FEDERAL MEDIATION AND CONCILIATION SERVICE

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **AFGE, LOCAL 3197** and **VA PUGET SOUND HEALTH CARE SYSTEM**	Case No. 09-58225 Employee Grievance

DECISION

PRELIMINARY STATEMENT

Stanley B. Stewart, Acting Stewart at Large, represented AFGE, Local 3197.

Jamie Wade, Employee/Labor Relations Specialist, appeared on behalf of VA Puget Sound Health Care System.

VA Puget Sound Health Care System, hereinafter the "VA", and AFGE, Local 3197, hereinafter the "Union", are covered under a Master Agreement[1] between the United States Department of Veterans Affairs and the American Federation of Government Employees, hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The grievance[2] in this matter involves the claim of employee Ms. Employee for back pay for the salary differential between GS-6 step 1 and GS-6 step 2 retroactive to her starting date as a Certified Respiratory Therapist on August 17, 2008. The parties agreed that James M. Paulson was selected to arbitrate the matter and that his decision would be final and binding as described in the Agreement.

On December 10, 2009 a hearing was held at the VA Puget Sound Health Care System, Seattle Division in Seattle, Washington. At the hearing the parties were each permitted to

[1] Exhibit Nos. 23 & 24 are Articles 16 and 42 of the Master Agreement. The Arbitrator has also been provided with the entire Master Agreement and will reference other portions of that document as may be necessary in this Decision.

[2] Exhibit No. 10.

present testimony and documentary evidence and to examine and cross examine witnesses. The Union called as its witnesses: Richard Goodman, M.D., member Respiratory Therapy Professional Standards Board and Medical Director for Respiratory Therapy; Lewis W. Massey, Chief of Respiratory Therapy; Darla Generoso, Human Resources Specialist; Julie Wilkerson, Director Human Resources Management Service; Brian Ricard, Chief of Employee and Labor Relations; and Stan Johnson, Director, VA Puget Sound Heath Care System. The VA called no witnesses but cross examined the Union witnesses as they were management employees.

The parties submitted their Briefs to the Arbitrator on or before January 25, 2010. Once the Briefs were received by the Arbitrator, the hearing was closed. The Arbitrator's Decision and Award will be issued to the parties on or before February 24, 2010.

STATEMENT OF THE ISSUES

Pursuant to Article 40 – Arbitration, Section 2, Paragraph E, of the Master Agreement, the parties requested that the Arbitrator frame the issues in this matter. Both parties submitted their proposed statement of the issues together with arguments supporting their respective positions as well as detailed documentation. On November 22, 2009, the Arbitrator determined that the issues to be decided are:

> Is the grievance dated March 17, 2009 on behalf of Ms. Employee arbitrable? If not, what shall the remedy be?
>
> To the extent that the grievance is arbitrable, did the Employer violate the Master Agreement or any applicable law, rule or regulation by placing Ms. Employee on GS-06, Step 1 rather than Step 2 on or about August 14, 2008? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 16—EMPLOYEE RIGHTS

Section 1 – General

In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, Union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping conditions. Employees will also be afforded proper regard for and protection of their privacy and constitutional rights. It is therefore agreed that Management will endeavor to establish working conditions which will be conducive to enhancing and improving employee morale and efficiency.

* * *

Section 8 – Dignity and Self Respect in Working Conditions

Employees, individually and collectively, have the right to expect, and to pursue, conditions of employment which promote and sustain human dignity and self-respect.

ARTICLE 42--GRIEVANCE PROCEDURE

Section 2 - Definition

A. A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or Management concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment.

* * *

C. Under Title 38 Section 7422, the following exclusions apply:

* * *

2. Any matter or question concerning or arising out of peer review, and/or

3. Any matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation under this Title.

Note 1: Any questions concerning the extent of the exclusions in Paragraphs C1-C3 will be resolved in accordance with the VA Partnership Council's *Guide to Collective Bargaining and Joint Resolution of 38 USC Section 7422 Issues*, which provides that these exclusions will be applied narrowly and only to those matters clearly and unequivocally involving direct hands-on patient care or clinical competence.

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Section 7 – Procedure

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Step 1. An employee and/or the Union shall present the grievance to the immediate or acting supervisor with an information copy to the Director of the facility in writing within thirty (30) calendar days of the date that the employee or Union became aware of or should have become aware of the act or occurrence or anytime if the act or occurrence is of a continuing nature. * * *

STATEMENT OF FACTS

Background Facts

Ms. Employee began her employment with the VA in February, 2002 as a Nursing Assistant in the Spinal Cord Injury Service area. While in this capacity, she attended and graduated from Highline Community College with an Associate in Applied Science degree in Respiratory Care in June, 2008. She then obtained her credentials as a Certified Respiratory Therapist.

Also in June, 2008 Ms. Employee completed a Performance Based Interview for the position of Certified Respiratory Therapist Technician. On July 16, 2008 she completed her application for that position.

Facts Giving Rise to the Grievance

On August 11, 2008 the Respiratory Therapy Professional Standards Board reviewed the qualifications of Ms. Employee in accordance with VA Handbook 5005, Part II Appendix G10 for the position of Certified Respiratory Therapist. The Board recommended her appointment to that position "using the highest previous rate, based on VA employment as a GS-5 Step 2, to full time excepted appointment at GS-6, step 2, under Title 38, USC 7401(3)."[3]

Also on August 11, 2008 Human Resources Specialist, Darla Generoso, acting as the Human Resources Technical Advisor to the Respiratory Therapy PSB, reviewed the Board's recommendation for adherence to all legal and technical requirements of applicable law and VA Handbook rules. She determined that the Board's recommendation of placing Ms. Employee at step 2 of Grade 6 was impermissible because her "highest previous rate" based on VA employment placed her at step 1 and not step 2 of Grade 6. Ms. Generoso used the actual annualized amount of Ms. Employee's previous pay and not the fact that she was at step 2 of Grade 5 in her previous position of Nursing Assistant. Ms. Generoso altered the typed position of the Board by striking out placing Ms. Employee at step 2 and writing in step 1. She initialed her alteration. She then signed the form in box 11 certifying as the "Initiating board technical advisor that [the] board action is completed and has been reviewed for adherence to all legal and technical requirements before forwarding to approving authority."[4]

The form was then passed on to Facility Director Stan Johnson and approved by him on August 14, 2008. On August 17, 2008 Ms. Employee moved into her new position of Certified Respiratory Therapist at Grade 6, step 1.

[3] Exhibit No. 13, Box 9, ¶ 1.
[4] Exhibit No. 13, Box 11.

The Grievance

On October 9, 2008 Ms. Employee signed an Authorization of Representation form authorizing Union Steward Stanley Stewart and the Union to represent her as well as a further authorization for him to have access her records to "enable him to investigate a grievance that I have filed or intend to file."[5]

On March 17, 2009 Mr. Stewart filed a step two grievance[6] on behalf of Ms. Employee with the Director of Human Resources. The Union alleged a violation of the Master Agreement, Article 16, Sections 1 and 8. In essence, the Union argued that the recommendation of the Board should not have been changed by the Human Resources Department. Back pay was demanded for Ms. Employee from the date of her appointment.

On April 13, 2008 the VA gave its response[7] denying the grievance. It noted that the grievance was untimely in that the action of the Facility was taken on August 14th and Ms. Employee was placed in her new position at step 1 on August 17th. Additionally, the VA contended that the Board action was a "peer review" action and thus not arbitrable under Article 42 of the Master Agreement. Finally, the VA took the position that it was not bound by the Board recommendation as the Facility Director has the final authority to set the new salary for Ms. Employee.

On April 30, 2009 the Union appealed[8] the grievance to step 3. It repeated its basic argument that the Board's recommendation should be implemented. In response to the VA position that the grievance was untimely, the Union contended that the act or occurrence was of a "continuing" nature that therefore could be filed at any time.

On May 26, 2009 the Facility Director filed the step 3 answer[9] denying the grievance on behalf of the VA. He reiterated that the grievance was not timely. His approval of the amended Board action was complete as of August 17, 2008 and was not of a continuing nature. As to the merits of the grievance, he noted that in order for Ms. Employee to have been placed above step 1 in Grade 6, the Board would have to have cited "superior qualifications". They did not nor did Ms. Employee.

On May 27, 2009 the Union demanded[10] arbitration of the grievance.

[5] Exhibit No. 11.
[6] Exhibit No. 10.
[7] Exhibit No. 9.
[8] Exhibit No. 4.
[9] Exhibit No. 3.
[10] Exhibit No. 1.

CONTENTIONS OF THE PARTIES

Union Contentions

Arbitrability

In response to the VA's claim that the grievance was untimely, the Union points to the language in Article 42 of the Master Agreement which states that where the act or occurrence it is grieving is of a "continuing nature" it may file a grievance "anytime". Every time Ms. Employee is paid on step 1 rather than step 2, another contract violation occurs and therefore the violation is continuing. The Union attached to its brief several court decisions discussing and applying the continuing violation theory.

The Union next responds to the VA's contention that the grievance is not arbitrable because under Article 42 all matters arising out of a peer review determination concerning a Title 38 position are not arbitrable. The Union contends that the Professional Standards Board in this case was not a "peer review board" because the Board members were not Ms. Employee's peers. All of the Board members were physicians and Ms. Employee was a respiratory therapist. The Union further argues that Title 38 USC §7422 does not apply to "hybrid" Title 38 employees.

Merits

As to the merits, the Union first references Article 16 of the Master Agreement which covers employee rights. In essence the Union contends that Article 16 requires that the VA treat employees fairly and it did not do so in this instance because it refused to follow the determination of the Board that Ms. Employee should have been placed on step 2 rather than step 1 of Grade 6. Finally, the Union argues that the Human Resources Technical Advisor to the Board "abused her authority" by failing to actually advise the Board. Instead, completely on her own and without notifying the Board, she simply crossed out their recommendation. Accordingly, what the Director got for his approval was a Board action that was improperly changed by the Technical Advisor.

The Union asks that the grievant receive back pay from the time of her starting in the position of Respiratory Therapist.

VA Contentions

Arbitrability

The VA first contends that this grievance is excluded from the grievance procedure and arbitration by Article 42, Section 2, subsection C, paragraph 3; that is, the determination of the Under Secretary of Health through the Professional Standards Board and the Facility Director "arising out of the establishment, determination, or adjustment of employee compensation under this Title [38] is not grieveable or arbitrable. Here the grievance concerns Ms. Employee's compensation as determined by the Under Secretary through his designee—the Facility Director.

The VA further contends that the grievance is not arbitrable because it was not timely filed. Clearly, the grievance was filed more than thirty days after the final decision of the Director and after Ms. Employee began working at the position. Contrary to the Union contention, all of the action of the VA in determining and finally setting Ms. Employee's compensation at step 1 occurred more than thirty days before filing the grievance. No continuing action or conduct by VA management occurred.

Merits

The VA contends that Ms. Employee was treated fairly and strictly in accordance with the procedures prescribed in the VA Handbook in setting her "initial" salary as a Certified Respiratory Therapist where she was an onboard employee with previous service. The VA cites in detail the procedure specified in the Handbook in that the Board authority is only to "recommend" the new level of compensation. The Board may only place a newly promoted employee above step 1 of the proper grade for the position[11] if it recites "superior qualifications" justifying doing so. Since Ms. Employee had no prior experience as a Respiratory Therapist, the Board did not and could not have cited "superior qualifications" to justify placing her at step 2. Indeed, Ms. Employee only met the minimum qualifications for Grade 6. Accordingly, her placement at step 1 was fair and in compliance with Handbook procedure.

DECISION

Arbitrability

Burden of Proof and Policy Favoring Arbitrability

When a party challenges the arbitrability of a grievance, it becomes the moving party thereby acquiring the burden of proof as to that issue.[12] This burden entails both the proof of any disputed facts necessary to establish its claim as well as the meaning of contract language which is relevant to a determination of whether the grievance is arbitrable. Here the VA has the burden of proof as to arbitrability[13].

Arbitrators generally tend to rule in favor of arbitrability, so that issues may be determined on their merits rather than on narrow technicalities. Additionally, "overwhelming arbitral precedence holds that doubts as to compliance with time limits should be resolved in favor of arbitrability."[14] Accordingly, there exists and this Arbitrator recognizes a strong policy favoring the arbitrability of grievances.

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[11] Neither party contends that placing the grievant at Grade 6 was inappropriate.

[12] Elkouri & Elkouri, *How Arbitration Works* (BNA 6th Ed. 2003), p. 217, n. 95.

[13] It should be noted that the VA raised its claim as to arbitrability during the grievance procedure as it was required to do under Article 42, Section 4.

[14] *How Arbitration Works, supra,* citing *Phillips 66 Co.*, 92 LA 1037 (Neas, 1989).

Timeliness

Article 42, Section 7, Step 1 of the Master Agreement requires that a grievance be filed "in writing within thirty (30) calendar days" of "the act or occurrence" that is being grieved. On its face, the grievance is untimely as it was filed on March 17, 2009 since the Facility Director made his decision on August 14, 2008 that the grievant was to be placed on step 1 and not step 2 of Grade 6. Additionally, Ms. Employee assumed her new position of Certified Respiratory Therapist on August 17, 2008. The VA has met its initial burden of showing that the grievance was not timely. Obviously, the Union has countered that the failure to place Ms. Employee on step 2 was of a "continuing nature" and was, therefore, timely.

Although arbitrators often apply the continuing violation theory in reviewing the timeliness of a grievance[15], in this instance the parties have taken the somewhat unusual step of setting forth that theory in the grievance procedure. Specifically, the agreement states that a grievance may be filed "anytime if the act or occurrence is of a continuing nature."[16] Normal rules of contract interpretation would require that the Arbitrator seek to determine what the parties intended when they placed those words in the agreement. Neither party submitted any bargaining history, settled grievances or past arbitration decisions dealing with this language. On the other hand, it is clear that this language has been in the agreement since at least 1997 as the present Master Agreement language has been in effect since then.

The concept of a continuing violation allowing an otherwise untimely claim to be pursued has it origin in discrimination law claims. Unfortunately, this does not give clear guidance in resolving the instant matter. "Unquestionably the biggest area of disagreement—arguably the most muddled area in all employment discrimination law—is that of alleged 'continuing violations'".[17]

Essentially, the employer's position in the instant matter is to urge the Arbitrator to adopt the analysis of the United States Supreme Court in the controversial decision of *Ledbetter v. Goodyear Tire & Rubber Co.*[18] In that case the court held that Ms. Ledbetter could not bring a claim challenging her pay when the alleged discrimination causing her lower pay occurred

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[15] "Many arbitrators have held that 'continuing' violations of the agreement (as opposed to a single isolated and completed transaction) give rise to 'continuing' grievances in the sense that the act complained of may be said to be repeated day to day, with each day treated as a new 'occurrence.' These arbitrators permit the filing of such grievances at any time, although any back pay would ordinarily accrue only from the date of filing." *How Arbitration Works, supra*, pp. 218-219 (citations omitted). See also, 2008 Supplement to *How Arbitration Works*, pp. 105-106 and cases cited therein.

[16] Article 42, Section 7. Exhibit No. 24.

[17] Lindemann & Grossman, *Employment Discrimination Law* (BNA 3rd Ed. 1996) , p. 1351; See also, 2002 Cumulative Supplement to *Employment Discrimination Law, supra*, pp. 938-948. "The cases addressing the continuing violations theory . . . continued to defy easy description or convenient categorization." *Supra*, p. 940.

[18] 550 U.S. 618 (2007). *Ledbetter* was a 5-4 decision which was later overturned by the passage of the Lily Ledbetter Fair Pay Act of 2009.

outside the limitations period. Here, the VA argues, even though the grievant's pay (she was still on step 1 and not step 2) may still be affected by the Director's decision within 30 days of filing the grievance in March, 2009, that decision was complete in August, 2008. Therefore, the grievance is untimely. In essence, the Supreme Court rejected the "continuing violation" concept under the facts presented in the *Ledbetter* decision. Federal statutory law historically, as contrasted to the language in the Master Agreement, has not recognized the concept of a continuing violation by specific language. Courts, not the legislature (until the passage of the Lily Ledbetter Fair Pay Act of 2009), created the concept.

The problem with applying the Supreme Court's analysis is that the parties, by the language they placed in their agreement, agreed that the "continuing violation" concept was to be in effect in assessing the timeliness of grievances under *their* agreement. Accordingly, it is reasonable to conclude that the continuation of paying the grievant at a disputed pay level is an "act or occurrence" of a "continuing nature" even though the employer's decision to do so occurred outside the time limits for filing a grievance. Every pay check that the grievant received at the step 1 instead of the step 2 level is a possible violation.

In addition to the foregoing analysis, the Arbitrator notes that research of the most recent 18 reported arbitration decisions by the Bureau of National Affairs involving the application of the continuing violation theory to complaints that a person's pay was adversely affected by employer action prior to the limitations period for filing grievances shows that in 16 of those decisions the grievances were found arbitrable. This is so in spite of the fact that in none of those cases did the parties specifically recognize the continuing violation concept in their agreements as is the case here.

Based on the above discussion and keeping in mind the strong policy favoring arbitrability, the Arbitrator finds that the grievance is timely.

Exclusion Under Article 42, Section 2, C.

An analysis of whether or not the grievance is excluded from the grievance and arbitration provisions of the agreement under Article 42, Section 2, C turns on a careful analysis of the contract language. At first, it would appear that it is excluded. While the Certified Respiratory Therapist position is apparently a "hybrid" Title 38 position, it is referenced in Title 38, §7401(3)[19], thereby coming under Title 38 as listed in the Master Agreement. Moreover, the question of whether or not Ms. Employee should be on step 1 or step 2 of Grade 6 appears to be a question arising out of "the establishment, determination, or adjustment of employee compensation."[20]

The problem with this analysis is that it does not take into account Note 1 to Section 2.

[19] Listed in that section are, *inter alia*, "registered respiratory therapists."

[20] Article 42, Section 2, C, 3. While the VA argued in the grievance procedure that the grievance was also excluded under Section 2, C, 2, the Arbitrator agrees with the Union that the recommendation of the Respiratory Professional Standards Board did not constitute a "peer review." All members were physicians.

Note 1 states, in part: "these exclusions [referenced in C1-C3] will be applied narrowly and only to those matters clearly and unequivocally involving direct hands-on patient care or clinical competence." The VA makes no explanation of how the decision of whether the grievant should be on step 1 or step 2 of Grade 6 *clearly and unequivocally involves direct hands-on patient care or clinical competence*. Basic rules of contract interpretation require that meaning must be given to all relevant language in the contract[21]. With no explanation for the language in Note 1, the VA has not met its burden of proof that the grievance is excluded from arbitration. Accordingly, the Arbitrator finds that the grievance is not excluded from arbitration by Section 2, C of the grievance procedure.

The Merits of the Grievance

Burden of Proof

As to the merits, the Union, having filed the grievance and demanded arbitration, is the moving party and therefore has the burden of proof.[22] In this case, there is no dispute as to what happened in terms of the facts giving rise to the grievance. Pursuant to the statement of the issues, the Union must prove that the Employer violated either the Master Agreement or any applicable law, rule or regulation by its actions. In the grievance, at the hearing and in its post hearing brief, the Union alleged that the VA violated the Master Agreement. While it could have alleged the VA violated its own Handbook (presumably a "rule"), a law or a regulation, the Union did not do so. Accordingly, the inquiry on the merits is to determine if the Union met its burden of proving a violation of the Master Agreement.

Application of the Facts to Master Agreement Provisions

Essentially, the Union's argument is a claim that Ms. Employee was not "treated fairly and equitably" as required by Article 16, Section 1 in that the Facility Director chose not to follow the recommendation of the Respiratory Therapy Professional Standards Board that she be placed at Grade 6, step 2. As part of this argument, the Union points to the action of the Human Resources Specialist (as the Human Resources Technical Advisor to the Board) acting unilaterally and without in fact "advising" the Board in altering the recommendation of the Board. The Union does not challenge as "unfair" the VA Handbook's detailed procedure on determining the pay level of an incumbent employee who applies for and is offered a higher level position. Accordingly, the Arbitrator will assume that procedures specified in the VA Handbook

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[21] *How Arbitration Works, supra*, pp. 462-464. "Arbitrators apply a presumption that parties intended their words to have effect and not to be interpreted in a way that causes a provision to perish or be superfluous.". *The Common Law of the Workplace*, §2.7, (St. Antoine ed., BNA, 2nd Ed. 2005), p. 78 "[T]he arbitrator should interpret each clause to make it compatible with the rest of the agreement." Nolan, *Labor and Employment Arbitration*, (West 1998), p. 310.

[22] "In non-disciplinary cases, the initiating party (almost always the union) bears both the burden of proof and the burden of going forward." *Labor and Employment Arbitration, supra*, p. 45.

are consistent with the concept of "fairness" expressed in the Master Agreement.

The general contention of the Union is that the judgment of the Board in placing the grievant at step 2 should not have been disturbed by the Human Resources Advisor. There are several difficulties with this analysis.

First, the authority of the Board was only to make a "recommendation" to the Facility Director as to the salary level.[23] Accordingly, so long as the Human Resources Advisor and the Facility Director are acting within the scope of their authority in changing the step placement of the Board, they are in compliance with the VA Handbook and there is no contract violation. Both VA Form10-2543[24] and the undisputed testimony of Human Resources Specialist Generoso indicate that she must certify that "the board action . . . has been reviewed for adherence to all legal and technical requirements before being forwarded to [the] approving authority." By this language and her testimony, Ms. Generoso had the authority to make the Board recommendation conform to all legal and technical requirements. There is also no requirement in the VA Handbook procedures that she either meet or communicate with the Board at any time in exercising her authority as "technical advisor".

Second, the undisputed testimony of Ms. Generoso articulated in detail how the procedures in the VA Handbook required that the grievant be placed at step 1 rather than step 2. Indeed, by the language chosen by Mr. Massey for the Board in explaining its recommendation, he thought that he was properly applying the grievant's "highest previous rate; based on VA employment as a GS-5, Step 2."[25] He apparently did not understand that this meant that he was to use her actual salary and not her previous step in Grade 5 when moving her to the proper step level in Grade 6. In fact, in order for her to be placed higher than step 1 pursuant to the Handbook, the Board would have to set forth "superior qualifications" justifying their recommendation. They did not try to do so.[26]

Third, because Ms. Employee was a recently certified respiratory therapist with no prior experience as a respiratory therapist, it is highly unlikely that she had the necessary "superior qualifications" to warrant a higher step placement than step 1. The Union makes no argument that she possessed such qualifications.[27]

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[23]Board Member, Dr. Richard Goodman testified that he understood that the Board was only making a recommendation to the Facility Director.

[24] Exhibit No. 13, Box 11.

[25] Exhibit No. 13, Box 9, ¶ 1.

[26] It is apparent to the Arbitrator that neither Mr. Massey nor the Board fully understood the procedure. Had either Mr. Massey communicated with Ms. Generoso or Ms. Generoso communicated with Mr. Massey before the Board made its recommendation, there may have been a different outcome. In either case, Ms. Employee probably would not have felt the need to file a grievance. In any event, at this stage the narrow question before the Arbitrator is whether the VA Handbook procedure was followed.

[27] There is no doubt that Ms. Employee is an outstanding young person who enjoys tremendous respect from her colleagues and managers for her ability and work ethic. However, that fact is not the same as having the requisite qualifications for a higher step placement.

Technically, the procedure laid out in the VA Handbook was followed. Accordingly, the grievant was not treated in an unfair manner constituting a violation of the Master Agreement. The Union has failed to carry its burden.

CONCLUSION

As set forth above, the grievance dated March 17, 2009 on behalf of Ms. Employee is arbitrable. The Employer did not violate the Master Agreement or any applicable law, rule or regulation by placing Ms. Employee on GS-06, Step 1 rather than Step 2 on or about August 14, 2008. The grievance is denied.

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James M. Paulson, Arbitrator

February 3, 2010