 different firm's, we probably should be investigating. The ServiceMaster issue is the same.

> I am happy to conciliate these cases, however, it is helpful to have documents in front of me. In addition, you emphasized taking more complaints in the employee meeting of last week.
>
> Denny, in summary, I don't want, in my desire to do a good job, and to give you option as to how to proceed, because of the Performance Standards to have it held against me. I feel it would be helpful for you to let me, and others in both offices know.

Ms. Scharlemann replied several hours later with the following e-mail:

> You have my e-mail from 1/20 directing you how to handle conciliations. Please follow it. You also should read FOH 51a02 again.
>
> You were given the DO Guidelines on Taking Complaints and they were thoroughly discussed with you on January 12. Based on the information in the e-mail below Work Connection fits in the Guidelines you were given for taking a complaint. The worker is low-wage and the practice affects a number of workers. You give no reason why you would consider this to be more appropriately handled as a conciliation rather than an investigation. . . .
>
> If you are not sure whether a complaint should be conciliated or handled as an investigation you should place it in the New Complaint folder and Terri and I will decide. In most cases you will make this determination yourself and assign the conciliation to yourself. However, in the instances where you are not sure you should put a short note with the complaint indicating that you considered the complaint for a conciliation and state why.

The following day, the Grievant related that he still had some uncertainty about when to conciliate and stated that, after speaking with peers, there appeared to be a lack of clarity in the office on that subject. The Grievant offered to sit down with Ms. Scharlemann and discuss certain questions about when cases should be conciliated "rather than [engage in] a barrage of e-mails." Ms. Scharlemann replied that the Grievant should direct any questions on DO processes to management. When the Grievant replied that he did have some questions and asked to take them up the following week at some point, Ms. Scharlemann sent back an e-mail that stated, in its entirety, "Send them to me on e-mail," prompting the Grievant to write back that:

> You apparently want to keep the barrage of E-mails going. I'll seek guidance from the union and then respond.
>
> I would like to work with you positively, however, it certainly seems difficult.

The following morning, Ms. Scharlemann wrote to the Grievant as follows:

> Your claim of a desire to work with me positively is not credible given the numerous inquiries concerning matters that were discussed with you during your initial training on January 12 and subsequently explained again in reply to your e-mail inquiries. If you are truly interested in maintaining a positive working relationship, I suggest that you follow the instructions that have already been given to you regarding your work assignments.
>
> If you plan to consult with the union during work hours, I would like to remind you that you must request and receive approval from Michelle for the use of official time for that purpose in advance.

On January 30, 2004, the Grievant and his Union representative met with Mr. Reardon to discuss the AWOL grievance and other matters. The Grievant raised questions about whether the Guidelines and instruction he was provided as to how to conduct conciliations and when to pursue conciliation conflicted with the FOH, particularly the confidentiality mandate that had been in effect at WH for many years. The Grievant confirmed his concerns in a seven-page, single spaced memorandum addressed to Mr. Reardon and dated February 9, 2004. The memorandum discussed the facts concerning various specific cases that had resulted in some criticism of the Grievant by Ms. Scharlemann or others on the management team. According to the memorandum, Ms. Scharlemann directed him to conciliate a number of cases that called for handling as a Complaint under the DO Guidelines and complained about specific alleged bullying and harassing behavior towards himself and others from Ms. Scharlemann and Ms. Lenkaitis.

The memorandum proposed a fresh start and to "try to give each other the benefit of the doubt." The Grievant conceded that "neither management nor [himself was] perfect" and sought a transfer (to Columbus to work under Mr. Victory or elsewhere) or a detail to a location where he did not report to Ms. Scharlemann and Ms. Lenkaitis.

The memorandum noted that he was "tired of trying to cover [his] rear end to avoid management keeping 'book' on [him]" while he "likewise [kept] book on them" and suggested that it was not in the best interest of the taxpayers, the Department, or their clients to continue on the present course.

The Grievant requested a response from Mr. Reardon. No reply, however, was ever made to that memorandum. The record failed to contain evidence that linked the Grievant's February 9, 2004 memorandum with the decision to remove him from federal service.

Ms. Scharlemann and the Grievant may well have had differing views as to the proper method for vigorous and effective enforcement of those laws and regulations for which the Department had enforcement responsibility. That disagreement, however, and the Grievant's actions in questioning directives that were at odds with the manner in which he had been enforcing those laws for 20 years, cannot provide grounds for discipline and did not constitute Uncooperative Behavior.

For all of these reasons, Reason I, Specification 13, is not sustained due to a lack of proof that the Grievant's activities constituted Uncooperative Behavior.

Reason I, Specification 14, is also not sustained. The Grievant completed a WHISARD submission in a "no money, no violation" conciliation case and then, on management review, the system reported fatal errors, four problems, and four warnings in the submission. The Grievant asked for a copy of the original WH-51. The Grievant had a legitimate reason for seeking the original WH-51. He wanted to verify that he would not be blamed for the fatal error being reported by the system or for the other problems or warning presently appearing in the system. (In fact, Ms. Lenkaitis' e-mail of March 2,

2004, at 8:20 a.m., makes clear that while the WHISARD system would not have allowed the Grievant to close out and submit the report for management review with a fatal error, obviously something happened after the Grievant's submission to cause the problem.)

Although the two page report was readily available, Ms. Lenkaitis refused and repeatedly directed the Grievant to simply make the WHISARD corrections. Later that same day, he made the corrections, but complained in his accompanying e-mails both about the delay in the management review being performed and about his suspicion that Ms. Lenkaitis' refusal to provide the original WH-51 suggested that she had "something to hide." The Grievant also indicated that he would be speaking with the Union and might consider filing a grievance for harassment.

There is nothing about this behavior that constitutes Uncooperative Behavior on the part of the Grievant. For reasons not clearly defined by the record, the WHISARD system changed and/or eliminated information previously input into the system by the Grievant. When he was criticized for the reported errors during the management review, the Grievant prudently sought access to what he previously had filed. Given the prior history in which relatively minor omissions or errors had been held against him, that request was perfectly understandable, particularly given the ease with which it could have been sent to him. (In fact, Ms. Lenkaitis completed a Performance Standard Advisory, dated March 3, 2004, citing the Grievant's performance as needing to improve due to the "missing" information that the WHISARD system reported at the time of the management review several weeks after the Grievant initially submitted the case for closure, thus proving that the Grievant's concerns were well-founded.) Contrary to the statement by Mr. Reardon in the Decision letter, the original WHISARD WH-51 report

was no longer accessible by the Grievant in the computer system. The system had failed to save various data input earlier by the Grievant. After several unsuccessful efforts to persuade Ms. Lenkaitis to forward the original report to him, the Grievant complied and simply documented his concerns and his plans (which included a protected right to consult with Union representation and to grieve if he ultimately concluded he was treated inappropriately in violation of the Agreement). Nothing about the exchange could reasonably be deemed Uncooperative Behavior.

For all of these reasons, Reason I, Specification 14, is not sustained as factually unproved.

Having found that the vast majority of the Specifications were unproved and that three of the four Reasons were unproved in their entirety, the question is presented as to the appropriate penalty for the two Specifications of Uncooperative Behavior that were sustained as factually proven by a preponderance of the evidence. Applying the Douglas factors, I am persuaded that the maximum reasonable penalty for this proven misconduct is a five day suspension.

The misconduct engaged in by the Grievant is relatively minor – Uncooperative Behavior. The behavior was intentional, however, and the Grievant was previously suspended for numerous cited instances of both uncooperative and unprofessional behavior in 2003. The MSPB appeal of that suspension was withdrawn and cannot now be collaterally challenged even if the rejection of the vast majority of the charges and specifications in this case raises questions about whether, if an improper review of the prior charges and specifications had occurred, they would have been upheld. The Grievant was a long-service employee and, instead of recognizing his many years of

discipline-free prior service as a mitigating factor (as would have been proper), Mr. Reardon apparently treated the Grievant's long-service as an aggravating factor in this case. Although the Grievant's behavior is found to have been intentional, mitigating this behavior is the unusual job tensions and personality problems that he was forced to deal with as a result of his treatment by Ms. Lenkaitis, Ms. Scharlemann, Mr. Reardon, and others. While not a total justification or excuse for the Grievant's behavior, that treatment spanning several years, is found to have constituted bad faith behavior that, in a number of instances, demonstrated an effort to provoke the Grievant into behavior that could then be seized upon to support his potential removal. The misconduct was not notorious and did not impact on the Department's reputation. Neither Party introduced evidence of similar prior cases and the Department does not have a published Table of Penalties.

The record evidence painted a clear picture of tension between the Grievant and his supervisors and managers. That situation did have the effect of requiring those supervisors and managers to focus their time and energies on the Grievant to an inordinate degree. The fault for this situation, however, is largely the product of actions by Ms. Lenkaitis and Ms. Scharlemann that created a strained working environment for the Grievant, who had not been disciplined during his many years of federal Service for multiple supervisors. The record strongly suggests that Ms. Lenkaitis and Ms. Scharlemann distorted some matters and fabricated others in an attempt to trigger the removal of the Grievant. When the Grievant attempted to be more cooperative after his return to work in January 2004, management (which was angry over the Grievant's change of position relative to retirement) ignored those efforts and chose to move

forward with his removal. The record also contained substantial evidence suggestive of animus towards the Grievant by Ms. Lenkaitis and Ms. Scharlemann and, to a lesser degree, by Mr. Reardon.

Balancing all of these factors, I am persuaded that a five day disciplinary suspension is the maximum reasonable penalty that could have been imposed for the Grievant's two proven instances of Uncooperative Behavior as reflected in Reason I, Specifications 1 and 3, both of which took place prior to the decision on the 2003 suspension and prior to the Grievant's long-term sick leave and treatment.

An award will be entered, therefore, finding that the removal of the Grievant was not for such cause as will promote the efficiency of the Service, mitigating that removal to a five-day disciplinary suspension for Uncooperative Behavior for the two proven specifications only, and directing that the Department make the Grievant whole for his improper removal in accord with the Back Pay Act, 5 U.S.C. §5596, et al., and any other applicable law, rule, or government-wide regulation. The Grievant is also entitled to an award directing his reinstatement.

Jurisdiction is retained to resolve any disputes over remedy that the Parties are unable to resolve on remand. Of course, nothing herein precludes the Parties from voluntarily reaching an appropriate agreement with respect to the remedy in this case that varies from the remedy directed herein.

AWARD

The removal of the Grievant, William J. "Doe" was not for such cause as will promote the efficiency of the Service.

The removal action is overturned and is mitigated to a five day suspension for uncooperative conduct for Reason I, Specifications 1 and 3, of the Decision Letter. The Department is directed to make the Grievant appropriately whole in accord with the Back Pay Act, 5 U.S.C. §5596, and other applicable law and government-wide regulation.

Jurisdiction is retained to resolve any disputes regarding the remedy that the Parties are unable to resolve on remand.

June 27, 2006

Ira F. Jaffe, Esq.
Impartial Arbitrator