

**American Federation of Government Employees, Local 1923 and  
Department of Defense, Navy, Indian Head Division, Naval Surface Warfare  
Center**

October 19, 1999

Hugh D. Jascourt, Arbitrator

Appealed (O-AR-3246)

**BECAUSE OF THE CONTINUED NONCOMPLIANCE OF THE AGENCY THE  
ARBITRATOR IMPOSED VARIOUS REMEDIES ON THE AGENCY.**

This arbitration began with a stipulated arbitration agreement by the arbitrator in April 13, 1999. Since then the arbitrator issued three compliance decisions and awards. The union filed a motion for compliance on the last decision, but this was withdrawn at the urging of the arbitrator. Since then a new motion for compliance was filed. The agency had been ordered to post the notice and to take diligent and appropriate actions against anyone who participated in the removal or defacing of the notice during a specified period. The arbitrator noted that the agency, among other things, claimed that it did not view the language of the award as requiring it to commence investigations when repetitious removal occurred. The arbitrator imposed various remedies for the noncompliance of the agency, in the instant matter. The arbitrator said that some of these remedies were ones that he never even contemplated or considered in the past. The arbitrator also said that given what has occurred he was compelled to take measures he was otherwise loath to take. Among the measure was an apology to be delivered within three business days from the date of this decision from the grievant's supervisor to the grievant. The agency was ordered to investigate the conduct of the grievant's supervisor. Also, the parties were ordered to reach agreement on all places where the notice was to be posted. And, a statement to all employees was to be drafted that said that anyone who defaced, removed or otherwise engages in activity to interfere with the legitimate posting of labor relations materials will be immediately suspended.

**DECISION AND AWARD**

**APPEARANCES:**

**On behalf of the Indian Head Division, Naval Surface Warfare Center:**

Michael T. McNerney  
Command Labor Relations Advisor  
Department of Navy  
Human Resources Office

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Richard C. Dale, II, Esq.  
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Mary Lacey  
Technical Director  
Department of Navy  
Naval Surface Warfare Center,  
Indian Head Division

**On behalf of American Federation of Government Employees Local 1923:**

William Milton, Jr.  
Director of Representation & Education

Michael J. Snider, Esq.  
General Counsel, AFGE Local 1923

**Procedural History**

This proceeding has its genesis in Stipulated Arbitration Agreements by this Arbitrator and to which the Naval Surface Warfare Center (Agency) and AFGE Local 1923 (Union) were signators on March 29, 1999 and April 13, 1999, respectively. Since then, this Arbitrator has issued three compliance decisions and awards, the last of which (hereafter Compliance Proceeding III) was issued September 20, 1999. The Union filed a motion on September 28, 1999 for compliance with the last decision, but which was withdrawn after the urgings of the Arbitrator during a telephone conference with the parties. However, after another joint telephone conference, the Union filed a new motion on October 8, 1999 responded to by the Agency at the close of business October 14, 1999. In the interim, a compliance proceeding was scheduled for October 15, 1999.

A hearing was conducted on the premises of the Agency on October 15, 1999. Although more than nine hours were consumed in intensive examination of the issues and of evidence, including documentary evidence, most of the proceeding was conducted off the record with no formal introduction of documentary evidence and with no testimony produced under oath. Consequently, the Arbitrator is limited in what he can set forth as findings of fact.

## Discussion and Analysis

When a fabric is frayed and greatly weakened, a minor event may result in significant tearing of the fabric and damage to it. Put in quantitative terms, there may be little difference between 32 degrees Fahrenheit temperature and 34 or 35 degrees. However, when applying this to the temperature of water, the transformation into ice is a rather significant consequence. When looking at what has happened in this case in terms of compliance with the Orders of this Arbitrator's Orders in Compliance Proceeding III, some may view the Agency's actions or inactions to be minor in nature. It is possible some action or inaction was unintended or was not malicious. Nevertheless, the consequence of such action or inaction has been significant in damaging the already frayed relationship of the parties and in harming the Union and its status as the exclusive representative of the members of the bargaining unit.

In addition, the events which have transpired must be viewed in the context of the history of previous non-compliance. Thus, when time deadlines imposed continue to be unmet or when Agency action does not occur or commence until one or two days prior to the compliance proceeding, the repeated pattern cannot be ignored. Exacerbating this even more is what has occurred when the Arbitrator has left unspecified dates certain for Agency action due to his desire to allow reasonable flexibility by the Agency and to reduce the impact on the Agency's resources to accomplish its mission. What has occurred is the Agency's construction of the Arbitrator's wording as a license to engage in an open-ended deferral.

Similarly, the Arbitrator has attempted, where possible, to be less than precise or to not spell out every step the Agency should take so as to once more allow some flexibility by the Agency and to not interfere with the legitimate management prerogatives and responsibilities of the Agency. However, this has led to the Agency's unduly varying from what the Arbitrator has either specified off the record to the Agency with detailed articulation or to varying from what was the clear intent of the Arbitrator's language or from the customary labor-management relations usage of his terminology. Worse yet, this has given the Union a reasonable basis to believe that such interpretations by the Agency have been the manifestation of a deliberate attempt to justify intended noncompliance. Given the history of the Agency's wording of the apology to Robert D. Paiva in terminology, which negated the intent of the apology and of the Agency's changing the language of the Notice the Arbitrator directed the Agency to post, what is the Union to think when the Agency or its representatives who are in positions of authority offer untenable explanations?

A case in point is the Arbitrator's order in Compliance Proceeding In (p. 10) with respect to the posting of the Notice he had previously ordered to be posted but was not posted or which had been removed:

The Arbitrator further Orders that the Agency shall take all appropriate measures not only to maintain such posting during the specified period but also to diligently take appropriate action against anyone who participates in the removal or defacing of the Notice during this specified period.

What is the Union to think when the Agency claims it did not view the quoted language to require it to commence investigations when repetitious removal occurs? What is the Union to think when the Agency argues that its ordering of enclosed bulletin boards satisfies the Order? What is the Union to think when the Agency articulates what may be legitimate difficulties in effectively accomplishing an apprehension of those who engaged in the removal of such Notices? In fact, what is the Arbitrator to think? Moreover, such Agency responses cause a more thorough examination of what the Agency has done which purports to constitute compliance. However naively misguided some Agency explanations may have been, given the history and context, it is difficult for the Arbitrator to confer credibility upon such explanations.

It is in this context that the Arbitrator has imposed the remedies set forth below. Some remedies are ones which this Arbitrator would never had even contemplated or considered or, in the alternative, had he considered them, he would have felt they were inappropriate. However, given what has occurred, the Arbitrator believes he is compelled to take measures he is otherwise loath to take.

## Remedies

### I. The Apology

#### A. The Setting

On March 29, 1999, the Arbitrator directed Mr. Paiva's supervisor Steve Carrier to give

him a written apology for having interfered with Mr. Paiva's protected Union activity. Among other things, in Compliance Proceeding III, the Arbitrator ordered the apology to be given to Mr. Paiva by September 10, 1999 (a date which the Agency had identified in August and promised to accomplish even though the Decision was issued subsequent to that date) and for discipline to be taken against Mr. Carrier after an appropriate investigation had been conducted (P. 12). In another place in the Arbitrator's decision (p. 14), he also ordered investigation and appropriate action against others who allowed improper activity to be taken.

On October'13, 1999, Van Gilmer, the Director of the Utilities Division, gave the apology to Mr. Paiva, upon Mr. Paiva's request to him. It is possible that Mr. Carrier would have personally given the apology to Mr. Paiva had the latter waited longer. However, it is equally possible that Mr. Paiva would still be waiting

for the apology had he not asked Mr. Gilmer for it. It is disturbing that the Agency argued that Mr. Carrier was not obligated to make personal delivery to Mr. Paiva because the Order did not expressly direct that Mr. Carrier do so - despite the Arbitrator's discussion of the impression conveyed by the Agency's terminology in a prior version of the apology . Unfortunately, and more importantly, this has further affected the Union's perception of what on its face may pass as compliance and the Agency's intent to carry out the spirit of any directive and to do anything more than what it is explicitly directed to do when ordered in formal writing to take action.

In addition, the Union alleges that Mr. Carrier has continued to engage in retaliation against Mr. Paiva. Also, Mr. Carrier took unscheduled leave on October 14 and 15 (the date of the hearing). Mr. Carrier did the same thing when the last proceeding was held. The Agency's investigation of Mr. Carrier's conduct has commenced but has not been completed and the investigation of others who may have assisted him in such conduct has yet to be-in.

## B. Remedies

In view of the foregoing

1. Mr. Carrier shall personally deliver said apology to Mr. Paiva within three business days from the date of this Decision in the event he has not done so by then.
2. The Agency shall within three business days of receipt of this Decision post and maintain the Notice in Appendix A in conspicuous places, including all places where notices are customarily posted for a period of 60 calendar days from the date of its posting.
3. The Agency shall expand its investigation of Mr. Carrier's conduct to include any and all conduct by him subsequent to March 29, 1999 and of all parties who allowed him to engage in any improper conduct. The Union shall receive by no later than October 29, 1999 a statement of the instructions given by the Agency to the investigator(s).
4. If such investigation shall conclude with a proposal of suspension of Mr. Carrier for less than 14 business days, the Agency shall provide to the Arbitrator (with a copy to the Union) a detailed justification why discipline for less than a 14-day suspension is justified. A complete copy of the record shall be supplied to the Arbitrator.
5. If either such investigation or the proposal of discipline has not been completed by December 20, 1999, the Agency shall delegate to this Arbitrator the task of completing the investigation and making an effective recommendation of discipline. In furtherance thereof, the Agency shall provide the Arbitrator with

all information it has obtained and the files of the last ten supervisors/managers it has disciplined.

6. Because of the services the Union was compelled to engage in because of noncompliance by the Agency, the Agency shall request within two days from receipt of this Decision payment to be made to the Union's legal Representation Fund in the following amount:

Legal fees for 27 hours at \$200 per hour = \$5,400

Paralegal fees for 29.8 hours at \$90 per hour = \$2,682

Total: \$8,082

Every reasonable effort shall be made by the Agency to ensure payment within 30 days thereafter. The Union shall verify to the Arbitrator and the Agency by affidavit and documentation such services. If such verification has not been received by the Agency by the date this Decision has been received by the Agency, the commencement of payment procedures by the Agency, shall be deferred to two business days after such information has been received by the Agency.

## II. Posting of the Notice to All Employees

### A. The Setting

Because a number of the Notices previously required by the Arbitrator to be posted either were not posted or were removed, the Arbitrator required a number of measures to be taken, including the extension of the posting period to 90 days from August 19, 1999.

Nevertheless, a considerable number of sites exist in which there is no posting. There is controversy whether or not posting ever occurred or whether removal of them has occurred. Furthermore, as indicated above no investigation has been made where removal has been suspected. In some situations, posting has been effectuated, but has been covered by other material - presumably by employees authorized by the Agency. In some other situations, there is a posting but of the Notice which the Agency improperly reworded and such Notice has not been replaced by the properly authorized Notice. In addition, there is disagreement over the locations where such Notices shall be posted.

### B. Remedies

In view of the foregoing,

1. The parties shall promptly reach agreement on all places where said Notice shall be posted. All postings or re-postings shall be accomplished by no later than October 26, 1999.
2. A statement to all employees shall be drafted jointly by the parties, to be signed by Mary Lacey (or the Commander if more appropriate), to address in strong language the significance of problems which have occurred in posting labor relations matters. Such statement shall declare that anyone who defaces, removes or otherwise engages in activity to interfere with the legitimate posting of labor relations materials shall be immediately suspended, in view of the importance of such postings and their protected status. This statement shall be issued promptly.
3. The Notice of the ALL HANDS FORUM referred to below shall identify the issuance of this statement.
4. The period for the posting of the Arbitrator's August 18, 1999 Notice shall be extended to 150 days from August 19, 1999.
5. Electronic delivery of said Notice shall be made promptly to all employees with electronic access, who shall acknowledge electronically such delivery. Hand delivery of said Notice shall be made to all those without such access, who shall sign for such delivery. Acknowledgements shall be provided to the Union.
6. The Agency shall purchase enclosed bulletin boards for "problem areas" agreed upon by the parties.
7. If any of the above statements or agreements are not completed by October 26, 1999, such matters will be finalized on that date in a proceeding before this Arbitrator.
8. Because of the services the Union was compelled to engage in because of noncompliance by the Agency, the Agency shall request within two days from receipt of this Decision payment to be made to the Union's legal Representation Fund in the following amount:

Legal fees for 27 hours at \$200 per hour = \$5,400

Paralegal fees for 29.8 hours at \$90 per hour = \$2,682

Total: \$8,082

Every reasonable effort shall be made by the Agency to ensure payment within 30 days thereafter. The Union shall verify to the Arbitrator and the Agency by affidavit and documentation such services. If such verification has not been received by the Agency by the date this Decision has been received by the

Agency, the commencement of payment procedures by the Agency shall be deferred to two business days after such information has been received by the Agency.

## ALL HANDS FORUM

### A. The Setting

In Compliance Proceeding III, the Arbitrator ordered that an ALL HANDS FORUM be conducted at which the Commander would personally make a public statement regarding the Agency's noncompliance. The Union was to have the opportunity to comment on the format of the Forum and the content of the Notice of the Forum. The Arbitrator did not establish a date certain for this to be accomplished. It was not until the close of business on October 14, 1999 that the Union received any information on the proposed Forum or its proposed date (October 25, 1999). In fact, the Union reasonably believed no action on this matter had commenced.

### B. Remedies

1. The parties shall submit to the Arbitrator the comments to be made at the Forum by the Commander if there is disagreement on the content.
2. The ALL HANDS FORUM shall be conducted on October 25, 1999 in a manner designed to allow all bargaining unit members to attend. Appropriate measures shall be taken to allow others who are unable to sit in the auditorium during the presentation to watch and hear it at other locations simultaneously. If other employees are legitimately precluded from watching and hearing, they will receive the opportunity to watch and hear a tape replay of the Forum at times and places agreed to by the parties.
3. Because of the services the Union was compelled to engage in because of noncompliance by the Agency, the Agency shall request within two days from receipt of this Decision payment to be made to the Union's legal Representation Fund in the following amount:

Legal fees for 27 hours at \$200 per hour = \$5,400

Paralegal fees for 29.8 hours at \$90 per hour = \$2,682

Total: \$8,082

Every reasonable effort shall be made by the Agency to ensure payment within 30 days thereafter. The Union shall verify to the Arbitrator and the Agency by affidavit and documentation such services. If such verification has not been received by the Agency by the date this Decision has been received by the

Agency, the commencement of payment procedures by the Agency shall be deferred to two business days after such information has been received by the Agency.

#### IV. Other

A. By Agreement of the parties, the Arbitrator shall retain jurisdiction of the matters herein.

B. The Agency shall bear all costs of the court reporter and the Arbitrator related to this matter.

C. The parties shall meet and attempt to reach agreement on the matters specified below. if the parties are unable to reach agreement, the Arbitrator shall conduct a proceeding on October 26, 1999 to dispose of such matters. The matters are:

##### 1. Discipline of Don Burchette

###### a. The Setting

Because Mr. Burchette interfered with the Agency's compliance on the Arbitrator's directions to make whole Ralph S. Lucas, Jr. and because Mr. Burchette had engaged in discriminatory and retaliatory conduct toward Mr. Lucas, the Arbitrator ordered an investigation of the conduct of Mr. Burchette for the purpose of determining-discipline. This investigation has commenced but has not concluded.

###### b. Remedy

The parties are to discuss whether there is a date certain by which the investigation and a proposal pertaining to discipline shall have been accomplished. The parties are to also discuss whether the Agency shall delegate to the Arbitrator the unfinished tasks of the Agency if the Agency has not completed them by the agreed upon date certain.

##### 2. Meetings of the Parties

###### a. The Setting

At Compliance Proceeding III, on August 17, 1999, the Agency offered as an

example of its efforts to change the relationship of the parties -and, therefore, compliance - meetings with the Union it-was going to conduct periodically (Tr. I pp. 12-13, 297). The Agency acknowledged at Compliance Proceeding IV that communications by itself - even if not at the level this Arbitrator believes is

needed could have mitigated much of what has occurred. Given the history of the relationship, the absence of communication has led to assumptions by the Union of what was happening or not happening. In fact, the Arbitrator truly believes that even if the Agency were to explain why it has not commenced or finished certain tasks, the Union might acquiesce - something which the Arbitrator senses the Agency would not believe. In any event, the Arbitrator believes that the Agency will continue to be perceived by the Union as engaging in further noncompliance if periodic scheduled communications do not commence soon. The bottom line is that the Arbitrator had assumed that such meetings were about to start in September. The Arbitrator's reliance on this affected the remedies he chose to impose or not impose and their articulation in his September 20, 1999 Decision.

#### b. Remedy

The parties shall discuss when the meetings shall commence and their frequency. They shall discuss whether they shall now schedule the first six meetings and whether the first three shall be facilitated by this Arbitrator. The parties shall discuss also who shall participate in such meetings.

### 3. Team Building

#### a. The Setting

At the heart of noncompliance has been the relationship between the parties and their mutual distrust. The continued noncompliance and the rationalizations, therefore, have caused the Union to view with suspicion almost anything said by the Agency. Unfortunately, the Agency has underestimated the fragility of the situation and has viewed Union responses as being overreactions or even reactions intended to keep "the pot boiling." As explained at the outset, what might otherwise be viewed by the Agency as minor or inconsequential is in reality major in consequence.

Equally unfortunate, the Union may brush off as pretext explanations of how the Agency's allocation of its resources needs to be applied elsewhere at the expense of certain needs of the Union at the time. The Union consequently may not recognizing the Agency's actions as satisfying the interests of those represented by the Union.

In addition, because of the relationship the compliance proceeding have produced a number of spin-offs. The Notice to be signed by the Commander itself was a spin-off. The Agency's alteration of the Notice produced another spin-off. Now the location of postings and discipline of those engaged in removal of notices are other spin-offs. In order to bring an end to the ever-expanding universe of spin-offs and new subjects of compliance, the relationship of the parties needs to be addressed. Although relationship affects matters outside the compliance matters, the prolonged history of these proceedings dramatically

demonstrates the likelihood of continued compliance proceedings unless the relationship issue is directly addressed. They are inextricably intertwined.

b. Remedy

The parties shall discuss whether this Arbitrator and another expert in interest-based methods shall conduct a two-or three day course on team-building and labor-management relationships, when such training shall take place and who should participate. The parties should also address whether they should utilize ADR processes to reduce their outstanding issues and thereby reduce the potential for other areas of controversy to arise. Hopefully, some success in problem-solving may put the parties on a track different than the negative one on which they now are.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Posted by ORDER of Arbitrator Hugh D. Jascourt

WE WILL CEASE AND DESIST from interfering with, restraining or coercing employees in any manner in the exercise of rights assured them by; the Federal Service Labor Management Relations Statute or the Agreement between the Agency and AFGE Local 1923.

We further will not engage in any activity which shall have as its purpose to make bargaining unit employees or their representatives believe they will be disadvantaged by their participation in activity protected by such Statute or permitted by said Agreement.

INDIAN HEAD DIVISION

NAVAL SURFACE WARFARE CENTER (Employer)

Dated: \_\_\_\_\_ By: \_\_\_\_\_

John J. Walsh

Commanding Officer

This is an Official Notice

This Notice shall remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any material. Those not complying with the above instruction shall be disciplined.