In the Matter of the Arbitration	)	
	)	
Between	)	
	)	
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, AFL-CIO	)	
	)	FMCS Case No. 14-56295
and	)	Issue: Telework
	)	
SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY ADJUDICATION AND REVIEW	)	

Before: Jerome H. Ross, Arbitrator

Dates of Hearing: November 17, 18 & 19, 2015, June 7, 8, & 9, 2016
September 14 & 15, 2016

Appearances

For the Union: Diana M. Bardes, Esq.
Rita S. Eppler, Esq.
Marilyn J. Zahm, Esq.

For the Agency: Mary L. Senoo, Esq.
Aminah Collick, Esq.
Meeka Savage Drayton, Esq.

Statement of the Case

In this Step Three grievance, dated April 2, 2014, the Union contends that the number of scheduled hearings as set out in a February 18, 2014 memorandum from Debra Bice, the Chief Administrative Law Judge (CALJ) of the Agency, are not, in fact, reasonably attainable numbers for many Administrative Law Judges (ALJs), thus violating Article 15, Telework of the parties' Collective Bargaining Agreement (CBA), effective September 30, 2013. The Agency's response to the grievance, dated May 9, 2014, states that the relief sought by the Union is not granted

where the Agency did not act inappropriately given the CBA provision in Article 15 stating that management determines when a judge has scheduled a reasonably attainable number of cases for hearing and provides for the procedures the Agency takes when a judge has one or more seriously delinquent cases. By letter dated May 21, 2014, the Union informed management that the Step Three grievance had been referred to arbitration.

By way of background, the Agency's Office of Disability Adjudication and Review (ODAR) employs approximately 1,500 ALJs stationed at approximately 160 hearing offices. The majority of cases heard are adult disability cases. These require decisions as to whether to grant or deny benefits to individuals claiming a disability. Judges must, among other duties, review all evidence in the file, hold hearings, write decisional instructions, and review, edit and sign decisions. The mission of the ODAR is to issue timely and legally sufficient policy compliant dispositions to the public.

The relevant Article 15 Telework provisions are set forth in Sections 7.L.3 and 7.L.4, Accountability, as follows:

> 3. Judges will schedule the hearing days prior to selecting the day 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.
>
> 4. The Telework Act recognizes that telework may not diminish employee performance or Employer operations. If: a) a Judge has one or more seriously delinquent cases in status controlled by a Judge (ARPR, ALPO, EDIT and/or SIGN) [Categories of Seriously Delinquent Cases], and b) has also been advised of that situation and of the fact 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.

CALJ Bice's February 18, 2014 memorandum to all ALJs, the subject of which is New Telework Provisions-INFORMATION, provides in part:

Section 7.L.3 Scheduling a reasonably attainable number of cases for hearing

This section provides that judges will schedule hearing days prior to selecting the days on which they telework, and if a judge does not schedule a reasonably attainable number of cases for hearing, then the judge's ability to telework may be restricted until a reasonably attainable number of cases are scheduled.

There is no fixed number of scheduled hearings required under this section, and any determination regarding the reasonableness of hearings scheduled depends upon the judge's specific situation.

Considering the necessity for quality, timely, and policy compliant hearings and decisions, and historical data, **scheduling** an average of at least fifty (50) cases for hearing per month will **generally** signify a reasonably attainable number for the purposes of this contractual provision. I want to emphasize that this provision concerns the number of hearings **scheduled**, not cases heard or dispositions issued. Accordingly, if you **schedule** at least an average of fifty (50) cases for hearing per month during a twelve-month rolling cycle, then management generally will determine you have scheduled a reasonably attainable number of cases for hearing for the purposes of this contract provision. Conversely, if schedule fewer than an average of fifty (50) cases for hearing per month during a twelve-month rolling cycle, then management likely will determine you have not scheduled a reasonably attainable number of cases for hearing, unless there are extenuating circumstances. For example, management may consider whether the ALJ is on a learning curve or training program or whether the ALJ has been on extended leave. Management may also consider postponement or heard-to-scheduled ratios.

The data showing the average number of hearings you have scheduled during the past twelve-month rolling cycle is now available on "How MI Doing?" Just click on the ALJ Dashboard – Hearings – Scheduled per day. This report reflects hearings scheduled per day – an average of 2.4 hearings scheduled per day is the equivalent of an average of 50 hearings scheduled per month.

When, after consideration of all factors, management determines that you have not scheduled a reasonably attainable number of cases for hearing, they will inform you of the determination and of the possibility that your ability to telework may be restricted. If management concludes there is no acceptable reason for not scheduling a reasonably attainable number of hearings, then they may restrict telework by not approving telework or canceling previously approved telework days. Again, management will consider any extenuating circumstances in making this determination.

Section 7.L.4 – Seriously delinquent cases in judge-controlled status

This section provides that if a judge has one or more seriously delinquent cases in an ALJ controlled status, then the judge's ability to telework may be restricted until the matter has been resolved.
There is no fixed number of days in status after which a case becomes seriously delinquent for the purposes of this contractual provision and any determination depends on the judge's specific situation.

Although there are no fixed numbers, we can provide you with some general guidelines for the purposes of this contractual provision. Absent extenuating circumstances, management generally will consider a case pending in SIGN [Case in ALJ's office waiting final review] for more than ten (10) calendar days as seriously delinquent, and a case pending in ARPR [Pre-scheduling], ALPO [Post Hearing], EDIT [Editing Decision] or other ALJ controlled statuses for more than thirty (30) calendar days as seriously delinquent. Management may consider any known extenuating circumstances, such as whether the ALJ is on a learning curve or training program, whether the ALJ has been on extended leave, or whether the ALJ has been on a travel docket, in determining whether cases are seriously delinquent.

If management determines that you have a seriously delinquent case(s), you will be advised of the situation and of the fact that the failure to correct the matter may affect your ability to telework. At that point, you will have fifteen (15) workdays in which to resolve the matter. If the matter is not resolved within that time, management may restrict your ability to telework until the matter has been resolved, and may also direct you to report to the office on a previously scheduled telework day(s) to work on the case(s) and appropriately move it to the next status.

Again, I believe that these telework provisions will affect only a small number of judges. Most of you are already scheduling a reasonably attainable number of cases, and do not have cases that are seriously delinquent.

Other Cited CBA Provisions

Article 3
Management Rights

The parties agree that management rights, as defined in this article, are consistent with 5 U.S.C. 7106 and other applicable laws.

A. Subject to subsection (B) of this section, nothing in this chapter shall affect the authority of any management official of the Agency:

1. To determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and

2. In accordance with applicable laws:

a. To hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

b. To assign work, take determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted;

c. With respect to filling positions, to make selections for the appointments from among properly ranked and certified candidates for promotion or any other appropriate source; and

d. To take whatever actions may be necessary to carry out the Agency's mission during emergencies.

B. Nothing in this section shall preclude any Agency and any labor organization from negotiating:

1. At the election of the Agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods and means of performing work;

2. Procedures which management officials of the Agency will observe in exercising any authority under this section; or

3. Appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Article 10

Grievance Procedure

Section 2

A. A grievance is defined as any complaint:

1. by any judge concerning any matter relating to the employment of the judge;

2. by the AALJ concerning any matter relating to the employment of any judge; or,

3. by any judge, the AALJ, or the Agency concerning:

a. the effect or interpretation, or a claim of a breach, of this agreement, or,

b. any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Issues

The parties agreed to the following issues:

Whether the Union's April 2, 2014 grievance fails to raise an arbitral issue because CALJ Bice's February 18, 2014 telework memorandum to all ALJs constitutes the Agency's exercise of the Agency's 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.

Whether the number of hearings for scheduling by CALJ Bice's memo of February 18, 2014, sets out a reasonably attainable number of cases pursuant to Article 15, Section 7.L.3 in light of the Agency's requirements and policies for adjudicating cases and the time periods listed in CALJ Bice's memo.

Whether the time periods for case processing required by CALJ Bice's memo of February 18, 2014, constitutes seriously delinquent periods and complies with the requirements of Article 15, Section 7.L.4.

Union Position

The Union maintains that this is a simple case of interpretation of a contract provision. The Agency does not have an unfettered right to interpret the CBA. Rather, its management rights have been limited by the bargaining process.

The Union contends that the Agency does not have a management right to unilaterally define "reasonably attainable" or "seriously delinquent." Because these are not defined in the CBA, they are ambiguous. This is not uncommon where parties ask an arbitrator to interpret the meaning of their contract. Where management has bargained a contract provision, it has limited its own management right in that area and thus its right to assign work according to the management rights clause of the CBA has been superseded by the bargained requirements of Article 15, which expressly provides that the parties must resort to the grievance and arbitration process for any dispute arising under that article. The Agency does not have an unfettered right to set any number it unilaterally determines to be reasonable as this violates the direct language of the CBA. Finally, management rights may be lost through the use of wide open arbitration clauses under which the arbitrator is given authority to decide questions raised by the Union. The cited Article 15 language provides the Union the ability to bring a grievance for any dispute, and, thus, the instant dispute is properly before the Arbitrator.

The Union asserts that the Agency's imposition of limitations on Telework to more than outlier Judges is consistent with the CBA language and the bargaining history, including having

been imposed in mediation/interest arbitration by Mediator/Arbitrator Ira Jaffe, and must be struck accordingly. Arbitrator Jaffe recommended the language included in Article 15, Section 7.L – not the AALJ or the Agency. The recommendations were approved by the Federal Service Impasses Panel (FSIP) in April 2013 and implemented by the Agency on September 30, 2,013.

The Union emphasizes that although Jaffe's language does not define "reasonably attainable" or "seriously delinquent," nor did the parties discuss their definitions during bargaining, his language did set up a mechanism to address disputes under Article 15 pursuant to the negotiated grievance and arbitration procedures; and his factfinder's report indicated that he was knowingly leaving the terms undefined, but the purpose of the language was to give the Agency a "limited mechanism to address…outlier cases" as set forth as follows:

> Section 7.L.3 allows the Agency to limit the ability of a Judge to telework when the Agency has determined that the Judge has failed to schedule a reasonably attainable number of hearings. The standard of reasonably attainable is not defined, but is expected to be situation specific, taking into account all relevant and appropriate factors….The link between timely processing of cases in a status controlled by the Judge and the ability to work Telework is the expectation that being absent from the office on Telework is not diminishing employee performance or Agency operations.

The Union points out that Mr. Jaffe chose only to allow the Agency a limited mechanism to encourage outlier Judges seeking to telework to schedule a "reasonably attainable" number of cases. If he had intended to enable the Agency to apply production quotas to all teleworking ALJs, and particularly to apply one standard production quota to all teleworking ALJs, he could easily have written that, but he did not.

In the same vein, the Union points out, Mr. Jaffe explicitly noted under the heading "The Link Between Scheduling Hearings and the Ability to Telework": "The Agency proposal is based upon its position that Telework is not a legal right. The Agency wishes to provide an inducement for each Judge to schedule a reasonably attainable numbers of cases for hearing

[Footnote 4 below] and to encourage Judges to take appropriate actions to ensure that cases do not remain seriously delinquent when in a controlled status that is controlled by the Judge.

FTNT 4 It is worth noting that this is not an attempt to condition the ability to Telework upon a **minimum number of case dispositions (i.e. goals) or adherence to the case processing benchmarks**. Further, 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**...(emphasis added by Union).

The Union additionally cites Mr. Jaffe's acknowledgement that he was leaving the term "reasonably attainable" undefined and "is expected to be situation specific, taking into account all relevant and appropriate factors." He did not define one measure of what would be "reasonably attainable." Rather, the intent of the language would require the Agency to implement a reasonably numerical quota only for outliner Judges. Instead, CALJ Bice testified, she unilaterally defined "reasonably attainable" as 600 cases a year for all Judges, no matter what their specific situations were by using the number of hearings scheduled by two-thirds of all ALJs in 2013; thus defining one-third as "outliers." Mr. Jaffe never intended for the Agency to set a minimum number of cases that screened out significant numbers of Judges from teleworking.

The Union submits that the Agency's definitions of reasonably attainable and seriously delinquent are unreasonable and, accordingly, must be struck. That ALJs schedule 50 cases per month violates the CBA because in order to meet this requirement, an ALJ must adjudicate a case in just 2.55 hours to 2.76 hours. This is not a reasonably attainable expectation.

Agency Position

The Agency points out that in Mr. Jaffe's fact finding report he observed: "...the Agency has established that it has a legitimate need to encourage Judges to schedule reasonably attainable numbers of cases and to timely address cases in a judicially controlled status." As a

result, the factfinder drafted two sections related to ALJ accountability, later incorporated into Article 15 as sections 7.L.3 and 7.L.4.

The Agency cites 7.L.3 which provides:

> 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 Agency further cites 7.L.4 which states:

> If a) a Judge has one or 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…

The Contract does not define "reasonably attainable" or "seriously delinquent." Under the plain language of Article 15, the Agency determines whether an ALJ has scheduled a reasonably attainable number of hearings and when a case is seriously delinquent.

The Agency points to CALJ Bice's February 18, 2014 memorandum in which she provided "general guidelines" in 7.L.3 and explained that whether an ALJ was scheduling a reasonably attainable number of hearings "depends on the judge's specific situation." Moreover, the memorandum states in 7.L.4: "Although there are no fixed numbers, we can provide you with some general guidelines for the purposes of this contractual provision." She shared the guidelines with all ALJs. She did not immediately implement the guidelines for scheduling a reasonably attainable number of hearings. Instead, she allowed for a gradual ramp-up period starting in October 2014 with an average of 40 or more hearings per month, followed by an average of 45 or more hearings per, and finally an average of 50 or more hearings per month.

The Agency further maintains that the Telework guidelines are reasonable given that in 2009 it provided docket management training and recommended that ALJs schedule 60 hearings a month on average and gave suggestions on how to break down their schedule to move their cases effectively. At the time CALJ Judge Bice established the Telework Memo guidelines, about two-thirds already were scheduling an average of 50 hearings per month. Moreover, the guidelines in the Telework Memo relate only to hearings scheduled and not hearings held. If an ALJ does not hold all of his scheduled hearings, his or her ability to telework is unaffected.

Based upon the above reasons, the Agency contends, the mere issue of the Telework guidelines is not grievable. Under the plain language of 7.L.3 and 7.L.4, an ALJ can challenge the Agency's action under Article 15 only after his or her telework is restricted. The last sentences of these sections are identical: "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." The use of the past tense in these sentences establishes that an ALJ can challenge management's actions only after his or her telework is restricted. The Telework Memo does not impose any telework restrictions on any individual ALJ. Rather, it merely constitutes management guidance for when an ALJ's ability to telework may be restricted. Accordingly, because the Telework Memo does not restrict an ALJ's ability to telework, it is not grievable under the plain language of Article 15.

Discussion and Findings

The parties have differing understandings of their negotiated CBA language including Arbitrator's 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 one of 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.

AWARD

The grievance is denied as non-arbitrable.

Jerome H. Ross, Arbitrator

January 16, 2017
McLean, Virginia