

IN THE MATTER OF THE ARBITRATION BETWEEN

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 777

Union,

and

UNITED STATES ARMY CORPS OF
ENGINEERS,
CHICAGO DISTRICT

Employer.

FMCS NUMBER
261230-02334

Grievance (Denial of Step 3
Grievance, Pinkston)

ARBITRATOR:

John F. Markuns

DATE OF AWARD:

June 17, 2026

HEARING SITE:

U.S. Army Corps of Engineers
Chicago District
231 LaSalle St.
10th Fl Lake Conf. Rm
Chicago, IL 60604

HEARING DATE:

April 21, 2026

RECORD CLOSED:

May 22, 2026

REPRESENTING THE UNION:

Colin C, Smalley
President, IFPTE, Local 777

REPRESENTING THE EMPLOYER:

Samira Suleiman-Oyesanmi Esq.
Assistant District Counsel
U.S. Army Corps of Engineers
Chicago District
231 South LaSalle St, Suite 1500

JURISDICTION AND BACKGROUND

The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of the Federal Mediation and Conciliation Service. The Employer is the Department of Housing and Urban Development ("HUD" or "Agency"). Employees are represented by International Federation of Professional and Technical Engineers Local 777 ("Union"). Upon invocation of arbitration, a hearing was held by agreement of the parties on April 21, 2026. At hearing, the parties stipulated to the following: the issue to be decided; 26 stipulated facts including footnotes containing stipulations (JSF); and 35 Joint Exhibits (J.Ex.). Additionally, the parties stipulated to the entry of their respective exhibits: six Union Exhibits (U Ex.) and six Agency Exhibits (A Ex.). Additionally, the Union called as witnesses Ben Paxton (Grievant) and Lock and Dam Operator Shift Chief Eric Osuch. The Agency called Financial Management Analyst and Customer Service Representative Cynthia Holcik.

By agreement of the parties, a transcript was taken and an electronic copy provided to the Arbitrator at the Arbitrator's request. The record closed on May 22, 2026 following the submission of post-hearing briefs exchanged by the Arbitrator.

ISSUE

The issues before the arbitrator in this matter have been stipulated to and defined by the Parties in the April 21, 2026 Joint Issue Statement as follows:

Was the remedy granted in the negotiated grievance process adequate with respect to the following issues?

- a. Is Grievant entitled to holiday premium pay and Sunday premium pay or an equivalent amount as alleged in the negotiated grievance process? If so, what is the remedy?
- b. Was a status quo ante remedy adequate to address the change made to Grievant's tour of duty (TOD), or should a posting be issued as requested in the negotiated grievance process?

**RELEVANT CBA PROVISIONS; OPM POLICY EMAIL AND
ADDITIONAL GUIDANCE; AND GRIEVANT'S DRP AGREEMENT**

AGREEMENT

Between

U.S. ARMY CORPS OF ENGINEERS, CHICAGO DISTRICT

and

LOCAL 777, INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS (IFPTE), AFL-CIO.

Agreed September 12, 2023 approved October 3, 2024

Article 1. Exclusive Recognition and Coverage of Agreement

Section 3 – The Employer shall be responsible for acting in a fair and equitable manner consistent with law, regulation, policy, and this Agreement in the conduct of Agency business affecting the working conditions of employees.

....

Article 17. Negotiated Grievance Procedure

Section 1 –

- a. The Employer and the Union recognize the importance of settling disagreements and disputes promptly and in an orderly manner that will maintain the self-respect of the employee and be consistent with principles of good management and the public interest.

To accomplish this, efforts will be made to settle grievances expeditiously at the lowest level of supervision.

- b. This Agreement does not preclude any employee, regardless of Union membership, from bringing matters of personal concern to the attention of appropriate officials without invoking the grievance procedure; in fact, informal discussion is encouraged by both the Union and the Employer whenever possible. However, discussions prior to and through the grievance process do not extend any time frames unless mutually agreed to in writing.

Section 2 – A grievance may be initiated by the Employer, an employee or group of employees, or by the Union. Grievance means any complaint defined by 5 USC 7103(a)(9).

Section 3 – Employees using this procedure may be represented by a Union representative, or represent themselves. In the event the employee(s) chooses self-representation, it is agreed that the Union shall be afforded the opportunity to be present during all grievance discussions, including electronic correspondence, except intra-management meetings. The final resolution of the grievance shall be consistent with the terms of this Agreement, other negotiated agreements between the Employer and the Union, and past practice of the Employer. Only the Union President or the District Commander may invoke arbitration.

Section 4 – This negotiated grievance procedure (NGP) does not apply to those issues excluded by statute at 5 USC 7121I. Further, this NGP does not apply to:

- 1) Non-selection for promotion, provided the list of candidates are properly ranked and certified, and in accordance with law, rule, and regulations;
- 2) Incentive awards granted in accordance with law, rules, and regulation;
- 3) Reduction-in-Force, which is appealable to the MSPB;
- 4) Termination of probationary employees or a decision not to extend any term temporary employee;
- 5) Decisions relating to Workers' Compensation claims that are adjudicated by the U.S. Department of Labor (DoL);
- 6) Wage or salary rates or schedules established by appropriate authority;
- 7) Non-adoption of a suggestion;
- 8) Requirement to submit to a fitness for duty examination or implementation of the medical results of a fitness-for-duty examination;
- 9) The content of any higher authority (i.e., Great Lakes and Ohio River Division (LRD), Headquarters US Army Corps of Engineers (HQUSACE), Department of the Army (DA), or Department of Defense (DoD)) policy, regulation, provision(s) of law, or regulations of appropriate authorities outside of the organization.

Section 5 – The NGP is the exclusive procedure for resolving all matters falling within its scope, with the exception of certain matters which may be grieved or appealed through another statutory process, but not both. These include, but are not necessarily limited to, adverse actions, prohibited personnel practices, and discrimination. Employees who have had an adverse action taken against them will be notified of MSPB appeal rights in the decision letter from the deciding official.

J Ex. 2.

....

**U.S. OFFICE OF PERSONNEL MANAGEMENT (OPM)
Email, “Fork in the Road,” dated January 28, 2025.**

Smalley, Colin C CIV USARMY CELRC (USA)

From: HR <hr@opm.gov>

Sent: Tuesday, January 28, 2025 5:58 PM

Subject: [Non-DoD Source] Fork in the Road

Importance: High

During the first week of his administration, President Trump issued a number of directives concerning the federal workforce. Among those directives, the President required that employees return to in-person work, restored accountability for employees who have policy-making authority, restored accountability for senior career executives, and reformed the federal hiring process to focus on merit. As a result of the above orders, the reform of the federal workforce will be significant.

The reformed federal workforce will be built around **four pillars**:

- 1) Return to Office:** The substantial majority of federal employees who have been working remotely since Covid will be required to return to their physical offices five days a week. Going forward, we also expect our physical offices to undergo meaningful consolidation and divestitures, potentially resulting in physical office relocations for a number of federal workers.
- 2) Performance culture:** The federal workforce should be comprised of the best America has to offer. We will insist on excellence at every level — our performance standards will be updated to reward and promote those that exceed expectations and address in a fair and open way those who do not meet the high standards which the taxpayers of this country have a right to demand.
- 3) More streamlined and flexible workforce:** While a few agencies and even branches of the military are likely to see increases in the size of their workforce, the majority of federal agencies are likely to be downsized through restructurings, realignments, and reductions in force. These actions are likely to include the use of furloughs and the reclassification to at-will status for a substantial number of federal employees.
- 4) Enhanced standards of conduct:** The federal workforce should be comprised of employees who are reliable, loyal, trustworthy, and who strive for excellence in their daily work. Employees will be subject to enhanced standards of suitability and conduct as we move

forward. Employees who engage in unlawful behavior or other misconduct will be prioritized for appropriate investigation and discipline, including termination.

Each of the pillars outlined above will be pursued in accordance with applicable law, consistent with your agency's policies, and to the extent permitted under relevant collective-bargaining agreements.

If you choose to remain in your current position, we thank you for your renewed focus on serving the American people to the best of your abilities and look forward to working together as part of an improved federal workforce. At this time, we cannot give you full assurance regarding the certainty of your position or agency but should your position be eliminated you will be treated with dignity and will be afforded the protections in place for such positions.

If you choose not to continue in your current role in the federal workforce, we thank you for your service to your country and you will be provided with a dignified, fair departure from the federal government utilizing a deferred resignation program. This program begins effective January 28 and is available to all federal employees until February 6. If you resign under this program, you will retain all pay and benefits regardless of your daily workload and will be exempted from all applicable in-person work requirements until September 30, 2025 (or earlier if you choose to accelerate your resignation for any reason). The details of this separation plan can be found below.

Whichever path you choose, we thank you for your service to The United States of America.

.....

Upon review of the below deferred resignation letter, if you wish to resign:

- 1) Select "Reply" to this email. You must reply from your government account. A reply from an account other than your government account will not be accepted.
- 2) Type the word "**Resign**" into the body of this reply email. Hit "Send".

THE LAST DAY TO ACCEPT THE DEFERRED RESIGNATION PROGRAM IS FEBRUARY 6, 2025.

Deferred resignation is available to all full-time federal employees except for military personnel of the armed forces, employees of the U.S. Postal Service, those in positions related to immigration enforcement and national security, and those in any other positions specifically excluded by your employing agency.

.....

DEFERRED RESIGNATION LETTER

January 28, 2025

Please accept this letter as my formal resignation from employment with my employing agency, effective September 30, 2025. I understand that I have the right to accelerate, but not extend, my resignation date if I wish to take advantage of the deferred resignation program. I also understand that if I am (or become) eligible for early or normal retirement before my resignation date, that I retain the right to elect early or normal retirement (once eligible) at any point prior to my resignation date.

Given my impending resignation, I understand I will be exempt from any "Return to Office" requirements pursuant to recent directives and that I will maintain my current compensation and retain all existing benefits (including but not limited to retirement accruals) until my final resignation date.

I am certain of my decision to resign and my choice to resign is fully voluntary. I understand my employing agency will likely make adjustments in response to my resignation including moving, eliminating, consolidating, reassigning my position and tasks, reducing my official duties, and/or placing me on paid administrative leave until my resignation date.

I am committed to ensuring a smooth transition during my remaining time at my employing agency. Accordingly, I will assist my employing agency with completing reasonable and customary tasks and processes to facilitate my departure.

I understand that my acceptance of this offer will be sent to the Office of Personnel Management ("OPM") which will then share it with my agency employer. I hereby consent to OPM receiving, reviewing, and forwarding my acceptance.

.....

Upon submission of your resignation, you will receive a confirmation email acknowledging receipt of your email. Any replies to this email shall be for the exclusive use of accepting the deferred resignation letter. Any other replies to this email will not be reviewed, forwarded, or retained other than as required by applicable federal records laws.

Once your resignation is validly sent and received, the human resources department of your employing agency will contact you to complete additional documentation, if any.

OPM is authorized to send this email under Executive Order 9830 and 5 U.S.C. §§ 301, 1103, 1104, 2951, 3301, 6504, 8347, and 8461. OPM intends to use your response to assist in federal workforce reorganization efforts in conjunction with employing agencies. See 88 Fed. Reg. 56058; 80 Fed. Reg.

72455 (listing routine uses). Response to this email is voluntary. Although you must respond to take advantage of the deferred resignation offer, there is no penalty for nonresponse.

J. Ex. 8.

**U.S. OFFICE OF PERSONNEL MANAGEMENT
Washington, D.C.**

MEMORANDUM

TO: Heads and Acting Heads of Departments and Agencies

FROM: Charles Ezell, Acting Director, U. S. Office of Personnel Management
Andrew Kloster, General Counsel, U. S. Office of Personnel Management

DATE: February 11, 2025

RE: Additional Guidance on Compliance with the Age Discrimination in Employment Act as amended by the Older Workers Benefit Protection Act in the Implementation of Deferred Resignation Program Agreements

The U. S. Office of Personnel Management ("OPM") is providing additional guidance to agencies regarding implementation of the Deferred Resignation Program ("DRP").

Out of an abundance of caution, agencies should treat the DRP as an "exit incentive program" under section 7 of the Age Discrimination in Employment Act (ADEA), as amended by the Older Workers Benefit Protection Act (OWBPA), and implementing regulations of the Equal Employment Opportunity Commission (EEOC).¹ Accordingly, agencies should provide employees aged 40 and over with a supplemental notice containing additional, agency-specific information necessary to comply with the OWBPA.

An "exit incentive program" is a "voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled . . . in exchange for their decision to resign voluntarily and sign a waiver."²

With respect to the DRP, once OPM notifies the employing agency of which of its employees have indicated their interest in participating in the DRP, the agency should determine whether any of those employees are excluded from participation ("ineligible"), either due to DRP program exclusions or additional agency-specific exclusions. Agency-specific exclusions can be based on certain positions or based on other criteria.

¹ 29 U. S. C. § 626(f); 29 C. F. R. § 1 625 . 22(f).

² See 29 C. F. R. § 1 625 . 22(f)(1)(iii)(A) In particular, an "' exit incentive or other employment termination program' includes both voluntary and involuntary programs. " 29 C. F. R. § 1 625 . 22(e)(3)

....

J. Ex. 33.

Deferred Resignation Program (DRP) Separation Agreement

This agreement is between Department of the Army ("Agency") and the Employee identified below.

On January 28, 2025, OPM circulated a memorandum to Agency employees (Fork in the Road Memo) offering them a voluntary deferred resignation option. The offer stated that those employees who accept the offer will not be subject to any reduction in pay and benefits by their agency and exempted them from all applicable in-person work requirements until September 30, 2025, or earlier if they choose to accelerate the resignation date for any reason (Deferred Resignation Program).

The Agency has received Employee's voluntary request to be included in the Deferred Resignation Program and the Agency accepts Employee's request to be included in the Deferred Resignation Program. Accordingly, the parties agree as follows:

1. Employee is accepted into the Deferred Resignation Program.
2. Employee shall be placed on paid administrative leave on [April 3] 2025. Employee shall remain on paid administrative leave up through and including September 30, 2025, or such earlier date on which Employee may choose to resign (Deferred Resignation Period). If retiring, employee shall be placed on paid administrative leave on [April 3] 2025. Employee shall remain on paid administrative leave up through and including December 31, 2025 or such earlier date on which Employee may choose to retire.
3. Employee agrees to turn in all Agency equipment and property no later than [April 4], 2025, as directed by Employee's supervisor.
4. Employee shall not be expected to work during the Deferred Resignation Period and shall be exempt from any return-to-office requirements.
5. During the Deferred Resignation Period, Agency shall continue to pay Employee's current salary and Employee shall continue to retain and receive all benefits of Employee's federal employment, including but not limited to TSP contributions, health, dental, vision and/or any other similar benefits, with Agency making the government's contribution. Employee will receive retirement service credit during the deferred resignation period consistent with the retirement provisions applicable to Employee. If Employee becomes eligible for a within-grade increase during the deferred resignation period, Agency shall process the within-grade increase and Employee shall receive the associated salary increase.
6. Employee will continue to accrue annual and sick leave during the deferred resignation period. Employee will receive a lump sum payment of accrued annual leave in accordance with 5 CFR part 550 upon separation from service.
7. If there is a lapse in appropriations during the Deferred Resignation Period Employee shall retain all existing rights covering such lapse in appropriations regardless of their status as a Deferred Resignation Program participant including but not limited to receiving back pay consistent with the Government Employee Fair Treatment Act of 2019.
8. Agency shall comply with all terms of this agreement even if Employee's position is eliminated

or reassigned prior to September 30, 2025 [or December 31, 2025 if retiring]. Employee shall not be subject to furlough, termination, reduction in force or layoff as a result of an agency initiated reorganization or reduction in force. Employee agrees to cooperate with steps taken by Agency to exempt Employee from any reduction in force.

9. Nothing in this agreement prevents Employee from retiring from federal service at any time if Employee is eligible to do so under the applicable provisions of CSRS or FERS prior to December 31, 2025. If Employee is eligible and elects to retire before December 31, 2025,

Employee's retirement election shall override any benefits that would be available to Employee under this agreement after the effective date of Employee's separation. Employee understands that Employee is responsible for submitting a CSRS or FERS application.

10. Nothing in this agreement prevents Employee from retiring from federal service on or before December 31, 2025 if Employee is eligible to do so under the Voluntary Early Retirement Authority (VERA). If Employee is eligible and elects to retire under VERA, Employee's retirement election shall override any benefits that would be available to Employee under this agreement after the effective date of Employee's separation. Employee understands that Employee is responsible for submitting a VERA application.

11. Employee acknowledges they have entered the agreement knowingly, voluntarily, and free from improper influence, coercion, or duress.

12. Employee acknowledges that Agency will immediately rely on the terms of this agreement in consolidating and reassigning roles and otherwise taking steps to reform the agency workforce. As of the effective date of this agreement, Employee will permanently cease to serve in the position from which Employee is agreeing to resign or retire. Consequently, Employee understands that, as of the effective date of this agreement, this agreement is final and reflects Employee's decision to resign no later than September 30, 2025 [or retire no later than December 31, 2025].

13. **If 40 years of age or older**, Employee waives any claims, complaints, charges, or civil actions the employee has or could have raised under the Age Discrimination in Employment Act against Agency as of the effective date of this agreement. Employee further acknowledges the following in connection with this waiver of rights under the ADEA:

a. The Employee has reviewed the entire agreement and understands its provisions;

- b. The Employee has not waived any rights or claims that may arise after the date this agreement is signed;
- c. The Employee is advised to consult with an attorney prior to signing this Agreement;
- d. The employee has received, by separate attachment, information concerning the job titles, ages, and DRP eligibility of all other employees in the same job classification or organizational unit as required by the Older Workers Benefit Protection Act.
- e. The Employee has 45 days to consider the terms of this Agreement but, at the Employee's sole discretion, waives such right;
- f. After returning a signed and dated copy of the agreement to Agency, the employee retains the right to revoke the agreement for seven (7) days. The agreement will not become effective or enforceable until the revocation period has expired; and
- g. The actions/obligations described in sections 2, 3, and 4 of this Agreement shall not occur until the end of the 7 day revocation period.

14. Consistent with law, Agency agrees to waive any debt owed by Employee to Agency pursuant to a recruitment incentive, student loan repayment, or other service agreement. Agency also agrees to waive any remaining service requirements from taking paid parental leave and stipulates that it will not seek reimbursement from the employee of any costs it may be entitled to recover under the Paid Parental Leave Act (5 U.S.C. 6382).

15. This agreement shall constitute the entire agreement between the parties, and shall supersede all prior agreements, understandings and negotiations between the parties with respect to the terms of Employee's resignation.

Digitally signed
Grievant
Kenneth Rockwell COL, EN

J. Ex. 9.

FINDINGS OF FACT

The parties stipulated to most of the operative facts and there was no dispute as to the evidence introduced to establish the remainder. The Collective Bargaining Agreement (CBA) governing this matter is the CBA covering a consolidated unit of professionals and non-professional employees in the U.S. Army Corps of Engineers Chicago District signed September 12, 2023 and approved October 3, 2023. Joint Exhibits (J. Exs.) 1 and

2. The Parties stipulated that IFPTE 777 is to be assumed the exclusive representative and the CBA is assumed to be effective for the purposes of this arbitration without expressing any conclusive opinion as to the status of the Union and the CBA from the period March 27, 2025 (issuance of Executive Order (EO) 14,251) to October 1, 2025 (issuance of order enjoining EO 14,251). See also J Ex. 5 (Order granting preliminary injunction).

Grievant was employed by the District as a Lock and Dam Operator, WY-5426-09, assigned to the Chicago Harbor Lock. He served in this position for just over 10 years. Throughout that time he worked under a rotating compressed work schedule (CWS) of 12-hour shifts, as the Lock is staffed 24/7 365 days a year and Grievant's work schedule was assigned for the calendar year, typically in the November-December time period. Tr. 26. Grievant's assigned schedule to meet his biweekly 80- hour work requirement for calendar year 2025 was not in dispute. J. Exs. 3 and 6. As the shifts rotated between night and day and assigned days off, Grievant was assigned shifts paying night differential as well as certain Sundays and Holidays paying premium pay. Id.

Grievant elected to participate in OPM's Deferred Resignation Program (DRP) and to retire. JSF 10-11; J Ex 9. Grievant was afforded 45 days to consult an attorney and review the DRP contract before making his final decision to participate but waived that right, leaving him under the terms of the agreement with 7 days to revoke it at which time it became effective and enforceable. The only person he consulted was his supervisor. Grievant digitally signed the DRP contract on March 28, 2025. Colonel Kenneth Rockwell signed for the Agency on March 28, 2025. J. Ex. 9; Transcript (Tr.). 17.

After executing his OPM DRP contract, Grievant was placed on "DRP admin leave." JSF 13; J.Ex.-7. He did not physically report to duty or perform work for the District on any Sundays or federal holidays during the pay periods relevant to the subject grievance. JSF 14. However, on May 5, 2025 as expressed in a text, Grievant found that for pay period 19 he had been paid 48 hours administrative leave and annual leave was charged 32 hours. He expressed concern about the charge to annual leave as he as planning to cash in his annual leave upon retirement. In a reply text, Grievant's

supervisor, Assistant Lockmaster Kyle Zugel, agreed that it was concerning because he had placed all of Grievant's time in administrative leave. He promised to get to work "figuring it out right away." In a follow-up May 6, 2025 text Lockmaster Zugel indicated that on his end all he could see was administrative leave, explaining that he would have to message Customer Service Representative Cynthia Holcik "to look from her side of things." J. Ex. 10. Grievant replied:

There wasn't supposed to be any reduction in pay. So I don't really think Mon-Fri 8 hrs daily is right? I didn't work a schedule like that and so I'll lose all premium pay I would have been scheduled. That's definitely a decrease in pay. I think the hours should be submitted according to the schedule that was put out for 2025?

Id. Mr. Zugel responded in the early afternoon of May 8. He explained said that after verifying with Cynthia, "...if you're on long term admin leave your [sic] reduced to a normal first shift 40 hour a week schedule." Id. Grievant in turn replied "I'll talk to her and let her know about the agreement I signed. Somehow they will have to come up with the difference." Id.

The record contains email correspondence between Ms. Holcik and Payroll Program Manager Michael Brandon who provided the guidance to Ms. Holcik. Mr. Brandon was the Payroll Manager at the level of the Department of the Army. Tr. 40. On Monday April 28, 2025, Manager Brandon identified a problem with the timekeeping system for some employees on a DRP which he shared in an email that appeared to be Army-wide. J. Ex. 11. On that same date, Ms. Holcik reported to him that she was having the identified problem with two of her employees "where the system didn't like their compressed schedule." She asked if "they keep their schedule correct or are the DRP employees going into a regular hours M-F 8 hours regular shift with an AWS code of 2," Mr. Brandon responded, also on April 28, that she should "keep their schedule," and that it would stop being an issue the next pay period although their timecards might need to be corrected since the "fix was not in before that pay period opened." J. Ex. 12.

Ms. Holcik followed up on the morning of May 8, presumably following up on Grievant's inquiry to Mr. Zugel, to make sure that this included "lock employees that

work a 12-hour shift with night diff, correct?” Mr. Brandon replied almost immediately that “They shouldn’t be getting night diff if they are on DRP. If you have an entire pay periods worth of leave, you re not entitled to night diff.” Ms. Holcilk replied “so, they should be going on a M-F regular shift nothing with night diff” thanking Mr. Brandon and indicating that she would let Grievant’s supervisor know. Id.

On May 8, 2025, Mr. Zugel texted Grievant that Cynthia had told him that she would have the annual leave corrected, but as for the differentials she still was receiving guidance that if someone is on the DRP they won’t be receiving any nights or Sunday premiums. Grievant thanked Mr. Zugel and told him he would work on the premiums.

On June 4, 2025 Grievant filed at Step 1 of the CBA grievance procedure. J Ex. 12. He essentially complained that he based on a discussion with his immediate supervisor Mr. Zugel, Mr. Zugel told Grievant that Resource Management guidance was that for DRP admin leave, “it was correct to put him the on a “straight” 40-hour, Monday-Friday schedule, which resulted in no premiums.” The grievance alleged continuing violations of 5 U.S.C. § 5343 and 5 CFR §532.505; 5 CFR § 7513(a) and 5 CFR

§ 403(a); DRP Separation Agreement § 5; CWS MOA §6; CBA Art.1 § Art. 6 §§ 3-6; and LRC T&A policy §5.

In a detailed narrative accompanying the grievance, the Union cited, inter alia, 5 CFR § 532.505 requiring that night shift differential be paid for any leave with pay taken when scheduled to work night shifts or temporarily assigned to a day shift. The Union argued that there was no justification for terminating or suspending Grievant’s CWS where no other Lock and Dam Operators have been assigned such a tour of duty. The Union contended that this action constituted a violation of the merit principles as it constituted a decision concerning pay contrary to law.

The Union further maintained that the Agency reduced Grievant’s pay in violation of paragraph 5 of the DRP promising to continue to pay Grievant’s current salary and also implemented an unfair change in tour of duty in violation of Article 1 of the CBA. The Union also alleged that Grievant suffered a “loss of pay” without any of the due

process required of an adverse action under chapter 75 of title 5 United States code.

The Union further argued that CBA Article 6 was violated because conditions of employment, i.e., tour of duty/work schedule and related pay entitlements were changed for a bargaining unit employee with no notice or opportunity to bargain. Finally, the Union argued that the unilateral suspension or termination of Grievant's CWA without notice was in direct contravention of the Chicago District's time and attendance policies.

The record contains an extensive set of internal Agency email exchanges attempting to address at least some of the issues raised in the grievance. In a June 18, 2025 Step 1 response to the grievance, Assistant Lockmaster Zugel informed the Grievant that "based on developing guidance" Grievant's work schedule was incorrectly changed from a CWS to a standard 8-hour schedule, impacting Grievant's pay. He further stated that based on new guidance Management has made "prior pay corrections, current pay period corrections, and updated Grievant's schedule to reflect his previously held CWS. He informed Grievant that these changes would result in back pay for the affected pay periods. For reasons not evident in this record, the Union's allegations of unfair labor practice (ULP) were not addressed. J. Ex. 16.

On July 1, 2025, the Union filed a Step 2 grievance on behalf of Grievant, incorporating the allegations at Step 1 and requested relief. The Union argued that as reflected in the pay period ending June 16, 2025, Grievant was paid for 48 hours of night differential but that 12 of those hours should also have been entitled to Sunday premium pay. The Union further asserted that based on their belief, Sunday and Holliday pay had not been coded into the time and pay keeping system so as to automatically entitle grievant to Sunday and holiday premium pay. J. Ex. 18.

On July 8, 2025 Selwyn (Tyrone) Valley, Lockmaster, Chicago Harbor Lock rendered a Step 2 decision following a Step 2 meeting wherein the Union suggested as a potential remedy a lump sum payment or other similar arrangement. The Lockmaster cited 5 C.F.R § 550.103 as limited payment of Sunday and holiday premium pay to work "performed" thus precluding this additional payment whether an employee is on sick leave, annual leave or administrative leave pursuant to the DRP contract. Moreover, as

the applicable law and regulations were in effect at the time Grievant entered into his DRP the parties are assumed to have contracted with reference to those provisions as they relate to the contract.

With regard to the alleged ULP, the Lockmaster explained, while noting that it always Management's intent to refrain from unfair labor practices, that he decided not to post a district-wide notice as he was unaware of any chilling effect related to this issue because Grievant's pay records are private information.

On July 23, 2025, the grievance was elevated to Step 3. In the Step 3 filing, the union acknowledged and expressed appreciation for the efforts made by the Agency to correct the night differential issue, but noted that grievant had so far only been retroactively paid for 84 of the 120 hours of night shift differential owed.

With respect to the Agency's position regarding Sunday and Holiday premium pay, the Union argued that assuming *arguendo* the Agency's position on the law was correct, it is still possible for the requested relief to be granted in a legal manner, calculating that a \$4,700.40 in a lump sum would settle the matter. The Union argued that the authority would be derived from either the DRP against itself or the CBA.

With regard to Management's assertion that the lack of a ULP's chilling effect renders a posting unnecessary, the Union maintained that this is both an incorrect standard to evaluate a ULP claim and irrelevant. The legal standard is whether the Agency refused to bargain in good faith and the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees. Automatically cancelling or suspending CWS during long-term paid leave of any type without bargaining, even for a single employee, could affect all bargaining unit employees who might face a similar situation and, in any event, the financial implications for this one employee, Grievant, were substantial. Desisting from the practice and posting a notice to employees to that effect is a traditional remedy often upheld and ordered by arbitrators, administrative law judges and the FLRA. J. Ex. 21.

On September 4, 2025 Colonel Rockwell, Commander, Chicago District, rendered the Step 3 decision. The decision reiterated Management's position at Step 2, and

rejected the request for a lump sum payment because it would result in Management providing pay that grievant was not entitled to and would circumvent the purpose and intent of law and regulations. And with regard to posting a district-wide notice, he expressed his understanding that Management remedied Grievant's schedule as soon as the error was discovered, and the Step 2 and Step 3 decisions have been made in accordance with law. J. Ex. 23. Arbitration was invoked by the Union on December 1, 2025. J. Ex. 24

THE UNION'S POSITION

This arbitration involves a relatively simple contract interpretation matter. The Parties agree on essentially all relevant facts. The Office of Personnel Management created an unorthodox program called the "Deferred Resignation Program" (DRP), and Grievant participated with the understanding that he would retire at the end of 2025 and in exchange, he would receive no reduction in the pay he would have received in 2025 had he not participated. Further, in implementing the DRP, the Agency committed an unfair labor practice.

The Agency committed violations of two contracts in failing to pay the Sunday and Holiday Pay for the hours Grievant was scheduled to work when he opted in to the DRP, or an equivalent amount. The Agency's failure to pay Grievant violated both the Grievant's DRP agreement with the Agency and Article 1, Section 3 of the CBA.

The Agency has not disputed Grievant's assertion and testimony and at hearing regarding Grievant's 2025 work schedule as established by Joint Exhibit 6. With respect to the DRP agreement, there is also no dispute that but for Grievant's participation in the DRP, he would have worked those hours entitled to premium pay.

The Agency violated the DRP agreement by failing to include all the compensation Grievant otherwise earned had he not elected to participate in DRP – as a wage grade employee, this includes scheduled wages, differentials and premium pay. All three types of compensation are set consistent with statute and regulation. There are several sources to help interpret the term.

First, the preamble of this contract uses the phrasing, “...those employees who accept the offer will not be subject to *any* reduction in *pay* and benefits by their agency and exempted them from all applicable in-person work requirements...” Exhibit J-9 at 1 (emphasis added). Clearly, the (Agency) drafter of the agreement used “not... subject to any reduction” as synonymous phrasing for “current.” “Any” is an exhaustive term, communicating to a reasonable reader that the agreement is not referring to any part or subset of the term “salary.”

Second, “current” is reasonably understood as “what would have happened but for the Grievant’s execution of and performance under the DRP agreement.” This is also supported by the preamble language cited above – language which was put slightly differently in the first proffer of this deal. Exhibit J-8 at 1 (stating in the transmittal email, “...you will retain all pay and benefits regardless of your daily workload...” and in the text of proffered resignation letter, “I understand I will be exempt from any “Return to Office” requirements pursuant to recent directives and that I will maintain my current compensation ... until my final resignation date”).

Even if “current” – or its synonymously used phrases “all” and “not... subject to any reduction” – were still ambiguous, the modified noun is not. The DRP agreement uses the term “salary” – a term not directly applicable to prevailing wage employees like Grievant. However, here again we have plenty of context to illuminate what the (Agency) drafters of the agreement meant, and how Grievant understood the term. As mentioned above, the words “compensation” and “pay” have been used synonymously with “salary”.

Of these, “pay” is most directly utilized by relevant statute and regulations. For example, the Federal Wage System regulations at 5 CFR Part 532 use a few more specific terms involving “pay” such as “basic pay” – meaning the “scheduled rate of pay” plus “differential[s]”. 5 CFR §532.401 (defining “Rate of basic pay”). Another example is “premium pay” – defined as “additional compensation”. 5 CFR §532.501.

If the drafters of the DRP agreement had meant to confine the economic terms of the agreement to one or two of these three components, i.e., scheduled rate of pay,

differentials, and/or premium pay, then they had the language to do so. Instead, they used the broad and exhaustive “salary”, “compensation”, and “pay”.

If “current” or “salary” are capable of being ambiguous taken alone; they cannot be when read together as used in the provision of the DRP SA. “current salary” – or “all pay” or “current compensation” – must mean the sum of *all* the types of pay or compensation that the Grievant would have earned if he had physically shown up at Chicago Harbor Lock for his scheduled shifts. Because the preponderance of the evidence shows that both elements of this violation have been met, the Union has established a violation of the DRP agreement.

With regard to the claimed violation of CBA Article 1, section 3, The Union concedes that the record does not establish by preponderance of the evidence that the Agency acted inequitably. However, the Agency’s failure to perform under an agreement with an employee is inherently unfair. All contracts carry a duty of fair dealing, and patent violations of a fair deal therefore are unfair. The Agency deviated from OPM’s stated policy that an employee electing DRP will “receive all pay.”

Alternatively, the fact that Grievant’s schedule involved Sunday and Holiday scheduled work, and the Agency’s agreement to his participation in the DRP resulted in his excusal from in-person duty, does not necessarily relieve the Agency from the requirements to pay Sunday and holiday premium pay. 5 U.S.C. § 5546 & 5 CFR §§532.507-532.509. The Agency relies on the statutory phrase “work performed” but has not stated any authority for the assertion that the DRP’s terms provided that the DRP participants were not “performing” the “work” assigned to them during the DRP period.

The Back Pay Act, 5 U.S.C. § 5596, is a statutory waiver of sovereign immunity that supports a remedial award of back pay (with interest) when two conditions are met: first, the aggrieved employee was affected by an unjustified or unwarranted personnel action; and second, the personnel action resulted in a loss of pay, allowances, or differentials.

Violations of contracts, such as the violations of the DRP and the 2023 CBA proven above, are unjustified or unwarranted personnel actions. *Veterans Affairs and*

AFGE Local 85, 72 FLRA 455 (2021). Accordingly, the first prong of the Back pay Act is satisfied here.

The second prong of the Back Pay Act requires the finding of a causal connection between a violation of the parties' agreement and a withdrawal or reduction in pay, allowances, or differentials. *Id.* In this case, the parties have stipulated to facts supporting this finding.

Previous cases have established entitlement to backpay even in the absence of work being “actually performed.” When a contractual violation was the underlying cause, backpay was appropriate even when the employee did not actually perform the work. *Bureau of Prisons and AFGE Local 1242*, 66 FLRA 737 (2012). Applied here, the only reason Grievant was not physically working during his assigned shifts is because he relied upon the terms of the DRP agreement, which included that he would receive his current salary despite being excused from in-person work. The but-for causation required to satisfy the second prong is readily apparent, because it was explicitly included as consideration in a contract.

To address another potential consideration under the second prong, the Sunday and Holiday premium pay – or an equivalent amount – is pay under the Back Pay Act. As demonstrated *supra*, premiums are one portion of the total compensation that Grievant would have earned, but for the DRP agreement (scheduled wages, differentials, and premium pay). Once again, if Congress meant to restrict the Back Pay Act to only “basic” pay, they knew how to use that term. Instead, they used the phrase, “unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of *all or part of the pay, allowances, or differentials* of the employee...” 5 U.S.C. § 5596 (b)(1) (Emphasis added). Such personnel actions create an entitlement to “an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee *normally would have earned* or received during the period *if the personnel action had not occurred*. *Id.* (Emphasis added.)

For the foregoing reasons, the Union has established that the Grievant is entitled to a remedy under the Back Pay Act, and because BPA payments are an “amount equal to”

rather than a retroactive payment, they would not run afoul of the statutory limits on holiday or Sunday pay.

If the Back Pay Act is unavailable, the Tucker Act authorizes a monetary remedy. The Tucker Act, 28 U.S.C. § 1491, constitutes a waiver of sovereign immunity for monetary claims “founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States...” We have demonstrated *supra* that the failure to pay the premium pay or an equivalent amount is in violation of the DRP SA – an express contract with the United States, as well as the CBA – which is itself a contract entered into pursuant to an act of Congress (5 U.S.C. § 7101 *et seq.*, the Federal Service Labor-Management Relations Statute, “FSLMRS”).

The FSLMRS provides for a number of unfair labor practices which may be addressed either by filing charges with the FLRA or under a negotiated grievance procedure. In this case, the Union alleged a ULP in the grievances in this case. Exhibits J-12, J-18, J-21 (alleging a violation of 5 U.S.C. §§ 7116(a)(1) & (5)).

The elements of the ULP have been proven. The Union established that the Agency refused to consult or negotiate in good faith with the Union as the bargaining unit representative over the change in Grievant’s work schedule from a compressed work schedule to a fixed “straight 8” schedule. And failure to provide notice and opportunity to bargain over a change affecting even one employee constituted an unfair labor practice if the change was more than *de minimis*. Finally, the Agency raised at the hearing the matter of who was responsible for the change in working conditions. While the Agency attempts to pin this on the Customer Service Representative in the payroll office, her testimony clearly showed that she did not act except with the knowledge and direction of management officials. This does not absolve the Agency of responsibility for the unfair labor practice.

The Agency granted a *status quo ante* remedy in response to the grievances. See, e.g., Exhibit J-19 at 3 (Step 3 official stating, “I understand that management remedied

the employee's schedule as soon as the error was discovered"). The Union had also requested a notice-posting remedy for the ULP violation.

As the Union stated in the Step 3 grievance, posting a notice to employees to that effect is a traditional remedy often ordered by arbitrators and administrative law judges; and is a traditional remedy upheld and ordered by the FLRA. Exhibit J-21 at 3 n.9 (citing *Dep't of Justice, Fed. Bur. of Prisons, Fed. Transfer Center, Oklahoma City and AFGE Council of Prison Locals 33, Local 131*, 67 FLRA 221 (2014).) Further, the FLRA has described the notice-posting remedy as one of the only ways that a bargaining unit can feel secure in the knowledge that the Agency is committed to following the law. Exhibit U-4 (*SSA and AFGE Council 215*, 64 FLRA 293, 297 (2009)) at 7.

The Agency claimed that no other bargaining unit employees knew about the change as a reason for denying the notice-posting remedy. Exhibit J-19 at 3. The Agency does not offer any evidence to support this contention; however, it does not matter. A failure to bargain is a fundamental error that affects the most basic rights of the exclusive representative and the Union's duty to represent all employees in the bargaining unit. For this reason, even a corrected failure warrants the basic remedy of a notice-posting to ensure confidence in the labor- management relationship.

The Agency failed to pay Grievant premium pay or an equivalent amount for work he was scheduled to perform, but for his participation in the DRP. Doing so was a violation of the DRP agreement that the Agency signed with Grievant; and it was a violation of the CBA. The appropriate remedy is back pay plus interest under the Back Pay Act or the Tucker Act. In implementing the DRP, the Agency also committed an unfair labor practice. The status quo ante remedy provided to date is insufficient to resolve the issue, and a notice-posting remedy should be awarded.

MANAGEMENT'S POSITION

The operative facts are as follows. During the arbitration hearing on April 21, 2026, the Grievant testified that employees in his position do not earn Sunday or holiday premium pay when they are in a leave status. His former colleague, Mr. Eric Osuch, testified likewise.

Grievant was employed by the District as a prevailing rate Lock Operator. Prior to his retirement, the Grievant elected to participate in OPM's DRP. He had 45 days to consult an attorney and review the DRP contract before making his final decision to participate. After executing his OPM DRP contract, the Grievant was placed in a paid administrative leave (excused absence) status. He did not physically report to duty or perform work for the District on any Sundays or federal holidays during the pay periods relevant to the subject grievance.

Prior to his DRP administrative leave, Grievant worked a rotating CWS. When he transitioned into DRP administrative leave status, he noticed his schedule had been altered in the time and attendance (T&A) system to a standard five-day, eight-hour (5/8) schedule. This change to the Grievant's tour of duty (TOD) in the T&A system was made by Cynthia Holcik, a Resource Management (RM) Customer Service Representative (CSR) and bargaining unit employee. She initially changed Grievant's TOD to a straight 8-hour per day Monday through Friday schedule due to previous guidance regarding administrative leave and confirmed this approach with higher headquarters from outside the District (Michael Brandon) on how to execute OPM DRP administrative leave in the T&A system.

Local District management was not aware of the change to Grievant's TOD until after it had been made by the RM employee due to the list of DRP employees being closely held and only given to those with a need to know and in her role handling payroll for the District Ms. Holcik was tasked with the coding for employees who elected DRP for administrative leave.

Upon the Union filing a grievance at Step 1, local District management immediately investigated the matter and realized the higher headquarters guidance the RM employee had originally acted on to change the Grievant's TOD had subsequently changed. Recognizing that the RM employee had not yet acted on the subsequent higher headquarters guidance, the District promptly directed and implemented the restoration of Grievant's original rotating CWS in the T&A system. The RM employee worked closely with the Step 1 official to fully restore the Grievant's schedule in the T&A system.

District's Step 1 decision restored the Grievant's rotating schedule on paper and retroactively paid him the night shift differentials he was owed, fully resolving that portion of the grievance. However, the Union proceeded to file Step 2 and Step 3 grievances on this matter in pursuit of Sunday and holiday premium pay that Grievant would have earned if he worked.

The District's position in this matter is rooted in adherence to federal pay statutes and established labor relations precedent. The Grievant's requested remedies must be denied in their entirety for two fundamental reasons. First, federal law and regulations strictly prohibit the payment of Sunday and holiday premium pay to an employee who is in a leave status and performs no work, and the Union's request for a "lump sum equivalent" is an impermissible attempt to bypass statutory law. Second, the Union's demand for a formal ULP posting is entirely unwarranted because the evidentiary record shows a bargaining unit employee was responsible for the change to Grievant's schedule, so no ULP occurred. Even assuming a technical violation, the District's immediate, good-faith status quo ante remedy made the Grievant completely whole, rendering a posting moot and beyond the proper scope of the Arbitrator's authority.

The Grievant is legally barred from receiving Sunday and holiday premium pay on days he performed no work. The record unequivocally demonstrates that the Grievant is not entitled to Sunday or holiday premium pay. Further, the Union's artful suggestion of a "lump sum payment" in lieu of the Sunday or holiday premium pay is merely an attempt to disguise an illegal payment and would similarly be contrary to law.

Federal law and regulation prohibit accrual of Sunday and holiday premium pay when in a leave status. Sunday premium pay and holiday premium pay for prevailing rate employees are governed by unambiguous Federal law and regulation—such pay is strictly available to employees who actually perform or report to work on qualifying days. *See* 5 U.S.C. §§ 5544 and 5546.

Sunday premium pay is afforded to employees when their "regular work schedule includes an 8-hour period of service a part of which is on Sunday . . . for each hour *of work performed* during that 8-hour period of service." 5 U.S.C. § 5544(a) (emphasis

added). Per OPM regulation, “Sunday work means *work performed* during a regularly scheduled tour of duty within a basic workweek when any part of that work which is not overtime *is performed* on Sunday.” 5 C.F.R. § 532.501 (emphasis added). *See also* 5 C.F.R. § 532.509; *Nat’l Air Traffic Controllers Ass’n*, 62 F.L.R.A. 385, 388 (2008) (citing *Curry v. U.S.*, 66 Fed. Cl. 593, 600–04 (2005)) (Sunday premium pay may not be paid as part of leave for a tour of duty which includes a Sunday).

Similarly, holiday premium pay is provided to employees “*who perform[] work* on a holiday.” 5 U.S.C. § 5546(b); 5 C.F.R. § 532.507(a) (emphasis added). OPM regulations clarify that when an employee entitled to a night shift differential is granted “excused absence *on a legal holiday or other day off from duty granted by Executive or administrative order*,” the employee is still paid the night shift differential for that period of excused absence. 5 C.F.R. § 532.505(b) (emphasis added). However, the employee is not entitled to holiday premium pay unless they are required to report to work on a holiday. *See* 5 C.F.R. § 532.507(c) (employee “required to report for work on a holiday shall be paid at least two hours of holiday pay whether or not work is actually performed”).

By law, then, prevailing rate employees such as Grievant, are not entitled to Sunday and holiday premium pay while on leave because they perform no work. The Union’s own witnesses—Grievant and Mr. Osuch—conceded on the record that a Lock Operator on leave would not earn Sunday or Holiday premium pay. It is undisputed that while on DRP administrative leave, the Grievant was in a non-duty status and performed no work on the applicable Sundays or holidays. Therefore, awarding him premium pay for days he was in an administrative leave status is expressly prohibited by federal law.

Recognizing the statutory bar, the Union attempts to rely purely on the language of the OPM DRP contract to claim a right to this premium pay. However, basic principles of contract interpretation defeat their argument. Agreements between federal agencies and employees are subject to standard contract interpretation principles. *Pryor v. U.S.*, 85 Fed. Cl. 97, 103 (2008). Under the tenets, contracts are interpreted consistent with the laws and regulations in existence at the time and place the contract was formed, “as fully

as if they had been expressly referred to or incorporated in its terms.” *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 130 (1991) (quoting *Farmers & Merchs. Bank v. Fed. Reserve Bank*, 262 U.S. 649, 660 (1923)).

Because the U.S. Code and C.F.R. provisions explicitly requiring an employee to *perform work* to earn Sunday or holiday premium pay were in full effect at the time the Grievant entered into the DRP contract, the parties are legally assumed to have contracted with reference to those governing provisions. Accordingly, while the OPM DRP contract states that “employees who accept the offer will not be subject to any reduction in pay,” this provision must be interpreted consistently with existing law. “Pay” cannot be construed as a contractual guarantee to illegally disburse premium pay for hours not worked.

The Union’s suggestion that the Arbitrator bypass the U.S. Code and C.F.R. by simply awarding a “lump sum equivalent” to the amount the Grievant would have received for Sunday and holiday premium pay is equally fatally flawed. An arbitrator lacks the equitable or statutory authority to order the federal government to expend funds in contravention of existing law—5 U.S.C. § 7122(a)(1) dictates that awards must not be “contrary to any law, rule, or regulation.” *See AFGE, Local 1617 v. FLRA*, 103 Fed. Appx. 802, 805–06 (5th Cir. 2004).

Under the Back Pay Act, monetary remedies against the federal government are strictly limited to the pay, allowances, or differentials the employee “normally would have earned or received” but for an unjustified or unwarranted personnel action, and “shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement...” 5 U.S.C. § 5596(b). Because the Back Pay Act is only a limited waiver of sovereign immunity, an arbitrator cannot order a monetary remedy against the government if the law explicitly forbids the underlying payment. *U.S. Dep’t of Justice and AFGE Local 1302*, 65 F.L.R.A. 76, 78 (2010); *see also Immigration and Nat. Serv. and AFGE Local 505*, 52 F.L.R.A. 103, 105 (“an order by the Authority that agency remedy an unfair labor practice by providing monetary reimbursement . . . must be supported by statutory authority to impose such remedy”).

Because the Grievant was legally ineligible to earn Sunday and holiday premium pay while in a non-work administrative leave status, those amounts cannot legally form the basis of any back pay calculation or lump-sum award. Re-packaging an illegal premium pay demand as a “lump sum” is an impermissible run-around the law that exceeds the Arbitrator’s authority.

The Union bears the burden of proving the elements of an alleged unfair labor practice under 5 U.S.C. § 7116(a) by a preponderance of evidence. *See* 5 U.S.C. §§ 7118(a)(7) and (8); 5 C.F.R. § 2423.32. The statutory standard and burden apply to arbitration in the same manner as before the Federal Labor Relations Authority (FLRA). *AFGE Local 940 and U.S. Dep’t of Veterans Affairs*, 52 F.L.R.A. 1429, 143–40 (1997).

To establish a ULP under 5 U.S.C. § 7116(a)(1) and (5), the Union must prove that District management bypassed the Union and unilaterally changed a condition of employment. For a change in an employee’s conditions of employment to trigger an Agency’s statutory obligation to notify the Union and provide an opportunity to bargain, the change must result from an agency-initiated change. *NTEU and Internal Revenue Serv.*, 66 F.L.R.A. 577, 580 (2012).

However, unrefuted testimony and evidence have established that the individual who changed the Grievant’s schedule in the Time and Attendance (T&A) system was not a management official, but rather a Resource Management (RM) employee who is a bargaining unit employee (BUE). Furthermore, this BUE testified that she did not execute this change at the behest or direction of local District management. Rather, she was acting ministerially, adhering to system-driven, administrative processing guidance she received from higher headquarters to timely execute the OPM DRP program.

Because the schedule change was executed by a bargaining unit peer effectuating systemic guidance from outside the local bargaining relationship—and not as a deliberate policy change or working condition change directed by local management—the necessary elements of a ULP are absent. Local management cannot bypass the Union regarding a systemic payroll adjustment it neither initiated nor directed.

Even assuming *arguendo* That a technical violation occurred, the District's prompt status quo ante remedy made Grievant whole, rendering a ULP posting inappropriate. The purposes of the FLRA's remedial authority under 5 U.S.C. §§ 7105(g) and 7118 are to restore the status quo and to deter future unlawful conduct. *See Fed. Bureau of Prisons*, 55 F.L.R.A. 1250, 1258 (2000). However, when a grievance is limited to a particular grievant, the remedy must be similarly limited, or the arbitrator runs the risk of exceeding their authority. *Def. Logistics Agency Aviation*, 70 F.L.R.A. 206, 207 (2017) (footnotes 10 and 11 citing additional authorities). Although a posting is referenced in FLRA case law as a "traditional" remedy, there is "no law, rule or regulation mandating a notice-posting remedy" and the question of remedy is squarely "within the judgment and discretion of the Arbitrator." *AFGE Local 12 and Dep't of Labor*, 69 F.L.R.A. 360, 361–62 (2016).

The Joint Stipulations of Fact confirm that upon the Union raising this issue at Step 1 of the grievance process, local District management immediately investigated and implemented a status quo ante remedy in good faith. The Grievant's rotating schedule was restored on paper, and he was retroactively paid all night differentials he would have accrued.

Because the Grievant suffered no ultimate financial harm and was made completely whole by the District's good-faith corrective action at Step 1, the grievance is effectively moot. Furthermore, because the grievance was limited to one (now retired) employee in the context of a novel OPM program, any remedy should be strictly limited to the Grievant. In accordance with FLRA precedent, a District-wide ULP posting for an individual, instantly corrected administrative error would be punitive, would fail to effectuate the policies of the Statute, and would exceed the proper scope of the Arbitrator's authority.

For the foregoing reasons, the District respectfully requests that the Arbitrator deny the Union's request in its entirety. Management has already, and in good faith, made the Grievant whole by restoring his base pay night differential to which he was legally entitled. The Union's continued pursuit of an illegal premium pay windfall and a

punitive ULP posting is unsupported by the facts, the testimony, and the law. Neither the District nor the Arbitrator can provide relief beyond what a court or administrative body could order. Accordingly, the District respectfully requests that the Arbitrator deny the Union's request for an unjustified ULP posting and an illegal expenditure of funds.

ANALYSIS AND DISCUSSION

The parties have each offered documentary evidence and testimonies to support their respective cases. The parties have thoroughly argued their positions at hearing and in post-hearing briefs to support their contentions. The Arbitrator has considered all of the evidence and arguments presented and offers the following.

By any dictionary definition, salary describes fixed compensation, normally fixed annually. Grievant was a wage grade employee, whose compensation would normally not be considered "fixed" but computed based on an hourly wage with differentials and premiums. The term "salary" is thus normally not used in describing the compensation of wage grade employees.

So the question presented to the Arbitrator is, what did the parties intend in the DRP agreement? To the Arbitrator, the answer is found in the first substantive paragraph of the agreement where, in discussing the "Fork in the Road Memo," it was noted that "The offer stated that those employees who accept the offer will not be subject to any reduction in pay or benefits by their agency and exempted them for all applicable in-person work requirements ..." (Emphasis added). This language is reinforced by OPM's draft letter set out in its policy email which provided in pertinent part:

I understand I will be exempt from any "Return to Office" requirements pursuant to recent directives and that I will maintain my current compensation and retain all existing benefits (including but not limited to retirement accruals) ...

J Ex 9.

It is thus clear to this Arbitrator that the intent of the agreement was that the consideration to be given Grievant for staying out of work and subsequently retiring was his receipt without reduction of the compensation he otherwise would have earned, i.e., his "current compensation" -- described in the agreement as his "current salary" or "pay."

Due to the unique nature of Grievant's position and assigned work, his compensation was essentially fixed by a calendar-year schedule provided to him the previous November. Grievant fulfilled his part of the bargain: the Agency did not. Grievant was promised he would not be subject to any reduction in pay or benefits and would be exempted for all applicable in-person work requirements if he took the fork in the road. By failing to take into the account the amount of money Grievant would actually earn on his scheduled Sundays, Grievant's promised compensation was reduced, resulting in a reduction of his "pay," -- i.e. compensation he was promised if he took that fork. This action violated both the spirit and the express language of the DRP agreement. It further violated Article 1, Section 2 of the CBA insofar as the Agency did not implement the DRP agreement in a "fair ... manner consistent with law, regulation, policy."

Additionally, as clearly spelled out in OPM's February 11, 2025 additional guidance on Compliance with the Age Discrimination in Employment Act, (there is no dispute that Grievant is 40 years of age or over) Grievant's DRP agreement was to be treated as an "exit incentive program" where employees in such a program "are offered consideration in addition to anything of value to which the individuals are already entitled." J. Ex. 33. What Grievant was offered was his full salary without having to come to work -- he was free to find a new job in the private sector, stay at home, relax travel to your dream destination -- whatever he would like. And as clearly evident from Grievant's texts to his supervisor shortly after his DRP agreement was effected, he fully expected to continue to receive his full salary including the differential and premiums he would have earned based on his 2025 schedule.

It was incumbent on the Agency to find a way to pay Grievant's full salary, including those premiums he would have earned under his set 2025 schedule. The Arbitrator can find nothing in the DRP, in OPM's guidance or in law, rule or regulation that mandated that the Agency only use administrative leave to compensate Grievant. Administrative leave was clearly insufficient because as the Agency correctly argues such leave cannot be computed so as to include Sunday and holiday premium pay. The

Arbitrator finds, however, that the DRP as envisioned by OPM and as set forth in its guidance constituted an “exit incentive program” that authorized the Agency to pay Grievant the difference required to equate to his full salary where administrative leave fell short. This the Agency failed to do. The Arbitrator thus finds that Grievant was affected by this personnel action, that it was unjustified and unwarranted, and that it directly resulted in withdrawal or reduction of all or part of Grievant’s “pay, allowances, or differentials.” But for the DRP and the promises made to Grievant, the Arbitrator finds that he would have been ready willing and able to perform the required Sunday and holiday work. Accordingly, the Back Pay Act, 5 U.S.C. § 5596, governs the remedy to be applied under the circumstances of this case entitling him to an amount equal to all or any part of the pay, allowances, or differentials ... which he normally would have earned or received during the period if the personnel action had not occurred. *See Bureau of Prisons and AFGE Local 1242*, 66 FLRA 737 (2012) *and cases cited therein*.

The Arbitrator has considered the Union’s claim that the waiver of sovereign immunity set out in the Tucker Act, 28 U.S.C. § 1491 applies to this arbitral proceeding. In this Arbitrator’s view, however, a plain reading of the cited statute indicates that the waiver pertains to money claims brought to the U.S. Court of Claims and U.S. District courts and does not extend to arbitral proceedings such as this one.

With respect to the admitted failure by the Agency to unilaterally change Grievant’s schedule from CWS to a standard M-F 40 hour schedule without affording the Union notice and an opportunity to bargain, the Arbitrator concludes that Management’s error, while based on faulty guidance and quickly corrected nonetheless was initially taken without offering the Union notice and an opportunity to bargain as required by the Federal Labor Relations Statute. The Arbitrator finds no evidence in the record that Ms. Holcik was acting other than as Management’s agent in carrying out her T&A duties.

The Arbitrator finds it appropriate to order the traditional posting remedy to ensure confidence in the labor-management relationship. In this regard, the Arbitrator takes note that Management in its Step 1 grievance response neglected to address the Union’s ULP claim even though it was acknowledged.

REMEDY

1. The Agency is ordered to provide Grievant Ben Paxton with an amount of back pay and interest equal to the premium Sunday and holiday pay he would have earned if he had worked the schedule set out in Joint Exhibit 6 prior to his retirement.
2. The Agency is ordered to cease and desist from:
 - (a) Changing work schedules in the bargaining unit exclusively represented by the International Federation of Professional and Technical Engineers Local 777 AFL-CIO (the Union), without first affording the Union the opportunity to negotiate with respect to the change.
 - (b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.
3. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:
 - (a) Post at its facilities where bargaining unit employees represented by International Federation of Professional and Technical Engineers Local 777 AFL-CIO are located, copies of the following Notice shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

NOTICE TO ALL EMPLOYEES

4. POSTED BY ORDER SET FORTH IN FMCS CASE NO. 261230-02334

5. The Arbitrator in FMCS Case No. 261230-02334 has found that the United States Army Corps of Engineers violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

6. WE HEREBY NOTIFY EMPLOYEES THAT:

7. **WE WILL NOT** Change work schedules in the bargaining unit exclusively represented by the International Federation of Professional and Technical Engineers Local 777 AFL-CIO (the Union), without first affording the Union the opportunity to negotiate with respect to the change.

8. **WE WILL NOT**, in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured by the Statute

AWARD

The grievance is SUSTAINED. The Agency is ordered to provide the remedy set forth above. The Arbitrator will retain jurisdiction for at least 90 days from the finality date of this award to resolve any questions that may arise over application and interpretation of this remedy.

Date: **June 17, 2026**

John F. Markuns

John F. Markuns
Arbitrator