UNITED STATES OF AMERICA
THE FEDERAL LABOR RELATIONS AUTHORITY

In the Matter of:		
Social Security Administration,	)	
Agency	)	
Respondent	)	FLRA Case No. _____
	)	Case No. FMCS 14-56295
and	)	
Association of Administrative Law Judges, IFPTE, AFL-CIO (AALJ) Union	)	
Charging Party	)	Arbitrator Jerome H. Ross 6621 Weatheford Court McLean, VA 22101

UNION'S EXCEPTIONS TO THE DECISION OF THE ARBITRATOR

Diana M. Bardes
Mooney, Green, Saindon,
Murphy & Welch, P.C.
1920 L Street, N.W., Suite 400
Washington, DC 20036
(202) 783-0010 *tel.*
(202) 783-6088 *fax*
dbardes@mooneygreen.com

Judge Rita Eppler
National Grievance Chair
Association of Administrative Law Judges
401 North Front Street, Suite 400
Columbus, OH 43215
rita.s.eppler@ssa.gov

Counsel for Association of Administrative Law Judges

TABLE OF CONTENTS

Pursuant to 5 C.F.R. Section 2423.40, the Association of Administrative Law Judges ("AALJ," or "the Union,") by its undersigned counsel, hereby files the following exceptions to the decision of Arbitrator Jerome H. Ross (the "Arbitration Award") in *Association of Administrative Law Judges, AFL-CIO and Social Security Administration, Office of Disability Adjudication and Review*, FMCS Case No. 14-56295 (January 16, 2017).[1]

The AALJ filed a grievance asserting that Respondent Social Security Administration, Office of Disability Adjudication and Review ("SSA" or the "Agency") violated Article 15 of the collective bargaining agreement between the parties when it issued a February 18, 2014 memorandum (the "Telework Memo") (Jt. Ex. 5)[2] requiring Administrative Law Judges ("ALJs" or "Judges") to schedule a set number of cases per month and adjudicate their cases within certain set timelines in order to be eligible for telework.

RELEVANT CONTRACT PROVISIONS

Article 15, Section 7(L) of the Collective Bargaining Agreement ("CBA" or "Contract") provides, in relevant part:

3. Judges will schedule hearing days prior to selecting the days on which they telework. Selection of telework days will be made consistent with this Agreement and the Telework Act. If, the Employer determines that a Judge has not scheduled a reasonably attainable number of cases for hearing, then after advising the Judge of that determination and further advising the Judge that his or her ability to telework may be restricted, the Employer may limit the ability of the Judge to telework until a reasonably attainable number of cases are scheduled. **The Parties agree that any dispute as to whether the Employer has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures.** (emphasis added).

[1] The Arbitration Award was served by Arbitrator Ross on counsel for the AALJ, Diana Bardes, via regular mail. The Arbitration Award is dated January 16, 2017. These exceptions are timely filed pursuant to 5 C.F.R. § 2425.2(b), including five additional days for filing due to service by regular mail.

[2] Copies of relevant exhibits from the arbitration are attached hereto and are identified by the assigned arbitration exhibit number for ease of reference.

4. The Telework Act recognizes that telework may not diminish employee performance of Employer operations. If: a) a Judge has one of more seriously delinquent cases in status controlled by a Judge ... and b) has also been advised of that situation and of the fact that a failure to correct the matter may lead to a restriction of his or her ability to telework until the matter is resolved, and c) the Judge has not corrected the matter in the period consisting of the Judge's next fifteen working days, then the Employer may restrict the ability of the Judge to telework until the matter has been resolved and also direct that the Judge report to the office on a previously scheduled telework day(s) to work on those cases and move them into the next status. **The Parties agree that any dispute as to whether the Employer has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures.** (emphasis added).

Jt. Ex. 4.

RELEVANT LAW

Telework Enhancement Act of 2010, 5 U.S.C. § 6503
In General.- The head of each executive agency shall ensure that –

…
(3) teleworkers and nonteleworkers are treated the same for purposes of –
(A) periodic appraisals of job performance of employees;
(B) training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;
(C) work requirements; or
(D) other acts involving managerial discretion; …

STATEMENT OF FACTS

The Social Security Administration is a federal agency within the meaning of § 7103(a)(3) of the Statute. All full-time and part-time, non-supervisory judges employed by SSA are represented by the AALJ, a labor organization within the meaning of § 7103(a)(4) of the Statute. *Id.* The Union and the Agency entered into a collective bargaining agreement in 2013. Jt. Ex. 4.

The AALJ and the SSA are parties to a CBA which governs the terms and conditions of employment for ALJs working within ODAR. Jt. Ex. 4. When the parties negotiated their current collective bargaining agreement, they disagreed as to various provisions, including requirements for being eligible for telework. *See* Jt. Ex. 6. After reaching impasse, the Federal Service

Impasses Panel ("FSIP") imposed language on the parties, including Article 15 of the current contract, which had been recommended by Ira Jaffe, who had been designated mediator/fact-finder pursuant to the FSIP's procedures. Jt. Ex. 6; Jt. Ex. 7.

Article 15, Sections 7L.3 and 7L.4 of the Contract, as imposed by FSIP, state that if a Judge does not schedule a "reasonably attainable" number of cases for hearing or if a Judge has a "seriously delinquent" case, then the Judge's telework eligibility may be restricted by the Agency. Under the current Contract, the Union has the express right to grieve any disputes arising under Article 15, Sections 7L.3 and 7L.4: "**The Parties agree that any dispute as to whether the Employer has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures."** Jt. Ex. 4. The parties did not bargain about the meaning of the terms "reasonably attainable" and "seriously delinquent," nor are they defined anywhere in the Contract.

The fact-finder supplied his rationale for the language of Article 15, Section 7L. Jt. Ex. 6. He specified that the Agency would be allowed to impose production quotas as a "limited mechanism" only for "outlier" judges. Jt. Ex. 6 at 28. In other words, only Judges whose production was markedly outside the norm could have telework restricted, and only under the conditions set forth in Article 15 of the Contract. In addition, the fact-finder stated that the variability related to the Judge's docket and the Judge's specific circumstances needed to be taken into account (e.g., complexity, size of case files, and leave taken). Jt. Ex. 6 at 29.

However, rather than address Judges' telework requests on an individual basis, the Agency set out to unilaterally impose baseline definitions of "reasonably attainable" and "seriously delinquent." These definitions were issued by Chief Administrative Law Judge Debra Bice ("CALJ Bice"), in a Telework Memo in February 2014. Jt. Ex. 5. The Agency's unilaterally

created definitions of these terms are directly contrary to the purposes of the contract language imposed in the impasse procedure and accordingly, are in violation of the Contract.

The direct result of CALJ Bice's memo is to impose a numerical quota, requiring a uniform numbers of cases to be scheduled for all judges and an adherence to uniform benchmarks for case processing. The memo does not reflect reasonable numbers because it does not take into account how long it actually takes a Judge to adjudicate a case nor does it take into account the variables of each Judge's docket. The Telework Memo also fails to take into account the many responsibilities of each individual Judge and a variety of factors that can affect the Judge's ability to move cases, including availability due to leave taken (e.g., for reasons of illness, vacation, or educational training).

The Union properly filed a grievance regarding this contract interpretation issue, Jt. Ex. 1, and a hearing was held on eight (8) separate days (during the period of November 2015 through September 2016). The record is clear that the Agency unilaterally and impermissibly defined contract terms and then relied on those improper contract interpretations to impose uniform production quotas and restrict telework for ALJs.

THE ARBITRATOR'S DECISION

The Arbitrator held 8 days of hearings in this case, resulting in a correspondingly lengthy transcript. There were 96 Union exhibits and the Union's brief was 45 pages long. The Arbitrator issued a decision in which the "Discussion and Findings" section consisted of less than two double-spaced pages. The following is the Arbitrator's analysis in its entirety:

> The parties have differing understandings of their negotiated CBA language including Arbitrator Jaffe's language. I am obligated to determine and carry out the mutual intent of the parties. An ambiguity exists where any of the parties failed to express their intention with clarity or if there was an inconclusive meeting of minds during the negotiations.

In the instant case, plausible contentions may be made for conflicting interpretations of the CBA language at issue, including whether the language is clear or ambiguous. When a mutual intent can be discerned with a simple reading of the pertinent language, there is no justification for going beyond the stated words if their meaning is plain to me, although the parties may differ.

The Union's position is based primarily on what is known in arbitration as "gap filling" by adding words where contract silence was not intended. There is no clear dividing line between gap filling and adding words or meanings that modify the contract. Implied words will be acknowledged if such an interpretation can be derived from the contract as a whole. Otherwise, a party cannot gain at arbitration what it could not gain in collective bargaining. One portion of the contract should not be interpreted so as to nullify or make meaningless another provision.

I find the Union has not established that the Agency's management rights have been limited by the bargaining process. Arbitrator Jaffe's language in the final sentences of 7 L.3 and 7 L.4 is more reasonably read as plain language, especially where it states "pursuant to the negotiated grievance and arbitration procedures," wherein an ALJ can challenge management's actions only after his or her telework is restricted. Indeed, as the Union has noted, "... the concepts of reasonable attainability in the scheduling of hearings and the timely movement of cases in a judicially controlled status involve individualized determinations, taking into consideration all of the facts relevant in a particular Judge's case." This is the basis for the Telework Memo. Accordingly, there is an insufficient basis for concluding that Arbitrator Jaffe's language set up the grievance and arbitration procedure and addressed only outlier Judges. As a result, the Telework Memo more reasonably constitutes management guidance for when an ALJ's ability to telework may be restricted. Agency management has a legitimate need to fulfill this requirement as a management right under Article 3 of the CBA.

Based upon the above findings, the Telework Memorandum grievance fails to raise an arbitral issue as it constitutes the Agency's exercise of its retained right under 5 USC 7106 (a) and Articles 3 and 15 of the parties' CBA to set the parameters or guidelines for completion of the Agency work.

THE UNION'S EXCEPTIONS AND ARGUMENT

The Arbitration Award is deficient because it does not draw its essence from the parties' collective bargaining agreement. "To demonstrate that an award fails to draw its essence from a collective bargaining agreement, a party must show that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact, and so unconnected with the wording and purpose of the agreement, as to manifest an infidelity to the obligation of the arbitrator; (3) evidences a manifest disregard of the agreement; or (4) does not represent a

plausible interpretation of the agreement." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 3615 and U.S. Dep't of Health & Human Servs., Social Sec. Admin., Office of Hearings and Appeals*, 44 FLRA 806, 813 (1992); *see also U.S. Dep't of the Air Force, Oklahoma City Air Logistics Command Tinker Air Force Base and Am. Fed'n of Gov't Employees Local 916,* 48 FLRA 342, 348 (1992) (setting aside an award that manifestly disregarded the parties' agreement). In the instant case the Arbitrator's award fails on all four of the above- mentioned criteria.

The Arbitration Award is simply not compatible with the plain wording of Article 15, Sections 7L.3 and 7L.4 because it permits the Agency to rely on a general management rights clause in the CBA under circumstances where the parties have specific language in the CBA that directly conflicts with the clause by addressing the issue and restricting the Agency's actions.

Arbitrator Ross found that the Union should not obtain in arbitration what it failed to obtain in negotiation. That maxim may be applied to the Agency as well. The Agency limited its own management right when it submitted to negotiation and impasse resolution. There is no longer any unfettered right reserved to management regarding the number of hearings to be scheduled in order to telework under the language supplied by the fact-finder. The plain wording of Article 15, Section 7L.3 restricts the Agency to requiring only the number of hearings which are "reasonably attainable." In the Arbitration Award, Mr. Ross handed that reserved right back to the Agency even though the CBA expressly precludes it and the Agency had limited it by its actions. Thus, the Arbitrator has given the Agency something it failed to obtain in negotiation or the impasse proceeding. Having its right limited through the bargaining and impasse procedure, the Agency may not now enjoy an unfettered management right in this area.

For the reasons that follow, the Union contends that the Arbitrator erred by finding the instant grievance not to be arbitrable and requests the Authority grant the Union's exceptions and

set aside the award.

ARGUMENT

I. The Arbitrator Erred in Concluding that the Agency had a Retained Management Right Making this Grievance Not Arbitable where the Collective Bargaining Agreement Language Directly Addressed the Specific Issue; the Arbitrator's Award Evidences a Manifest Disregard of the Parties' Collective Bargaining Agreement.

It is axiomatic in labor relations and law that management retains all rights until they are limited by a contract. The Arbitrator erred when he found that the Agency had a retained management right to determine the meaning of the terms "reasonably attainable" and "seriously delinquent" and, thereby, mandate a minimum number of cases scheduled and processing times in order for a Judge to telework.

If there were no contract provisions limiting a reserved management right, the Arbitrator would be free to decide that the Agency retained that right. However, in the instant case, the parties have bargained to impasse and the reserved management right has been limited by the language fashioned by the fact-finder and imposed by the FSIP. Arbitrator Ross concluded that management retained a right, expressed in the Telework Memo, to decide on a minimum number of reasonably attainable or seriously delinquent cases. However, this conclusion is not supported by any facts - neither the plain language of the Contract nor the bargaining history – nor by any acceptable legal theory.

The Agency limited its management right by negotiating terms of telework and then bargaining to impasse. After submitting to bargaining, impasse arbitration and the subsequent imposition of contract language, the Agency cannot now rely on a management rights argument. The Agency's unilateral interpretation and definition of the Contract's terms are inconsistent with the bargaining history and the contract terms themselves. By its Telework Memo, the Agency used its unilateral interpretation of the Contract as an opportunity to impose uniform

Agency-wide quotas for case scheduling and processing times in violation of the clear language of the CBA.

Moreover, even if an ambiguity exists in a contract, it does not mean that an employer has the right to unilaterally decide on its own clarification of the language pursuant to its management rights clause. Even if this were a management rights issue, the Agency cannot assert that right because it has bargained over telework and submitted that telework provision to impasse arbitration. Therefore, its right to assign work according to the management rights clause of the Contract has been superseded by the requirements of Article 15. Moreover, the unilaterally created definitions of "reasonably attainable" and "seriously delinquent" are not reasonable under the circumstances herein, and thus they are not enforceable under the Contract.

The Agency's unilateral definitions of contract terms imposed on ALJs are inconsistent with the purpose of the contract language and the bargaining history. Where contract language is ambiguous, arbitrators look to the stated purpose of the contract language and the bargaining history. This contract language was imposed in impasse arbitration. The stated purpose of the impasse arbitrator's language is to provide a mechanism for the Agency to deal with a small minority of "outlier" ALJs whose caseloads are at the extreme minimums or maximums among the ALJ cohort. Jt. Ex. 6 at 28.

"Pre-contract negotiations frequently offer a valuable aid in the interpretation of ambiguous provisions." Elkouri & Elkori, *How Arbitration Works*, 7th Ed. at pp. 9-26. When the principal purpose of contract language can be ascertained, it is to be given great weight in interpreting the words of the provision. Elkouri, at pp. 9-33. Here, the principal purpose of the contract language and the bargaining history with respect to the interest arbitration for the parties' collective bargaining agreement make clear that the Agency is specifically disallowed

from conditioning telework eligibility based on agency-wide minimum goals affecting any judge other than an "outlier" judge.

Neither the Agency nor the Union drafted the language found in Article 15 or invented the disputed contract terms. They did not discuss the meaning of these terms during negotiations. (Tr. Vol. II 213:7-214:4; 220:21-24). However, in the fact-finding report, the fact-finder, Jaffe, explicitly stated that he was providing the Agency with a "limited mechanism" to address outlier cases. Statistics show that the number of cases – 600 cases – unilaterally chosen by the Agency as a cutoff for permission to telework is not met by half of the ALJs, not simply by outlier judges. Jt. Ex. 6 at 28. Since there was never mutual assent to the at-issue language by the parties in this case, requiring the issue to be addressed in impasse arbitration, the clear and express intent of the impasse fact-finder must be substituted. Here, that intent was thwarted by the Agency's decision to substitute its own decision for the fact-finder's meaning.

Acknowledging that he was leaving the term "reasonably attainable" undefined, the fact-finder explicitly stated that he chose not to set a specific number of cases necessary for a judge to telework. He noted that the determination of reasonable attainability "is expected to be situation specific, taking into account all relevant and appropriate factors." Jt. Ex. 6 at 29. Mr. Jaffe also clearly stated that he was not going to adopt the Agency's existing goals as the record failed to establish that they were appropriate or attainable. Mr. Jaffe stated "this is not an attempt to condition the ability to Telework upon a minimum number of case dispositions." Jt. Ex. 6 at 27.

Despite Mr. Jaffe's guidance as to the meaning and intent of the imposed contract language, CALJ Bice admitted that she unilaterally defined "reasonably attainable" as 600 scheduled cases a year for all Judges (Tr. Vol. V 61:20-62:8). She chose 600 cases because approximately two-thirds of all ALJs scheduled 600 cases in 2013. (Tr. Vol. V 63:8-10.) The

Agency's own documents show, however, that the percentage of Judges scheduling 600 cases per year by March 2016 was less than 50%. Un. Ex. 67. By the time of the arbitration, more than half of the ALJ corps would be defined as "outliers." Un. Ex. 67. [3]

The Agency's definitions of "reasonably attainable" and "seriously delinquent" are unreasonable. The Union demonstrated that in order to adjudicate the requisite number of cases to be eligible for telework (50 cases per month or 600 cases per year) the amount of time allotted by the Agency to adjudicate each case was 2.55 to 2.67 hours (Tr. Vol. VII 66:1-69:10), which for the majority of Judges is not "reasonably attainable."[4] Thus, based on the same reasoning, it follows that the Agency's determination of cases that are "seriously delinquent" is also unreasonable.

Despite the explanation of the fact-finder, clarifying the Contract term, the Agency decided to unilaterally establish its own interpretation to the meaning of both "reasonably attainable" and "seriously delinquent." The Agency's actions in defining and imposing these terms run directly afoul of the CBA because it has neither won the right in bargaining nor had it imposed by the fact-finder and FSIP. Because the Arbitrator ignored both the plain language of the Contract and the fact-finder's explanation, the Arbitrator's decision fails to draw it's essence from the Contract, and the Union's claims are arbitable.

[3] Mr. Jaffe never intended for the Agency to set a minimum number of cases that screened out significant numbers of Judges from teleworking. Rather, he expected the Agency to take a look at the numbers of cases that the Judges were scheduling and only deny telework to those who were "outliers" and had no reason, considering all of the facts in their individual situations, to be well below the norm. Outlier Judges, encompassing only those on the fringes, were to be restricted from teleworking by the "reasonably attainable" and "seriously delinquent" contract language – not the bulk of the bargaining unit Judges. Clearly, Mr. Jaffe did not mean that "reasonably attainable" and "seriously delinquent" would be employed by the Agency so as to prevent a half, a third, a quarter, or even a tenth of the bargaining unit from teleworking – only outliers.

[4] Multiple Judges testified that cases take on average a minimum of 7 to 10 hours to adjudicate. *See, e.g.*, Tr. Vol. VII 153:4-7; Tr. Vol. VII 269:7-8; Tr. Vol. III 126-132.

II. The Arbitrator's Conclusions Are so Unconnected with the Wording and Purpose of the Parties Collective Bargaining Agreement as to Manifest an Infidelity to the Obligation of the Arbitrator.

Parties to arbitration expect an arbitrator to draw the essence of the Award from the contract. The Arbitrator wrote that he finds "the Union has not established that the Agency's management rights have been limited by the bargaining process." Nowhere in the decision does he give the parties a reasoned explanation that would justify why he reached that conclusion or how it is based on the plain language of the contract or the history of how that language made its way into the contract.

The Union recognizes that finding of an infidelity to the obligation of an arbitrator is a significantly strong standard. These circumstances, showing as they do a willful failure to acknowledge the clear contractual language and the negotiating history in order to find that the imposition of a minimum number of scheduled hearings and processing times are an exclusive management right, fit squarely within the aforementioned standard for granting exception. To find that the Agency did not limit its management rights by specific contract language is simply incorrect as a matter of both fact and law, as well as beyond explanation given the facts presented in the instant arbitration.

In reaching his conclusion, which is in conflict with the plain language of the CBA, Arbitrator Ross states that "Arbitrator Jaffe's language in the final sentences of Article 15, Sections 7L.3 and 7L.4 is more reasonably read as plain language, especially where it states 'pursuant to the negotiated grievance and arbitration procedures,' wherein an ALJ can challenge management's actions *only after his or her telework is restricted*." (emphasis added). This language is not included in the Contract.

By adding this language that is nowhere found in the Contract, the Arbitrator took the position that a national level grievance, filed on behalf of all similarly situated teleworking Judges, is improper. Nothing in the plain language of Article 15, Sections 7L.3 and 7L.4 that permits "**any dispute as to whether the Employer has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures"** would preclude a national grievance representing the rights of all similarly situated teleworking Judges. Nonetheless, it should be noted, that the Union provided evidence at the hearing that specific Judges' telework was restricted in contravention of the Contract. The Union presented testimony from Union officials as well as several Judges whose telework had been denied. (Tr. Vol. VII 271:16-1; Tr. Vol. III 71:14-25; Tr. Vol. VII 271:18-22; Tr. Vol. III 87:7-19; Un. Ex. 36). Thus, under any plausible reading of the CBA, including Arbitrator Ross' reasoning, this grievance is clearly arbitrable.

The Arbitrator erred when he interpreted the "plain meaning" of the last sentences of Article 15, Sections 7L.3 and 7L.4 to mean that only claims in which the Employer restricted the rights of individual judges to telework could be brought to arbitration under the grievance and arbitration procedure of the Contract. There is no such restriction within the language of the Contract and, in fact, any dispute about whether the Employer has unlawfully restricted the right to telework, whether for individuals or judges as a class, would be permissible under the clear language of this contract. Therefore, the Arbitrator erred when he looked outside the contract and substituted his own interpretation of the plain meaning of the language of Article 15, Sections 7L.3 and 7L.4.

Those provisions, imposed by the fact-finder, provide that "... **any dispute as to whether the Employer has properly restricted the ability to telework under this paragraph is to be**

resolved pursuant to the negotiated grievance and arbitration procedures." Reading Article 15, Sections 7L.3 and 7L.4 in this context, or any context, it is impossible to reach any other conclusion other than this: the phrase "**any dispute**" does not distinguish between individual and group grievances or among grievances brought before or after the Employer has restricted telework. Unless one goes outside the Contract to interpret those words, there is no limitation on who can bring a grievance under this language or when it can be brought. The plain meaning of the Contract specifically accommodates all grievances under Article 15, Sections 7L.3 and 7L.4 – even those that Arbitrator Ross seems to think were excluded. In this respect, the Arbitrator inappropriately looked outside the contract language to deny the instant grievance.

Arbitrator Ross mistakenly found that Article 15, Sections 7L.3 and 7L.4 presented him with an issue of requiring analysis based on gap-filling. In fact, the Union's arguments support the opposite conclusion - that the language is easily interpreted and should be applied as written. However, had the Arbitrator felt that there was some ambiguity, he should have relied on the fact-finder's intent as expressed in his report. Arbitrators use bargaining history to supply an understanding of the parties' intent when forming a collective bargaining agreement. In cases where contract provisions are supplied by an impasse mechanism, we look to the fact-finder's explanation of intent as if it were bargaining history.

Arbitrator Ross went outside the contract when he ignored the intent of the fact-finder in supplying the disputed contract language. As discussed above, the fact-finder made a definite choice not to set a specific number of cases necessary for a judge to telework. Yet, despite this clear and plain language of the fact-finder's intent and the at-issue contract terms, Arbitrator Ross found that the Employer had a retained right to specify a number that is "reasonably attainable." Further, he found that the Employer had a retained right to apply that number across

the board to every ALJ, instead of making decisions about a "reasonably attainable" caseload in a way that is "situation specific, taking into account all relevant and appropriate factors" for each ALJ. This information was supplied to Arbitrator Ross in the Union's testimony, evidence and argument. The Arbitrator denied an arbitrable grievance when he willfully ignored the Contract bargaining history in the instant dispute as well as the Union's arguments.

The Arbitrator in this case conflated concepts that were meant to be separate and distinct. He finds that the idea of "individualized determinations" of "reasonably attainable" and "seriously delinquent" cases that consider "all of the facts relevant in a particular Judge's case" is the basis of the Employer's Telework Memo. In fact, just the opposite is true. The Agency's Telework Memo both on its face and in practice prescribes a minimum number of cases that must be scheduled in order for a Judge to telework. In the method of implementing this policy, the Agency has not taken into account individual circumstances of Judges. The Union offered numerous examples in its evidence, testimony and argument (e.g., use of leave time, size and complexity of case files, number of dismissals for failure to appear, the need for experts and interpreters, and available support staff for assistance). The Union argues that such an irrational conclusion must be rectified in the name of justice for all the members of the bargaining unit.

The Arbitrator found, further, that "there is an insufficient basis for concluding that [the fact-finder's] language set up the grievance and arbitration procedure and addressed only outlier Judges. As a result, the Telework Memo more reasonably constitutes management guidance for when an ALJ's ability to telework may be restricted." Not only is there sufficient basis to conclude that the impasse language set up the grievance and arbitration procedure for resolving disputes over telework eligibility, but that is the only possible conclusion that can be drawn given that the procedure is clearly and expressly provided for doing so in the language of the at-

issue contract provisions. Despite this clear language both as to the disputed contract terms and the fact-finder's intent, Arbitrator Ross incorrectly concluded that there was insufficient basis to believe that Mr. Jaffe's language addressed only outlier Judges and that the grievance-arbitration procedure was designated as the route for resolving what is "reasonably attainable" and "seriously delinquent" only as to grievances brought by individual judges after they have been denied telework pursuant to the terms of the Telework Memo.

III. The Arbitrator Erred Since His Award Cannot in any Rational way be Derived from the Parties Collective Bargaining Agreement and His Conclusion does not Represent a Plausible Interpretation of the Parties' Collective Bargaining Agreement.

Whether an Arbitrator uses an objective or a subjective theory of contract interpretation is irrelevant in a case where the parties did not reach mutual assent and the disputed contract provisions were provided by a fact-finder. Such a discussion, which did not occur in this case, would implicate the likely actual intent of each party when coming to agreement.

Here, there is no need for such an analysis. The parties did not reach agreement. The language was supplied by the fact-finder, who has left a clearly marked trail for us to follow. Instead of following the fact-finder's intent, which was expressly clarified by him for the parties, and the plain language of the contractual words at issue, Arbitrator Ross reached outside the contract language to bring into it his own interpretation of the language. However, none of the Arbitrator's conclusions have a basis in reality under the actual contract language. Thus, the Arbitrator has not followed the contract in any rational manner.

The law of the workplace and of grievance arbitration is one of common sense. We look to the most reasonable contract interpretations, the ones that will resolve rather than create problems for the parties down the road. Here, the Arbitrator has interpreted the impasse

provision language to mean that, instead of one grievance brought by the Union on behalf of all its members, the impasse arbitrator intended that only individual grievances involving Article 15, Sections 7L.3 and 7L.4 could be entertained. His interpretation of the contract, which goes well outside the plain meaning of the actual language, would create a situation in which the Union was only able to bring individual grievances after a Judge was refused telework on the grounds that the Judge had not scheduled a "reasonably attainable number of cases" or was "seriously delinquent" in managing their caseload, despite the Agency having defined these terms on a wholesale basis.

The result of Arbitrator Ross' interpretation of the last sentences in the cited contract provisions would be to promote a system whereby the Union would be forced to potentially litigate hundreds of individual grievances to be heard by hundreds of separate arbitrators. That unreasonable interpretation, which was wholly imported by Arbitrator Ross from outside the plain language of the imposed contract provisions in contravention with Mr. Jaffe's stated intent, would create chaos in the system of ALJ telework.

IV. The Agency's Implementation of the Eligibility for Telework Violates the Telework Act by Resulting in Inconsistent Treatment of Teleworking and Non-Teleworking Judges and the Arbitrator Erred in Failing to Address this Violation of Law.

Under the Telework Enhancement Act, 5 U.S.C. § 6503(a)(3)(B), the Agency must treat teleworkers and non-teleworkers the same, specifically for "work requirements." Un. Ex. 27. Both the plain language in the Act as well as the guidance promulgated by the Office of Personnel Management reflects that an agency cannot have one set of rules for teleworkers and another set for non-teleworkers. Un. Ex. 27 and 28. The *Guide to Telework in the Federal Government* issued by the U.S. Office of Personnel Management requires agencies to "establish that the performance of teleworkers will be evaluated consistent with the agency's regular

performance management systems (i.e., teleworkers should be treated the same as non-teleworkers with regard to performance management.)" Un. Ex. 28 at 12. The Guide goes on to point out that performance standards for teleworking employees must be the same as performance standards for non-teleworking employees. Un. Ex. 28 at 24, 30.

Testimony from the hearing, however, shows that the Agency does in fact treat the two groups of Judges differently. Teleworking Judges who schedule fewer than 50 cases per month or do not move cases in accordance with the "seriously delinquent" deadlines lose their telework privileges. Non-teleworking Judges who schedule fewer than 50 cases per month or do not move cases in accordance with the seriously delinquent deadlines did not have any impact on their working conditions. (Tr. Vol. IV 218; 272-273). Because the Arbitrator also failed to consider this arbitrable issue which was proved on the record, the exceptions should be granted.

CONCLUSION

The Union takes exception to the Arbitration Award in the instant case, on the grounds that the Award does not draw its essence from the parties' Collective Bargaining Agreement and that it violates the Telework Act. The Union asks the Authority to find that the grievance is arbitrable.

Respectfully submitted,

/s/ Diana M. Bardes

Diana M. Bardes
Mooney, Green, Saindon,
Murphy & Welch, P.C.
1920 L Street, N.W., Suite 400
Washington, DC 20036
(202) 783-0010 *tel.*
(202) 783-6088 *fax*
dbardes@mooneygreen.com
Counsel for Association of Administrative Law Judges

/s/ Rita Eppler

Judge Rita Eppler
National Grievance Chair,
Association of Administrative Law Judges
401 North Front Street, Suite 400
Columbus, Ohio 43215
Rita.s.eppler@ssa.gov

February 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February 2017, the Charging Party's Exceptions were filed through the FLRA's e-filing system and service copies were served via certified mail to:

MARY L. SENOO, ESQ.
Social Security Administration
Office of the Regional Chief Counsel, Region V
200 West Adams Street, Floor 30
Chicago, Illinois 60606
Mary.Senoo@ssa.gov

AMINAH COLLICK, ESQ.
Social Security Administration
Office of the General Counsel
61 Forsyth Street, S.W., Suite 20T45
Atlanta, Georgia 30303
Aminah.Collick@ssa.gov

MEEKA DRAYTON, ESQ.
Office of General Counsel
Seattle Region
Meeka.Savage.Drayton@ssa.gov

/s/ Diana M. Bardes
Diana M. Bardes