ARBITRATION AWARD

U.S. DEPARTMENT OF VETERANS AFFAIRS

&

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

(National Veterans Affairs Council)

F.M.C.S. Case No. 190110-03185

OPINION AND AWARD

ADMINISTRATION

By letter from the Federal Mediation & Conciliation Service., dated January 18th 2019, the undersigned was notified of his selection by the parties, (U.S. Department of Veterans Affairs (VA) & American Federation of Government Employees (AFGE)-National Veterans Affairs Council, (NVAC), to hear and decide a matter in dispute between them. Accordingly, the hearing was set for and went forth at 10:00am est., May 30th,2019 in the headquarters of the American Federation of Government Employees, at 80 F Street, NW Washington DC 20001. In where the parties were afforded the opportunity to make opening statements, present evidence and testimony and participate in both direct and cross examination of the witnesses in support of their respective positions. There was a stenographic record of the hearing. The arbitrator also took periodic notes. The record was closed on July 22nd 2019 following receipt of the parties' post hearing briefs, via separate e-mails.

At the outset of the hearing the parties handed the arbitrator the below agreement on the issues, listed here for the record.

ISSUE(s)

The parties have conferred prior to the hearing and have stipulated to the following issues:

1. Whether the Agency's use of the pre-hearing submissions at issue violated Article 44 of the Master Agreement; if so, what shall be the remedy be?
2. Whether the Agency had a duty, under the Master Agreement and Federal Law, to notify and bargain with the Union over the use of the pre-hearing submission; if so, what shall the remedy be?

*_statements_ in quotations, are not verbatim, but a close recollection of the arbitrator's notes.

APPEARANCES

For the Employer U.S. Department of Veteran Affairs
Damon A. Pace, ESQ. Office of the General Counsel (VA)
Aaron L. Robison, ESQ. Office of the General Counsel (VA)
Daniel Berdichevsky, Labor relations Specialist
for the Office of Labor Management and Relations (VA)

For the Union American Federation of Government Employees
Michael A. Gillman, ESQ. Office of the General Counsel (NVAC)
Denise Alves, Legal rights attorney for OGC-(AFGE)
Rushab Sanghvi, Legal rights attorney for OGC-(AFGE)
April Fuller, Legal rights attorney for OGC- (AFGE

JOINT EXHIBITS

JX-1 March 2011 Master Agreement between the Department of Veteran Affairs and the American Federation of Government Employees

JX-2 November 15, 2018 National Grievance, including; VA letters of the Departments synopsis of 38 U.S.C. 714, to arbitrator's Miller and Joseph Simeri.

For VA

The U.S. Department of Veterans Affairs, was represented by attorney's: Mr. Damon A. Pace, ESQ. and Mr. Aaron L. Robison, ESQ. of the Office General Council. The VA., offered no exhibits but would rely on opening statements and the joint exhibits, along with both direct and cross testimony of the witnesses to support its position.

For NVAC

The (NVAC,) National Veterans Affairs Council-American Federation of Government Employees, (AFGE) represented by OGC., attorney Mr. Michael Gillman, ESQ. offered (2) exhibits, along with it's opening statement and witness testimony to support its position. The first exhibit (1) was objected to by the VA, and the objection was sustained (*see note)

UX-1 * e-mail transmission from Miss. Alves in response to an e-mail from Miss. Blackman.
UX-2 letter dated February 25, 2019 from Department of Veterans Affairs to Arbitrator Greenberg referencing VA's synopsis of section 714 of title 38 of the United States Code.
*arbitrator's note; VA's objection sustained. There is agreement on the initiation of the e-mail and the follow up response. But the corresponding response is unsupported. Author of e-mail not subpoenaed, thereby no testimony for cross or direct available.

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Pertinent Contract Provisions

Article 2

Governing Laws and Regulations

Section 1-Relationship to laws and Regulations

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

Section 2-Department Regulations

Where any Department regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern.

Article 43

Grievance Procedure

(in part)

Section 7 Step 4.

If the grievance is not satisfactorily resolved in Step 3, the grievance may be referred to arbitration as provided in Article 44-Arbitraton. Only the union or the Department can refer a grievance to arbitration.

Section 11- National Level Grievances

A national level grievance is one that is filed by the Union or by the Department. Grievances between the Department and the Union at the national level shall be filed by the aggrieved party as follows:

A. Within 30 calendar days of the act or occurrence or within 30 days of the date the party became aware or should have become aware of act or occurrence or at any time if the act or occurrence is continuing, the aggrieved party (Department or the Union) may file a written grievance with the other.

B. Upon receipt of a grievance the parties will communicate with each other in an attempt to resolve the grievance. A final written decision, including any position on grievability or arbitrability, must be rendered by the respondent within 45 days of the receipt of the grievance. If a decision is not issued in 45 days, or if the grieving party is dissatisfied with the decision, the grieving party may proceed to arbitration in accordance with Article 44-Arbitration. The time limits may be extended by mutual agreement.

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Pertinent Contract Provisions

(cont.)

ARTICAL 44-ARBITRATION

(In part)

Section 2 Arbitration Procedure

C. The procedure used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. All witnesses necessary for the arbitration will be on duty time if otherwise in a duty status. On sufficient advance notice from the Union, the Department will rearrange necessary witnesses' schedules and place them on duty during the arbitration hearing whenever practical. Such schedule changes may be made without regard to contract provisions on Article 21-Hours of Duty. A reasonable amount of preparation time for arbitration will be granted in accordance with the provisions of Article 48-Official Time and local supplemental agreements.

G. The arbitrator's decision shall be final and binding. However, either party may file an exception to the arbitrator's award in accordance with applicable law and regulations' arbitrator will be requested to render a decision within 60 days. Any dispute over the interpretation of an arbitrator's award shall be returned to the arbitrator for settlement including remanded awards.

H. An arbitrator's award shall have only local applications unless it was a national level grievance or the matter was elevated to the national level. Where it is mutually agreed between the NVAC President and the Department within 30 days after a local union has filed a notice for arbitration, an arbitration dispute will be elevated to the national level. The arbitrator has full authority to award appropriate remedies including reasonable legal fees pursuant to the provisions of Section 702 of the Civil Service Reform Act, in any case in which it is warranted.

ARTICLE 47-MID-TERM BARGAINING

(in part)

Section 1-General

A. The purpose of this article is to establish a complete and orderly process to govern mid-term negotiations at all levels. The parties are encouraged to use IBB approach in all mid-term negotiations and will ensure that negotiators are trained in this approach prior to the inception of bargaining.

B. **Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement**, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded form mid-term bargaining will be identified within each article.

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ARTICLE 49- RIGHTS AND RESPONSIBILITIES

(in part)

Section 1-Introduction

The parties recognize that a new relationship between the Union and the Department as full partners is essential for reforming the Department in an organization that works more efficiently and effectively and better serves the customer needs, employees, Union representatives, and the Department

(Arbitrators note) The entire section(s) are not typed but cited only for reference.

Background

In 2017 congress passed the; VA Accountability and Whistleblower Protection Act, Public Law 115-41. 38 U.S.C. 714, was established after it was sent to the President and signed by President Trump on June 23, 2017. This law established an accelerated removal, demotion, and suspension procedure for covered individuals at the VA. It requires the expedited review of any appeal on a 38 U.S.C..714 actions, establishes a "substantial evidence," standard for such actions.

The U.S. Department of Veterans Affairs, sometime thereafter the enacted law, made the following decision as a, "litigation strategy." To forward in a (prehearing brief submission format,) the said law to arbitrators selected to hear and decide these types of actions under the new law. Accordingly, they did so in a number of these arbitrations. The Union (NVAC) National Veterans Affairs Council, under the National Union, the American Federation of Government Employees, representing some (250,000) two hundred fifty thousand employees in VA, took exception to this action, filed the timely grievance, advancing it as a "National Grievance." Thereby bringing rise to the subject arbitration.

The positions and arguments of the Department and Union relative to this case, are outlined throughout, along with the arbitrator's (Discussion and Opinion). Therefore, they will suffice to supplement the background for this case.

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Position of the parties

DEPARTMENT VA Position

The Department's position, is clear and direct. As in the opening statement and throughout the hearing their position is no more than; simply offering the selected arbitrator, (advance information) before the hearing for those subject cases outlined in 38 U.S.C. Section 714. Or as stated in Mr. Pace's opening statement; (Tr. 20 2-6) "The purpose of sending the synopsis was to inform the arbitrators about Section 714 and to assist them in understanding the new standards without having to research it themselves." Also, (Tr. 20-15) "The Agency completely agrees that Article 44 of the Master Agreement, (JX-1) gives the arbitrator the authority to determine the arbitration procedure. The Agency has done nothing to interfere or encroach upon this authority." And, continuing; (Tr 20-21,22) and (Tr 21-1,2) "Regarding these letters related to Section 714, an arbitrator has the complete authority to halt in abeyance or to read them or to completely ignore them." Also, in addressing the second issue (notice and bargaining) the Agency argued in; (Tr. 20 11-14) "Furthermore, the content of the Section 714 letters does not relate to a **condition of employment**, thus further negating any need to negotiate over them." As I said, the Agency's position is clear and direct. The arguments that the Agency puts forth supports its position on both issues. In wrestling with the absence of any language that either allows or denies the, "prehearing brief submissions," the Agency argued repeatedly that the fact that there is no specific language denying the submission of prehearing briefs and the contract language thereby being, "silent." In that regard argued; it solidified the agencies position and issuance of such briefs.

AFGE (NVAC) Position

The Union position is also clear in its argument. The Union argues, not only is the Agency in violation of the Master Agreement, by the submission of prehearing briefs, that also they did not bargain, (Tr. 18 6-11) (So,) "if the Agency wants to change or further explain or clarify or amend in any way the practices that have been the history between the parties with regard to arbitration procedure, then it has to notify the Union and bargain over those changes." Also, though not a part of the collective bargaining agreement language, the Union, via testimony seemed (put back) (Tr. 49 1-3) "And so, like I said, professional courtesy, that's what you do. You have a communication with the other side." The Union continues with Art. 44 Sect. 2. c. is clear, as both Union and Agency testimony brought forward, e.g., Agencies witness on direct, question, (Tr. 122 3-5) "And what is your understanding of what Article 44 provides in terms of arbitration procedure? response (Tr. 122 6-8) "What it speaks to in terms of arbitration procedures is that arbitration procedures are set forth by the arbitrator."

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Discussion and Opinion

The opposing counsels delivered their arguments well with decorum and professionalism. They had the witnesses ready to make the factual arguments as to the foundation of their respective positions. It was a pleasure for me to listen and decide to their well-presented objections and the hearing in its entirety.

Now let's look at the testimony of the witnesses and arguments of the opposing counsels. First, I found that each witness was credible and extremely knowledgeable in their testimony. The first three witnesses were put on by AFGE. They all held positions as Legal Rights Attorneys for the Union. Each was called to testify on the issue(s) at hand, first the issue of the Agency sending prehearing brief to the respective arbitrators.

First up was Miss. Denise Alves, who received her law degree in 2005 and who has been with AFGE since 2009 and a Legal Rights Attorney since 2013. In her testimony under direct she testified (Tr. 27 2-8" that she handled approximately (36) thirty arbitration in the federal sector and approximately (12) with the Veterans Administration." She was questioned on direct about the prehearing submissions, question, (in part) "as to whether or not this was contrary to the Arbitration Article 44 Sect. 2. c. in the Master Agreement (JX-1)." Her response, (Tr. 49 -4-11) (in part) "under the terms of the collective bargaining agreement that the parties have negotiated and agreed upon, how a hearing is to be conducted, how an arbitration is to go forward, or the process by which an arbitration takes place, that's left to the purview of an arbitrator. And that's what the parties agree to."

Under cross, question, (in part) "she was asked first about her knowledge of the collective bargaining agreement specifically, Article44 Section 2.C," in which she responded, (Tr. 51-12) "I have a working knowledge of document. So, I'm aware." Continuing under cross was a valent effort on the agencies counsel to find language in Art. 44 that allowed for the submission of prehearing briefs. What the Agency was able to establish was that there was no specific language that either permitted or denied the act of filing a prehearing submission to the respective arbitrator. In that respect the contract was, "silent."

The next two Union witnesses; Mr. Rushab Sanghvi and Miss April Fuller both legal rights attorneys for the Union, similarly testified under direct that the language in the (CBA) made it clear that the process for arbitration was for the respective arbitrator to decide. And, under cross also, could not specify language that either permitted or denied the submission of a prehearing brief. Other than referring again to the opening sentence in Section 2 C of Article 44, which says, (Tr. 86 -19-21"The procedures used to conduct an arbitration hearing shall be determined by the arbitrator."

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Discussion and Opinion

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So now let's go to the Agencies witness Mr. Daniel Borichevsky, a labor relations specialist with extensive experience (20) twenty years in both private and federal sector collective bargaining. Under direct, testified that he was involved in training sessions with both the union and managers "shortly thereafter" the ratification of the current Master Agreement. That when asked, under direct, (Tr. 120-8-16), question, "And are you familiar with the 2011 Master Agreement between AFGE and the Agency? Responded, "Yes." In continued direct, question, "How are you familiar with it?" responded (in part), "It is essentially a guide that I use on a daily basis working with the facilities, working with the regions as just to interpret, to assist, guide Managers and HR officers throughout the country in understanding the contract,"

With that foundation, the Agencies direct questioning, centered on Art 44 Section 2.C.; in reference to Article 44 page 234, (Tr. 121-15-22 & 122 1-14) question, "are you familiar with this article?" response, "I am." and continuing; follow up question, "how are you familiar with this article in particular?" response, "This is just a guide that we utilize whenever a step three National grievance has not been resolved and arbitration has been invoked by either party. We would look to this for procedure, following procedures." Continuing; (Tr. 122 3-5), question, "what is your understanding of what Article 44 provides in terms of arbitration procedure.?" response, (Tr. 122 6-8) "What it speaks to in terms of arbitration procedures is that arbitration procedures are set forth by the arbitrator." And, still continuing, (in part) (Tr. 122 9-12), question, "is your understanding of what Article 44 provides in terms of prehearing submissions by either party to an arbitrator?" response, "The contract is silent on prehearing submissions."

There was a lot of testimony concerning Article 44 Arbitration. Discussions that ended up with the agreement that there is no specific (additional) contractual language that addresses, "prehearing brief submissions!" Ok, so what does the absence of any specific language mean? Well the Agency, in its opinion got what they were looking for, to support its argument. That the contract had no specific language, that accordingly the arbitration article was, "Silent" in that respect. Now let's spend a minute on the word, "silent." Then the Unions cross examination following.

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Discussion and Opinion

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Here's how an ambiguity in language or the absence of language, "silent," is normally handled in collective bargaining agreements;

First; if both parties find a section that doesn't specify language that is needed, (see Article 47 Section 1. B.) the parties can agree to (make note of it), start to make it a practice, wait until the next round of term negotiations and implement the new language into the CBA. Where then, it's no longer a practice but contractual language. Or…...

Second; The parties, if not wanting to wait can do a; mid-term bargaining, and via that create; a, Memorandum of Understanding (MOU), Memorandum of Agreement (MOA), Addendum, Supplement or side letter. Sign it off and either keep it as such or agree to implement that into the CBA during the next round of term bargaining.

Third; and here's the foundation of, "silent." They can agree through its use to create a "Practice." (see above) As the basis of a practice is;

* 1. The issue is recognized and agreed to by **both** parties; e.g., AFGE and the DEPARTMENT.
* 2. The issue has had consistent, "agreed upon application." And, has occurred repeatedly for at least 2-3 contract terms, now making it a, Past practice.
* 3. The issue is not a gratuity.
* 4. The contract is ambiguous or, "SILENT."

What one cannot do, is create a practice separately. That is contrary to the definition. If a contract has language missing that doesn't allow or disallow an issue, one party cannot simply unilaterally implement some action. Above, are some ways to address the current issue, **if so desired**, as there is always the, "Quid Pro Quo," in bargaining. So, the parties could, move toward any of the above listed avenues.

Now the Agency attorney moved to the second issue for this hearing. Whether or not that there was an bargaining obligation for the agency to meet and bargain over sending prehearing submissions to the arbitrators? Mr. Berdichevsky, testified that, "(in part) there is no (COE) Condition of Employment being changed. (TR. 133 13-16) This (the prehearing submissions) is not impacting and how they (employees)perform their work. Their duties are not being impacted. Nothing is impacting their day-to-day duties or working conditions."

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Discussion and Opinion

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On cross the Union's counsel addressed the duty to bargain issue. On cross, question; "(in part) (Tr.143-16-20) Is it your testimony that there's a duty to bargain over only those things that relate to condition of employment?" response, "Conditions of employment, yes." And continuing on cross, question, (Tr. 144-5-8) "Okay is there any duty to bargain over grievance and arbitration procedures? response, "There is --- if it's outside of conditions of employment, no." Continuing on cross, (Tr. 144-18-20) question, "Where is the duty to bargain? Are you aware of the statutory cite on which the duty to bargain that you're talking about is found? Response, (Tr. 144-21-22 & Tr. 145-1) "If I'm correct, it is 7114 if you were to call me off out the top of my head. That's the good faith bargaining if I'm correct, 7114."

The parties had laid the 2nd issue before me and my direct approach as stated in my award; is to grant the status quo ante. As, I am clear on the contract language; "The procedure used to conduct an arbitration hearing shall be determined by the arbitrator." That's clear to me. So, what-ever an arbitrator wants to set up is up to the arbitrator. The language gives the arbitrator wide open latitude. If an arbitrator wanted prehearing submissions then that particular arbitrator has the authority under the Master Agreement to request such, the contract being silent or not. So, yes, the contract IS silent on that, but you could say, it's silent on any special request an arbitrator might make!

Also, as I mentioned above, the parties may if desired; go into, "Mid-Term," bargaining for any enhancement either party can extract via bargaining! Let me say that, I appreciate the parties selecting me. Selecting me for a case, which in respect to the issues, will have an impact on all future arbitrations addressing, "removal, demotion, and suspension procedure for covered individuals at VA., under the new law. This fact, did not go over looked in reaching my Opinion and Award. But, it's like any new law or regulation, each negotiating team, must/should be able to work with it by, "adapting, overcoming" and using the inherent bargaining skills, that I witnessed from each of them during the hearing.

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Award reasoning

I understand the frustration that created this new law, but prehearing briefs, will not accelerate the final disposition of disciplinary action. The opening statement by the VA, in reference to its argument on the issuance of a prehearing brief to arbitrators that, (in part,) (Tr 21-1,2) "to read them or to completely ignore them." This gave no demonstrated need to this arbitrator as to why the issuance prehearing brief? When in fact, it didn't matter if the arbitrator, "read them or ….to completely ignored them."

In the opening of the hearing, I may have mentioned that, "I like contract language interpretations." This particular case is a good example of that feeling. As you probably already know, I spent my first 35 years of employment in the labor-management arena, handling contract disputes, interpreting and writing contractual language for negotiations involving Hundred-Million-dollar agreements. The next 15 plus years, mediating those type disputes and this past 4 years making decisions based on this experience.

So, what we have here, (is as in the movie,) "Cool hand Luke," "Is a Failure to Communicate!" Apparently, no communication by the VA when embarking upon its, "litigation strategy," of sending to various arbitrators a, "prehearing brief submission." Why was it so urgent to send to a selected arbitrator their opinion of this new law? Why not as stated in my award, "submit this new law in its opening statement, follow up in its post hearing brief, where they can expand their arguments on the new law. Both of which I feel would be much more beneficial and germane to the issue at hand.

As then the agency could lay out the ground work for the proposed disciplinary action. Build its case, as to why the particular disciplinary action should be supported by the arbitrator. The Agency can highlight the changes in the new law to demonstrate the reason why it was created. Marry the changes in the law that requires, "substantive standards" along with the <u>reasons for disciplinary action</u> that's before the arbitrator. Once meeting that burden, put a side by side comparison of the law with its "substantive standards" and the issues for the current discipline!

<u>There is an old saying when building a case for discipline, it's called, "making book! "Enough said.</u>

Now another reason not to send a prehearing brief to a particular arbitrator; An arbitrator could have five to a dozen cases pending his/her award, requiring the study and preparation. These are cases already heard and payment pending on the issuance of their award. So, in this example an arbitrator selected by the VA-AFGE could receive potentially; a pre-hearing brief, take time to read a brief for a case that may never happen! Yes, suppose case is settled and settled outside the cancellation peroid of the hearing. Theoretically, the arbitrator has taken the time to familiarize the law, but now with no compensation? 11 of 13

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AWARD REASONING

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Or let me take it a step further. Let's say if I had upheld the issuance of the pre-hearing brief submissions. I can find absolutely no reason why I would want to read, familiarize myself in advance of a hearing." When, during any hearing, I need to; listen to the testimony, rule on objection(s) as they arise and be able to question the parties. Then after any hearing; arbitrators are routinely reviewing their notes, written or tape recorded, the transcript, (if one) the post hearing brief(s), various contractual language, grievance steps, cited arbitration cases, personnel files and both joint and separate exhibits! Then to read in *advance* a pre-hearing brief!?

Which brings another reason, suppose arbitrators were to start receiving in advance; collective bargaining agreements or various articles or sections of contracts in advance to read and interpret in advance? There is no discussion as to the intent previous bargaining notes to reference? Who would the arbitrator ask questions of? This has the possibility of creating a, "prehearing per-diem, for a prehearing submission!" When the VA and AFGE selected me as the arbitrator to hear and decide this case. I am sure that both parties not only wanted a ruling but, also a perspective coming from the arbitrator his self. I believe, I have given that herein.

The bottom line; I could not find one solitary reason or benefit in receiving and reviewing **any** pre-hearing brief! As an arbitrator likes to enter each hearing with an open mind unencumbered and void of positions that they're going to hear first-hand during the hearing.

I'm a Vietnam Veteran. I'm concerned with the treatment of our veterans. As a Commissioner of Mediation, I had occasion to do mediations in Baltimore, at the VA facility. My meeting would maybe last couple of hours or more and when I left, the same veterans were still waiting as when I arrived! For whatever reason, it's a sad commentary.

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Exhibits

This arbitrator appreciates the exhibit/cite references as presented by both parties. I reviewed them, thank you.

Award

The grievance is sustained in its entirety.

1. The VA will cease and desist sending, "their synopsis of 38 U.S.C. Section 714 in a pre-hearing brief submission format, to arbitrators for pending or future arbitration hearings regarding; a removal, suspension, or demotion of covered VA employees.

   In addition, any such pre-hearing brief submissions previously issued with a hearing pending, should be rescinded effective the date of this award. Accordingly, the VA may always resubmit their synopsis of 39 U.S.C. Section 714, either during a; "opening statement, in a final argument or in a **post hearing** brief, for all current, pending or future arbitration hearings.

2. Article 44 Section 2. c., language remains the, "status quo ante." As this arbitrator can find no opening in the current language to allow for a, "pre-hearing brief submission format," without direction from a procedural determination by the respective arbitrator. Therefore, making an order of notice and bargaining, in language that is clear to this arbitrator, mute.

   Note: The fact that the wording of a particular article or section is left, "Silent," (see Discussion and Opinion) doesn't open a door to "a creation of a circumstance" to meet a particular need!

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Dated: August 01, 2019

Gary L. Eder

Milton, DE

Gary L. Eder, Arbitrator

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