

In the Matter of the Arbitration)	
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Between)	
)	
INTERNAL REVENUE SERVICE)	
)	
(Agency))	
)	National Grievance
and)	Flexiplace Commuting Area
)	
NATIONAL TREASURY EMPLOYEES)	
UNION)	
)	
(Union))	

Before: Jerome H. Ross, Arbitrator

Date of Hearing: January 29, 2007

Appearances

For the Union: Katherine M. Tijerina, Esq.
Richard J. Bialczak, Esq. (on brief)

For the Agency: Garry Wade Klein, Esq.

Statement of the Case

In this grievance, dated April 20, 2006, the Union claims that “the IRS’s policy of requiring employees to work at a flex or telework location within or quite near their commuting areas...was implemented without advance notice to NTEU so that it had an opportunity to bargain....” as provided in Article 47, Section 2 of the National Agreement in connection with changes in the implementation of Article 50, Flexiplace, Section 1(A)(1) and (2). The grievance further asserts violations of 5 USC 7114(a)(1) and (4) and was amended to include 5 USC 7116(a)(5) respectively for alleged unilateral

implementation of the Flexiplace policy and refusal to negotiate the policy outlined in a memorandum dated March 6, 2006. The Union requests a make whole remedy for employees adversely affected by the Agency's action.

The current National Agreement was effective on January 3, 2006, and provides under Article 42, Institutional Grievance Procedure, in Section 2, Definitions and General Provisions for Local/National Institutional Grievances:

C. Grievances must be in writing, signed by the appropriate Chapter President or designee, and filed with the Employer within fifteen (15) workdays of the incident that gives rise to the grievance, or within fifteen (15) workdays of the time the Union learned, or should have learned, of the matter out of which the grievance arose. However, where the grievance is...for alleged violations of 5 USC 7116(a)(2), (3), (5), and/or (7), the time limits for filing grievances shall be one hundred and eighty (180) calendar days.”

D. Grievances must: 1. cite the Agreement provision alleged to have been violated....”

The National Agreement, under Article 47, Mid-Term Bargaining, provides in relevant part in Section 2, National Bargaining: “A. Where either party proposes changes in conditions of employment that are Service-wide in nature (to include those matters that affect employees in one (1) or more Divisions in multiple geographic areas), it will consolidate those proposed changes and serve notice thereof on a quarterly basis.” Subsection C, which follows, states: “Within fifteen (15) calendar days of receipt of such notice, the appropriate party will either request to negotiate or request a briefing.” Article 47, Section 1, General Provisions, states in subsection S.1, “Unless otherwise permitted by law, no changes will be implemented by the Employer until proper and timely notice has been provided by the Union, and all negotiations have been completed including any impasse proceedings.”

Article 50, Flexiplace, provides in Section 1, General respectively under subsections A and C:

A.1. Flexiplace is a program that permits employees to work at home or at other approved locations remote to the assigned post of duty. The terms "flexiplace," "telework", and "telecommuting" are synonymous and include working at home or in satellite office sites, with or without computers and other electronic equipment. The assigned POD of an employee approved for Occupational Flexiplace must be an IRS POD and may not be the employee's residence.

2. A supervisor's official relationship with, authority over, and accountability for any employee participating in the Service's Flexiplace Program (on an occupational or situational/hourly basis) is no different than his or her relationship with, authority over, and accountability for employees who are not participating in said program. In this regard, the supervisor retains the authority to review, determine, and approve participation in this program.

B. Employees may be eligible for Occupational (formerly "Traditional") Flexiplace or Situational/Hourly Flexiplace under the criteria set forth in subsections 2E and 2F. Under Situational/Hourly Flexiplace, employees may work up to eighty (80) hours per month at a Flexiplace site.

C. Participants will be permitted to work at home or other Flexiplace work sites full days or a portion a day when approved for a Flexiplace arrangement pursuant to the provisions of this Article. Unless as otherwise provided by the provisions of this Article, there is no limitation on how the work schedule may be configured as long as the scheduling is not disruptive to the work that remains in the office nor cause an unreasonable burden on those who choose not to work a Flexiplace arrangement.

The National Agreement also contains a document titled Exhibit 50-1, which is a form signed by an employee prior to beginning a flexiplace schedule and states in part:

Internal Revenue Service
Flexiplace Work Agreement

C. Voluntary Participation

Employee voluntarily agrees to work at the IRS approved alternative workplace indicated below and follow all applicable policies and procedures. Employee recognizes the Flexiplace Agreement is an alternative work site arrangement approved by his/her supervisor to accomplish the employee's daily work task and/or special assignment.

By memorandum dated March 6, 2006 (the Memorandum), Barbara Pabotoy, the Director of the Workforce Relations Division, issued guidance “to assist managers in deciding what an appropriate Flexiplace location is once a decision is made by a manager to approve a Flexiplace arrangement in accordance with Article 50 of the National Agreement.” The Memorandum cites an Office of Personnel Management (OPM) regulation, 5 CFR 531.605, Determining an employee’s official worksite, issued May 31, 2005, which states in part:

- (d)(1) For an employee covered by a telework agreement who is scheduled (while in duty status) to report at least once a week on a regular and recurring basis to the regular worksite for the employee’s position of record, the regular worksite is the official worksite. However, for an employee whose work location varies on a daily basis, the employee need not report at least once a week to the established official worksite (where the employee’s work activities are based) as long as the employee is performing work within the locality pay area for that worksite at least once a week on a regular and recurring basis. An agency must determine a telework employee’s official worksite on a case-by-case basis.
- (2) If an employee covered by a telework agreement does not meet the requirements of paragraph (s)(1) of this section, the employee’s official worksite is the location of the employee’s telework site.

The Memorandum sets forth the following rationale for issuing the Flexiplace guidance:

IRS policy mandates that every employee must be assigned to an official duty station (post-of-duty) that is documented on a Standard Form 50. An official duty station/post-of-duty (POD) is defined as a building in which the IRS occupies space. In accordance with IRS policy, the official duty station of an IRS employee must be a building in which the IRS occupies space and may not be the employee’s home or other location not occupied by the IRS.

In contrast to IRS policy, current regulations...would allow a manager to approve a Flexiplace location outside the commuting area of the employee’s assigned IRS POD. The commuting area is defined in 5 CFR 351.203 as “the geographic area that usually constitutes one area for employment purposes. It includes any population center for two or more neighboring ones) and the surrounding localities in which people live and

can reasonably be expected to travel back and forth daily to their usual employment.”

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Approval of a Flexiplace location outside the regulatory commuting area of the employee may also result in the employee improperly receiving locality pay in violation of Government-wide regulations. For example, if an employee is assigned to an IRS POD in Washington, D.C., and the employee requests a Flexiplace site at their home in Kansas City, Missouri, the request will be denied since the employee would improperly receive locality pay based upon the cost of living in the Washington, D.C. area.

Using the same example, travel from Kansas City, Missouri, to Washington D.C. would constitute the normal commute of the employee. In order to report to the official duty station or work within the locality pay area once a week, the employee would be required to pay for any costs incurred while traveling to and from Kansas City and Washington, D.C., making it unlikely that either criteria would be met, and resulting in the Flexiplace location (employees' home) in Kansas City becoming an IRS POD, contrary to IRS policy.

Therefore, for both Situational and Occupational Flexiplace arrangements approved by a manager, the Flexiplace site must be by IRS policy within the regulatory commuting area. Enforcement of this policy will negate the possibility of an employee's home or other site not occupied by the IRS becoming an IRS POD and will avoid the other potential work related and regulatory problems mentioned above.

The record also contains a document titled Treasury Directive 74-14, Treasury Telework and Flexiplace Program, dated October 18, 2004, which provides in relevant part:

1. PURPOSE. This directive sets forth a program that provides an opportunity for an employee to work at an alternative work site without changing an employee's official duty station or other conditions of employment.

6. TELEWORK ARRANGEMENTS.

c. A Telework arrangement does not alter the terms and conditions of appointment, including an employee's official duty station, salary, benefits, individual rights, or obligations.

Issue

Whether the Agency had an obligation under the National Agreement or law to negotiate the Memorandum concerning the commuting mileage limitation to the parties' Flexiplace Agreement; and if so, what is the appropriate remedy?

Union Position

The Union contends that the Agency's unilateral imposition of a 50-mile commuting area restriction onto the contractually bargained criteria for eligibility for flexiplace work violates Article 47, Section 2 of the National Agreement. It asserts that the clear and unambiguous language of Article 50 contains no mileage requirement or any other limitation on flexiplace locations. For example, because Section 2.A – 2.D contains five or more criteria an employee must meet to use flexiplace, the contract interpretation principle "to express one thing is to exclude another" suggests no more criteria, such as a limitation on the distance between an employee's home and POD, may be assumed. Furthermore, it points to the Section 1 general provisions which mandate that: 1) "Participants will be permitted to work at home or other Flexiplace work sites full days or a portion of a day when approved for a Flexiplace assignment pursuant to the provisions of this Article."; and 2) "Unless as otherwise provided by this Article, there is no limitation on how the work schedule may be configured as long as the scheduling is not disruptive nor cause an unreasonable burden on those who choose not to work a Flexiplace arrangement." Accordingly, the Union emphasizes, there is no requirement in Article 50, or in law, rule or regulation, that employees reside within the commuting area of their assigned IRS POD. Given this absence of any limiting contract language and the

practice since 2002, there is no basis for finding a mileage or commuting area limitation on flexiplace locations outside the commuting area of an employee's POD.

The Union argues that bargaining history clearly establishes the Agency's failure to gain agreement on the commuting area limitation requirement which management had proposed. It points out that the Agency's two bargaining goals with regard to Article 50 were to require: 1) an employee's flexiplace location to be within the normal commuting area of the assigned POD; and 2) the assigned POD to be an IRS POD and not the employee's residence. It explains that the give-and-take of collective bargaining resulted in the adoption of one and not the other. As a result, the Union concludes, management attempted and failed to negotiate for a commuting area limitation.

For the above reasons, the Union claims, the Agency's assertion that the Memorandum did not constitute a change to Article 50 is demonstrably false. Indeed, it says, the Memorandum's terms explicitly state that changes would occur, such as: "Currently approved Flexiplace sites, not in conformance with the IRS policy, must be disapproved and discontinued and an appropriate Flexiplace site substituted or other measure taken to ensure compliance with IRS policy." In fact, the Union emphasizes, many flexiplace agreements were disapproved and discontinued after issuance of the Memorandum, resulting in many employees nationwide having been adversely affected.

The Union asserts that 5 CFR 531.605 does not deal with flexiplace; rather, it provides guidance in determining an employee's official worksite for locality pay purposes. It cites a decision of the Federal Labor Relations Authority (FLRA) upholding an employee's right to flexiplace three weeks per month at her home in South Carolina and to report to her duty station in Washington, D.C. one week per month. Department

of Education, 61 FLRA 307 (2005). The Union submits that, assuming arguendo, the OPM regulation applies and FLRA precedent concerning application of the regulation is rejected, the Memorandum went further in prohibiting the flexiplace locations of employees than any reading of the regulation could allow. In effect, it argues, the Memorandum sets forth a new policy whereby even those employees reporting to their POD at least once a week, or those employees conducting work within the locality pay area at least once a week, were prohibited from working under a flexiplace agreement. Furthermore, it claims, the Memorandum's requirement to flex within the employee's regular commuting area is more onerous than the area discussed in the regulation, because Article 50, Section 1.A.1 establishes the assigned POD as an IRS POD, as opposed to an employee's home or other flex-site. As such, the Union contends, the combined effect of Section 1.A.1 and the subsequently issued regulation is that management can order an employee who is not satisfying at least one of the two requirements of paragraph (d)(1) of the OPM regulation to do so or flex at a different location within a broadly drawn locality pay area, as opposed to a more narrowly defined commuting area. Finally, it claims, OPM does not even have a grant of authority to regulate the flexiplace program, which was given to the General Services Administration.

Agency Position

The Agency contends that the Memorandum did not alter the terms of the National Agreement. It emphasizes the Treasury Directive 74-14 requirement that a telework arrangement was not to alter the terms and conditions of appointment, including an employee's official duty station and salary. It points out that under OPM regulations,

an employee's official worksite and salary must be changed if the employee has a flexiplace site outside of the commuting area and does not report at least once a week to the commuting area. Therefore, the Agency concludes, although the Treasury Directive does not specifically state that the flexiplace site has to be within the commuting area, in order for the employee's salary and official duty station to not change, management had to limit flexiplace sites to the commuting area.

The Agency asserts that historically its policy had been to limit flexiplace sites to the commuting area, in accordance with management's right under Article 15, Reassignments/Realignments and Voluntary Relocations, Section 1(B)(3) of the National Agreement, to define the term "commuting area." It also relies upon management's reasonable expectation that an employee will report to the office whenever management needs the employee there. Moreover, it submits, management must protect the integrity of locality pay, which is closely tied to the commuting area of employees, as required by OPM regulations. It further says that management must protect the integrity of the merit promotion system, especially where a vacancy announcement lists a specific POD for a position that requires a willingness to relocate to that POD. In such cases, it explains, if a selected employee did not relocate to the set POD and established a flexiplace site anywhere the employee wanted, other job applicants would have been unfairly knocked out of the competition, and other employees, who did not apply because they acknowledged the POD's specificity, also would have been unfairly treated. Finally, the Agency claims, allowing employees to establish a POD anywhere they choose would render Article 15 meaningless where it provides for an employee to request a POD change for hardship reasons or other personal or voluntary reasons.

The Agency argues that management's authority to limit a flexiplace site to the commuting area was derived from Article 50, Section 1.A.2, citing retained supervisory authority "to review, determine, and approve participation in this [flexiplace] program." It explains that because managers were having problems understanding the extent of their role in the review and approval process, management proposed clarifying language in the National Agreement, even though it was not necessary, because the contract has become a management handbook. Thus, the Agency emphasizes, management tried to clarify the existing contract language by specifically stating what IRS policy on flexiplace had always been, i.e. the flexiplace site had to be within the commuting area. Indeed, it points out, when the Union would not agree to including the statement that the flexiplace site had to be in the commuting area, management clearly notified the Union during the negotiations that it would continue to restrict flexiplace sites to the commuting area as had been the practice, consistent with the existing contract language concerning retained supervisory authority to approve an alternative worksite arrangement in order to limit the area of the flexiplace sites. For these reasons, the Agency maintains, the Memorandum did not alter the terms and conditions of employment of bargaining unit employees since management already had this right, as affirmed in a prior arbitration award.

The Agency contends that the Union's interpretation of the disputed Article 50 provision would violate 5 CFR 531, which predates the disputed subsection A.1 language in the January 3, 2006 National Agreement. It maintains that the parties are governed by pre-existing government-wide regulations, such as OPM locality pay regulations, and many not negotiate to avoid them. Specifically, it claims, the Union's position would violate the requirement for an employee to report to his/her official duty station at least

once a week or for management to change the employee's official duty station to the employee's residence or other flexiplace worksite. In sum, the Agency contends that the Union's position conflicts with the OPM regulations on locality pay which require the agency to change the employee's official duty station to their residence under certain circumstances if the employee's flexiplace site is not within the same locality pay area as the IRS POD to which the employee is assigned. Therefore, it concludes, since an employee does not have to report to his/her IRS POD at least once a week under the National Agreement, the only way to avoid having the employee's residence become his/her official worksite under the OPM regulations is to fix the flexiplace site somewhere in the regulatory commuting area.

Discussion and Findings¹

Article 50, Flexiplace, in the 2002 National Agreement, stated in relevant part under Section 1, General:

A. Flexiplace is a program that permits employees to work at home or at other approved locations remote to the assigned post of duty. The terms "flexiplace", "telework", and "telecommuting" are synonymous and include working at home or in satellite office sites or other approved flexiplace work sites, with or without computers and other electronic equipment. A supervisor's official relationship with, authority over, and accountability for an employee participating in the Service's Flexiplace

¹During the hearing, the Agency raised questions of arbitrability and new argument by the Union. Although not contained in the Agency's post-hearing brief, they are addressed summarily as follows: While the grievance at issue was filed more than 15 days after the Union's e-mail to Pabotoy questioning the Memorandum, the subsection C proviso, under Article 42, Section 2, clearly establishes a 180-day time limit for filing a grievance alleging a violation of 5 USC 7116(a)(2), (3), (5) and/or (7). The grievance asserts a violation of 5 USC 7116(a)(5). Accordingly, the 180-day time limit controls and was not violated. Secondly, the Union's references in the grievance to Article 50 do not constitute new argument. Rather, the grievance addresses management's failure to provide notice and to bargain with the Union over an asserted unilateral change to Article 50, in effect the Flexiplace Agreement. The change at issue is the imposition of a commuting mileage limitation. Although the substance of Article 50, Section 1 must be reviewed to determine whether the Memorandum constituted a clarification of, or a significant change to, the provision, the grievance raises the question, as the above-framed issue reflects, of the Agency's bargaining obligation under Article 47, Section 2.

Program (on an occupational or situational basis) is no different than his or her relationship with, authority over, and accountability for employees who are not participating in said program. In this regard, the supervisor retains the authority to review, determine, and approve participation in this program.

B. Employees may be eligible for Occupational (formerly "Traditional") Flexiplace or Situational/Hourly Flexiplace under the criteria set forth in subsections 2E and 2F. Under Situational/Hourly Flexiplace, employees may work up to eighty (80) hours per month at a flexiplace site.

The 2002 National Agreement contained a provision under which each party could reopen five contract provisions during a mid-term reopener. Prior to the start of the reopener negotiations, management internally raised concerns regarding the definition of "commuting area" and the potential for employee fraud under Article 50. For example, as Pabotoy testified, in 2006 a Revenue Agent with an Austin POD was selected for a position in Houston, which is in a higher locality pay area. The Revenue Agent had stated an intention to select Flexiplace and move to Houston. However, she did not move and refused to report to the Houston POD after signing a Flexiplace Work Agreement to report one day a week.

The bargaining history of Article 50, Section 1.A.1 reflects that ultimately the parties agreed to remove the last two sentences of subsection A.1 in the 2002 National Agreement which became subsection A.2 in the 2006 National Agreement. They further agreed to a new final sentence in subsection A.1 of the 2006 National Agreement which states: "The assigned POD of an employee approved for Occupational Flexiplace must be an IRS POD and may not be the employee's residence." With regard to these changes made during the 2005 reopener, the parties exchanged the following proposals.

On November 19, 2004, the parties simultaneously exchanged initial contract proposals. The Agency's initial proposal contained two new provisions under subsection A:

2. Flexiplace locations approved by the Employer must be located within the normal commuting area of the employee's assigned POD. The assigned POD of an employee must be an IRS POD and may not be the employee's residence.
3. If approved by the Employer, an employee may work at two (2) Flexiplace locations such as their home or another IRS POD. Approval of the alternate IRS POD is subject to space limitations and equipment availability.

The Agency's proposal retained the first two sentences of the existing subsection A as subsection A.1 and moved the last two sentences of the existing subsection A.1 to a new subsection B. It also proposed to reduce the number of hours available for employees to work Situational/Hourly Flexiplace under subsection B from 80 to 40 per month at a flexiplace site.

On December 13, 2004, the Agency submitted a counterproposal which contained a change in subsection A.2 from "the normal commuting area" to "the recognized commuting area of the metropolitan area." This change constituted an expansion of the area set forth in its initial proposal from which employees could commute to their assigned POD.

On December 16, 2004, the Union countered with the addition of a new second sentence to the existing subsection A under a new subsection A.1 and the creation of a new subsection A.2, which mirrored the Agency's proposed subsection B. The new second sentence in subsection A.1 accommodated the Agency's position by stating: "The assigned POD of an employee must be an IRS POD and may not be the employee's residence." The Agency's expressed concern at the bargaining table focused on

employees with a POD in a high locality pay area who resided outside of the POD's pay area in a lower pay area. The Union also proposed increasing from 80 to 120 hours per month the limitation on Situational/Hourly Flexiplace, in response to the Agency's position to reduce the figure to 40 hours per month.

The Agency rejected the Union's proposal. Impasse was reached over numerous Article 50 provisions as well as other articles. At med-arb the Union withdrew its prior proposals on subsections A.1 and A.2. The Agency offered to insert into subsection A.1 the Union's previous proposal limiting an employees assigned POD to an IRS POD. The Agency offer did not address limitations on the commuting area. Subsection B remained at 80 hours per month.

I find that the Memorandum extends considerably beyond simply clarifying the ability of supervisors, as set forth in the last two sentences in subsection A of the 2002 Flexiplace Agreement and ultimately retained as subsection B in the new Flexiplace Agreement. During the reopener management twice attempted to insert a limitation on the commuting area mileage for Flexiplace eligibility. Indeed, after the Union rejected the "normal commuting area" limitation, the Agency resubmitted the limitation of "the recognized commuting area of the metropolitan area of employee's assigned POD." Given the absence of any reference to a commuting mileage limitation in subsection A of the 2002 Flexiplace Agreement, there was little basis for management's conclusion that supervisors had the authority to determine an employee's eligibility for Flexiplace participation based on a commuting mileage limitation. The Agency's reliance upon the general language of subsection A.2 (formerly Section A in the 2002 National Agreement) cannot be credited where management's efforts at the bargaining table during the

reopener bespeak volumes with regard to its view of the need to augment the existing provision in order to establish the right to approve Flexiplace participation based upon commuting mileage. Management's comments in bargaining regarding its reliance upon subsection A.2 of the National Agreement and the Flexiplace Work Agreement form are reasonably considered as efforts to salvage what remained in subsection A as a basis for asserting a right to determine a commuting area after its unsuccessful efforts to define the term in the National Agreement. That the opening proposals at med-arb did not contain any mention of a commuting area limitation does not erase the fact that those proposals are part of the bargaining history of Section 1.A.1 and .2 and reflect on the drafters' intent with regard to the agreed upon language.

I find that the Agency cannot draw sufficient support from an arbitration award, dated August 30, 2005, involving a flexiplace dispute between the instant parties concerning the eligibility of Insolvency Specialists in the Denver IRS facility to participate in Occupational and/or Situational Flexiplace respectively under Sections 2.E and 2.F of Article 50. As the Union argues in the present case, it asserted in Denver IRS that the grievants met the general criteria under Sections 2.A – 2.D for working flexiplace as well as the specific criteria for Occupational flexiplace under Section 2.E. The Union also argued inter alia that the Agency does not have unfettered discretion to deny flexiplace applications by otherwise eligible employees. As the Agency contends in the present case, it maintained in Denver IRS that management has the unconditional authority to decide flexiplace requests under Article 50, Sections 1.A, 2.E and 2.F, and it denied the requests based on good faith business reasons. The arbitrator specifically found “for three reasons” that “the Union failed to prove the Agency violated Article 50

[Section] 2.E. or [Section] 2.F. when it denied Occupational Flexiplace and Situational Flexiplace to Grievants.” 1) The National Agreement cannot reasonably be read to confer an individual right to work Occupational Flexiplace if an employee’s job meets the specific criteria in Section 2.E.1. 2) Neither the flexiplace originally granted the grievants nor the flexiplace they subsequently requested are covered by Section 2.F; and a plain reading of Section 2.F leads to the conclusion that the grievants had no right to Situational Flexiplace if they could show their positions met the Section 2.F criteria. 3) The Agency exercised its discretion to approve or deny both types of flexiplace in good faith. In sum, beyond stating the Agency’s position on a supervisor’s retained authority to review, determine and approve participation in the flexiplace program, the arbitrator did not refer to Section 1.A.2 in his analysis of management or supervisory rights.

The Agency’s remaining contentions can be summarily addressed. The record contains no legal or regulatory authority that sets forth a mileage limitation on a Flexiplace location. Nor is there any evidence indicating that Section 1.A.1 of Article 50 is contrary to law or regulation. The absence in Article 50 of any specific mileage restrictions and overriding management right to impose such restrictions must be accorded greater weight than: 1) any general provision elsewhere in the contract, such as Article 15, which specifies management’s right to define the term “commuting area”; 2) management’s general expectation for an employee to report to the office when needed; and 3) management’s general obligations to protect the integrity of locality pay and the merit promotion system. The parties’ use of the National Agreement as a “management handbook” of procedures does not alter the arbitral requirement to render the drafters’ intent based upon accepted contract interpretation principles. Beyond noting the 5 CFR

531.605(d) requirements for determining a telework employee's official worksite, it is unnecessary to address other questions concerning the OPM regulation and the respective flexiplace options of the Agency and an employee when the employee is not meeting the requirement to report at least once a week to the employee's regular worksite.

Based upon the above findings, I find that the Agency violated Article 47, Section 2 and 5 USC 7116(a)(5) when it failed to provide the Union an opportunity to bargain over the impact of the Memorandum.

AWARD

1. The Agency forthwith shall cease and desist from using the guidance contained in the Memorandum to approve placement in the flexiplace program and shall return to the status quo ante. In effect, the Agency shall follow the midterm bargaining procedures under Article 47, Section 2 or require bargaining unit employees to either meet the standard under 5 CFR 531.605 or move to a flexiplace location inside the locality pay area. Compliance shall be administered on a case-by-case basis.

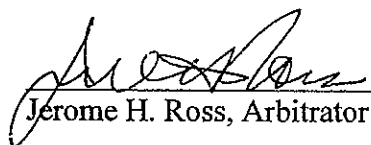
2. Concurrent with the above requirement, the Agency shall post the attached notice (Attachment 1) on all IRS bulletin boards for a period of 60 consecutive days from the date of posting.

3. The parties shall review the individual employee flexiplace agreements which were discontinued based upon the guidance set forth in the Memorandum. They shall determine an appropriate remedy on a case-by-case basis, including back pay where warranted but for the Agency's disapproval or denial of flexiplace. Under the same

procedures, the parties also shall review claims of individual employees who assert that they were adversely affected by the Memorandum.

4. I shall retain jurisdiction of this grievance for 180 calendar days from the date of this Award for purposes of resolving any dispute concerning: 1) an appropriate remedy, including back pay, arising out of the parties' review of individual employee flexiplace agreements and the facts and circumstances surrounding other adversely affected individual employees, including the employees whose cases were raised at the arbitration hearing; and 2) the payment of attorney fees.

5. Pursuant to Article 43, Section 4.A of the National Agreement, I find that because the grievant (the Union) substantially prevailed, the Agency shall pay 75% of the regular fees and expenses including travel expenses of the arbitrator.


Jerome H. Ross, Arbitrator

April 6, 2007
McLean, Virginia

Attachment 1

NOTICE TO ALL EMPLOYEES

AS ORDERED BY ARBITRATOR JEROME H. ROSS

TO EFFECTUATE THE POLICIES OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to comply with the provisions of section 7116(a)(5) of the Federal Service Labor-Management Relations Statute (Statute) by refusing to provide notice and the opportunity to bargain over changes in conditions of employment in accordance with provisions of the parties' negotiated collective bargaining agreement, at Article 47, Section 2 and in accordance with section 7116 of the Statute.

WE WILL NOT enforce the March 6, 2006 memorandum issued by Barbara Pabotoy, Director of Employee Workforce Relations, which established a "commuting area" limitation requirement on flexiplace without notice and bargaining.

Internal Revenue Service

Dated: _____ By: _____

Mark Everson

Commissioner, IRS

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.