In the Matter of:

NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION v. U.S. DEPT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

ARBITRATION

December 19, 2013
IN THE MATTER OF

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NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION,

Union,

CASE NO. 13-02394-1

v.

Arbitrator Mariann

Schick, Esq.

U.S. DEPT. OF COMMERCE,

NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION,

Agency.

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Arbitration Proceeding Before
Arbitrator Mariann Schick, Esq.

Silver Spring, Maryland

Thursday, December 19, 2013

11:34 a.m.

Job No. 1-242710

Pages 1 - 274

Reported by: Patricia A. Edwards, RPR
ARBITRATION PROCEEDINGS

Held at the offices of:

U.S. Department of Commerce
1325 East West Highway
Silver Spring, Maryland 20910

Pursuant to Agreement, before Patricia A. Edwards, Registered Professional Reporter, and Notary Public in and for the State of Maryland.
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A P P E A R A N C E S (continued)

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ALSO PRESENT:

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DANIEL A. SOBIEN
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PROCEEDINGS

THE ARBITRATOR: We are here in the matter of National Weather Service Employees Organization versus the U.S. Department of Commerce. FMC is case number 13-02394-1. My name is Arbitrator Mariann Schick, you have selected to hear this dispute between you.

Would counsel kindly enter their appearance on the record, On behalf of the Union?

MR. HIRN: Richard Hirn.

THE ARBITRATOR: Very good. And on behalf of the U.S. Department of Commerce?

MS. SMITH: Nia Fripp Smith.

MS. CIOFFALO: And Monique Cioffalo.

THE ARBITRATOR: Very good. And all representatives here today are attorneys. We have reviewed the file that was submitted to me prior to the hearing and marked the documents therein as joint exhibits, and I am hereby admitting them into the record.

(The documents referred to were marked for identification and received into evidence as Joint
Exhibit Numbers 1 through 5.)

THE ARBITRATOR: Joint 1 is the collective bargaining agreement of October 25, 2001, which is still in full force and effect, correct?

MR. HIRN: Yes.

THE ARBITRATOR: Very good. Exhibit -- that's J1. J2 A and B is a two page document which is the grievance. J3 A and B is the employer response to the grievance. J4 is the memorandum of understanding which is at issue. And J5 is the submission agreement which states the issues as framed by the parties, and just for convenience sake, I am going to read it into the record, so we all know exactly what the issues are we are dealing with today.

One, did management violate the parties' September 25, 2009 memorandum of understanding when the acting CFO issued a memorandum on March 26, 2013, directing subordinate managers not purchase disposable cups, plates, utensils and other items.

Number two, if management did violate the parties' September 25, 2009 memorandum of understanding when the acting CFO issued a memorandum
on March 26, 2013, directing subordinate managers not
to purchase disposable cups, plates, utensils and
other items, was that an act an unfair labor
practice, in violation of 5-USC, Section 7116(A), 1
and 5.

Three, if management did violate the parties'
September 25, 2009 memorandum of understanding when
the acting CFO issued a memorandum on March 26, 2013,
directing subordinate managers not to purchase
disposable cups, plates, utensils and other items, or
committed an unfair labor practice in violation of
5-USC Section 7116(A), 1 and 5, by doing so, what
shall the remedy be. And this is signed by both
counsel, so those are the stipulated issues before
me.

Inasmuch as this is a contract violation case,
the burden rests with the Union to go forward, and
Mr. Hirn, would you like to make an opening
statement?

MR. HIRN: Thank you.

THE ARBITRATOR: Very good.

MR. HIRN: Ms. Schick, the National Weather
Service Employees Organization, whose acronym is NWSEO, is certified to represent a nationwide bargaining unit of all 3600 non-supervisory, non-managerial, non-confidential Weather Service employees, most of whom who are employed at the nation's 122 Weather Forecast Offices, which are located everywhere from Fairbanks, Alaska to Guam, to Caribou, Maine, to San Juan, Puerto Rico, or in 13 --

THE ARBITRATOR: You couldn't hold this in San Juan, Puerto Rico? What's the matter?

MR. HIRN: I have an arbitrator there in January, but --

THE ARBITRATOR: I had an arbitration there, which I did in Spanish, for Cingular when they were still in business. Okay. Go ahead, I'm sorry.

MR. HIRN: Okay. No, that's okay. And these all -- the forecast offices are staffed 24 hours a day, seven days a week, and they issue, you know, the routine weather forecast that AcuWeather, or Weather Channel then calls their own, but they come from our clients, and the -- as well as warnings of severe weather. The River Forecast Centers, 13 River
Forecast Centers, operate about 16 hours a day, and they issue the flood warnings for different river basins, Susquhanna River Basin is one such example. And these River Forecast Centers are co-located with the Weather Forecast Offices. There are 12 smaller Weather Service Offices in 12, maybe 15 in remote parts of Alaska, and the Pacific, there are a number -- there are Tsunami Warning Centers in the Pacific and in Alaska, there are major national Forecast Centers with which you may be familiar, such as the National Hurricane Center in Miami, and if you've ever watched the movie Twister with Helen Hunt, they had that storm center -- that's a storm prediction center in Oklahoma that does prediction for major tornado outbreaks, severe storms.

There are a couple of other National Forecast Centers around the country which operate 24/7, and then there is the National Weather Service headquarters here in Washington, which is mostly administrative employees, but there are some operational units here, and as well as southern regional offices -- regional measuring direct offices.
throughout the country. So that's our market. In 2009, Weather Service management grew concerned about the impact of the potential H1-N1 influenza pandemic. They were worried about -- they were concerned, as was the Union, about the impact it might have on employees and Agency operations. The evidence today is going to show that, even when fully staffed, there's only a minimum number of forecasters necessary -- on the staff to maintain 24/7 coverage and, as a result of budgetary constraints, there are 300 bargaining positions that are still vacant -- are vacant now, creating difficulties in ensuring that there is sufficient staffing.

As a result of these minimum staffing policies and profiles, there is an adverse impact, you will hear, on office's operations if there is more than one employee sick at one time. So, management initiated discussions with NWSEO about preventative measures that might be taken to mitigate the impact that the influenza threat on Weather Service employees and facilities.

On September 29, 2009, the Agency's chief
negotiator, or our president, Dan Sobien, and management's chief negotiator, Mickey Brown, who is the deputy director of the Weather Service eastern region, who will be called to testify today, they agreed to an MOU that you have as Joint Exhibit 4, addressing ways to reduce the potential impact that the influenza outbreak may have on their offices, staff and operations.

The agreement contained two paragraphs, and it is the second paragraph that is at issue in this case, and it reads that the Weather Service will hereafter provide hand sanitizer at each work station and each cubicle or office, disinfectant spray or wipes for shared surfaces, and tissues, paper towels, disposable cups, plates and utensils. Dan is going to explain that providing these disposable cups, plates, utensils, was necessary to protect against the transmission of flu, colds, and other communicable illnesses, because employees generally have to eat where they work.

As he will explain, most of the forecast offices, the Weather Service offices, the RFCs and
other operational units, are in standalone buildings. They are not part of the larger federal building or complex, there are no cafeteria facilities, and the typical operation shift is eight hours long, which does not include a meal break.

Because these facilities are typically isolated, because the employees are generally working around the clock, break-rooms with kitchen facilities are provided. Employees typically eat where they work, or while they are on momentary breaks. In fact, under our contract, employees cannot even leave their work stations for more than 10 minutes.

So, although the title of the MOU, Joint Exhibit 4, refers to the implementation of the H1-N1 preparedness action, the language of the agreement is worded more broadly and is not limited to the particular H1-N1 outbreak that was expected in 2009 and '10. In their testimony, both from Mr. Brown and Mr. Sobien, will say that they agree that this MOU was not time-limited, and was intended to protect the health of the staff on an on-going basis and in future years, in particular the use of the words will
and hereafter provide, demonstrate the agreement was not intended to -- was indeed intended to continue indefinitely, and is not limited to the 2009-10 influenza season.

We are also going to show in evidence today, ironically, that, according to the Centers for Disease Control, this year's influenza season, almost all of the influenza that is beginning to spread around the country this year, is the 2009 H1-N1 strain. So, this agreement still has continuing vitality, even if it wasn't addressed just for the H1-N1 flu that's in the title.

In early April of this year, the Union learned, through unofficial channels that the acting chief financial officer of the international Weather Service, sent an e-mail to all subordinate managers on March 26, ordering them to cease purchasing tissues, paper towels, disposable cups, plates and utensils, because such purchase was, ostensibly, against appropriations law. In support of this claim, the acting CFO cited a Comptroller General decision from the Coolidge Administration, in which
the Comptroller General wrote that federal agencies cannot use appropriated funds to provide their employees with lab coats or other protective equipment because these were, ostensibly, personal expenses.

A few days later, Dan will testify that he filed a grievance alleging that Mr. Longenecker, who is the chief -- acting CFO's directive violated this September 25th, 2009 MOU. The grievance alleged that the Weather Service -- also alleged that the Weather Service committed an unfair labor practice in violation of the Federal Service Labor Management Relations Statute because the Agency essentially repudiated that agreement. In his grievance, Mr. Sobien wrote that the reliance on this Comptroller General's decision in the Coolidge Administration was misplaced. He explained that the Comptroller General has long since changed his view, and now says that so-called personal items may in indeed be purchase with appropriated funds, if it promotes the health or morale of federal employees.

Mr. Sobien explained that the disposable
plates, cups and utensils are necessary to ensure that the employees, who eat at their work place and share common break room facilities, do not spread the flu or colds or other illnesses, through the use of common plates and utensils, and that this benefits the Agency, particularly during current-type staffing situations, by promoting health and reducing a need for sick leave.

He also explained how the agreement to provide these materials promotes the cleanliness of the break rooms, ensuring that dirty cups, plates and utensils are not left behind, as well as promoting the efficiency of Agency operations, by alleviating the employees of the responsibility for washing dishes and utensils when their work shift ends.

Several days after Dan filed this grievance, management representative Stan Kensky -- Stan is sitting over here -- sent the Union our first official notice that the Agency was no longer going to comply with the September 25, 2009 MOU. Stan wrote that, quote, the Weather Service has taken steps to terminate what we consider to be illegal and
improper activity, i.e., providing personal use items to Weather Service employees, pursuant to our 9/25/09 Memorandum of Understanding. Mr. Kensky claimed that, quote, the necessity for such no longer exists, close quote, because a committee of the World Health Organization, quote, declared an end to the 2009 H1-N1 pandemic globally, although Mr. Kensky did note that it is likely that the 2009 H1-N1 virus will continue to spread for years to come.

Mr. Kensky also wrote that the Comptroller General appears to support our position, once again citing this Coolidge era Comptroller General's decision. A few days later, Dan responded to Mr. Kensky's e-mail and explained that if the Agency believed that there was no longer a need for the 2009 MOU, it should propose to re-open the agreement, rather than unilaterally terminating it. Management eventually denied the grievance, but in so doing, it cited no statute or case that holds that federal agencies cannot use appropriated funds to stock employee break-rooms with disposable cups, plates and utensils, whether for employee convenience, or, as in
this case here, to protect against the spread of
colds and flu.

Management continues to rely on this 1924
Comptroller General decision, which involved the
purchase of laboratory coats, which states that
appropriated funds cannot be used to purchase items
for the personal comfort and protection of federal
employees. Initially, it must be remembered that the
decisions of the Comptroller General are not
authoritative case law. The Comptroller General's
decision are advisory only. The Comptroller General,
and the General Accounting Office which he heads,
formerly -- well, now the Government Accountability
Office --

THE ARBITRATOR: It's not GAO anymore?

MR. HIRN: Well, GAO -- they still use the
acronym, but they changed it from Government
Accounting Office to Government Accountability
Office. But the GAO, whichever it's called, is only
-- is part of the legislative branch, and the
comptroller's decisions are not binding on executive
agencies, they're not binding on the courts, and the
FLRA has made clear that these decisions are not binding on them, and -- and as a result, not binding on an Arbitrator. But nonetheless -- nonetheless, recent decisions of the Comptroller General fully support the expenditure of funds in this case. This is not the Coolidge administration anymore.

The law has been liberalized in the Attorney General's view, and the 1924 decision is long out of date, as exemplified by the fact that the General Services Administration, their online catalogue now contains a dozen -- dozens of choices of lab coats for federal employees [sic] to purchase their employees. And I will mark for identification Union Exhibit 1.

(The document referred to was marked for identification as Union Exhibit Number 1.)

MS. CIOFFALO: Are we introducing exhibits in our opening statements or is this for testimony?

MR. HIRN: I'm not --

THE ARBITRATOR: Let me see what it is first.

If it's --

MR. HIRN: I'm not introducing it yet, I
referred to something and I'm just going to mark it for identification.

THE ARBITRATOR: Okay. So, let's just mark it for identification. U1 for identification only. Do you want to tell us what U1 is?

MR. HIRN: This is from the GSA -- the government -- the General Services Administration is a federal Agency that does supply purchases for federal agencies. They have an on-line catalogue and a printed catalogue, and they now have lab coats, which the Comptroller General said can't be purchased for federal employees in 1924, this is just an example that they are readily available for purchase by federal agencies for their employees. Just an example of how out of date --

THE ARBITRATOR: Well, this document only shows they're available for purchase. I think the question is who pays for them. I don't know if --

MR. HIRN: You have to be --

THE ARBITRATOR: This doesn't establish that

MR. HIRN: You have to be a government agency to buy from the GSA.
THE ARBITRATOR: Well, I presume you'll have some evidence on that or something. Okay.

MR. HIRN: The Comptroller General now recognizes that the purchase of things that are previously been viewed as personal items, quote, also endures for the benefit of the Agency in a number of ways, including increased employee productivity, health and morale, and therefore this justifies the use of appropriated funds. The Comptroller General now writes that the accepted -- the retention of employees and promotion of employee morale generally as a justification for paying for some expenses that, in many circumstances had been viewed previously as personal in nature, but are now typically provided by employers.

For example, in 1982, the Comptroller General approved purchase of paper napkins, now being denied for Weather Service employees, for lunchtime use by IRS employees, who, like maybe Weather Service employees, were unable to leave facilities for meals in the time allotted. The Comptroller General wrote that the purchase of paper napkins in this case
helped to ensure productivity and morale or service center employees.

But perhaps the most clearly analogous Comptroller General's decision involved the approval of payment for cooking utensils to be used in air traffic controller facilities. The evidence that we will present today will demonstrate that the working conditions which justified the expenditure of funds in the FAA case, also exist in Weather Service facilities. In fact, the Comptroller General's description of the work environment that the FAA sounds identical to what we will show today as the working environment in the weather forecast offices. They operate a 24-hour schedule, without commercial restrooms or snack bars readily available, that it is necessary at most of the facilities to eat their lunches and coffee breaks out or near their places of duty, and that controllers are required to be continuously available for duty during their eight-hour shift.

Now, if there is any doubt left about the propriety of federal agencies purchasing disposable
cups, plates and utensils for employees, we are also
going to present evidence that all of these materials
are available to federal agencies in the General
Services Administration supply catalogue. There, in
the chapter kitchen and break-room supplies, there
are pages of disposable flatware, disposable
dinnerware, paper napkins for purchase, and face --
as well as facial tissues which were at issue in the
-- which are covered by our 2009 MOU.

Furthermore, the Federal Labor Relations
Authority has ordered the Social Security
Administration to negotiate over the provision of
eating utensils, which it found did not violate
appropriations law. The evidence today is also going
to show that the Weather Service failed to consider a
statute enacted in 1946 that specifically authorizes
federal agencies to expend funds to promote and
maintain employee health, including the expenditures
that are directed towards the control of communicable
diseases such as influenza.

Title 5 of the U.S. Code section 901 provides
that agencies may establish within the limits of
appropriations available, health service programs to promote and maintain the physical and mental fitness of its employees. Such a health service program can include treatment of on the job injuries, in emergency situations, pre-employment and other physicals, and quote, preventive programs related to health.

This law has been used to pay for matter that would otherwise be clearly called personal expenses of employees. For example, the Comptroller General has written that this statute authorizes federal agencies to pay for employee's access to private health and fitness facilities. Congress enacted this law after finding that illness was one of the chief causes of employee turnover and absenteeism, and that such illnesses are a drag on employee's efficiency and productivity. The legislative history specifically states that among the things that Congress intended to authorize was quote, preventive programs relating to health, including the elimination of health hazards in the workplace environment, which include the control of
communicable diseases and promotion of environmental
hygiene.

Relying on this particular section of the
statute's legislative history, the Comptroller
General has approved the expenditure of funds to pay
for routine immunization of federal employees. The
evidence which we will present today will show that
the Weather Services management does, indeed, provide
free influenza inoculations to employees here at
Weather Service headquarters, but not to operational,
bargaining employees in the field where staffing
shortages due to illness often will have the greatest
impact on Agency operations. In fact, as Dan will
explain, right here in this building, a few floors
below us, is a health service unit, where the Agency
pays for all kinds of health prevention and
inoculations, and medications, and screenings,
testing or whatever, things that would clearly fall
under personal expenses, that the Agency has
categorized the other things as.

It's our view that if the Agency is legally
authorized to expend funds to immunize headquarter
employees against influenza, it is certainly entitled
to spend funds in other ways to prevent employees in
the field from contracting influenza by the use of
common dishware and utensils. As will be seen from
the photographs of break-rooms that we will introduce
from several of forecast offices, employees are
resorted to using -- to sharing and hand-washing
common dishware because there are no dishwashers
installed in those offices. As a result, the Weather
Service may indeed be in violation of OSHA sanitation
regulations that state common drinking cup and other
common utensils are prohibited.

In sum, the grievance also alleges, as you
heard yesterday that we allege the management
committed an unfair labor practice in violation of
this statute by repudiating the September 2009 MOU.

Now, an isolated or discreet violation of the
collective bargaining agreement is not, of course, an
unfair labor practice, but a repudiation of an
agreement is, and he contractual violation arises to
the level of an unfair labor practice when two
criteria are met. When the breach is clear and
patent, and two, when the provision goes to the heart
of the parties' agreement. The Agency acts at its
peril, according to the FRLA, if it repudiates a
provision in the belief that the provision is
illegal. A violation may be found, even if the
agreement being repudiated is not necessarily the
parties' master collective bargaining collective
agreement.

In this case, the evidence will show that the
breach of the 2009 MOU is not only clear and patent,
but undisputed, and the grievance involves not just a
breach of that agreement, a patent breach of that
agreement, but the evidence will show that the
Weather Service explicitly repudiated the agreement
in the e-mail that Mr. Kensky sent the Union in April
of this year. And it goes to the heart of the
agreement, because the section repudiated is one of
the only two paragraphs in the e-mail.

Now, in sum, we believe the evidence will show
that the Agency's claim that the MOU is illegal,
their legal argument on that is so insubstantial, and
that the evidence will show that the real reason why
it repudiated this MOU is simply to save money. Coincidentally, this repudiation happened at the same
time as the sequestration was imposed last March, and the Weather Service was under significant financial
pressures at the time, and initiated a hiring freeze and took lots of other actions to cut back. We believe the evidence will show that that was the real reason, and in fact, we will have evidence that, in early April, the meteorologist in charge of the Green Bay forecast office sent his staff an e-mail, telling them that the office would no longer buy these materials, pursuant to the MOU, and his e-mail telling the staff said nothing about any alleged illegality or impropriety of the agreement, but merely said that it was being done in response to the tightening and uncertainty of the Weather Service budget.

So, that's our case that we expect to show today.

THE ARBITRATOR: Very good. Thank you very much. Ms. Smith, do you wish to make opening now or do you want to reserve until the employer's case
MS. SMITH: I'll make it now.

THE ARBITRATOR: Very good.

MS. SMITH: As we discussed, good morning, my name is Nia Fripp Smith. I have the privilege of representing the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce. As you said earlier, the parties have agreed to resolve three issues, the facts presented today will show that management terminated its provision of disposable cups, plates and utensils because doing so was illegal. The practice was in plain violation of federal appropriations law which had to stop without a delay, as a result the Agency could not and cannot comply with the September 2009 MOU to the extent that it requires it to provide disposable items for the personal use of Weather Service employees. Today you will hear that in 2012 and 2013, the Weather Service, and frankly, the entire federal government was facing significant financial management challenges, as opposed to budgetary challenges. Yet, the Weather Service was working
diligently to move through these challenges. One step in that process was requiring training regarding appropriations law and the appropriate use of federal funds, which as we all know, Congress appropriates the funds and decides what we should do with them. And you know, just as a side note, we'll get into appropriations, but I don't think anybody here is an expert and I'm sure no witness testifying is an expert on appropriations law, however, there are people who have been significantly trained who will testify.

So, out of this training came the question of whether the use of appropriated funds could be spent disposable items. The issue came to the attention of John Longenecker, our first witness. At that time, Mr. Longenecker was acting chief financial officer for the Weather Service. He was charged with managing the funds that Congress appropriates to the Weather Service and ensure they were used with appropriations law. When he learned that Weather Service employees were using appropriated funds for these items, he directed senior management officials
to make sure the practice ceased.

Further, he will testify that he sent, through this March 26, 2013 e-mail -- further, he will testify that he sent this e-mail because he knew the practice was illegal. He will also testify that there are significant penalties for employees who use appropriated funds for unauthorized expenditures.

We will also hear from Laura Furgione, deputy assistant administrator for the Weather Service. Ms. Furgione will testify regarding the Agency's decision to terminate this practice, that this practice was illegal, and that she agreed with Mr. Longenecker that the practice needed to stop. She will also testify as to her experience in the field, she has been with the Weather Service for about 20 years, and she has also been a shift worked, and she has personal experience with those conditions.

Our last witness will be David Murray, chief negotiator for the Weather Service. He will testify regarding the Weather Service's notification to NWSEO about its decision to stop the practice. He will also testify that, although invited to, NWSEO never
presented any proposals.

THE ARBITRATOR: NWSEO never what?

MS. SMITH: Presented any proposals regarding
the change. As you heard in Mr. Hirn's opening
statement, you heard the a lot of history and
overview of the bargaining process of this MOU.
While that history may be informative, it will not
demonstrate that the Agency's provision of disposable
items was a legal use of appropriate funds. It
simply cannot. And, in any event, we believe that
the post-hearing briefs that the parties will submit
will lay out our legal arguments in an erudite
fashion.

Today, we should stick with the facts. As a
result, the Agency respectfully requests that you
find that it did not violation the MOU or commit an
unfair labor practice, and thus no remedy lies here.

Thank you.

THE ARBITRATOR: Thank you both counsel. All
right, Mr. Hirn, you may call your first witness.

MR. HIRN: Which would be Dan Sobien.

(Off the record.)
THE ARBITRATOR: Our first witness for the Union is Dan Sobien. And Mr. Sobien, do you have any objection to taking an oath?

THE WITNESS: No.

Whereupon, DANIEL A. SOBIEN called as a witness, and having been duly sworn or affirmed, was examined and testified, as follows:

THE ARBITRATOR: I presume as Agency president you've testified in hearings before?

THE WITNESS: Yes.

THE ARBITRATOR: Very good. The only thing that I would again caution you about is if opposing counsel makes an objection, please just stop testifying and give me a chance to rule on the objection. If I sustain the objection, I won't permit you to continue on that line. If I overrule it, I will permit you. And I will, of course, as you know, let counsel go back and forth until all those questions are answered. I may have a few questions at the end.

So, very good.
DIRECT EXAMINATION:

BY MR. HIRN:

Q. Dan, what is your education?
A. I have a bachelors degree in meteorology and an MBA.

Q. And where are those degrees from?
A. My bachelors degree is from Florida State University and my MBA is from Amarillo Aeronautical University.

Q. And how long have you been employed -- well, when were you first hired by the National Weather Service?

Q. And where was that?
A. In Del Rio, Texas.

Q. And what were you hired to do?
A. Well, I was an intern. It was really a training type job. I mean, I launched balloons, I did numerous other things, took observations, general technician work, but it was training for, you know, future employment.

Q. And did there come a time when you were
promoted from the internship?

A. Yes.

Q. And when was that?

A. That was 1994.

Q. And did you remain Del Rio?

A. No, I went to Tampa, Florida. And that's where I remained, in Tampa, since 1994.

Q. Have you received any promotions since then?

A. Yes. I was promoted to a lead forecaster, that was around 1999, I think, 1998, 1999, and then I was promoted to an emergency response -- well, lead emergency response meteorologist in 2010, might have been 2011, it was right there on the --

THE ARBITRATOR: Just so I understand this, as Union president, you still work for the Agency or are you now on full-time leave serving as president?

THE WITNESS: I'm 100 percent official full-time, so I'm still an employee --

THE ARBITRATOR: But you work --

THE WITNESS: But I do Union work. I mean, theoretically, and I have been called in to work from time to time, but --
THE ARBITRATOR: Your job now is to be president of the Union?

THE WITNESS: Yes.

THE ARBITRATOR: Very good.

BY MR. HIRN:

Q. What was your first Union office?

A. My first Union office was steward in Tampa.

Q. And when was that?

A. '97, maybe '98.

Q. And did you run for higher Union office after that?

A. Yes. Shortly after that, I was the vice-chairman of the southern region, then around 2000 I became the chairman of the southern region, vice-president of the Union a few years after that, and I've been the president since 2006.

Q. And did you -- were you ever a member of the national negotiating team, that led to the collective bargaining agreement?

A. Yes. I was, in fact, the bargaining agreement that was entered into as an exhibit, I believe, I helped negotiate that, and since late 1999
I was on the negotiating team.

Q. Do you hold any department-wide labor position?

A. Department-wide?

Q. With the department -- can you tell us what the department of Congress labor council is?

A. Okay. I know what you're saying. The Obama administration issued an executive order shortly after it was brought in its first term, its first year, creating labor councils, at the department level, and also they were supposed to created at the Agency levels also.

I am the co-chairman of the Department of Commerce national labor council.

Q. And who is on that -- who's on the council and what does it do?

A. The heads -- the presidents of all the major unions within the Department of Commerce are on the labor side, and on the management side -- well, my co-chairman is the CFO for the Department of Commerce. And generally, it is HR-type people or Agency heads from the Department of Commerce that...
represent management side. It's not actually a
negotiating body, it's more like a
pre-decisional-type body where we try to work out
problems before they become problems.

Q. And how often does this meet?
A. Quarterly. Although, sometimes we have
interim meetings.

Q. How many employees does the NWSEO represent
at the National Weather Service?
A. At the National Weather Service? About 3600.

Q. And what is the geographic scope of the
bargaining unit?
A. It -- well, you said it best in your opening
statement. We are -- we actually have one office in
the southern hemisphere, Samoa, as far east as Guam,
which is almost in Asia, north of Barrow, Alaska,
Caribou, Maine and then San Juan, and every place
in-between, there's over 150 offices in between,
various facilities, most of which are the weather
forecast offices.

Q. And how many weather forecast offices are
there?
1        A. 121.
2        Q. 121.
3        A. Or 122. I think it's 121.
4  THE ARBITRATOR: It gives me an idea.
5  BY MR. HIRN:
6        Q. And what are the hours of operation of these
7        offices?
8        A. They are 24 hours a day, seven days a week,
9        all holidays, they never close. It's an
10       emergency-type function.
11        Q. And what is the responsibility of these
12        offices?
13        A. Well, they issue, you know, all the weather
14        warnings. The weather forecast offices specifically
15        issue tornado warnings, severe thunderstorm warnings,
16        winter storm warnings, they issue hurricane warnings
17        after -- beyond the immediate coast and any kind of
18        inland type areas that need hurricane warnings. They
19        essentially issue any type of weather warnings
20        specific to the geographical location that they're
21        responsible for. They also issue more generalized
22        weather forecasts that are used by industry commerce
and just the economy in general.

Q. How about River Forecast Centers, what do they do?

A. River Forecast Centers are a specialized unit, there are 13 of those around the country. They are usually -- they are always in the same building as a WFO somewhere. That might not be true in Alaska. I'm not sure about that. And they are responsible for major river flooding, you know, when the Mississippi was flooding a few years back, that was the River Forecast Center providing that information to emergency providers and water managers and that type of thing.

Q. What are the hours of operation in a typical RFC?

A. That's not 24/7 unless there's an event going on. Typically they run 14 to 16 hours a day, as a rule of thumb.

Q. Every day or just --

A. No, seven days a week.

Q. Are there any smaller Weather Service offices in remote locations that are not fully forecast
A. Yes. The only ones I know of are very remote locations in Alaska and some of the South Pacific Islands which are in Hawaii.

(Off the record.)

BY MR. HIRN:

Q. And are there any -- are we sitting in weather forecast headquarters right now?

A. Yes.

Q. And are there any employees here?

A. Oh, yes. We have hundreds of employees here.

Q. Are there any operational employees here?

A. Sure. Two units I can speak about off the top of my head, and it might be more. There is what's called a telecommunications gateway, and just to describe it, when a forecaster issues a warning or a forecast, they get it into a computer, it goes electronically to a group in this building, who then disseminates it out, and we see it on the crawler, on the bottom of the screen. They're a 24/7 operation, and then there's another --

THE ARBITRATOR: The crawler on the bottom of
1 your TV screen?
2 THE WITNESS: Yes.
3 THE ARBITRATOR: Okay.
4 THE WITNESS: When it says a warning came
5 from --
6 THE ARBITRATOR: Right, right, right.
7 THE WITNESS: And it's disseminated by that
8 group that's in this building. They didn't issue a
9 warning -- the forecaster in Dodge City or Chicago or
10 wherever issued that, but they electronically got it
11 and made sure that it got to everybody and
12 double-checked and triple-checked it.
13 There's another unit in this building. I'm
14 not 100 percent sure if it's 24/7, but it's an
15 operational unit, much like the WFO or perhaps EON,
16 and it's called the NOP, the National Operations
17 Center. And, in fact, now that I think about it, I
18 think they're only 24/7 when there is a big event
19 going on. And their duties primarily are to collect
20 the warnings and information and coordinate them, and
21 so there's one location where people can go and if
22 the media or the president or whoever wants that kind
BY MR. HIRN:

Q. Are there any larger centralized forecasting units?

A. Yes, yes, there's -- we have national centers. The weather forecast offices deal with a worldwide area. I'm from Tampa. In the west coast of Florida, we're responsible for, if there's a thunderstorm in that area, you know, our guys start -- our people issue the warnings and -- for that area. The larger scope forecast, nation-wide forecast for in-flight aircraft, the forecast for hurricanes, for large scale tornado watches, we have a space runner mother center that monitors solar flight.

They come from what's called a national center, and they are collectively grouped all into a group called the national center for environmental prediction, which is in the Washington, D.C. area but a few miles away, it's not in this building. So, yes, we have a larger, national centers, with specific customers or duties like the hurricane
center, there's the aviation weather center that forecasts for aviation groups, you mentioned the storm prediction center, that's primarily looking at tornados and severe thunderstorms.

There is also the ocean prediction center that forecasts for ocean-going vessels, that sort of thing.

Q. Where is the bulk of bargaining employees found?
A. They are in the weather forecast offices.

Q. And have you visited many forecast offices?
A. I've probably been to a quarter or a third of them.

Q. Are these buildings generally part of a larger complex or are they standalone?
A. Of all of those that I've ever been to, Sacramento was the only one that was in like a government complex, and that was a state government complex, California state government. The Tulsa office was in a separate office commercial building, but almost all of them are standalone buildings, maybe 4,000 to 5,000 square feet.
THE ARBITRATOR: When you say almost all of them, almost all of them that you visited, or almost all of them are --

THE WITNESS: All the ones --

THE ARBITRATOR: That are in the bargaining unit?

THE WITNESS: Almost all of the ones I visited and almost all the ones that I haven't visited that I know of --

THE ARBITRATOR: All right.

THE WITNESS: There are very few that aren't standalone buildings, and they are usually in very remote locations. The offices are usually co-located with a large radar, and the radar emits radiation, and that's how we're seeing the storms.

Not many people wanted those in their back yards, so these are usually offices that are usually out in farms or warehouse districts that -- where people aren't going to complain about having this big, tall, giant radar in their back yard.

BY MR. HIRN:

Q. And do the employees have access to
cafeterias in these buildings?

A. No.

Q. And --

A. With the possible exception of Sacramento. That one might have, I don't know.

Q. Where do employees eat then?

A. Well, as a rule of thumb, you eat at your work station. And let me explain a work station in a weather forecast office. It isn't like in this building, where you have your own cubicle, your own computer and you kind of control your space. It is a place that has -- there's some dubbing terminals to the main computer that they call AWIPS, and you know, two or three terminals of that, and then a personal computer next to it, and that's your home for eight hours, and after your eight hours you pick up your stuff and leave and the next guy comes in and sits down at that same terminal, and it's 24 hours a day, seven days a week like that.

So, they get pretty disgusting after a while.

Q. And where do employees get their food or prepare their food?
A. You know, it --

Q. Let me withdraw that and let's do this another way. I'm going to ask you to look at what's been marked as exhibit -- I'll ask you to mark for identification as Union Exhibit 2. It's a photo array before you that says WFO Mobile, and in Union Exhibit 2. There's a photo array before you that says WFO Monterey, we'll mark that for identification as Union Exhibit 3. And there's a photo array before you of WFO Duluth, Union Exhibit 4.

(The photographs referred to were marked for identification as Union Exhibit Numbers 2, 3 and 4.)

BY MR. HIRN:

Q. Dan, are these photo arrays typical of what we would find in the standard forecast offices?

A. Yes. And, in fact, I think if you look at it, there are -- you know, you can see that they're all the same. I mean, everything is pretty much -- this is a typical forecast office kitchen, except that I've been to Mobile several times, and they've cleaned it for the picture.

MR. HIRN: I'll move the admission of Union
1 Exhibits 2 through 4.
2 THE ARBITRATOR: Ms. Smith, any objection?
3 MS. SMITH: Who took the pictures?
4 THE WITNESS: Are you asking me or him?
5 MS. SMITH: Yes.
6 THE ARBITRATOR: No. She's asking you --
7 MS. SMITH: I mean, somebody --
8 THE ARBITRATOR: Do you want to do voir dire
9 on this? Do you know who took the pictures?
10 THE WITNESS: I believe our steward in each
11 office.
12 THE ARBITRATOR: Okay.
13 THE WITNESS: That's where I get them from, so
14 I assume they took them.
15 MS. SMITH: So before today, have you seen the
16 pictures?
17 THE WITNESS: Yes. Not all of them, actually.
18 I saw Duluth, but I did not see Monterey or Mobile,
19 but I saw the e-mails, but I didn't look at them on
20 my e-mail.
21 MS. SMITH: I don't know about 4. He doesn't
22 have any personal knowledge. I mean, you're saying
1 that this is what Mobile looked like when you saw it?
2 THE WITNESS: That is Mobile, yes. I mean,
3 this is a typical WFO. We asked our stewards to go
4 take pictures of their kitchens and e-mail them.
5 They e-mailed them over to Richard, they copied me, I
6 looked at the Duluth one. I didn't go in and open
7 all of them because I know what a WFO looks like.
8 THE ARBITRATOR: You've been personally to
9 these three, or --
10 THE WITNESS: No, I've been to Mobile. I've
11 never been to Duluth or Monterey.
12 THE ARBITRATOR: Okay. But these were
13 received in response to your request of some stewards
14 to take pictures?
15 THE WITNESS: My stewards in these offices.
16 MR. HIRN: And his testimony was that this is
17 typical of a weather forecast office.
18 THE ARBITRATOR: Understood. Do you have any
19 objection to 2 and 3?
20 MS. SMITH: I'm fine with it.
21 THE ARBITRATOR: Okay. Very good. The
22 Union's 2 through 4 are admitted into evidence.
(The documents referred to were received into
evidence as Union Exhibit Numbers 2, 3 and 4.)

BY MR. HIRN:

Q. How long are the typical operational shifts
at a forecast office?

MS. SMITH: Objection, asked and answered.

MR. HIRN: I don't remember that.

MS. SMITH: Yes, we talked about 24 hours,
eight hour shifts.

MR. HIRN: No, that's not the -- I mean it's a
24 hour operation. I didn't ask what the typical
shift was.

THE ARBITRATOR: Yes, I think his recollection
is correct. Overruled. Go ahead.

THE WITNESS: Well, there is no answer to that
question, because there's a whole -- there's a flurry
of alternate work schedules. I would say the --
there is no common, okay, it's eight hours a day, but
as a rule, it's eight hours a day, that's the
standard that everybody goes by.

But in some offices, they might work nine
hours a day, and then throw in eight hour a day
shifts in there so they only work, you know, less
days in a week, but an eight hour day is a, you know,
eight hours a day is easily divisible by 24 is how
things are usually calculated out.

BY MR. HIRN:

Q. Is a meal hour scheduled during these
operational shifts?
A. No. Meal hours aren't scheduled for the
operational folks.

Q. And when do employees eat?
A. If it's a really busy day, you don't eat.

There -- but typically, you know, you have a sandwich
next to you, and you eat it, and you're looking at
the radar, and you pick it up, and take another bite,
and you're looking at the radar, and it's just back
and forth like that.

Q. Are there break-rooms exhibited in these
pictures?
A. Yes.

Q. And are there dishwashers in these
break-rooms?
A. No. I've never seen a dishwasher at a WFO.
Q. Are employees allowed to leave premises during operational shifts for meals?

A. As a rule of thumb, no, but I would be lying if I told you it didn't happen sometimes, like on a quiet weather day somebody didn't send somebody out for pizza, and they brought it back for the rest of the office, or something like that.

Q. How many employees are typically scheduled to work on an operational shift at a forecast office?

A. Always there are two people on, two forecasters on. On some occasions, it depends -- then there is another unit within the Weather Service office, or weather forecast office called the HMT, which is hydro-meteorological technician in-term unit, and depending on what the duties of that office, they might work one or two shifts a day within that office, and there's not always inside the office, because one of their duties is to go out and fix some observational equipment they have, and make sure they're running and maintaining those. The -- so, you can count on two people there.

Say, for instance, it's an office that does
upper air balloon launches, they might actually have
three people there for most of the day, but if they
don't do that, they might only have two people there
at any given time of the day. And in fact, there are
some offices that well, I think that answered your
question.

Q. Is this number sufficient to run operations
during severe weather?
A. No.

Q. How many employees does it take to -- well,
what happens during severe weather?
A. They call somebody in on overtime.

Q. Okay. How many employees does it take to
cover a typical two-person, 24/7 forecast office?
A. Okay. Okay. So, if you have two people on
every shift, and the shifts are eight hours a day,
that means you would have three shifts, during the
day, so it would take six people for the two people
-- seven days a week, that's 42 shifts. If you have
10 forecasters, five days a week, to cover eight hour
shifts, that's 50 shifts. However, those forecasters
are given annual leave, so that knocks that down to
45 shifts.

So, if you have 10 forecasters, you'll have 45 shifts to cover 42 that you need, but that doesn't count training, or if somebody gets sick, and it also doesn't count that the way the shifts run, if something -- every week your shift is moving, and if you're on, say, a midnight shift, and the guy who is out is mostly on the day shift, you can't take the guy who's been, you know, who's been working two midnight shifts to work a day shift and then go back to his midnight shifts, so it takes away that flexibility. So, really, you need more than 10 people to run the two shifts a day, 24 hours a day, seven days a week.

So, when somebody is sick or absent, it really throws a monkey wrench into the operations.

Q. Is the Weather Service -- is the forecast office when a forecast office is fully staffed, does it generally have an excess of forecasters to cover the shifts?

MS. SMITH: I'm going to object right here.

I'm not sure how this is relevant to the issues.
MR. HIRN: Well, I think it goes to the point we are trying to make largely here, is that it's in the Agency's interests -- not necessarily only his interest, the employee's health, so you come to work, and you can issue the forecast every morning. This is an Agency that is -- I will proffer Dan will testify that it is minimally staffed and now under-staffed, and as such when employees get sick and you can't more than two people sick at a time, Agency operations are going to suffer, so it's in the government's interest to keep the employees healthy, as well as for the Agency's interest.

And why that is relevant is, to the extent that one looks at the Comptroller General's decisions, the Comptroller asks, well, notwithstanding the personal benefits to employees, is there enough -- you know, is it benefiting from x, y, z, etcetera.

MS. SMITH: Just being present at the office doesn't mean you're healthy or -- I think that's too far tangential to be -- and when you're talking about staffing woes and -- I mean, I think it's bringing up
other issues that just aren't relevant. I mean, we
can stipulate that, yes, everybody wants everybody to
come to work, and how many people need to be there,
but --

THE ARBITRATOR: But I think what counsel is
arguing is if -- that if there is an interest in
making sure that employees are healthy, thus the
reason for --

MS. SMITH: He's essentially said that.

THE ARBITRATOR: Yes, but thus the reason for
the collective bargaining agreement and he's going to
link it up purportedly from what he is saying, to the
decisions of the Comptroller General, so because it's
going to be linked up to some decisions which I
haven't even seen yet, I'm going to have to permit
the testimony to come into record.

Overruled.

BY MR. HIRN:

Q. Okay. I'm not quite sure where I left off,
so I apologize if I'm repeating myself. When a
forecast office is fully staffed, does it generally
have enough in excess of the minimum number of
forecasters to cover a 24/7 operational --

A. I -- without going through the whole number thing that I just did again, I think that -- my opinion is no.

Q. Is even now the Weather Service fully staffed?

A. No.

Q. And why is that?

A. Well, there was a -- starting about three years ago, they stopped filling positions to save money and then --

THE ARBITRATOR: You mean vacancies were --

THE WITNESS: Yes. It's called lapsed labor.

There's a certain amount of lapsed labor that's built into the system, because it takes a certain amount of time when someone leaves one position to get someone else in there to fill it. They actually track that in this building and use that as part of their budget formulations.

They made a conscious decision a couple of years ago to increase that amount of lapsed labor to
help balance their books. Then sequester came along and they increased it further, and then NOAA, our parent organization, declared a hiring freeze across the books, which increased it even further in the Weather Service. There were some ways around the hiring freeze but the Weather Service rarely took advantage of that.

THE ARBITRATOR: When was the sequester and when was the hiring freeze?

THE WITNESS: The sequester was part of the FY 13, but I think it didn't start until January 1st.

I'm looking at him because I'm not --

MR. HIRN: Sequestration and budget control --

MS. SMITH: I'm going to object to --

THE ARBITRATOR: Well, perhaps -- yes, unless we --

MR. HIRN: I'm not testifying. Everybody knows when the --

MS. SMITH: She doesn't know. She doesn't know.

THE ARBITRATOR: Can you stipulate? Do you know? Because if you both know, since you're both,
you know, you're more familiar with the federal
government than I am, but --

MS. SMITH: Well, this goes back to my

objection, because the point is, we have to have a

related issue with respect to hiring, which we're

getting to far afield in it. So, to the respect that

we're talking about why the Agency hired and didn't

hire people, that's not relevant.

THE ARBITRATOR: Okay. But he's testified to

the sequestration and I need a date. Can you

stipulate to approximately what it was?

MS. SMITH: I believe that it was in the

spring.

THE ARBITRATOR: Spring of 2013?

MS. SMITH: Yes.

MR. HIRN: March, it was March.

THE ARBITRATOR: Okay, can you stipulate March

of 2013, spring of 2013.

MR. HIRN: Well, in fact it wasn't spring, it

was winter, March 1st was winter.

MS. SMITH: 21 days shy.

THE ARBITRATOR: Okay. I'm going to take
1 judicial notice that it occurred approximately in
2 March of 2013. When was the hiring freeze that you
3 were just testifying to?
4 THE WITNESS: That was right around the same
5 time.
6 THE ARBITRATOR: Okay. I just want to get
7 dates, I don't want to go back and read the
8 transcript, now that I know the time frame that
9 you're talking about.
10 THE WITNESS: March 27th.
11 THE ARBITRATOR: Okay. Counsel, try to
12 refrain from testifying.
13 MR. HIRN: I think that's an undisputed fact
14 THE ARBITRATOR: Well, but you're not here to
15 testify about facts, okay, so, refrain from
16 testifying, get it through your witness, or we'll get
17 it by stipulation.
18 MS. CIOFFALO: And if I may object, I need
19 testimony about what the intentions of the Weather
20 Service matters when I don't think that Mr. Sobien
21 can competently testify as to what the weather -- why
22 the Weather Service did anything or they
1 intentionally did.
2 I mean, I think some of this testimony is
3 getting largely opinionated.
4 THE ARBITRATOR:  I can't have you double-team.
5 One of you needs to handle each witness.
6 MS. CIOFFALO:  Okay.  I'm sorry.
7 THE ARBITRATOR:  So, this witness -- okay.
8 Very good.
9 MR. HIRN:  I'm sorry.  Did I ask -- please
10 correct me if I did -- did I ask a question about
11 management's intent?
12 MS. CIOFFALO:  No, it's just part of what he
13 testified.
14 COURT REPORTER:  Okay.  You need to keep your
15 voice up.
16 MS. SMITH:  Okay.
17 THE ARBITRATOR:  All right.  To the extent
18 that you know because of something that you heard
19 expressed by a manager as to what their purpose was,
20 you are certainly free to testify about that.  You
21 don't know what management's intent was unless
22 somebody said something to you.  Okay.  You may have
an opinion, okay, but I'm not here to hear your opinion.

I'm here to get the facts that you observed and have personal knowledge of, okay. But what I'm saying is, is that their objection goes to the intent of management, and you can testify that to the degree you know it.

THE WITNESS: Okay, well --

THE ARBITRATOR: And not just suppose it.

THE WITNESS: To the degree that I know it and my meetings with management and the discussions that we've had.

THE ARBITRATOR: Okay.

THE WITNESS: Everything I said before was their intent.

THE ARBITRATOR: Very good.

BY MR. HIRN:

Q. Are any of the employees you've talked about today designated emergency essential?

A. Yes. All employees in a weather forecast office and I believe in the RFCs also are emergency essential. The regional headquarter employees are
all essential, there are some people in this building that are emergency essential. Most of the National Weather Service -- probably over 80 percent of the National Weather Service is.

But everybody in a weather forecast office is.

Q. What's the consequence of being designated emergency essential?

A. It puts us in the same boat as, say, the FBI, and air traffic controllers. It's something that has -- it's a function of government that has to be done, if the hurricane is ongoing, if the blizzard is ongoing, if a bomb goes off, these guys still have to go to work.

Q. If the government is shut down due to severe weather or some other physical disaster, do these employees still have to come to work?

A. The men and women that work in these forecast facilities have to go to work, unless there is an immediate physical danger to them in that building, like a bomb was in that building.

Q. When the government shut down earlier this
1 fall, due to a lapse in appropriations, did these
2 Weather Service emergency essentials -- were they
3 required to work?
4 A. Yes.
5 Q. Did there come a point in time when the
6 Weather Service feared that its operations would be
7 in danger from the H1-N1 influenza pandemic that was
8 expected during the 2009 flu season?
9 MS. SMITH: Objection. He can't testify as to
10 what management expected, and that was the question.
11 THE ARBITRATOR: Do you want to try and
12 re-phrase, perhaps, you know?
13 MS. SMITH: And I object that it's complex, as
14 well. His paragraph.
15 THE ARBITRATOR: Okay. It's -- you know, all
16 right -- try not to lead the witness and get your
17 testimony in, but if you can re-phrase --
18 MR. HIRN: Well, first of all, with regard to
19 preliminary foundation questions, which is undisputed
20 this is, there's no dispute that the Weather Service
21 was concerned about H1-N1.
22 THE ARBITRATOR: Whether they're concerned or
not, the operative fact is, is did there come a time
when in fact negotiations commenced about the H1 --
there were concerns raised by management, whatever.

BY MR. HIRN:

Q. Did the Weather Service ever express concern
to you about the H1-N1 influenza pandemic?

A. Yes. Around that time, I believe the
directive came out of the OBM, that directed all
agencies to come up with plans for H1-N1
preparedness, because of the scare that it was going
to create an epidemic, and as you mentioned, we are
an emergency management organization. The CFO at the
time, Bob Byrd, mentioned it to me that we needed to
go together and discuss this issue and --

THE ARBITRATOR: And the time period is what?

THE WITNESS: That was in 2009, in the fall of
2009. Late summer, early fall.

THE ARBITRATOR: Okay.

BY MR. HIRN:

Q. And did you -- with whom did you meet with
management to negotiate over these matters?

A. At the time, the chief negotiator for the
National Weather Service was Mickey Brown, who was the deputy director of the eastern region. We went to his office in Long Island and had a meeting with some folks from our side and some folks on their side, where we discussed the issue and negotiated an agreement.

Q. Did the parties mutually agree on how to mitigate the potential impact of the anticipated H1-N1 outbreak?

A. Yes.

MS. SMITH: Objection.

THE ARBITRATOR: Basis?

MS. SMITH: I object to the second part of that question, did they negotiate an agreement. I think he's already testified that there was an agreement. Was the purpose of the agreement, what Mr. Hirn just said, I think is the question of fact, so there is a fact late in the second half of his question that has not been established. In other words, he never got -- he never got his testimony about management's intent or if management was scared about the H1-N1 virus.
All we know Mr. Sobien testified to, that management expressed concerns, they negotiated, but the purpose is what we haven't -- which is in the premise of Mr. Hirn's question, has not been established.

THE ARBITRATOR: Do you want to re-phrase your question?

MR. HIRN: I'm a little confused what it is, but I'm also confused, and I think maybe you better have more than a day hearing on it, if counsel is going to continue objecting to every question I ask to things that are undisputed --

THE ARBITRATOR: Well, but I think --

MR. HIRN: You know, these are -- I mean, if you want --

THE ARBITRATOR: But Mr. Hirn, you're leading your witness. You're leading your witness, so, I know, I think you -- I think you're seasoned enough, obviously, to be able to re-phrase the question as to certainly what is the Agency's understanding as to what the MOU was about what management told him. I mean, obviously, anything -- any admission that was
made to him by any manager as to what their concerned
comes in, and anything as to yes, were you concerned
about the H1, and that's why we want the MOU, or what
was the Agency's understanding, and what was the
Agency's understanding based on.

Obviously, it's going to based on
communications they have had with managers, so, I
presume that you can re-phrase it so that hopefully,
and I understand, you know, your diligence, counsel,
but, you know, we're trying to get to the meat of
this. If we have objections every, you know, ten
seconds, we're going to be here for more than one
day, so let's try -- I know these -- I understand
counsel is leading, and I've asked him to -- to --
this is direct testimony, try not to lead -- but
let's just try to get through some of the preliminary
events.

I think I'm a seasoned enough arbitrator to
know, looking at what the issue is, whether you have
hiring issues, you know, that may be something else.
I need to focus on what you have said the issues are
before me.
Okay, go ahead, Mr. Hirn.

BY MR. HIRN:

Q. Dan, with regard to Union Exhibit -- excuse me, Joint Exhibit 4, the September 2009 MOU, with whom did you negotiate that?

A. That was Mickey Brown.

Q. And did Mickey express to you any concerns that management had that led him to want to negotiate such an MOU?

A. Well, I mean, that's why we flew to New York, to negotiate an MOU over the H1-N1 virus, and -- and and as I said a few seconds ago, I also had discussions with Bob Byrd, who was then the CFO, who was heading up labor relations for all the agencies, and -- and he -- he also, you know, stated that that they needed to come up with this plan.

Q. Did they explain to you why they needed to come up with a plan?

A. Well, obviously -- well, again, my understanding was that they were directed to do that and I'm assuming that came from OBM, I'm not 100 percent sure on that. The -- the reason is because,
you know, an epidemic would be catastrophic to the
operations of the National Weather Service. If in
fact, we had these discussions, so, you know, what
are you going to do if many offices close down.

I mean, every office has a back-up office,
but if the office and the back-up office closes down,
you know, because they can't fill the positions, and
yes we had these discussions, you know, what do we
do, how do we, and the, you know -- and of course the
MOU itself was, well, let's do things to prevent that
from happening, let's do everything we can to prevent
that from happening.

Q. What was the intent of providing the tissues
and the disposable plates, cups and utensils?

A. It was to prevent the spread of disease, to
keep people healthy in general; there were several
offices that were already doing that, we just said,
look, there are offices already doing this already,
let's just do this nation-wide, it just makes sense,
and, you know, we added a couple of things to it at
the time, like the Dorel, and -- but, you know, it
was, again, to provide a healthy working environment
for the employees of the National Weather Service.

Q. Was the agreement limited to just the
2009-2010 weather season?

A. No.

Q. Is there any language in the agreement
indicating that the agreement to provide the tissues
and disposable plates, cups and utensils was not
limited to the 2009-2010 flu season?

A. Yes, there is language in there, and the
language we put in there on purpose, to make sure
that it wasn't limited to the 2009 worry about the
pandemic issue.

Q. And what language was that?

A. It states that hereafter they will purchase
these items.

THE ARBITRATOR: Can I just interrupt -- do
you recall whether there were specific discussions on
whether this would be limited to the 2009 virus, do
you recall discussions with your counterpart in
management?

THE WITNESS: Can I -- the -- I did a little
research before this. What's referred to as the 2009
virus doesn't just deal with what happened in 2009. The H1-N1 virus even today, and ten years from now, we refer to as the 2009 H1-N1, so, your question, I don't know if it dealt with --

THE ARBITRATOR: Okay. Here's my question.

I've got to -- I've got to determine what your memorandum of understanding means.

THE WITNESS: Right.

THE ARBITRATOR: And generally, in our field, the way that is, is you get someone who likely in a position like you, who is there at negotiation, and you tell what happened at negotiations. So, negotiations. You're sitting with your counterpart in management, and statements are being made by both sides, and from that, I've got to determine what the intent of the parties was.

So, you're saying, oh, this was supposed to go beyond just that 2009, how do you know that, what are you basing that statement on?

THE WITNESS: That was the specific discussions that we had at the time.

THE ARBITRATOR: Okay.
THE WITNESS: If you look at the memorandum of understanding, there are basically two parts to it, two paragraphs. One part, while it doesn't specifically say you can't keep doing this, it says, look, we've got something going on here, you need to educate people, let them know about how to take leave, let them know not to share pencils, and all that, and then there was a second part where we specifically sat down and discussed, well, this we want to go on forever, and -- and it says hereafter you're going to purchase the Purell, whatever the generic term for that is, for work stations, so people can kill the germs there, paper plates and plastic utensils, and paper cups, and -- for sanitary purposes, to, you know, because it's an environment that's -- and he had the discussion at the table, that it's an inherently dirty environment that get's used a lot, and usually you don't have time to do the type of cleanliness you do at home.

THE ARBITRATOR: Was the proposal from one particular side they go on beyond this H1 concern, or were both parties saying, yes, we have to have this
1  go on?
2  THE WITNESS: The -- I would characterize it
3   as jointly agreed to. I think we brought it up
4   initially but I'm not going to swear to that. I'm
5   not 100 percent, but clearly, it was like, yes, this
6   is something we have to do, jointly.
7  THE ARBITRATOR: Okay. Okay. Sorry, Mr.
8  Hirn. That was just something I had to clarify for
9   myself.
10  BY MR. HIRN:
11    Q. Who in the forecast office is responsible for
12      ordering supplies such as these?
13    A. You know, every office is a little bit
14      different, and they have different people doing it.
15      I would say, if there was a, you know, inside the
16      bell curve kind of person who usually would do this,
17      would be the administrative support assistant, or the
18      ASA, I'll refer to him as.
19    Q. Is that a bargaining unit employee?
20    A. Yes.
21    Q. And --
22    A. Most of the time, there are a few locations
Q. And have you communicated with any ASA's to find out where they ordered these materials from?

A. Me specifically no. I communicated with some stewards about ordering this kind of information. You know, what -- in concert with this arbitration, in the past I have contacted ASA's about purchasing this type of equipment and I've talked to them about -- so, yes. very recently no, but over the last -- over my -- you know, the last 10 years, because my office in Tampa happened to be one of the ones that had been purchasing these things since day one, since I've been there, so

Q. From your years as a federal government employee, do you know what the General Services Administration is?

A. Yes. The General Services Administration is -- it's a federal Agency that essentially -- they do bulk buying, they pull resources so that at each office say doesn't go out and buy tissue paper -- GSA buys huge amounts of it, stores it, or has contracts, nowadays it has global distribution networks the way
they are. So, it's -- think of it as the supermarket for federal agencies.

Q. Okay. Earlier this morning you showed me a document that says GSA order, is this -- and I'll --

THE ARBITRATOR: We'll mark this as U5. I'm marking this for the purposes of identification, it's a multi-page document, so I'm marking it as U5a, U5b, U5c, and U5d, U5e, U5f, U5g, U5h, U5i, U5j. (The document referred to was marked for identification as Union Exhibit Number 5A-J.)

BY MR. HIRN:

Q. Is this the document you showed me earlier today?

A. Yes.

Q. And where did you find that?

A. I found it on the -- well, I did a Google search. When the Arbitrator asked about who can purchase from GSA, I did a little Google search, and found their -- I don't know what you would call it -- we call it directives in the National Weather Service, but it is essentially a description of everybody who can buy from the GSA, a description of
Q. And where on the internet did you find this?

MS. SMITH: I'm going to object to that. I thought -- I'm going to object to that, because I'm assuming things you're going to be asking, and then comes back with this other document.

THE ARBITRATOR: What difference does it make?

MS. SMITH: I just -- you know, I think it's kind of a sandbag surprise to the Agency that, you know, if we can always go back and look up stuff on Google, then why have a hearing?

THE ARBITRATOR: Well, anything that's on Google is something that I can take judicial notice of.

MS. SMITH: Right. So what are testing on?

We can stipulate to this.

MR. HIRN: Okay. Those --

THE ARBITRATOR: Do you want to stipulate that this is a GSA-ordered directive? Great.

MS. SMITH: It is what it says. The document says what it says.

THE ARBITRATOR: U5 is in.
(The document referred to was received into evidence as Union Exhibit Number 5A-J.)

BY MR. HIRN:

Q. Okay.

MS. SMITH: We can stipulate to all of them.

MR. HIRN: Okay. Well, which ones. I mean, you can -- let's cut to the chase.

MS. SMITH: Let's see where -- it would probably take an hour to -- if we get more further along the field with things that are, you know --

THE ARBITRATOR: You just let us know if there's something that he introduces that you can stipulate to.

MS. SMITH: All right.

BY MR. HIRN:

Q. Okay. Did the -- there, the GSA catalogue --

THE ARBITRATOR: U6?

MR. HIRN: U6.

THE ARBITRATOR: This is stapled, so I'm not going to separately mark each page.

(The document referred to was marked for identification as Union Exhibit Number 6.)
BY MR. HIRN:

Q. Do you recognize this document?

A. It's what it says it is. Supply catalogue for 2014 from --

MS. SMITH: I'm going to have some voir dire on this.

THE ARBITRATOR: You have some voir dire?

MS. SMITH: Yes.


VOIR DIRE:

BY MS. SMITH:

Q. Have you seen the entire supply catalogue?

A. No, this is a print-off from the internet.

Q. And is it the entire catalogue, to your knowledge?

A. No.

Q. So, how many pages did you print out?

A. Well, I'll tell you, it starts at 157 and goes through -- well, there are just various different pages. It's -- it ends on 224, but there at least 224 pages of this catalogue, I'm guessing well over 400 or 500, I mean, it's a huge catalogue,
but nobody really uses the catalogue anymore, they go
online and get things off of it like this.

MS. SMITH: Well, we'll stipulate that a few
of the pages that have items on there that you say
you can get on the GSA website.

THE ARBITRATOR: Very good. But what made you
choose these particular pages to get together as
Exhibit U6?

THE WITNESS: Well, I believe that it
highlights what the General Services Administration,
who only federal agencies can purchase from, are
actually selling, things like table napkins, that we
are arbitrating here, things like plastic forks and
knives, like we're arbitrating here.

I mean, if you weren't allowed to buy them,
they wouldn't be selling them.

THE ARBITRATOR: I understand. But you
essentially restricted to what you pulled off to what
we're dealing with today?

THE WITNESS: I think -- I'm not going to
swear to it, but, you could have probably pulled off
many more pages.
THE ARBITRATOR: Okay. Well, these are certain pages that you pulled off, and counsel is going to stipulate that these are the pages from the supply catalogue. U6 is in.

(The document referred to was received into evidence as Union Exhibit Number 6.)

DIRECT EXAMINATION (resumes):

BY MR. HIRN:

Q. Dan, did there come a time -- well, did there come a time earlier this year, that you had learned that Weather Service headquarters had issued guidance preventing the purchase of these disposable items?

A. Yes.

Q. I'm going to show you what has been marked for identification as -- we're going to skip over -- to move things along, we're going to skip over -- a document titled, it's from Gary Austin, dated -- an e-mail dated April 4.

MS. SMITH: Okay.

MR. HIRN: And we'll withdraw the document.

THE ARBITRATOR: Well, we -- it's not in -- so -- it's a document that says at the top forwarding
MR. HIRN: Yes.

THE ARBITRATOR: So we're going to mark this as U7?

MR. HIRN: Yes.

(The document referred to was marked for identification as Union Exhibit Number 7.)

BY MR. HIRN:

Q. Did this e-mail get forwarded to you?

A. Yes.

Q. And what did you do as a result of seeing this e-mail?

THE ARBITRATOR: Well, before we can do that, who's Gary Austin?

MR. HIRN: It's a Green Bay file e-mail, you can see on signature line.

THE ARBITRATOR: Meteorologist in charge NWS Green Bed [sic] -- it's the Weather Service office in Green Bay?

THE WITNESS: Meteorologists in charge are often what we refer at the MIC as the -- as the top supervisor in a weather forecast office.
THE ARBITRATOR: Very good.

THE WITNESS: And he happens to be in the Green Bay office.

THE ARBITRATOR: Very good. Okay.

BY MR. HIRN:

Q. Okay. What -- after seeing this, what, if any action did you take?

A. We filed a grievance.

Q. Is that the grievance we're arbitrating here today?

A. Actually, I take that back. I believe I also forwarded -- before I filed the grievance I think I was forwarded an e-mail from the CFO, but yes, we did file a grievance, that was the action I took, so, yes.

Q. Did -- I will show you what's marked -- what will be marked for identification as Union Exhibit 8 --

THE ARBITRATOR: Mr. Hirn, before you move on from U7, could you have the witness identify what CRH and NWSH are?

BY MR. HIRN:
Q. Yes. What is CRH -- do you know what the acronym CRH slash NWSH stand for?

A. Sure. NWSH stands for National Weather Service headquarters, and that's the facility we're in right now. Below them there are regional headquarters for the National Weather Service. Green Bay happens to be in the central region headquarters area responsible.

THE ARBITRATOR: Very good, thank you.

BY MR. HIRN:

Q. Did you linger -- were you later -- did you later see the guidance to which -- from Weather Service headquarters to which Mr. Austin is referring?

A. Yes, I did.

Q. Directing your attention to Agency -- to what's being marked for identification as Union Exhibit Number 8, a March 26 e-mail from John Longenecker to NWS office directors. Do you recognize that document?

A. Yes, that's the -- I was -- I guess -- I believe this -- I don't recall if anybody actually
sent it to me, but this is the e-mail that was the basis of the MIC in Green Bay's e-mail, and apparently this went to, as you can see from the headers, all the regional offices of the National Weather Service, and then that was further distributed down. (The document referred to was marked for identification as Union Exhibit Number 8.)

MR. HIRN: I'll move the admission of Union Exhibit 7 and 8.

THE ARBITRATOR: Any objection?

MS. SMITH: I don't have any objection.

THE ARBITRATOR: Very good.

(The documents referred to were received into evidence as Union Exhibit Numbers 7 and 8.)

BY MR. HIRN:

Q. And do you know John Longenecker?

A. Yes.

Q. And who is John Longenecker?

A. At the time, he was the acting chief financial officer for the National Weather Service.

Q. After you received the grievance -- after you
filed the grievance in this case, did you receive some acknowledgement from management that they did in fact instruct managers to cease purchasing these supplies?

A. Yes.

Q. Directing your attention to an e-mail from Stan Kensky to Dan Sobien dated April 11, which is marked for identification as Union Exhibit 9. Can you identify this document?

A. This is the e-mail that I got from Stan Kensky.

(The document referred to marked for identification as Union Exhibit Number 9.)

THE ARBITRATOR: Who is Stan Kensky?

THE WITNESS: Stan is sitting over there in the corner, and he is the assistant to the chief negotiator. I don't know his exact title, but -- but he -- he helps in labor management to formulate policies and relations.

THE ARBITRATOR: Very good.

BY MR. HIRN:

Q. Did you respond to Mr. Kensky?
A. Yes, I did.

Q. Directing your attention to an e-mail from you to Mr. Kensky dated April 22, which will be marked for identification as Union Exhibit Number 10. Do you recognize this document?

A. Yes, I do.

(The document referred to was marked for identification as Union Exhibit Number 10.)

BY MR. HIRN:

Q. Is this the response that you sent to Mr. Kensky?

A. Yes, it is.

MR. HIRN: Move for the admission of Union Exhibit Number 10.

THE ARBITRATOR: Any objection?

MS. SMITH: No.

THE ARBITRATOR: 9 and 10 are in.

(The documents referred to were received into evidence as Union Exhibit Numbers 9 and 10.)

BY MR. HIRN:

Q. Did you ever discuss this grievance with management in person?
A. Yes, I did.

Q. And where was that?

A. In this building on the 18th floor.

Q. And with whom did you discuss it?

A. On our side of the table, it was our vice-president and our secretary treasurer, on the management's side of the table it was the assistant administrator of the director of the National Weather Service, Louis Uccellini, his chief of staff at the time, Dennis Staley, David Murray, the chief negotiator for the National Weather Service was there, I believe Stan was in the room, and Monique Ciofallo, the counsel for the Agency.

THE ARBITRATOR: And what are the names of the people who were there for you?


THE ARBITRATOR: And which position does Mr. Solano hold?

THE WITNESS: Mr. Solano is the secretary treasurer, and Mr. Hopkins is the vice-president.

THE ARBITRATOR: Very good.
BY MR. HIRN:

Q. And what did you say to them about why you filed a grievance?

A. Well, I -- I -- you know, I told them that we have an MOU, and the MOU was in effect, and they can't unilaterally just stop doing an MOU and I told them that their explanation for doing it, for stopping the MOU, the 1920-something Coolidge administration GAO study or report, wasn't valid, I mean, you know, I don't even think plastic knives and forks were invented back then. The -- the -- I handed them several other Comptroller General reports that -- that -- while, none of them exactly answered the -- the -- what we do in the National Weather Service, taken in their totality, I think would clearly show that it was completely legal to provide these types of -- of -- of items for the benefits of the employees' health and -- and -- I mean, that was in general, that was the meeting.

Q. Does management take any action to protect their managers and other employees from catching the flu every year?
1        A. Yes.
2        Q. And could you tell us what that is?
3        A. Yes. On the ninth floor in this building,
4   you could go right now and get a free flu shot. You
5   could also go right now and get a free cholesterol
6   screenings, and blood sucrose screenings. People in
7   this building do get free health -- you know, things
8   that help promote their health, which is good, but,
9   it seems they're interested in keeping themselves
10  healthy, but not so much their employees, but maybe
11  that was something I should have kept to myself,
12  sorry about that.
13        Q. The -- I will ask you to look at a page form
14   the internet from the NOAA website which has been
15   marked for identification as Union Exhibit 11; is
16   that right?
17        THE ARBITRATOR: Yes.
18   (The document referred to was marked for
19   identification as Union Exhibit Number 11.)
20        BY MR. HIRN:
21        Q. And ask you if you have seen this before and
22   know anything about this health service?
A. I -- in fact, I have in fact went there this morning just to check it out, because, while I come to this building frequently, I've never actually been there, and it looks like a small doctor's office, there's nurse practitioners there, I actually talked to two of them this morning, so, yes.

Q. And which one is that, is that, looking at Union Exhibit 11?

A. Are you asking which of the facilities I visited?

Q. Yes.

A. That would be the SSMC campus facility.

THE ARBITRATOR: In Silver Spring.

THE WITNESS: In Silver Spring.

BY MR. HIRN:

Q. And is that -- did you say that that is in this building?

A. That is in this building on the ninth floor, same exact location on the ninth floor.

Q. And directing your attention to the second page of this, did you confirm in your visit -- did you ascertain whether in fact they provided these
services?

A. I didn't ask about each and every one of these specifically, like for instance the allergy shot clinics, but I did ask about some of them, you know, the health fair, the educational materials, I was specifically noticed the glucose and the cholesterol checks, and of course immunizations.

Q. And directing your attention --

THE ARBITRATOR: When you say immunizations, are you referring to traveling immunizations, or the influenza shot?

THE WITNESS: I'm sorry. No, the influenza -- the free immunization shots that they offer.

BY MR. HIRN:

Q. And directing your attention to the next page which is a document that begins, know your numbers, mark this for identification as Union Exhibit 12, have you seen this before?

A. Yes.

(The document referred to was marked for identification as Union Exhibit Number 12.)

BY MR. HIRN:
Q. And how did you obtain this document?
A. This was on the counter up there, and when I was speaking to the nurses they handed this to me.
Q. And what did they -- did they explain this to you?
A. They said it -- they said it's some of the services that they offer, it's by no means the totality of it, but it gives an idea of the -- for this specific concern, diabetes, and related cardio-vascular disease, some of the stuff that they do.

MR. HIRN: I move for the admission of Union Exhibits 11 and 12.

THE ARBITRATOR: Any objection?

MS. SMITH: I'm going to object on the grounds that it's not relevant.

MR. HIRN: Well, I think that the point is, if they're saying we can't provide -- we can't spend federal funds on personal -- things that may be personal items to prevent employees from getting the flu, but we can spend funds to give them -- to give headquarters employees flu shots, and other kinds of
health preventative things, and glucose tests --
MS. SMITH: But this is a legal question.
THE ARBITRATOR: So then it doesn't go to
relevance, it's a legal question.
MS. SMITH: But why do we need this in the
record?
THE ARBITRATOR: Because his legal point is
that it's legal based on the argument he just made.
MS. SMITH: But what does it have to do with
the common cold? This is about weight, blood
pressure, waist measurement, and cholesterol --
THE ARBITRATOR: Because it's the Union's
argument that these are things of personal concern
that the Agency is spending money on, and therefore
it undercuts the Agency's argument that they can't
spend money on the napkins, and other disposable
things because it violate appropriations law.
MS. SMITH: We haven't really related those
issues in a health way, we've taken it for granted.
But no one has testified that there is a health need
for a plastic knife as opposed to a disposable one.
That's not a fact that's been established.
THE ARBITRATOR: I understand, but counsel is still putting his case on, and this is part of his argument, and that may be something you'll raise in your brief if he doesn't ever establish it, but it's arguably relevant to counsel's case and I'm admitting Agency 11 and 12.

(The documents referred to were received into evidence as Union Exhibit Numbers 11 and 12.)

MR. HIRN: But I think Mr. Sobien has testified that both parties believed, based on the course of the discussion, that the disposables were necessary to prevent people from transmitting colds and flus to each other at the forecast offices.

MS. SMITH: That hasn't been established.

THE ARBITRATOR: Well, it'll be on the record. I'm not going to tell you how to put your case on, or what's -- what's been testified to. I can't remember everything that's been said, these documents are in. They're arguably relevant.

BY MR. HIRN:

Q. Dan, I'm going to show you what will be marked as Union Exhibit -- well, let me back up. Is
there a cafeteria in the next door building?

A. Yes.

Q. Is that part of the NOAA campus?

A. Yes.

Q. Do employees of the Weather Service and the other NOAA offices here go in there to eat?

A. Yes, sometimes.

Q. This will be marked for identification as Union Exhibit 13. Do you know what this is a photo of?

A. It's a photo of a poster that -- can I ask the Arbitrator a question? Can I -- can I explain what this complex is so you know what the building is I am talking about?

(The document referred to was marked for identification as Union Exhibit Number 13.)

THE ARBITRATOR: Sure, anything to make it clear to me what we're talking about is helpful.

THE WITNESS: Okay. The -- what is referred to as the Silver Spring metro complex. It's -- it's four buildings that -- that the -- mainly, I'm sure there are other clients, too, but mainly the Weather
Service and NOAA headquarters are located at, well, actually I think the NOAA headquarters might be downtown, but most of the NOAA facilities are within this complex.

This is building two. Immediately adjacent to and actually connected by a parking garage is building three, and this was a poster -- you can see the easel, and everything that was up in building three, telling people to go to the health unit over here in building two to get their free flu shots.

MR. HIRN: I move for the admission of Union Exhibit 13.

THE ARBITRATOR: Any objection?

MS. SMITH: I think it's redundant, that's my objection.


(The document referred to was received into evidence as Union Exhibit Number 13.)

BY MR. HIRN:

Q. Operational employees at the forecast offices and the River Forecast Centers, and the smaller
WSO's, are they offered free flu shots at the government's expense?

A. The only time that I ever heard of that, and other than in the Washington, D.C. area, which would be the NOAA headquarters, the only other time I know of this was a few years back at western region headquarters, which was another large government facility, where they brought someone in to give free flu shots. I've never heard of it at a WFO, RFC, at a WSO, or CWSU any of the other units.

CWSU is a center Weather Service unit, it's a very small unit of meteorologists that are at air traffic control centers around the country, advising them of weather information.

Q. Dan, have you looked into whether the -- what kind of flu is being -- what kind of influenza is spreading this season?

A. Yes.

Q. And where did you look into that?

A. I went to the CDC website.

MS. SMITH: I'm going to object on relevance we well. The e-mail that terminated the practice was
in March. Whether there is flu now is irrelevant.

THE ARBITRATOR: Okay. What's your argument?

MR. HIRN: Just to go to the extent that Mr. 
Kensky's letter said that H1-N1 is over, we don't 
need it anymore, whatever. If there is any doubt 
 whatsoever about the continuing effect of the MOU, if 
-- and I haven't necessarily heard this argument 
other than in communication from Mr. Kensky's e-mail, 
that it's -- that the H1 -- that the MOU is only 
applied to the threat from the 2009 strain of 
influenza, this evidence will show that this year's 
flu -- almost all of the flues that around this year, 
is the 2009 H1-N1.

THE ARBITRATOR: Okay. But if in fact the MOU 
-- let's take what his argument is, this MOU was 
limited to the 2009 influenza outbreak. Whether 
we're in another influenza outbreak that happens 
fortuitously, you know, to be the same as not, 
doesn't matter. From what he expressed, the Agency's 
position is this was limited to 2009, it's done, it's 
four years later, we're done. Your argument is this 
is a broader MOU.
Even if the influenza virus that is coming around this year was totally different, your argument would be the same, it doesn't matter which strain is coming around, this is still in effect.

MR. HIRN: Yes, but if they're going to say it's hinged to one particular strain of flu --

THE ARBITRATOR: I thought his argument -- right. I thought his argument was not that it's restricted to a particular strain, it was --

MS. SMITH: The kind of strain that was a pandemic outbreak, the H1-N1.

THE ARBITRATOR: No -- so -- okay. If I'm correct and that the Agency will admit that the Agency's position as expressed by Mr. Kensky was that it was limited to the 2009 outbreak, is that the Agency's position?

MS. SMITH: I don't believe that's what Mr. Kensky said that it was limited to, but I will say that that was -- I mean, the title of the MOU says this is the implementation plan of the Agency's pandemic. We're talking about a pandemic of H1 -- not the virus in and of itself, so the outbreak of
the virus is the issue, it's not --

THE ARBITRATOR: It's not that it was that particular virus.

MS. SMITH: Yes, it's not -- yes, it wasn't that it was that particular virus, and in fact, if you look -- I mean, given to what a pandemic is, and that was the word that was used at that time, there were -- and I think it is Mr. Hirn's argument that it doesn't matter if it was H1-N1 strain or if it was an outbreak of cholera.

It still is that -- their argument is that this is for the health of the employees, so whether the H1-N1 2009 strain is going on right now, that is not relevant.

MR. HIRN: Can I -- well, maybe this will help to clarify things. In the grievance denied, and in the discussions with Agency counsel, we have not heard the Agency to argue that the MOU is no longer in effect, other than it's illegal. We're -- I'm only addressing this based on what I saw was an implication from Mr. Kensky's e-mail. I am not sure, and it's not clear to me because I haven't done it in
the greivant's denial, that they're taking the
position that if it was legal, the agreement is no
longer in effect because it expired on its own terms.
If we can get that clarified, that might save a lot
of time.

THE ARBITRATOR: Okay. Here's my problem, is
that I can't stop the hearing at this point and go
look at Mr. Kensky's e-mail and try to make a ruling
on what his intent was. It sounds to me like the
Agency is saying, look, our position was it dealt
with 2009, 2009 was over, and that's the end of it.
There may be some more argument as from what counsel
is saying as well it was illegal anyway to do it, the
way he is interpreting it.

I can't look at these documents now. If I --

you know, I'm going to let counsel proceed on this
line of questioning -- I may find it irrelevant, you
may be right, but I just can't make a definitive
statement at this point and we're just going to have
to take up more time if -- you know, we argue more
about it. We'll get it in, it may or may not be
relevant, you may be right.
1 You may be right -- I just can't -- so I'm
going to let you go --

3 MR. HIRN: But maybe we can save some time,
and have the Agency clarify what I had understood
from my conversations with --

6 MS. SMITH: Counsel is testifying.

7 THE ARBITRATOR: Okay. Let's go off the
record.

9 (Off the record.)

10 THE ARBITRATOR: Okay. We had hoped -- there
had been an objection raised by counsel for the
Agency to permitting counsel's current line of
questions regarding the current virus strain that's
going around. We had hoped that perhaps we might get
some stipulation as to whether the Agency's defense
was simply that the MOU was rejected because it was
illegal and they never should have entered into it,
or was the basis of the Agency's position also that
it really was executed for the 2009 virus and 2009 is
over, so the parties really couldn't stipulate off
the record, so I advised them the parties that I'm
going to give counsel for the Union latitude, because
he is not quite clear what the Agency's position is and therefore if he feels there is something indicative in a response he's gotten from the Agency that may be an issue, he needs to explore that in his examination, and I'm going to give him that latitude. So, with that said, counsel, feel free to ask whatever question you want.

MR. HIRN: Thank you, and the expense of repeating what I did before --

THE ARBITRATOR: That's fine.

MR. HIRN: I don't know where we left off --

THE ARBITRATOR: I think it was we were dealing with the flu strain that's going around now and whether it's the same flu strain or not.

BY MR. HIRN:

Q. Dan, did you make -- did you do any investigation to find out what the flu strain is that's going around now?

A. I -- I went -- no, I went to the CDC website to see -- I heard about the flu strain, in fact I just read yesterday that a lady in the Tampa area, 27 year old mother of three died from this flu strain.
Q. Which flu strain?

A. Well, it's ultimately called swine flu, but it's H1-N1 virus. The -- the -- but I went to the CDC website just to see what the flu situation was like this year. When I -- when I went back to Stan Kensky's e-mail and it said the pandemic was over, I wanted to see, so what is going on this year, and that's what I found, that, well, actually, there's a lot of flu going on, and it happens to be this H1-N1 -- actually, the 2009 H1-N1 virus.

Q. And what is the Union Exhibit that's been marked for identification as Union Exhibits 14 and 15? Are these the materials you found in the CDC website?

A. Yes.

Q. I'm moving they should be entered as Union Exhibit 14 and 15.

MS. SMITH: We didn't identify them.

THE ARBITRATOR: We didn't identify them, but that's okay.

MR. HIRN: 14 is the -- it says flu Centers for Disease Control.
THE ARBITRATOR: Okay. U14 --

MS. SMITH: They both say flu, so --

MS. CIOFFALO: The pie graph, or the --

MR. HIRN: The multi-page document I have marked as 14.

THE ARBITRATOR: Okay. U14 and the pie graph is U15.

MR. HIRN: Yes.

THE ARBITRATOR: Any objection?

MS. SMITH: No.

THE ARBITRATOR: U14 and 15 are in.

(The documents referred to were marked and received into evidence as Union Exhibit Numbers 14 and 15.)

BY MR. HIRN:

Q. Okay. Now, I apologize for -- if this is a repeat, but I think there was some lack of clarity as to whether you did testify to this or not, so let me go back and ask you. The second paragraph of the 2009 MOU, what was the intent of providing the tissues, the disposable paper plates, cups and utensils?
A. For the health of the employees.

Q. And how would that promote the health of the employees?

A. The -- in a typical weather forecast setting, like in the pictures, there's no dishwasher, there's a one-bowl sink, one multi-bowl sink, there's no bleach to sterilize anything there, when somebody's finished using a glass, you're trusting that they actually use soap when they washed it out and didn't just swish it out and put a little water in it and put it back in the counter.

The same goes for forks and knives and spoons, so it -- it clearly is a way that germs are spread throughout the office; and in addition, part of the -- the -- the agreement included not only plastic utensils but also it included the gelled alcohol that people use -- the Purell that people use to kill viruses and germs, so -- we specifically discussed that, yes, this is not just for H1-N1, but for any germs, you know, that -- just to help create a better, cleaner working environment for employees.

Q. I have no further questions and I marked for
identification earlier on in my opening this printout from the GSA website on the lab-coats --

THE ARBITRATOR: Did this witness print this out?

MR. HIRN: No. Well -- no, but you said earlier that you -- that's why I'm not asking to identify this, or --

THE ARBITRATOR: Just take judicial notice of it?

MR. HIRN: Do you want me to leave it as just for identification or do you want it as an exhibit, or should I withdraw it -- whatever you want.

THE ARBITRATOR: I'm going to admit it -- you objected to U1 and I'm going to admit over counsel's objection, since it is something I think I already took notes of. All right, we are done with the Union's direct.

Now, I know that both parties had expressed an interest in taking a lunch break. Do you want to do it before you begin your cross?

MR. HIRN: Well, we have another witness. We have -- we're calling the management negotiator to
THE ARBITRATOR: I know, but she's entitled to do cross.

MR. HIRN: Oh, I'm sorry, I'm sorry. I'm sorry.

THE ARBITRATOR: So, I presume that we ought to take a break now, so, what time -- 2:15?

MS. SMITH: Yes, that's great.

THE ARBITRATOR: Okay, very good. All right. We'll come back here at 2:15 to begin with counsel for the Agency's cross examination. Mr. Sobien, you are on the stand and because you are on the stand, you cannot talk to anybody during this break about this testimony, and that includes your attorney.

THE WITNESS: Gotcha.


MR. HIRN: And Ms. Schick, you said that you might -- you were planning on taking a 5:00 o'clock train home. Did you make a reservation for that, and perhaps that might be ambitious --

THE ARBITRATOR: Well, I'm wondering at this rate if we're even going to get done today. But, you
know, as I said when you were out of the room, you
know, if -- if we can finish and it means I have to
stay here til 5:30, 6:00, whatever, I don't mind
taking a 6:00 o'clock train home. I'm not sitting
here til 7:00 or 8:00 at night and getting home at
10:00 or 11:00 at night, I can't do it at this stage
of the game, so, you know, let's come back at 2:15,
let's see where we are somewhere around 4:00, 4:15,
if it looks like we're not finishing today, I'm going
to go take the train home.

If it looks like we can finish if I stay til
5:30 or 6:00, I'll stay til 5:30 or 6:30. Okay. All
right. We're breaking for lunch.

(Whereupon, at 1:20 p.m., a luncheon recess was
taken.)
AFTERNOON SESSION 2:10 p.m.

THE ARBITRATOR: We are back on the record at ten after 2:00, after a luncheon break; we have finished with the direct examination of the witness, and we're ready for cross by the Agency counsel.

CROSS EXAMINATION:

BY MS SMITH:

Q. Good afternoon, Mr. Sobien, how are you today?

A. I'm fine.

Q. I just had a few questions about your direct testimony. So, you talked about eating at your work stations, is that correct?

A. That's correct.

Q. Do you bring your food from home?

A. Either that or somebody would run out and grab -- there's a couple of fast food restaurants nearby, and we'd bring that back, or someone would get a pizza, or sometimes, if the weather was good, maybe somebody would cook something, or bring in a pie, or, you know, that kind of stuff.

And in addition, like everybody else in the
office, we have like TV dinners and stuff in the freezer, just in case you got stuck there and couldn't go home.

Q. You don't get free food at a WFO? How much?
A. Well -- sometimes I didn't pay, if that's what you're -- I mean, what --

Q. To your knowledge, does the Agency provide you free food?
A. Oh, no, no. Well --

Q. On a regular basis.
A. No, not on a regular basis. If it happened it was once or twice in my whole career of 20 plus years.

Q. So, you went to the cafeteria in building two, today, right, at the Silver Spring campus?
A. Three.

Q. Building three. And you went to the cafeteria and you paid for the food there, right?
A. Yes, however they had paper napkins and plastic forks, and I wasn't sure who paid for those.

Q. Okay. Well, do you know who runs that cafeteria?
A. I have no idea.

Q. So do you know, to your knowledge, does the Agency run it, or provide the food therein?

A. Well, no, but I know that -- I know that the agency does subsidize some of the -- I better not say that, because I've never seen it, it's just hearsay, so --

Q. So, fast forwarding to the MOU that's at issue here. Isn't it true that the first sentence of the MOU discusses the implementation of the H1-N1 preparedness plan of action for NOAA?

A. Yes.

Q. And have you ever seen that H1-N1 preparedness plan of action?

A. The whole implementation plan?

Q. Uh-huh.

A. I might have seen it, it was four years ago, I've not gone back and read it.

Q. Okay. So, to your knowledge, does it say anything about disposable plates, cups or utensils in that implementation plan?

A. I was concerned with the portion of it --
Q. That's not my question. My question --

THE ARBITRATOR: Answer her question.

THE WITNESS: Okay. So what was the question?

BY MS. SMITH:

Q. To your knowledge, does it say anything in the implementation plan about disposable items?

A. I have no knowledge one way or the other on that.

Q. You weren't involved in developing that plan?

A. No.

Q. And also, you talk about virus prevention techniques. To your knowledge, what are virus prevention techniques?

A. You know, washing your hands, certainly not re-using plates or -- I mean I grew up in the restaurant business, so I know there's some very strong standards for sterilizing plates to re-use, you can't just wash them and put them back out again. You know, plastic utensils, the gelled alcohol supposedly kills a good amount of germs. You know, I've heard about using your hands to cover your mouth when you sneeze, but I'm not here as a health expert
But I am here as -- as a reasonable citizen that obviously doesn't want to get sick either, so I've been able to research some of this stuff and answer it the best that I could.

Q. In your research, did you come across any information about agencies are supposed to react to pandemics?
A. How agencies are -- I never researched that.

Q. You're not familiar with the NOAA pandemic influenza and continuity of operations plan, you're not familiar with that?
A. I have heard of it, but I've never read it.

Q. Okay. So you don't whether it discusses disposable items in this plan?
A. I don't.

Q. Okay. And you're not a purchase card holder?
A. No.

Q. So you can't buy anything in the GSA catalogue?
A. That is correct.

Q. Only a purchase card holder can.
THE ARBITRATOR: Can you keep your voice up, because I'm having a little trouble hearing you.

MS. SMITH: I'm sorry.

BY MS. SMITH:

Q. And you're not an authorizing official for a purchase card holder, either, right?

A. That is correct.

Q. So, the agency does provide health insurance for Weather Service employees, is that right?

A. The agency pays some of the expense of health insurance, yes.

Q. And, so --

A. It's subsidized.

Q. Right. I think you testified that the 2013 H1-N1 influenza, that that's prevalent this season, is that right?

A. That is correct.

Q. You are aware that the H1-N1 outbreak ended in 2010, is that right?

A. No. That -- first of all, it's specifically the 2009 H1-N1 virus -- I think there might be more
-- I've seen it specifically referred to that way, so
there might be more than one H1-N1, and, no, clearly
the outbreak didn't end, or we wouldn't be having the
outbreak we're having right now.

Q. Well, what's your definition of an outbreak?
A. What is your definition of an outbreak?
Q. I'm not testifying, so my definition's not
relevant.
A. Of course you're not. I mean, an outbreak is
when a lot of people are getting sick.

Q. Are a lot of people getting sick right now,
to your knowledge, in the Weather Service?
A. Yes, yes. Based on my research on the CDC
website, it's higher than average amounts of cases
being reported, and like I said before, just last
night, I saw an article from a local newspaper -- not
a newspaper, a TV station, in the Tampa area that a
27 year old woman died from the H1-N1 virus; I mean
she was fine like a week or so ago, and now she's
dead, so -- so -- so I mean, I'm not an expert, I
can't tell you what an outbreak is, but in my head --

Q. You know that the definition of a pandemic is
an outbreak, something that happens quickly and
spreads fast, it's not something that is always
around.

You know there's a difference between a
pandemic and -- I'm sorry.

(Off the record.)

BY MS. SMITH:

Q. So, actually I don't have any more questions.

THE ARBITRATOR: Nothing further? Any
re-direct? Thank you very much for your testimony.
You may discuss your testimony with counsel, do not
discuss it with any other witness. Next witness?

Excuse me?

MR. HIRN: He may be subject to recall if we
don't conclude today.

THE ARBITRATOR: He may be subject to recall,
but he still can't discuss his testimony at this
point.

MR. HIRN: But I mean --

THE ARBITRATOR: New testimony he may discuss,
yes.

MR. HIRN: Okay. Our next witness is going
to be Mickey Brown, who is the eastern region director, and I think, Monique, or --

MS. SMITH: I called him during the break to give him a heads up, and I can call him now, to just go in there.

MR. HIRN: We don't have to take him in order if he's hung up somewhere.

MS. SMITH: I don't think -- he was waiting.

THE ARBITRATOR: Oh, we're going to watch him on video, okay.

MS. SMITH: Yes. I will try to keep my voice up.

(Off the record.)

THE ARBITRATOR: Okay. The next witness on behalf of the Union is --

MR. HIRN: We're calling Mickey Brown.

THE ARBITRATOR: Okay. Mr. Brown, can you hear me?

THE WITNESS: Yes.

THE ARBITRATOR: Mr. Brown, my name is Mariann Schick, and I'm the arbitrator that the parties have selected to settle this dispute between them. You
are being called as a witness on behalf of the Union, and you're going to be questioned by Union counsel and then by Agency counsel, and I'm going to let the attorneys go back and forth until they've had all their questions answered, and I may have a few questions at the end.

Do you have any objection to taking an oath?

THE WITNESS: No.

Whereupon,

MICKEY BROWN

called as a witness, and having been duly sworn or affirmed, was examined and testified, as follows:

DIRECT EXAMINATION:

BY MR. HIRN:

Q. Hi, Mickey, would you give us a capsule summary of your employment history with the Weather Service?

A. Yes. I've been with the National Weather Service for about 25 years now, started in 1988 as a meteorologist intern in Meridian, Mississippi, went to the hurricane center for about a year, then as a general forecaster in the New York city office,
senior forecaster in the New York city office, came to the eastern region headquarters as the regional transition meteorologist, then I was promoted to the chief of the meteorologist services division, and in my current position as deputy director for the eastern region.

Q. Okay. And I presume that that's management position, not bargaining, correct?
A. Correct.

Q. And you have been involved in representing management at the bargaining table, have you not?
A. Correct.

Q. Please tell us in capsule summary what your responsibilities were, you know, what kinds of stuff have you done for management in the way of labor relations?
A. Sure. It started -- as deputy director for the eastern region, part of my responsibilities is to represent management in regional labor issues, I'm management's representative to the labor council, back in the early, I guess late 1990's, early 2000's, I was part of the negotiating team management side
for the current collective bargaining agreement.

Somewhere in, I guess it was 2007-ish, I became chief negotiator for the agency when the person who was doing the job and left to go somewhere else.

I was chief negotiator up to about 2010 and in between that obviously I was dealing with regional and national issues and since 2010, back to doing regional issues.

THE ARBITRATOR: One second. Let me ask Union counsel. Are you calling this witness as a cross? As an adverse witness?

MR. HIRN: A hostile witness.

THE ARBITRATOR: Yes. Okay. Very good. I just wanted to make it clear that since you are a management rep, you are being called as if you were being called on cross examination and that will permit counsel to ask leading questions.

BY MR. HIRN:

Q. So, just to be clear, when you were chief -- when you say you were chief negotiator for management in, from like 2007 to 2010 I believe you said, you -- that was on the national level, not just on the
eastern region, correct?

A. Correct.

Q. Okay. And you were involved in the negotiation that led to the September 2009 memorandum of understanding about the pandemic flu H1-N1, correct?

A. Correct.

Q. And what did -- when the parties went to go negotiate that general subject matter, was that at the initiation of management or of the Union?

A. Management.

Q. And what did you -- why did management initiate negotiations over this subject matter?

A. During that time frame, a direction came from the office of personnel management to the agencies to have contingency plans in place for pandemic influenza outbreaks. NOAA took that guidance and turned that into what I believe is called the NOAA pandemic influenza plan, or annex. That -- we were requested from the NOAA level to notify our Unions of NOAA's intent to implement that plan, or annex, and that's when I gave notice to NWSEO of management's
1 intent to implement that plan.
2 Q. Did the parties negotiate any provisions or
3 -- any provisions that went above and beyond that
4 which management had intended to implement in its own
5 contingency plan?
6 A. I think -- above and beyond what management
7 intended to implement. I think the main thrust of
8 the negotiation was to get that plan implemented. If
9 it covers other contingencies, so be it.
10 Q. Well, let me direct your attention to the
11 second paragraph. Do you recall that second
12 paragraph.
13 A. I don't have the document in front of me, but
14 I do -- but I know what we're referencing.
15 Q. And that is the provision of --
16 THE ARBITRATOR: Why don't you -- we're going
17 to have counsel read to you that second paragraph,
18 just so it's in the record, and we all know what
19 we're talking about, the same thing.
20 MS. SMITH: And he has access to the
21 documents. We sent him these documents in advance,
22 so if you want to refer specifically to the document.
1 Mickey, do you have them printed out?
2 MS. CIOFFALO: I don't know if he printed them out.
3 THE WITNESS: I can go print them out if you give me a minute.
4 THE ARBITRATOR: Sure, why don't you take a minute and go do that?
6 MR. HIRN: Well, Mickey, I only need to ask you about the MOU itself.
7 MS. SMITH: Which is Exhibit C.
8 MS. CIOFFALO: It's Exhibit C. If we need the others later you can print them out later. No, I'm sorry, it's Exhibit C.
9 THE ARBITRATOR: It's Exhibit C, print out Exhibit C. Okay.
10 THE WITNESS: Okay. One second.
11 THE ARBITRATOR: Very good. Okay. We'll go off the record.
12 (Off the record.)
THE ARBITRATOR: Okay. We're back on the record. The witness is back in the room. Do you have what Agency counsel sent you as — she denoted as Exhibit C that she mailed you or faxed you, whatever it was, which is the memorandum of understanding? Which is one of our Joint exhibits.

THE WITNESS: Yes.


BY MR. HIRN:

Q. Mickey, if I'm correct, these two paragraphs, the provisions here, these are not what was included in the Agency drafted implementation plan, correct?

These were something you guys, you and Dan negotiated, correct?

A. If you're referring to the NOAA influenza -- pandemic influenza annex, I would -- the answer is no, this is -- that -- to my knowledge, what's here is not in that plan.

Q. Right. And this is something -- in other words, you and Dan didn't lift this out of the plan, right?

A. Not to my knowledge, no.
Q. Right. This was the product of the conversations between you and Dan, correct?
A. Correct.

Q. Okay. With regard to the second paragraph, was the primary intent of the second paragraph to provide these matters as a convenience to employees, or rather was it intended to limit the potential to transmit the cold, flu and other illnesses in the workplace?
A. It was not an intent for the primary use of -- the primary use of the employee, it was to have available to the office when they were needed, when employees needed to use them, to ensure the operations of the office.

Q. What are the consequences to the Agency if multiple employees at a Forecast Office or River Forecast Center are out sick at the same time?
A. If the office doesn't have enough people to cover shifts, then responsibility for forecasting at that office, or all the responsibility associated with that particular office are transferred to their backup office, which places the burden on their
backup office to do the backup office's primary job
and their job as backup.

Q. The break-rooms. Are there dishwashers in
the break-rooms of the Forecast Office and River
Forecast Centers?

A. Not the ones that I've been in.

Q. When you were negotiating the second
paragraph, was there any discussion that the promise
to provide these materials was limited to only the
2009-2010 influenza season?

A. Not that I recall, no.

Q. What was the intent of the -- of adding the
word will -- adding the phrase will here and after
provide? What was the intent of the word hereafter?

A. Honestly, I don't remember. I'm not sure. I
don't know. I don't know where exactly that wording
came from. To the best of my recollection, that one
-- I can't give you a good answer on that one.

Q. Do you recall receiving the e-mail from John
Longenecker instructing regional offices and
subordinate managers not to purchase these supplies
anymore?
1. A. Yes.

2. Q. Were you surprised when you received that?

3. A. Yes.

4. Q. And why were you surprised?

5. A. Having gone through this process to get this MOU signed, I thought that -- I thought that what we were doing was consistent with particular laws and regulations.

6. Q. And why did you believe that?

7. A. Because before this MOU was moved forward, it was provided to Agency lawyers.

8. Q. And did the Weather Service continue to provide those materials covered -- itemized in the second paragraph after the end of the 2009-2010 flu season?

9. A. I would say we did, yes.

10. Q. And is it correct to say that you were -- the offices in your region continued to provide them up until the time that they received Mr. Longenecker's memo?

11. A. Without checking the records, because I don't deal directly with purchasing, from that perspective,
I would say that's a reasonable statement, yes.

Q. During March of this year, when this memo came down, was the Weather Service facing any particular financial troubles?

A. Yes.

Q. And could you tell me to your knowledge what they were?

A. Part of sequestration and the limited budget that we had, our budget has been tight, particularly tight, I would guess -- I would say, for at least the last year or so.

Q. Were there any other out of the ordinary economizing actions that were implemented last March?

A. I wouldn't go back specifically to last March, but we certainly have cut back on travel and training, as an example.

Q. How about the hiring freeze?

A. There is a hiring freeze in place.

Q. And that was -- that became effective in March, did it not?

A. I -- I can't tell you exactly when it did.

MR. HIRN: I have nothing further.
THE ARBITRATION: Okay. You are now going to be cross-examined by Agency counsel.

MS. SMITH: I think I'm going to -- well, I'm going to ask him to print out those exhibits.

THE ARBITRATOR: Very good.

MS. SMITH: Mickey, it's more printing.

THE ARBITRATOR: Yes, we'll go off the record to give you a chance to print the other documents that were sent to you.

(Off the record.)

THE ARBITRATOR: Okay. Back on the record. You have the documents printed out now?

THE WITNESS: Yes, I do.

THE ARBITRATOR: Very good. Okay. Now we'll go to cross examination by Agency counsel.

CROSS EXAMINATION:

BY MS. SMITH:

Q. Okay. Good afternoon, Mr. Brown, how are you today?

A. Okay. Thank you.

Q. You discussed this continuity of office plan
earlier, the pandemic annex. Do you have Exhibit A
in front of you, what the Agency marked as Exhibit A?
Is that the plan that you were referring to earlier?
(The document referred to was marked for
identification as Agency Exhibit Number A.)

THE WITNESS: That was the plan that I was
referring to that we were asked by NOAA to implement
and notify the Unions of that implementation.

BY MS. SMITH:

Q. I'm also -- you also talked about -- when you
said we, who were you talking about? We were
implementing -- are you referring to Weather Service?

A. The line offices within NOAA.

Q. Okay. Did the Weather Service come up with
its own implementation plan?

A. Specifically for pandemic influenza, I don't
think so. We have other continuity plans for
facilities.

Q. So, are you familiar with the H1-N1
preparedness plan of action?

A. Not off the top of my head, no.

Q. Okay, can you look at Exhibit B?
A. Okay.

(The document referred to was marked for identification as Agency Exhibit Number B.)

BY MS. SMITH:

Q. Have you seen this document before?
A. Say again, please?
Q. Have you seen this document before?
A. Yes.
Q. What is this document?
A. That was a memo that Bob Byrd -- or Robert Byrd issued, who at the time was the chief financial officer for the National Weather Service, issued around the time that the influenza plan for NOAA was put out.

Q. Do you remember if this plan of action was completed at the same time as the memorandum of understanding you were discussing before?
A. It's within the same timeframe if I remember correctly.

MR. HIRN: Is it customary for opposing counsel to get a copy of the exhibits that are --
MS. SMITH: Oh, I'm sorry. Yes.
MS. CIOFFALO: Sorry about that.

BY MS. SMITH:

Q. So, do you know if implement -- the preparedness plan of action, was that created before or after the memorandum of understanding?

A. I don't remember what the exact timeframe as to when one went out with the other, that I don't remember off the top of my head.

MS. SMITH: We're going to enter Agency Exhibit A and B into --

THE ARBITRATOR: A and C? Or A and B?

MS. SMITH: A and B.

THE ARBITRATOR: Okay. Any objection to the admission of Agency A and B? Very good. Agency A and B are in.

(The documents referred to were received into evidence as Agency Exhibit Numbers A and B.)

BY MS. SMITH:

Q. Now you talked about the intent of the MOU on cross examination. Was the purpose of the MOU to prevent the spread of the common cold among Weather Service staff?
A. I don't -- I would -- I would say, it
probably not the common cold.

Q. So, what exactly was it supposed to prevent?

THE ARBITRATOR: Which document are you referring to?

MS. SMITH: I'm just asking a question.

THE ARBITRATOR: Oh.

MS. SMITH: About the MOU. We're talking about the MOU.

THE ARBITRATOR: The MOU, okay.

THE WITNESS: I think the MOU is -- the MOU is put in place as part of negotiations associated with the pandemic flu -- or pandemic influenza annex on a plan -- it's part of the tools that offices can use to maintain operations.

BY MS. SMITH:

Q. In the event of what? What would be something that would interrupt operations?

A. There are many things that can interrupt operations. There could be sickness, there could be facility problems, there could be weather; there's a number of things that can prevent operations, or I
should say prevent -- interrupt operations.

Q. But sickness would not include the common cold, is that right?

MR. HIRN: Objection.

THE ARBITRATOR: Basis?

MR. HIRN: That's just leading.

THE ARBITRATOR: Well, but I mean --

MS. SMITH: It's already in evidence.

THE ARBITRATOR: He was called on cross, but this is cross examination by her, so, overruled.

THE WITNESS: I don't know to what extent the common cold could do that. I don't know. I don't know how to answer that question.

BY MS. SMITH:

Q. So, what's your understanding of a pandemic?

A. An outbreak of some type of virus.

Q. Who determines that a pandemic has occurred?

A. I would assume the Center for Disease Control.

Q. Has a pandemic happened since you signed the MOU?

A. Not to my knowledge.
Q. So, at the time that you signed the MOU, do you know if the Weather Service employees were purchasing disposable cups, plates and utensils?

A. Can you repeat that question?

Q. At the time that you signed the MOU, do you know if Weather Service employees were purchasing these disposable items?

THE ARBITRATOR: Do you mean whether individual employees were purchasing these items?

MS. SMITH: For the -- as employees for the Weather Service funds -- using Weather Service funds.

THE ARBITRATOR: Oh. Okay. So, the question is, do you know that at the time of the MOU whether agents of the Agency -- employees of the Agency on behalf of the agency were purchasing these plastic plates, cups and everything. Okay. Before the MOU was signed?

MS. SMITH: Before.

THE ARBITRATOR: Before the MOU was signed?

THE WITNESS: I'm sorry, I'm going to have to ask for one more clarification. Could I have that question repeated?
1 THE ARBITRATOR: Yes. What she's asking is,
2   before you entered into the MOU, were these items
3   being purchased by employees of the Agency, on behalf
4   of the Agency, acting in their official capacity, to
5   provide these items? That's her question.
6 THE WITNESS: Yes.

BY SMITH:

8 Q. And do you know why they were being
9   purchased?
10   A. Yes. It was a result of a directive that we
11   have in place to address continuation of offices
12   during significant weather or disasters.
13   Q. Okay. Do you know what the number of that
14   directive is?
15   A. Not off the top of my head.
16   Q. Can you take a look at Exhibit E, please?
17   A. Yes.
18   (The document referred to was marked for
19   identification as Agency Exhibit Number E.)
20 BY MS. SMITH:
21   Q. Is that the directive that you're referring
22   to?
A. Yes.

MS. SMITH: I'd like to enter Exhibit E into the record.

THE ARBITRATOR: Okay. Any objection?

MR. HIRN: Yes. He said that -- well, it can't possibly be what he said it was, because he said that before the 2009 memorandum, stuff was being purchased based on the directive.

THE ARBITRATOR: And this directive is dated March 1st, 2011.

MR. HIRN: Yes.

THE ARBITRATOR: Yes.

MR. HIRN: Is that a problem?

MS. SMITH: I can ask him to -- I believe it's just been updated, it's not -- it's the same directive that was in place at the time.

THE ARBITRATOR: Very good.

BY MS. SMITH:

Q. Mr. Brown, can you refer back to Exhibit E?

A. Yes.

Q. You see how it's dated March 1, 2011. Was this directive in place in 2009 when you signed the
MOU?

A. Yes.

Q. Can you explain why the date is different on this document?

A. The date probably is associated with a revision that was done around that time frame. If you actually look at the first page, it says summary of revisions. There -- there's a listing of what was revised, so, that's why I believe it's got that new date on it.

THE ARBITRATOR: Can -- would it be possible to get a copy of the directive that was in effect -- this directive that was in effect in its provisions prior to the MOU?

THE WITNESS: I would say yes. I would -- that's something the Weather Service headquarters maintains. I would believe somebody in that building could get you one.

THE ARBITRATOR: May I suggest this to the Agency, that we'll hold the record open to give you an opportunity to submit Exhibit E that would have been in effect prior to the execution of the MOU? It
looks like it would have been in effective as of June 2007.

MS. CIOFFALO: In the meantime, can we, for the purposes of going through it, assume that the changes that are summarized on the first page reflect the differences between this document and the 2009 document?

THE ARBITRATOR: I mean, we can presume it reflects the changes. I don't know what the relevance is here. Maybe you can point it out.

MS. SMITH: The relevance of the document?

THE ARBITRATOR: No, no. I don't know. I thought you were introducing Exhibit E to show that the Agency was engaging in purchases prior to the execution of the MOU. I don't see that that says that here.

MS. CIOFFALO: Oh, right. We're going to get through what circumstances the Agency was purchasing those items, in limited circumstances, per this directive, those purchases were happening.

THE ARBITRATOR: Okay. But this directive gives you the changes as of 2011.
MS. SMITH: But those changes didn't -- that
-- none of these changes reference the authority that
this delegation gave to the Weather Forecast Offices
to purchase these items. The authority didn't
change, the specific provision changed.

THE ARBITRATOR: But this document doesn't
have the authority in it, does it?

MS. SMITH: It does.

THE ARBITRATOR: Oh, okay. Well, then show me
where that is.

MS. SMITH: Okay.

BY MS. SMITH:

Q. So, Mr. Brown, can you turn to page four of
the document?

A. No, because I don't think it printed. I
don't have it as part of -- we lost a page here in
translation. If you'll indulge me for one second, I
can actually make a copy from the website if that's
acceptable.

THE ARBITRATOR: Just -- sure, I mean, you'll
have it for your testimony. We are going to submit
the substitute -- the 2007 document, but so that
1 counsel can ask you questions now, why don't you go
2 do that?
3 THE WITNESS: Okay. Thank you.
4 THE ARBITRATOR: And we'll go off the record.
5 (Off the record.)
6 THE ARBITRATOR: All right, back on the
7 record.
8 BY MS. SMITH:
9        Q. So, have you reviewed page four?
10        A. No. Any paragraph in particular?
11        Q. 3.33.
12        A. Okay.
13        Q. What does this paragraph give Weather Service
14 employees the authority to do?
15        A. Based on the opinions of -- based on opinions
16 issued by the Comptroller General to permit the
17 expenditure of funds for lodging by securing hotel
18 accommodations for emergency situations --
19 THE ARBITRATOR: I can read the document. You
20 know. Is there anything other than the words to the
21 document as to your understanding as to what this
22 document does, or -- I mean, essentially, counsel,
the document speaks for itself.

BY MS. SMITH:

Q. Right. Right. Well, what is your understanding of -- that was the question, though. What does the document say, and so I was --

THE ARBITRATOR: Well, we don't need to -- I can see what the document says, but if you want to explore what his understanding of what the authority was in 2007, you may do so.

MS. SMITH: Okay.

BY MS. SMITH:

Q. So, Mr. Brown, can you explain what your understanding of the delegation I 2008 in place of -- well, as of 2009, what did that directive give you the authority to do?

A. Gave us the ability to purchase emergency supplies for continued operations of an office.

MS. SMITH: That's -- that's all my questions are.

THE ARBITRATOR: Very good.

BY MS. SMITH:

Q. And what kind of emergencies were you
referring to?

A. Could be anything from weather keeping people in an office for an extended period of time, could be some situation that requires us to implement a shelter in place; what we need to keep operations going.

Q. But all weather operations that -- I mean -- weather reasons for these emergencies, is that right?

A. Not necessarily. That was not my understanding.

Q. So what else besides weather would give you the authority to purchase these items?

A. It's any -- anything that's associated with, I believe as the title says, weather emergencies or disasters.

Q. But not the common cold, is that right?

A. Unless the common cold was having a significant impact on the office, I guess I would say no.

MS. SMITH: That's all my questions for Mr. Brown.

THE ARBITRATOR: Very good. We're now going
to have re-direct from Union counsel.

RE-DIRECT EXAMINATION:

BY MR. HIRN:

Q. Mickey, have you ever taken sick leave when you've gotten a cold?
A. Rarely, but yes.

Q. Okay. Do employees that work for you, have you ever known -- you've approved sick leave slips, haven't you, obviously?
A. Yes, I have. Yes, I have.

Q. Have employees who work for you taken sick leave when they've gotten a cold?
A. Yes.

Q. Does sick leave cost the government money?
A. I would -- I guess it does because of the employees being paid for sick leave.

Q. And there's lost productivity when employees take sick leave, right?
A. Correct.

Q. And if you have a lot of sick leave at a Forecast Office, or a Forecast Center, that's going to impact operations, correct?
A. It does, yes.

Q. And it doesn't matter whether the sick leave is from the cold, or influenza, or a broken toe -- sick leave is sick leave, correct?

A. Yes. Employees have the right to take sick leave.

MR. HIRN: All right. I think that's all I have.

THE ARBITRATOR: Anything further?

MS. SMITH: Yes.

RE-CROSS EXAMINATION:

BY MS. SMITH:

Q. Mr. Brown, was the intent of the MOU to minimize the use of sick leave?

A. No.

Q. The intent of the MOU was to ensure that operations could continue, as you understood it, isn't that right?

A. Yes.

Q. And operations continue when people go on sick leave, isn't that right?

A. They do.
Q. Okay. And when you schedule people for shifts, don't you budget into your schedule that there might be some extra people for your shifts? When you're planning a shift -- well, let me ask the question this way. Let me ask the question this way. Earlier today we heard testimony that Weather Service Offices scheduled extra shifts when people need leave.

Is that your understanding of the way that shifts are scheduled?

A. Shifts are -- shifts are scheduled, or, schedules are planned months in advance, from a planning schedule and then from a fixed schedule. As people come and go from the office or -- or people need leave -- annual leave, vacation or sick leave, shifts are filled through a process that's contained in the collective bargaining agreement.

Q. So in the planning -- in the planning of schedules for shift works at the Weather Service, there is an understanding that sick leave may come up, is that right?

A. I think it's part of operations -- I mean,
it's part of -- managers understand when sick leave comes up.

Q. And do they do anything specific from preventing people taking sick leave?

A. To prevent people from taking sick leave?

Not to my knowledge.

MS. SMITH: I don't have any more questions.

THE ARBITRATOR: Anything further?

FURTHER RE-DIRECT EXAMINATION:

BY MR. HIRN:

Q. Yes. Mickey, at a Forecast Office, when you are doing rotation schedules for forecasters, or the interns in the HMT's and upper air shift, one does not commonly schedule extra people in advance in the anticipation that there might be sick leave, correct?

You only schedule the minimum staff that is operationally necessary, correct?

A. That's correct.

Q. And there really isn't only extra staff otherwise on duty, except during the day shift Monday through Friday, correct?

A. Yes.
Q. And so when there is an unexpected illness sick leave on an operational shift, it's generally necessary to call somebody else in or assign overtime to cover that shift, correct?

A. It can be covered with somebody who's considered a super numerary shift that may be in the office, and or overtime, reassignment of a shift -- a number of ways to cover that particular scenario, through our collective bargaining agreement.

Q. But the super numerary -- there's only a super numerary if at all on the Monday through Friday day shift, correct?

A. The majority of the time correct, yes.

MR. HIRN: That's all.

THE ARBITRATOR: Anything further?

MS. SMITH: I don't have anything further.

THE ARBITRATOR: Thank you very much for your testimony. You were called as an adverse witness by the Union, so there's not going to be any need I'm sure for you to discuss your testimony with Union counsel, but I want to caution you against discussing your testimony with any other witness in this case,
all right?

Very good, thank you.

THE WITNESS: Very good, thank you.

THE ARBITRATOR: Thank you. Okay. We just

finished with the testimony of a witness, and we had

referred Agency Exhibit E. Did you want to admit

Agency Exhibit E -- the 2007 version of it?

MS. SMITH: Yes, I do.

THE ARBITRATOR: All right. Would you have

any objection, counsel? Fine. I'm going to leave

the record open and you will send Exhibit E -- send

it directly to me, because I am going to take my

exhibits with me. Have you been given a copy of

exhibits?

Okay, very good, so you'll send them to me

and to counsel and we will -- at the time of receipt

they will be considered part of the record, so --

MR. HIRN: This is not --

THE ARBITRATOR: That copy is not being

admitted into the record. E will be sent to us, the

2007 version. All right. Mr. Hirn, another witness?

MR. HIRN: No, we rest, thank you.
THE ARBITRATOR: All right. The Union rests.

All right, very good. Ms. Smith, the Agency's case?

MS. SMITH: Okay. The Agency would like to present John Longenecker.

THE ARBITRATOR: Mr. Longenecker, my name is Mariann Schick and I'm the arbitrator that the parties have selected to settle this or to decide this dispute between you. All right. You're being called as a witness on behalf of the Agency. Have you ever been a witness before in a proceeding?

Okay.

It's not like Perry Mason. You're first going to be questioned by Ms. Smith, and then you're going to be cross-examined by Mr. Hirn, and I'm going to let the counsel go back and forth until all their questions have been asked and answered. I may have a few questions at the end. When you're testifying, Ms. Smith asks you a question and Mr. Hirn has an objection, would you stop testifying, give me a chance to rule on the objection.

If I overrule the objection, I'm going to permit you to keep testifying on that point, but if I
sustain the objection, I'm going to cut you off on that. Do you have any objection to taking an oath?

THE WITNESS: No, I do not.

Whereupon,

JOHN LONGENECKER called as a witness, and having been duly sworn or affirmed, was examined and testified, as follows:

DIRECT EXAMINATION:

BY MS. SMITH:

Q. Good afternoon, Mr. Longenecker.

A. Good afternoon, ma'am.

Q. Could you please state and spell your name for the record?

THE ARBITRATOR: And could you keep your voice up? Thank you.


Q. Are you currently employed?

A. Yes, I am.

Q. Where are you employed?

A. I'm employed with the Department of Commerce, National Fisheries Service, Office of Law
Enforcement.

Q. What's your current position?

A. My current position is assistant director for operations for Office of Law Enforcement.

Q. What are your duties and responsibilities?

A. Duties and responsibilities are to manage the finances for the Office of Law Enforcement as well as the personnel actions and responsibilities regarding staffing for all of the OLE.

Q. Where were you employed before the Office of Law Enforcement?

A. Again, with the Department of Commerce, National Weather Service.

Q. And what positions did you hold?

A. I was -- my billet was the deputy chief financial officer.

THE ARBITRATOR: Okay. You're going to have to keep your voice up, because I'm right next to you. I imagine Mr. Hirn must be having a great deal of difficulty unless his hearing is a lot better than mine. But please do keep your voice up. Okay.

BY MS. SMITH:
1       Q. How long were you deputy CFO of the Weather
2       Service?
3       A. I was deputy CFO from September 2012 til
4            November of 2013.
5       Q. How long were you -- you said that you -- I'm
6            sorry. We didn't get to your positions. You talked
7            about your billet. What positions did you hold?
8       A. So, I was acting chief financial officer from
9            September 2012 to May of 2013, and then I was acting
10           chief of operations from August of 2012 til November
11            of 2013.
12       Q. Okay. What was your series and grade level?
13       A. The series and grade level was a GSA 15 301.
14       Q. And was that the same position for all of the
15            -- was it the same series and grade levels for all
16            the positions?
17       A. Yes, even though they were acting SES's, you
18            do not change series or grade.
19       Q. And what's an SES?
20       A. Senior executive staff.
21       Q. What were your duties and responsibilities as
22       deputy CFO for the Weather Service?
A. As deputy CFO, it was my responsibility to carry out the actions, or the desires of the chief financial officer and any functions associated with that position.

Q. What were your duties and responsibilities as acting CFO?

A. As acting CFO it was my responsibility to basically make sure that all the financial matters of the Weather Service were taken care of as well as communication and personnel actions.

Q. What were your duties and responsibilities as acting chief of operations?

A. As acting chief of operations, the main responsibility was ensuring that the data systems were fully operational, as well as the dissemination of that data across the Weather Service.

Q. So, let's talk about your chain of command as acting CFO. Who was your first line supervisor?

A. First line supervisor was the deputy director of the Weather Service, or deputy assistant administrator.

Q. And when you were in that position, who was
in the acting -- or, I'm sorry -- who was the deputy assistant administrator?

A. Initially, when I took over in September, it was Stephen Cooper, and then it became Laura Furgione.

Q. When you were acting CFO did you have direct supports?

A. Yes, I had five.

Q. When you were acting CFO, what was the structure of the Weather Service?

A. The current structure what it is right now, they have essentially regional directors and office directors that manage the financial management centers of the Weather Service.

Q. How many regional directors?

A. There are six.

Q. How many office directors?

A. Five.

Q. And who headed the regions -- I mean -- we already know that. Who handled the financial management of the regions?

A. The regional directors.
Q. Was it the same for the office directors?
A. The office directors manage their funds, yes.

THE ARBITRATOR: Keep your voice up.

THE WITNESS: Sorry.

BY MS. SMITH:

Q. Did you interact with the regional directors?
A. Yes.

Q. How.

A. We had regional director calls on a regular basis, as well as through e-mail and other communication as necessary.

Q. How many employees are in the Weather Service?
A. Roughly five thousand.

Q. How many of those employees are in the bargaining unit?
A. Just over three thousand, I believe.

Q. And what's the name of the bargaining unit?
A. National Weather Service Employees Union, or NWSEO.

Q. Did you interact with NWSEO?
A. Yes, I did.
1       Q. How?
2       A. Through either phone calls and direct
3   communication and e-mails as well.
4       Q. And with whom did you most interact?
5       A. With Dan and Richard.
6       Q. Before the Weather Service --
7   THE ARBITRATOR: Can you give me their last
8   names?
9   THE WITNESS: Richard Hirn and Dan Sobien.
10   THE ARBITRATOR: Right.
11   BY MS. SMITH:
12       Q. Before the Weather Service, where were you
13   employed?
14       A. I was employed with Department of Commerce
15   NOAA, under the office of program planning
16   integration.
17       Q. And how long have you been with NOAA?
18       A. I've been with NOAA for over 22 years.
19       Q. How long have you been in the federal
20   government?
21       A. Over 30.
22       Q. What's your educational background?
A. Educational background?

Q. Yes.

A. I hold two Masters certificates and a Bachelor Degree in mechanical engineering.

THE ARBITRATOR: What's a Masters certificate?

THE WITNESS: It's one of the Masters degree, but not quite there.

THE ARBITRATOR: Okay.

BY MS. SMITH:

Q. Okay. So, when you were acting CFO, what were the biggest challenges facing the CFO's office?

A. The biggest challenge facing the CFO's office was the continuation of the -- I won't say fallout, but the follow-on actions from the internal investigation -- the decision memorandum from both Dr. Lubechenco and Dr. Blank, the corrective actions required by them, and then of course being September when I took over we were looking at how to position ourselves for execution for Y13, at the time looking at a pending continuing resolution as well as the budget control act sequestration potential issues coming up.
THE ARBITRATOR: Are you going to explain who these doctors are -- I have no idea what you're talking about. Thanks.

MS. SMITH: I do. Yes.

BY MS. SMITH:

Q. Now, you said decision memorandum from Dr. Lubechenco? Can you spell that for us?

A. Yes. L-U-B-E-C-H-E-N- --

THE ARBITRATOR: K-O?

THE WITNESS: No. C-O.

BY MS. SMITH:

Q. And who was that?

A. She was the NOAA administrator at the time.

Q. And the other person that you mentioned?

A. Under secretary of commerce. The other person was Dr. Blank, she was the acting secretary of commerce.

Q. And what was the gist of the decision memorandum?

A. The gist of the decision memorandum was basically their interpretation of the results of the internal investigation as to what corrective actions
they wanted to have done for the Agency as well as
the department, to ensure that the failures within
the Weather Service do not occur again, or at least
the similar types of occurrence, so essentially the
internal investigation did find, you know,
anti-deficiency act violation, of which the letter
was forwarded to the President with several of these
names on it --

THE ARBITRATOR: Okay. I'm just getting
confused. This is all before sequestration -- there
was some kind of an internal investigation?

THE WITNESS: Yes.

THE ARBITRATOR: Okay. You're going to have
to give me the background on this, because I have no
idea what you're talking about, and all of the sudden
there are these people's names who I don't recognize,
so, if you could just give me a little background,
you know -- obviously there was something that was
done as a result of which you took corrective action.
What happened?

THE WITNESS: In 2011, well even prior to
that, there was several employees that felt the use
of programmatic funds were not being appropriately utilized the way in which Congress intended it, they had supposedly raised their concerns within the Weather Service, nothing was done about it, they then went to the office of the Inspector General, the office of the Inspector General referred the case back to NOAA for investigation.

THE ARBITRATOR: Kind of like whistle-blower.

THE WITNESS: Correct. So they did an internal investigation, meaning that NOAA did their own investigation on themselves, that investigation resulted in finding of a anti-deficiency act, actually the internal investigation cannot find that per se, they had to recommend that to general counsel, general counsel had made the determination that --

THE ARBITRATOR: So they found certain shortcomings in the way you were operating.

THE WITNESS: They found that the funds were being misused, inappropriate use of funds, mismanagement of funds, was some of the terminology they used within the report.
THE ARBITRATOR: Okay. Okay. So that was the biggest thing you were facing when you came in.

THE WITNESS: Yes. Essentially, there was a lack of trust amongst the downtown leadership, but also the Hill, others the way that the money was appropriated to the Weather Service was being spent.


BY MS. SMITH:

Q. So what did you do as acting CFO to address the corrective actions in the decision memorandum?

A. So, as acting CFO it was my responsibility to ensure that the corrective action plan that we had put through the department was continuously followed and we were ensuring that, you know, the milestones that we put forth were being met. At the time, you know, some of the corrective actions required us to re-look at our budget process. I had established a team of which Steve Pritchard was a member of, to look at how to restructure PPA's, PPA being a program project and activity which is the way we get our funding. The funding that we were receiving and still receive within the Weather Service, the
restructuring will take effect hopefully in the 15
budget.

Came in at such a fashion that it was hard for
any employee to really understand how to
appropriately spend that money, so we were trying to
do to make it simpler and easier to understand, that
was, it was if mistakes were being made it would have
not been from ignorance on how to go about doing it,
it would have been more potentially blatant mistakes,
in other words, they -- the issue was there that
everybody could understand.

Anyway, and along with that we were looking
at, you know, headquarters restructuring or
restructuring the leadership in order to manage to
the new program structure. You know, the decision
memorandum also required us to look at communication
methods so that any employee who questioned anything
within the department or you know within the
individual line offices or agency would have a path
to go forward whether it's through your current chain
of command, and if you're not getting any results
that you feel are warranted for your concern, you
have the ability then to go direct to other leaders within the department if not the OIG of course, always was an avenue. There was requirements for training, for appropriation of law training, specifically for every employee associated with any kind of financial matters, the department set up a four hour training course that every employee had to take -- that training course was deemed not adequate for most of the Weather Service employees that were financial managers. We required them to take a week long training course, and that was approved through the deputy under-secretary as well.

You know, the summary level transfer policy that was a NOAA policy had to be re-written, we were in the process of, you know, complying with that, or looking at how we need to change business to follow those new structures, that policy came out right at the beginning of September. So those were some of the things we were dealing with.

Q. Thank you. Let's talk about the appropriations law training that you mentioned. Have
you taken this training?

   A. Yes, I have.

Q. How many times?

   A. I've taken a week long course once, and the shortened version several times.

   Q. And what other resources do you have available for abiding appropriations law?

   A. Well, we have the general law division within the Department of Commerce that we, you know, routinely call and ask questions if need be. You know, the appropriation law book that the General Counsel puts out that is called the red book, is obviously a resource that can be used, it's online as well. There are other resources that you can, you know, utilize, you know, through NOAA's General Counsel as well, not necessarily always through the departments.

   Q. Okay. And do you own the red book?

   A. Yes, I do. I also have an electronic version.

   Q. I'm going to move forward Joint exhibit -- well, actually it's the Union Exhibit, just to
minimize exhibits. It's Union Exhibit 8. Have you seen this document before?

A. Yes, I have. I created this document.

Q. What prompted you to create this document?

A. So, basically, what was happening is after the folks were taking the appropriations law class, they were raising things to my level that they felt were not appropriate, and at one meeting we had with regional directors, one of the directors had raised the issue that they felt that the purchase of some of the items that they were doing within the region were considered to be personal use, and based on the appropriations law class they just took, they did not think it was appropriate.

At the same -- the way they were describing it to me, I also felt it was not appropriate, and therefore I took action to ensure it would stop.

Q. What items were you aware of they were purchasing?

A. They were talking about paper plates, and cups and utensils mostly.

Q. Do you remember who brought those concerns to
your attention?

A. I do not which regional director it was.

Q. So, did you discuss this issue with anyone before you sent out this e-mail?

A. I did not discuss in the sense of getting permission; I did inform both the deputy assistant administrator and my deputy financial officer at the time, to let them know that I was sending it out, because, typically, anything that I send out, people would question either one of them in regards to, what did he really mean, what, you know, what does it really apply to, and that sort of thing, so I wanted to ensure that they were aware.

Q. So, just to get clarification, who exactly did you send this e-mail to?

A. This went to the regional directors, the office directors, and then I copied, of course, on the XO's and the deputy regional directors.

Q. And who are the XO's?

A. The XO's are mostly the headquarters, considered to be deputies.

Q. Okay. Now, why did you send it to the
regional directors and the office directors?

A. Because they are the financial management center directors or responsible parties.

Q. Responsible for what, just to be clear?

A. They are responsible for executing the appropriated dollars within the Weather Service that are allocated to --

Q. So, when you said that you spoke to the deputy assistant administrator, that was Laura Furgione?

A. Correct.

Q. And what did she say?

A. She basically just said if that's what you need to do, go ahead.

Q. And the deputy CFO was who?

A. Marie Laverne at the time.

Q. And what did she say?

A. She agreed as well.

Q. Did you discuss the issue with -- the issue of using appropriated fund for these personal items with anyone after you sent the March 26, 2013 e-mail?

A. Yes. After I sent it, I discussed it with
several individuals, including the chief resource
manager, which is Ring Wiley downtown, as well as the
deputy chief of staff, Jackie Bright.
    Q. And what did Ms. Wiley say?
    A. She said I did the right thing and we need to
move forward. And also had a discussion with General
Counsel as well to verify it.
THE ARBITRATOR: To verify what?
MS. CIOFFALO: Objection. We cannot disclose
any attorney client privilege information.
THE ARBITRATOR: But as I understood it, part
of your defense was is that Mr. Longenecker consulted
with counsel as a result of when he took this action.
MS. SMITH: I mean, he consulted with them,
but --
MS. CIOFFALO: It's not part of the defense.
    I mean, he consulted with attorneys, I mean, but
that's not part of the defense.
THE ARBITRATOR: It's not part of the defense
that this was -- that you repudiated the MOU because
of this citation in here which he has three Com Gen
4339 1924?
MS. CIAFFOLO: But I mean, whether or not the witness consulted with counsel is not germane to the issue. I mean, his conversations with counsel are protected -- attorney client protected information -- it's not, you know -- Mr. Longenecker took action based on whatever knowledge and counsel that he has received. I don't think that the Agency should be -- I don't think -- you know, I don't think that that waives attorney client privilege in any way.

THE ARBITRATOR: But he's the client. And he's -- as I understand it, he's -- he's put out an e-mail here that this is being appropriated funds can't be used based on this citation that is here, and I understood that this citation, I presume you don't go do your own legal research, correct?

THE WITNESS: I did for this. I did not contact counsel until after the fact.

THE ARBITRATOR: Oh, so you --

THE WITNESS: The red book. This came from appropriation law red book.

THE ARBITRATOR: Are we going to get this red book -- I mean --
MS. SMITH: It's very big. It's three volumes.

MR. HIRN: It's about 1500 pages.

THE ARBITRATOR: Well, I mean, you know, I can tell you both, you're raising questions here of appropriations law that so far are not part of the record. You're apparently relying on that, on the other hand I've got collective bargaining legislation that pertains to federal employees and I'm going to have to make some kind of a legal judgment as to whether or not I think this gentleman was correct in what he did.

Now, I'll tell you right now, when you submit your post-hearing briefs, anything that you want me to look at, whether it's statutory, regulatory, or case law, you must provide a copy of. I don't go searching for these things in the law library.

MS. CIOFFALO: Absolutely, we will.

THE ARBITRATOR: Okay.

THE CIOFFALO: We plan to address the legal question substantively in our post-hearing brief; we're trying to stick to just the facts of what
THE ARBITRATOR: Okay. Well, since you went and did your own research, I guess it's not necessary to get into the question of what counsel may have advised you, so it's really moot. Okay. Go ahead, continue.

BY MS. SMITH:

Q. So, what happened after you sent this March 26, 2013 e-mail? What happened in the agency?

A. So, shortly after I sent this out, it was brought to my attention that there was a MOU between the National Weather Service Employees Union and NOAA management to allow them the purchase of these types of items. We then looked at that MOU; I was not aware of the MOU at the time, we questioned whether or not there was an issue, and Dr. Uccellini felt that we needed to possibly rescind my direction. He wanted to have --

THE ARBITRATOR: Who's he?

THE WITNESS: He is the actual assistant administrator of -- my second level supervisor.

BY MS. SMITH:
Q. So let me -- to the extent that you are going
to get into -- I mean not that you talked to any
attorney client privilege, but the substance of that
we're not, we can't divulge that right now.

A. Okay. But he did want to have a formal legal
opinion received. We did that and request that from
the Department of Commerce, and that was received.
You know, at the same time, we were trying to
determine whether or not it was in our interpretation
an illegal activity, whether or not that that
outweighed any agreement that was in place. The
counsel -- not general counsel, I'm sorry, but the
advice from Ring Wiley and other downtown was, yes,
that is true, you do not continue any illegal
activity, and therefore I did not rescind the
direction -- Dr. Uccellini was fine with that, but
still was anxiously awaiting the general counsel
ruling.

By that time, we'd already received a
grievance from the National Weather Service Employees
Union for sending out this notification. That
grievance was then, you know, and action was taken on
it. Unfortunately at that time we did not, I guess
follow the appropriate steps, which was later
informed to me, that we should have notified NWSEO
prior to sending this out, because of the prior
agreement, but as I stated, I did not -- was not
aware of that prior agreement before doing it, nor
was I aware that this was a requirement to notify
them, so the notification then went out after the
grievance was received

Q. Okay. So, to your knowledge, who in the
Weather Service would have purchased these disposable
items?

A. So, these items would have been purchased
more than likely by the credit card holders at the
Weather Forecast Offices, and I believe most of those
would have been the ASA -- the assistant support
services type folks.

Q. And they're in the bargaining unit?

A. Yes.

Q. So, are there any penalties associated with
the unauthorized expenditures of appropriated funds?

A. There is. You know, within the commerce
acquisition manual, it clearly states you are not authorized to do personal items, they call out some of the items, specifically those discipline actions that are referenced in there; it either goes to the department of administrative order, which will allow removal from your position, to, you know, the most extreme, to basically just losing the credit card and losing the ability to, you know, spend appropriated funds.

Q. So, who would have to pay these penalties?
A. If it was determined that it was an inappropriate use, then it would be the employee's liability.

Q. Okay. I just want to mention two documents -- I want to make sure that we have them in the record. It's Exhibit J. J and K, sorry.

(The documents referred to were marked for identification as Agency Exhibit Numbers J and K.)

BY MS. SMITH:

Q. So, if you could turn to Exhibit J, let's just look at the front page. Well, you can review it. So, is this the commerce acquisition manual that
you were referring to?

A. Yes.

Q. And where are the penalties that you discussed?

A. Several clauses in here. One is under personal liabilities, it says the card holder and prudent officials shall --

Q. Can you tell us what page you're on first?

Q. Sure, it's page 19, section 3.14.

THE ARBITRATOR: And this is J? J 19?

MS. SMITH: J 19, yes.

THE ARBITRATOR: Okay.

THE WITNESS: So, section 3.14 under liabilities where it states that the card holders and approving officials shall make sure that all purchases made with the purchase card are in accordance with all federal department and operating unit acquisition laws, regulations, policies and guidance.

Card holders and approving officials may be held personally liable for any action deemed by the reviewing officials as non-compliant with these
acquisition policies and regulations --

THE ARBITRATOR: Excuse me, what page are you on?

MS. SMITH: Page 19, section --

THE ARBITRATOR: Oh, you're on J 22.

THE WITNESS: I'm sorry.

MS. SMITH: Oh, that's right.

THE ARBITRATOR: Okay. 3.14 is what you were reading?

THE WITNESS: Yes, ma'am.

BY MS. SMITH:

Q. And the provision that you're referring to?

A. So, page J 18, where it says federal appropriation law restrictions, in accordance with the principles of federal appropriation law, the following items are generally prohibited from purchases with appropriated funds, as there may be authorized exceptions of certain items card holder shall obtain approval from the head of the contracting officer after legal review and document the exception prior to the purchase of any of the following items, and it then goes on to personal
expenses and furniture and other types of things that are of the personal nature.

Q. I think that's good, that gives us a overview. And you also mentioned another document or directive? Is it Exhibit --

A. Well, somewhere in this acquisition manual it references the department of administrative order, which is the discipline order that involves discipline action to be taken against folks that were essentially are not following regulations, but knowingly not following regulations or policies.

Q. Can you turn to page 10?

A. 10?

Q. Well, it's my page 10 and you can tell us all what page it is in your version.

A. J 13.

Q. So, section 2.11 on that page, is that the section you were referring to?

A. Yes.

Q. So, let's turn to Exhibit -- I'd like to enter Exhibit J into evidence.

THE ARBITRATOR: Any objection?
MR. HIRN: None.

THE ARBITRATOR: Exhibit J is in. Agency J.

(The document referred to was received into evidence as Agency Exhibit Numbers J and K.)

BY MS. SMITH:

Q. Agency J. The next document is K. Exhibit -- Agency Exhibit K.

MR. HIRN: No objection to that.

THE ARBITRATOR: Okay. J is admitted, K is admitted.

BY MS. SMITH:

Q. And what provision were you citing in this document?

A. Well, this is actually the DAO, it's referenced in the section to which she just brought up in the acquisition manual, it gives you different offenses, and what level of penalty is appropriate for first offense, second offense, and I'm not sure --

Q. I'll direct you attention to the one at the top, it says 8 out of 11?

A. Okay, I'll skip over to that.
1        Q. Okay.
2        A. Use of a loan and use of government funds
3   property or personal or other resources for
4   unauthorized purposes, is that the one you're
5   referring to?
6        Q. Is that the section you were referring to?
7        A. That is one that could be used in this case,
8   yes.
9        Q. Okay.
10       A. All right. No further questions for Mr. 
11   Longenecker. Oh, I'm sorry. I just want to enter
12   K --
13   THE ARBITRATOR:  J and K are in. They're in.
14   All right, cross?
15   MR. HIRN:  Yes.
16   CROSS EXAMINATION:
17       BY MR. HIRN:
18        Q. John, you said you looked to the red book
19   when you --
20   (Off the record.)
21   THE ARBITRATOR:  Back on the record.
22   BY MR. HIRN:
Q. John, did you -- when you read the red book, did you read any of the cases cited in it in either of the Comptroller General decisions?

A. I read cases but I don't remember if I did for this particular case.

Q. Okay. So, you don't know whether you -- you don't know what cases you relied upon in making your decision to terminate -- that this appropriation was impermissive.

A. There was a case cited in my e-mail, I assume I read that case, but I -- at this point, I could not --

Q. You don't remember reading anything other than the case -- do you remember reading any of the Comptroller General decisions other than the one cited in your e-mail, in your particular research on this matter?

A. Not for this matter, no.

Q. Okay. Do you -- in making your decision, did you take into account 5 US C 7901, the statute that authorizes federal agencies within the limits of their appropriations to fund a health service program
for their employees?

A. I am aware of that but I did not take that into consideration for this.

Q. When you decided to terminate -- to issue that memo, you said you were not aware there was an MOU outstanding, correct?

A. Correct.

Q. So, it's fair to assume then that you didn't consult with management negotiator Mickey Brown about what the intent of that MOU was?

A. Mickey Brown was not the management negotiator at the time.

Q. Well, but he was -- he did negotiate this MOU.

A. That's what I understand after the fact, but at the time, there -- MOU's were negotiated throughout the years. I've -- you know, each one of them by different --

Q. Right, but it's fair to say then, that because you didn't even know it existed, you didn't call up Mickey and say, Mickey, why are we buying this?
A. Correct.

Q. Okay.

THE ARBITRATOR: Can I just ask -- did you consult with any of the HR people? Do you have an HR department, a human resources, or a labor relations department at the agency?

THE WITNESS: We do.

THE ARBITRATOR: Did you consult with them?

THE WITNESS: I mean, the decision was based on the appropriation law, not based on any human resource or --

THE ARBITRATOR: Did you -- my question is did you consult with human resources or labor relations?

THE WITNESS: No, but I still don't understand why that would have been something I would have thought of.

THE ARBITRATOR: You don't need to understand. You just need to answer my question, okay. You did not consult, is that correct?

THE WITNESS: That is correct.

THE ARBITRATOR: Very good. That's all I need to know.
BY MR. HIRN:

Q. When you found out after the fact -- when you found out there was an MOU, have you since that time at all consulted with Mickey Brown about what the Agency's intent was in negotiating the provision to buy these things?

A. I personally did not, but that was done by the Agency, yes.

Q. And who did it, and how do you know that?

A. Well, David Murray.

THE ARBITRATOR: Who's David Murray, I don't know who that is?

THE WITNESS: David Murray is our current lead negotiator.

THE ARBITRATOR: Lead negotiator?

THE WITNESS: Yes.

BY MR. HIRN:

Q. And Dave -- did David -- what did David Murray tell you that Mickey said?

A. I do not know about what the conversation was.

Q. Okay. Now, as the CFO did you ever have the
occasional look at sick leave usage at the National Weather Service?

A. Have I ever had the --

Q. Yes.

A. No.

Q. You don't have any idea how much sick leave costs the Weather Service every year?

A. Not off the top of my head, no.

Q. Maybe a generalized idea?

A. No.

Q. Okay. Do you have any idea of how many days a year sick leave that the employees of the Weather Service take?

A. No, but I don't -- I mean, sick leave is used for doctor's appointment, dental appointments, it's used for a lot of things, it's not a correlation of somebody being ill. So, I'm not sure that I would have had a need to look for that based on this case.

Q. No. I just was asking whether you had any idea how many days of sick leave employees take?

A. No.

Q. Okay. You mentioned the budget control act
and sequestration. When did sequestration go into effect?

A. Well, the budget control act was passed in 2011, and that's why we were looking at that with what needed to be done starting in 2012.

Q. But when did sequestration go into effect?
A. Sequestration was actually in effect 13.

Q. And what -- was there a particular day that it went into effect.
A. I don't remember the exact day off the top of my head.

THE ARBITRATOR: Do you remember approximately the time of year?

THE WITNESS: January, I think, is when it kicked in.

BY MR. HIRN:

Q. The --- when sequestration went into effect, didn't the Agency take any number of things to significantly cut back its expenses?
A. We were looking at different things that needed to be curbed back, in order to ensure the mission was being accomplished, yes.
Q. Okay. You looked at it, but did you actually take any -- take any actions to limit Agency expenses at the time, as a result of sequestration?

A. Well, yes, I mean, every office was restricted what allotments they were given, yes.

Q. Okay. What actions did the -- did the Weather Service take to cut back on expenses when sequestration went into effect?

A. Well, there were a lot of things that were done when sequestration went into effect. Including basically putting furloughs on the table, basically saying we're not going to make it without furloughing employees and that was done right as sequestration was before us.

We talked about the need to cut back on radiosonde launches per day --

THE ARBITRATOR: Cut back on what?

THE WITNESS: Radiosonde launches, they're launches with balloons that collect atmospheric data across the spectrum. Radiosonde launches.

THE ARBITRATOR: What's the second word you're saying?
THE WITNESS: It's one word, radiosonde, it's a --

THE ARBITRATOR: Radiosonde.

THE WITNESS: Yes.


THE WITNESS: E.


THE WITNESS: S-O-N-D-E.

THE ARBITRATOR: S-O-N-D-E.

BY MR. HIRN:

Q. You say you looked at them, but what actions did you actually take?

A. We did actually say that we were cutting back to one a day, we were going to furloughing ten days across one service, and that's when downtown started looking at options to either get us additional appropriation, or other ways to mitigate those impacts.

Q. But furloughs never actually took place?

A. They did not, only because Congress appropriated additional funds.

Q. Well, Congress re-programmed additional
funds.

MS. SMITH: Objection. We're getting argumentative about what Congress did and what kind of --

THE WITNESS: -- supplemental was additional --

MS. SMITH: Wait, wait, wait.

THE ARBITRATOR: Okay. It's established that apparently there was no furloughs as he said as a result of additional action by Congress which awarded you more money, is that correct?

THE WITNESS: Correct.

THE ARBITRATOR: All right, so that's fine.

BY MR. HIRN:

Q. And there was an Agency hiring freeze?

A. Sorry?

Q. There was a hiring freeze March 27th.

A. I don't remember when the hiring freeze memo came out, but it was shortly after sequestration took effect, yes.

Q. What was your -- you said you had previous employment with NOAA, you were a NOAA Corps officer,
were you not?
A. I was.
Q. And that's a ship-work position, correct?
A. No.
Q. You were -- you didn't -- you never sailed?
A. I did, for two years.
Q. Oh, and what vessels did you sail on?
A. The Oregon II was my primary vessel. NOAA Corps is the seventh smallest unit of service.
THE ARBITRATOR: But what does it stand for, NOAA Corps?
THE WITNESS: NOAA is the National Oceanic and Atmospheric Administration, Corps is just like a marine corps, it's just like --
BY MR. HIRN:
Q. And those ships were mixed civilian and NOAA Corps crew, correct?
A. Correct.
Q. And how often did -- how long a voyage did the Oregon take? Was it like an overnight voyage,
six months, voyage?

A. You know, usually took where we wouldn't stay out longer than 30 days, but that was not -- I mean we were out longer from home port for 30 days, but just between ports was no more than 30 days. I mean that was back in 1992 I was in that, so --

Q. And it was a mix of civilian crew and NOAA Corps crew, correct?

A. Yes.

Q. And some of the officers were civilian employees, correct?

A. Some of the officers were civilians?

Q. Yes, engineering department.

A. Well, they were not commissioned officers, no.

Q. Right. They were civilian employees.

A. Yes.

Q. And did any of the crew be it officer or unlicensed or low-corps, did any of them bring -- have to bring paper cups and paper plates and utensils with them when they sailed?

A. Not to my knowledge, no.
Q. I'm going to show you what will be marked for identification as Union Exhibit 16.

(The document referred to was marked for identification as Union Exhibit Number 16.)

BY MR. HIRN:

Q. Do you recognize this cup and saucer? Ever seen anything like it before?

A. I have seen cups and saucers, yes.

Q. And where do you recognize this from?

A. I don't know where this came from, no.

Q. Isn't this the china that NOAA uses aboard its vessels?

A. I do not know. The Oregon II did not have a wardrobe.

Q. You did not have a wardrobe.

A. We did not have a wardrobe. It's a fishing vessel. People are operating fishing --

Q. So what kind of -- did you eat on board?

A. Yes.

Q. And what did you eat off of?

A. Very cheap plates and nothing that was ever embossed with NOAA emblems or china, or anything like
Q. Did you have to bring it from home, or did the Agency supply them to you?

A. Well, the Agency had it as part of the crew's mess, it was not personal use of the employees.

Q. Well, the employees used them, correct, for their meals, when they were working, right?

A. Yes.

Q. Okay. Do I understand your testimony that it is impermissible for federal agencies to buy paper cups for example for their employees' use, or coffee cups?

A. No, I did not say that.

Q. Okay. Is it permissible for federal agencies to buy coffee cups for use of federal employees?

A. There could be times when, yes, that would be permissible.

Q. And when would that be?

A. Well, it depends on bona fide need, or the actual intent of the appropriation for which the agency received.

Q. Well, give me an example.
A. Well, say, for example, FEMA disaster response, when you're trying to feed a group of mass of people who are displaced from their homes and or community.

Q. That's for the civilians that they're helping, correct?

A. I don't work for FEMA, I don't know what they define as --

Q. But basically -- you see, you've made a determination based on your understanding of the appropriations law. I guess my question to you is I'm asking under what circumstances would it ever be permissible for federal agency to pay for paper cups or coffee cups for use by federal employees at the work site?

A. In the work that I do I cannot think of any.

Q. Okay. So, I'm going to show you what will be marked for identification as Union Exhibit 17.

THE ARBITRATOR: Do you -- since he couldn't identify 16, do you want to withdraw that?

MR. HIRN: Yes, yes.

THE ARBITRATOR: Okay. U 16 is withdrawn.
MR. HIRN: I'm sorry, I don't want to stand over the witness and ask him something.

THE ARBITRATOR: Okay.

BY MR. HIRN:

Q. And do I understand your position that in order for, in order to -- the Weather Service employees would have to bring coffee cups and plates from home to work, correct?

A. I would assume if they're using it for personal use, yes.

Q. Okay. To show what will be marked as Exhibit 17. Do you remember seeing this picture any time before?

A. Yes.

(The document referred to was marked for identification as Union Exhibit Number 17.)

BY MR. HIRN:

Q. Is it your testimony that the Secretary of Defense and the Secretary of State brought these paper cups and coffee cups from home?

MS. SMITH: Objection. Objection.

THE ARBITRATOR: Cross examination.
Overruled.

BY MR. HIRN:

Q. Or did the White House violate federal appropriations law by supplying --

A. You're making an assumption that the White House actually used appropriated funds to buy them.

Q. So --

A. There are, in the DOD and other areas, what's called a morale and welfare fund, that they use to purchase things like refreshments and those sort of things, that are outside of the standard appropriation.

Q. But this is the situation room of the White House, is it not?

A. But they also have morale and welfare fund that they can use, so I have no idea where these funds are used or where they came from.

Q. I have no further questions.

THE ARBITRATOR: Any re-direct?

MS. SMITH: Yes.

THE ARBITRATOR: Do you want to submit this into evidence or no?
MR. HIRN: I was just trying to make a point.

THE ARBITRATOR: Do you want to withdraw it?

MR. HIRN: Sure.

THE ARBITRATOR: U 17 is also withdrawn. Did you hear me counsel? He withdrew U 17.

MS. SMITH: Okay. That's good.

RE-DIRECT EXAMINATION:

BY MS. SMITH:

Q. So, Mr. Longenecker, I've got just a few clarifying questions. On cross examination, Mr. Hirn asked you about 5 US C 7901. What's your understanding of that statute?

A. I do not know the statute by number, but it's just what he said, it was the health services statute that allows federal government to provide health services to federal employees in metropolitan areas such as this and other places where there is a vast groupings.

Q. So, what kind of health services does it authorize?

A. It's basically --

Q. Understanding.
A. You know, there's usually a nurse available to deal with immediate needs if necessary, will do periodic physicals, it will do flu shots, those kinds of things necessary for ensuring the welfare of the employees.

Q. Now, on direct you also talked about a conversation with -- I'll withdraw that question. Now, in terms of sick leave, what's your understanding of how an agency budgets for sick leave?

A. How an agency budgets for sick leave?

Q. Yes. Or does an agency budget for sick leave?

A. It is not written in the budget per se, no.

Q. Okay. So, what's the understanding when you created a budget about sick leave, or employees using sick leave?

A. You create a budget based on FTE account, which is a federal -- full-time employment, and essentially each position may not work the full 80 hours, but you have to have so much coverage, and it's based on the dollar amounts required to ensure
that your mission is being accomplished within that
limits, so, whether it's family medical leave,
whether it's sick leave, whether it's some other
thing, you have to have a body to ensure the mission
is getting accomplished.

Q. Okay. So the idea of an FTE encompasses sick
leave and annual leave and temporary unavailability
of an employee?

A. Correct.

Q. In terms of the budget control act, where
does sequestration fall into that, what was the
process?

A. Well, the budget control act basically put a
ceiling authorized for discretionary spending across
the government, which required also periodic cuts to
everybody's budget. There were different
interpretations as to what -- whether it had to be an
across-the-board cut, whether it had to be cuts
dictated by the agency --

THE ARBITRATOR: This was before

sequestration, right? Or this was sequestration?

THE WITNESS: This was sequestration.
THE ARBITRATOR: Okay.

BY MS. SMITH:

Q. So, when you say sequestration, that was a mandatory budget cut that Congress put into the law and the budget control act?

A. Correct.

Q. And it mandated five percent of each account, is that right?

A. Correct.

Q. How many accounts does the Weather Service have?

A. Oy vey. I believe it's about 16.

THE ARBITRATOR: Accounts is what you're saying? 16 accounts?

BY MS. SMITH:

Q. So, can you just explain --

A. You probably know better than I do.

THE ARBITRATOR: You mean on your PNF?

THE WITNESS: PPA structure --

THE ARBITRATOR: You mean on the PNL, is that what you're talking about?

THE WITNESS: Well, there are programs, plans
and activities, each one of them is --

MR. HIRN: These are the lines in the --

THE WITNESS: Lines in the --

MR. HIRN: NOAA appropriations.

THE ARBITRATOR: Okay.

MR. HIRN: That the Commerce Department

appropriates.

THE ARBITRATOR: Very good.

BY MS. SMITH:

Q. And pursuant to sequestration, NOAA was

required to cut five percent of each of those

accounts, is that right?

A. Correct.

Q. Okay. Now, Mr. Hirn asked you about your

time at sea. Were you provided food when you were on

a vessel?

A. Yes.

Q. And why are you provided food?

A. Because there were no other options available

to the employee. There was no McDonald's, you know,
you couldn't pull the ship over every day to -- or

during lunch breaks, whatever, so --
Q. So there was no option available to get food?
A. Correct.

Q. There was no option available to get a paper plate?
A. Correct.

Q. There was no option available to get a paper cup, there was no option available to get utensils, is that right?
A. Correct.

Q. Is that the same for Weather Service employees? Do they have options to purchase paper plates, cups and utensils?
A. They do. They're all land-based.

Q. Now, you talked about a bona fide need, when you were talking about the use of appropriated funds. Can you tell us more about that?
A. Bona fide need is a concept in appropriation law that basically says that anything you do must have a need that fits within the timeframe that appropriation is good for, and the intent to which Congress gave you the funds for.

Q. So, to your knowledge, did Congress intend to
give Weather Service employees personal plates, cups and utensils?

MR. HIRN: Objection.

MS. SMITH: I said to his knowledge.

MR. HIRN: The intent of --

THE ARBITRATOR: Unless he knows legislative history, he's not going to know what the intent of Congress is.

Sustained.

BY MS. SMITH:

Q. Is it your responsibility to ensure that funds are -- appropriated funds are spent in accordance with Congressional intent?

A. Yes.

Q. So, to your --

A. As the CFO it was.

Q. So, as acting CFO it was your job to make sure that appropriated funds were spent in accordance with Congressional intent, is that right?

A. Correct.

Q. To your knowledge, was it the Congressional intent to provide paper plates, cups, utensils, or
napkins --

THE ARBITRATOR: I'm going to -- how does he
know -- you haven't laid a foundation as to how he
knows what Congressional intent is.

MS. SMITH: If this was his job to --

THE ARBITRATOR: But you still haven't laid a
foundation. I don't know whether he's looking at a
document, he gets a document that says this is the
Congressional intent --

MS. SMITH: Okay. Okay.

BY MS. SMITH:

Q. So how -- when you were acting CFO how did you know what the Congressional intent was for appropriated funds for the Weather Service?

A. So, NOAA submits a budget to Congress, with a desire to say, we need X number of dollars to perform the following things, and for the following purposes. Congress then will either approve that or will give you a version of their own with documentation that will tell you what these funds are to be used for?

Q. And how long have you been involved in the budget process with the federal government?
Q. And so, just give us an overview of what the budget process is for a federal agency.

A. So there's basically a two year budgeting process that every agency goes through. That you go through, not only your agency, developing the budget, then it goes through department review, then it goes on to OMB before it's submitted to Congress, and each one of those steps will alter the budget if you will, so to speak, to ensure that it continues to meet with the bigger picture of the administration, so that then is submitted to Congress as the President's budget, as the administration's budget, and those budgets are then reviewed by committees on the Hill, and would then be altered or blessed, which I have not seen a President's budget blessed without alteration yet, but -- and then those are returned to us through what's called appropriations, or what's called an appropriations bill, either through a continuing resolution, which is what we're currently under or a full budget.

Q. And what's your role in that process? As an
acting CFO, what was your role in that process?

A. As the acting CFO, it was my responsibility to develop the budget, through the planning process and then also to execute the budget to which we received from Congress, so it was an end to end kind of process.

Q. So based on your knowledge of the budget process, budget procedures, in your capacity as acting CFO did you believe that providing these items was appropriate?

A. No, I did not. That's why I sent the memo out.

MS. SMITH: No more questions.

THE ARBITRATOR: Anything further?

MR. HIRN: Yes.

RE-CROSS EXAMINATION:

BY MR. HIRN:

Q. John, other than large recurrence, like weather satellites, or radar systems, Congress doesn't specifically authorize individual purchases of things that the Agency uses on a daily basis -- you get the video conferencing, the tables we're
using, the chairs, the rugs, the map on the wall, does it?

A. To a certain extent, yes, they do.

Q. We're going to find this somewhere in --

A. You will see under GAO determination that, yes, in order to manage your program, certain items are to be expected to be purchased, other things are not.

Q. Where do we see this?

A. I've seen GAO determinations on numerous things.

Q. You mean, when you say -- what is a GAO determination?

A. Well, when you look at a --

Q. You mean the Comptroller General decisions, is that what you mean?

A. Yes.

Q. Yes. No, but Congress didn't -- we won't go to 2000 -- FY 2013 Congress appropriations act and Congress didn't say the Weather Service can buy, you know, 14 radiosonde -- 4000 radiosondes, or the Weather Service can buy carpeting, or the Weather
Service can buy light-bulbs, or the Weather Service can buy toilet paper, it can't buy toilet paper — those kinds of individual items that agencies purchase on a day to day basis, that's not anywhere in the appropriations law, appropriations bill or the report accompanying it, is it?

A. There is -- I'm trying to think what it says in the appropriations law, but yes, there is some degree of understanding that each program will need to have certain things procured under it -- others --

THE ARBITRATOR: Well, let's say, like the Congressional -- wherever this understanding is might just say office supplies, for example? I mean, isn't it correct that you've got discretion to purchase things you need to run this agency?

THE WITNESS: There is, and it says it in appropriation law, it defines what discretion is, and limits as to what that discretion is and the appropriations given for.

THE ARBITRATOR: What does it say?

THE WITNESS: I don't have it in front of me, I can't read it --
THE ARBITRATOR: How is it limited?

THE WITNESS: Well, it basically states that

if I give you money for a radar, I'm not going to expect you to buying carpet for the floor, or anything else based on, you know, what the intent to which the funds were given. Now, if I give you money to basically operate the headquarters type function, then yes, you would be expected to buy computers, desks, carpeting, those kinds of things, and that is in the appropriation law section.

BY MR. HIRN:

Q. There's nothing in the appropriations act -- 2013 appropriations act that says you can buy toilet paper, correct?

A. No.

Q. Or paper towels?

A. I mean, there's never going to be that detail in there.

Q. Okay. That's --

A. But it does clearly state and you know, it even says in the Congress acquisition manual, that there are certain things, personal use items are one,
that are not authorized within the appropriation law.

Q. Is there anywhere that you can show me in any statute, in any legislative history, in any Comptroller General decision, in any federal regulation, that says you can't buy disposable paper plates, cups, napkins and plastic utensils?

A. Yes, by definition of bona fide need, yes.

Q. No, no. Is there anything that says those items?

MS. SMITH: I'm going to object to the arguing with the witness.

THE ARBITRATOR: Well, this is cross examination. He's got latitude and frankly it's not clear to me why he decided what he did, so I'm going to allow it.

BY MR. HIRN:

Q. Is there anything we can look at where it says you can't -- anything other than this general you're not supposed to -- you say you can't buy personal items, okay, from a 1924 Comptroller General decision, that says you cannot buy paper plates, paper cups, napkins, tissues, plastic flatware?
A. Yes. Within the bona fide need definition.

The Weather Service does not have a bona fide need to
buy those items.

Q. That's your opinion.

A. No it's not my opinion, that is --

THE ARBITRATOR: Okay. Stop. Everybody. He
keeps referring to a bona fide need -- is this in a
document somewhere?

THE WITNESS: Yes, it's in the appropriation
law and it's also in the red book.

THE ARBITRATOR: Okay. Do you have the
document here?

MS. SMITH: I have a summary of what it says,
the concept -- do you want me to read it? I mean,
this is my notes.

THE WITNESS: The point is --

THE ARBITRATOR: No, let me see it. The point
is, quiet.

MS. SMITH: The first paragraph refers to the
concept insights --

MR. HIRN: I don't know what you're looking
at --
1 THE ARBITRATOR: You will after I look at it.
2 Everybody quiet. Okay. For example, you are showing
3 me something from --
4 MS. SMITH: That's what I said earlier -- I
5 said --
6 THE ARBITRATOR: No, you said it was a
7 summary, I thought it was an Agency summary --
8 MS. SMITH: No, these are my notes.
9 THE ARBITRATOR: Okay, please. Quiet, quiet.
10 Is there a document in this building that defines
11 this bona fide need?
12 MS. SMITH: I'm sure that every administrative
13 office has a red book.
14 THE ARBITRATOR: Is your office in this
15 building?
16 THE WITNESS: No, it's not.
17 THE ARBITRATOR: An administrative office has
18 the red book. Is there someone we can look up and --
19 MS. SMITH: We can get it from someone in the
20 building, I'm sure.
21 THE ARBITRATOR: Yes, let's take a five minute
22 break. I want to see this bona fide --
MS. SMITH: Well, the whole thing --

THE ARBITRATOR: I just want to see the

definition of bona fide that this witness keeps

referencing.

MR. HIRN: Well, I would suggest that a bona

fide need is a long common law case --

MS. SMITH: Yes.

THE ARBITRATOR: It probably is, but I --
everybody's referring to this bona fide, and I don't
know what the hell he's talking about, where it comes
from. If it comes from the red book, I'm ready to
look at Chairman Mao, my God. You know, usually,
when people are going to testify to documents, you
bring in an exemplar of the document, you know,
you're all referring to documents and nobody has
thought to bring in a document that he's relying --
that he apparently is saying he didn't interpret and
he looked at a document.

I need to see what he's talking about.

MS. SMITH: I don't mean to --

THE ARBITRATOR: Fine. Don't bring it in.

MS. CIOFFALO: No, no, we can get it. Judge,
I think the witness testified that based on his knowledge of appropriation law and, you know, consulted the red book, that that was the decision that he made, but I mean perhaps, if you want to go --

THE ARBITRATOR: But he's just told counsel here, yes, it's defined, because what is bona fide is defined, and he looked at that, so I want to see what the hell he's talking about.

(Off the record.)

THE ARBITRATOR: This is what I am confused about and I will put it out for counsel, and if you guys can't clear the record up for me, then maybe I should ask my own questions, but I have here an e-mail from an agent of the Agency, who was saying that, as I understand your testimony, you are -- you are the expert for the Agency on appropriations, you deal with the appropriations all the time.

You looked at the appropriations law, you looked at the red book, is that correct, and you determined that the payment for these items that are at issue before me are -- the paper goods and things
like that -- were deemed personal furnishings, correct?

THE WITNESS: The way that they were described, the use to me, yes.

THE ARBITRATOR: Okay. And we had been talking about bona fide, is bona fide personal belongings, or something, or is there bona fide purpose -- how is bona fide coming up in this?

THE WITNESS: So, bona fide need, basically attaches to the purpose to which you're obligating the funds. In other words, there has to be a true bona fide need for using Congressional appropriated funds, and it has to meet the intent or the purpose to which --

THE ARBITRATOR: Let me ask you this. What was your thought process? How did you conclude, looking at these items, that these items violated -- the purchase of these items by the Agency in accordance with this MOU, violated federal law. Give me your thought process.

THE WITNESS: So, my determination was not based on knowledge of the MOU, my determination was
based on the description that was given to me as to how these items were being used, which was for personal nature, in other words it was for an individual to go into a break-room, grab a plate, put a sandwich on it, and use that for its own --

THE ARBITRATOR: Okay. Now, when you say that the item was being -- it was presented to you as it was being used for a personal nature. Did someone give this to you in a memo, was it verbally?

THE WITNESS: This was through a phone call.

THE ARBITRATOR: Okay. And who was it who called you?

THE WITNESS: It was during a regional director's call, and I do not know which regional director raised the --

THE ARBITRATOR: So one of the regional directors said, what about paper goods that employees are using at the various offices for their lunches, and they're going in and using the paper goods -- did he use the word personal?

THE WITNESS: So, as each one of these regional directors was required to take the
appropriation law training class, they were all coming back and throwing all kinds of things at me, to say, hey, I don't think this is right, I don't think that's right. So, one of them raised the fact that, hey, do you know we're buying paper plates and utensils and stuff for our break-room, and I'm like, no, I didn't know that.

THE ARBITRATOR: Okay.

THE WITNESS: And I said, well, what are they being procured for, and they said, well, so people can use them for their lunches and whatever else, and I said, well that's of a personal nature, that's not for benefit of --

THE ARBITRATOR: And why did you -- why did you conclude that? What did you base that conclusion on, that it was something that was personal?

THE WITNESS: I mean, I based it on just the understanding of a plate with a sandwich on it is not benefitting myself or anybody else in that office --

THE ARBITRATOR: Okay. So you just -- it was your own thinking, it wasn't, gee I looked at a red book and I saw the word personal defined somewhere.
It was your own thought process.

THE WITNESS: I mean, I understood from my own appropriation law training and knowledge of the red book and things, that there is the definition of a personal use type item, and they do define things --

THE ARBITRATOR: Where is that defined? Can we -- is there somewhere where that is defined, because you concluded that, and I'm -- and you're basing it on your knowledge of appropriation law, and I'm trying to find out if it's somewhere written down.

THE WITNESS: It is, and I'm used to using the electronic version where I can search on things, but here it says, personal expense and furnishings.

THE ARBITRATOR: See, now I know I'm older than you are. I was taught at law school, I learned how to research by books, and I had a tough time trying to convert it to computer, and you're just the opposite.

THE WITNESS: Items that are classified as personal expenses or personal furnishings may not be purchased with appropriated funds without specific
statutory authority.

THE ARBITRATOR: Okay. So, let the record show that he is citing from what we have been referring to as the red book, principles of federal appropriation law, the red book, published by Government Training, Inc., and you are referencing section 13 of -- let's see if it's a particular chapter -- four, availability of appropriations purchase and -- and for the record, the red book says, items that are classified as personal expenses or personal furnishings may not be purchased with appropriated funds without specific statutory authority.

Most of the cases tend to involve government employees, the theory being simply that there are certain things an employee is expected to provide for him paren her end paren self. A prime example is food covered in detail previously in this chapter. The rule on personal expenses and furnishings was stated as follows in three Com Gen 433 1924, personal furnishings are not authorized as to be purchased under appropriations, in the absence of specific
provisions therefore contained in such appropriations or such acts if such furnishings are for the personal convenience, comfort or protection of such employees, or as such to be reasonably required as part of the usual and necessary equipment for the work on which they are engaged or for which they are employed.

This decision is still cited frequently, and the rule is applied in many contexts. Of course, over the years, exceptions have evolved, both statutory and non-statutory. The remainder of this section explores several categories of personal expenses.

And then the next -- that was the A introduction. So, B we have business or calling cards, C we have health, medical care and treatment, let's see if there's anything else, and under health medical care and treatment, we have purchase of health-related items, rehabilitation act is cited, office furnishings are cited.

So, what was it -- and E personal qualification expenses. F, photographs. G, seasonal greeting cards, I, wearing apparel. Did you consult
this section, is this where you got this citation to the 1924 case from this training, this red book?

THE WITNESS: I got it from the red book, whether it was that particular chapter, or -- I'm not sure if that's the same citation -- I don't know which -- I got the e-mail from.

THE ARBITRATOR: Well, it's the same -- it is the same citation to the 1924 opinion. Is there any other section of the red book you would have consulted other than personal expenses or furnishings?

THE WITNESS: Yes. Appropriateness of expenditures which is also --

THE ARBITRATOR: Do you want to find that thing?

MS. HIRN: Ms. Schick, while John is looking at that thing, may I interject, and maybe I don't need to, but I will anyway, that the section you read is sort of out of context, it needs to considered within the whole body of the case decided later on, and we will be discussing many cases cited in that Chapter five --
THE ARBITRATOR: I'm just trying -- I'm not even there yet. I'm just trying to get what he consulted. You know, I'm still at baby steps.

MS. HIRN: I just wanted to make sure that this is not the final word.

THE ARBITRATOR: It's -- from what I see, this is a training book.

MR. HIRN: Well, I would say that the red book, known as the red book, is regarded as an authoritative federal --

THE WITNESS: The red book is actually published by --

THE ARBITRATOR: You both stipulate this is an authoritative piece, right.

MS. SMITH: Oh, yes.

THE ARBITRATOR: Okay.

MS. CIOFFALO: Can we enter this into evidence or you can take judicial notice of it, the online version, or something like that --

THE ARBITRATOR: Wonderful. Show me where I can get it on line, then.

MS. CIOFFALO: We'll submit something after
with the address --

THE ARBITRATOR: Wonderful. I'm just trying
to --

MR. HIRN: We'll find it cited by the federal
courts.

THE ARBITRATOR: Great. I'm just trying to
find out what he consulted. He concluded it was
personal, I'm trying to get to the thought process
and conclusion. I'm trying to figure that out.

THE WITNESS: So, based on the facts that we,
or I determined that, in my mind, this was a personal
use expenditure, and looking at --

THE ARBITRATOR: But before you get there, I'm
trying to get to what you looked at to make that
determination. So we looked at the personal
furnishings, you say I may have looked at that, I may
have looked at, I'm going to find another section --

THE WITNESS: So, what I'm saying, is based on
the purpose to which the appropriation was given,
which is what he was trying to get at with purposes
and things --

THE ARBITRATOR: And what was the purpose of
THE WITNESS: The purpose of the appropriation is for conducting a Weather Service mission --

THE ARBITRATOR: Okay.

THE WITNESS: And, to my knowledge, the Weather Service mission does not include providing paper plates to employees, and that's what the determination which I made, but in here it states that basically --

MS. SMITH: Can you tell us what page you're on?

THE WITNESS: Yes, this is 4-6, availability of appropriations appropriateness --


THE WITNESS: So, simply stated, 31 US C 1301 A states that appropriated funds may be used only for the purpose or purposes for which they were appropriated, and prohibits charging authorized items to the wrong appropriation and unauthorized items to
any appropriation. So, my determination -- my
understanding of what a personal use item was, it was
an unauthorized use of appropriated --

THE ARBITRATOR: Okay. Before you even get to
that, your -- that's what I'm trying to get at. What
-- where did you find -- what was your understanding
of a personal use item, and where did you get that
understanding?

THE WITNESS: So, reading the Comptroller's
determination, a personal use item is something that
basically benefits the employee, not the Agency.

THE ARBITRATOR: So, you're saying, reading --
you -- as I understand it, you went to the red book,
correct? And --

THE WITNESS: Correct. The electronic version
of the red book has links, if you go to that -- you
hit the link, and --

THE ARBITRATOR: Right. And somewhere you saw
this 1924 citation.

THE WITNESS: Correct.

THE ARBITRATOR: And you read that Comptroller
General's decision.
1 THE WITNESS: Yes.
2 THE ARBITRATOR: And based on your reading of
3 that decision you determined these were personal use
4 items.
5 THE WITNESS: Based on the way it was
6 described to me as to how they were being used, yes.
7 THE ARBITRATOR: Based on how they were
8 described to you and your reading of this 1924
9 decision, you reached a conclusion these were
10 personal use.
11 THE WITNESS: Correct.
12 THE ARBITRATOR: Okay. That's what I was
13 trying to get to.
14 THE WITNESS: And I mean, based on -- my
15 determination was also based on the fact that we just
16 completed this investigation which found a lot of
17 misuse and inappropriate use of funds within the
18 Weather Service --
19 THE ARBITRATOR: Okay.
20 THE WITNESS: So, my actions were quick and
21 precise to ensure that, you know, protecting the
22 employees that were potentially liable for making
these procurements, as well as ensuring that we were continuously violating the law as I understood it. Now, you know, at any time, we could have reversed that action, but since then we have determined that the decision was valid.

THE ARBITRATOR: Okay. And the section I had just cited to you, where I was going through the explanations --

THE WITNESS: That's in here.

THE ARBITRATOR: Okay. Personal things were -- okay. The section 13 of Chapter four in volume one of the red book. Do you recall if you reviewed that section, section 13?

THE WITNESS: Yes.

THE ARBITRATOR: You did review it?

THE WITNESS: Yes.

THE ARBITRATOR: Okay. And do you recall my reading to you, it says that this decision, meaning the 1924 decision, is still cited frequently and the rules applied in many contexts, of course over the years exceptions have evolved, both statutory and non-statutory, the remainder of this section explores
several categories of personal expense. Do you recall reading that section?

THE WITNESS: Yes.

THE ABRITRATOR: Did you look at -- did you personally look and see if there were -- exceptions have evolved, did you read any of the other decisions other than the one cited here, the 24 decision?

THE WITNESS: Yes, but none that would have applied to -- I mean, I remember reading something on furniture from an army facility and some other things that were in there, but nothing that would have pertained to what I was trying to determine at this time.

THE ABRITRATOR: Okay. How did you get to those decisions that you said these just don't apply, the furniture --

THE WITNESS: I think it was through the link to the actual decision which I cited, there were other decisions, or, you know, related-type decisions they have --

THE ABRITRATOR: Were the links cited in the decision or was it part of the page on the web -- the
website? See, what happens in the law, sometimes if you have a 1924 decision, you're going to have decisions cited in the 1924 decision that might be from 1917 or something, so what I'm trying to find, were things that you looked at decided after 1924?

THE WITNESS: I -- you know, I honestly don't remember.

THE ARBITRATOR: Okay. All right. So now I -- now I understand at least where you got your belief, now I'm clear, okay. Very good. Now I'm clear as to where he got his belief as a result of which you issued this e-mail. Okay. Now, as a result of my questions, do you have --

MR. HIRN: I think I'm still in the middle of cross.

THE ARBITRATOR: You're still in the middle of cross. Okay. Fine. And you are free to ask any questions or questions based on my question. I leave it to you.

BY MR. HIRN:

Q. Okay. John, you've never worked in a Forecast Office, right?
1        A. Correct.
2        Q. And Mickey Brown has worked in a Forecast Office?
3        A. I do not know that for a fact, but if you say so.
4        Q. Okay. But you know Mickey Brown was the chief negotiator for a number of years for the Weather Service?
5        A. I am aware of that, yes.
6        Q. And, you know, Dan worked in the Forecast Office for many years, correct?
7        A. I will take your word on that.
8        Q. Right. And --
9        THE ARBITRATOR: Dan's last name for the record is?
10       MR. HIRN: Sobien.
11       THE ARBITRATOR: Very good.
12       BY MR. HIRN:
13        Q. And isn't it true that in September of 2000 -- now, you determined that it was not a bona fide need to purchase these disposables?
14        A. Based on the reason to which they were being
procured that was described to me.

Q. That some regional director told you over the phone.

A. Correct.

Q. Okay. But isn't it true that in September of 2009, both Mickey, how had many years in the Forecast Office, and Dan, who had many previous years in a Forecast Office, both authorized, representing management and union — didn't they — based on their experience and knowledge, come to an agreement that there was indeed a bona fide need for the purchases of these disposables?

MS. SMITH: Objection. Objection.

THE ARBITRATOR: Basis?

MS. SMITH: He's already testified he didn't know about the MOU when he made that decision, he's testified to that at least four times, first of all.

THE ARBITRATOR: That's fair.

MS. SMITH: Second of all, he doesn't know the intent of why they entered into the MOU, because he wasn't involved.

THE ARBITRATOR: I think you're making — but
I think you're making argument -- I think it's --
MR. HIRN: Well, so is John -- everything John said goes to argument.
THE ARBITRATOR: Yes, but I think -- you know, obviously, it's left to argument -- what you want to establish, I think, is these people in the link, their experience, and I think the rest is argument for your brief. Okay?
MR. HIRN: Okay. But it was to rebut his argument that there was -- that he was not involved. Okay.
MS. CIOFFALO: Can we object for just a quick second for a completely unrelated issue? I promise I'm not going to argue with you, but I want to.
MS. SMITH: Do you want to go off the record?
MS. CIOFFALO: Yes, we can go off the record.
(Off the record.)
BY MR. HIRN:
Q. John, one quick question. Wouldn't paying the health club dues of employees be also be a personal expense?
A. The health club dues of the employees?
Q. Yes. It was determined that there was a health plan or something that authorized that based on a ruling, so, no, that's not a personal expense, if it is part of an overall health management plan of an agency.

MR. HIRN: Okay. No further questions.

THE ARBITRATOR: Okay. Very good. Any re-direct?

FURTHER RE-DIRECT EXAMINATION:

BY MS. SMITH:

Q. I just want to clarify. I believe during the Arbitrator's questions, there was a question about did you rely only on the 1924 decision that you cited in your e-mail.

Did you rely on any other decisions?

A. Based on what I reviewed off of that 1924, I don't know if I would have --

Q. But you consulted other decisions besides the 1924 decision, right?

THE ARBITRATOR: But his testimony was that the other decisions weren't relevant, for example, they were for furniture, and he didn't know what year
they were even issued, whether they were cited in the 1924 decision, or whether it was a link that was on a web page that he was looking at in the red book.

MS. SMITH: But he consulted other decisions beside the 1924 decision.

MR. HIRN: But he said he didn't.

THE ARBITRATOR: Yes, but -- no, he testified that he consulted others, we're not sure whether they were cases cited in the 1924 decision, or whether it was a link on the web page. He didn't remember.

MR. HIRN: But he said that they weren't relevant.

THE ARBITRATOR: He said that they didn't seem to be relevant. One was about furniture, for example, and that didn't seem to be relevant.

BY MS. SMITH:

Q. But right now, you don't recall every single case that you reviewed before you made this memorandum?

A. No. As I stated, the majority of my decision process was in the way -- from the information in which it was presented to me and the way in which
these items were being procured, and frankly, I disagree with what Richard was saying in the sense that the regional directors had probably even more experience than Dan or Mickey in regards to how those WFO's are operating, so, for having a regional director raise that concern to me stresses that this is a concern.

Q. Okay. So, when you found out about the MOU, did that change your decision?

A. When I found out about the MOU?

Q. Yes.

A. It did not change my decision. I questioned whether or not I was still in the right to have that.

THE ARBITRATOR: And it was at that point that you consulted counsel?

THE WITNESS: Okay. And as a result of your consult with counsel, you stuck with your decision.

THE WITNESS: Correct.

MS. SMITH: Okay.

FURTHER RE-CROSS EXAMINATION:

BY MR. HIRN:

Q. John, you said that you didn't recall which
1 regional director raised the issue about the disposables, how can you say that they had more experience than Dan or Mickey?

   A. Well, I think that by definition, the regional directors all are the senior people in the regions that -- regardless which one it was, each one of them has been with the Agency for quite a long time and all -- each one of them, to my knowledge, has worked their way up through WFO's and, you know --

11 MS. SMITH: Okay. I have nothing further.

12 THE ARBITRATOR: Thank you very much for your testimony, as difficult as it was dealing with me. But I was confused. This is something that you deal with all the time, and I'm a novice, you know, at this, and so, it's helpful to me if sometimes I have to take a bull by its horns and, you know, take it step by step, and I get my question answered. You may discuss your testimony with both of your attorneys; you may not discuss it with any other witness.

22 All right? If counsel will let you go, you
may go.

MS. SMITH: Feel free to go.

THE WITNESS: Thank you.

THE ARBITRATOR: I think what I would like to do, and I'm happy to make the red book an Arbitrator's exhibit. I will not require that the book be admitted, but I will ask the counsel for the Agency to direct me to the citation on the internet, and we will make the internet production of the red book Arbitrator's 1, okay? And I will admit that into evidence.

(The document referred to was marked for identification and received into evidence as Arbitrator's Exhibit Number 1.)

MR. HIRN: You can find that, just google GAO red book.


MS. SMITH: I could even text it to you.

THE ARBITRATOR: Great. Email me. I don't have text, then I'll never get it, cause I'll -- it'll be there for months, and I'll say, oh, someone sent me a message. Okay, and so that is Arbitrator's
1 1.
2 MS. SMITH: Are we off the record?
3 THE ARBITRATOR: Now we're off the record.
4 (Off the record.)
5 THE ARBITRATOR: All right. The witness has
6 suddenly left the room. Could somebody explain this
7 to me, please.
8 MS. SMITH: The parties have entered into a
9 stipulation, and agreed to stipulate that MWSEO did
10 submit any proposals after -- I'm sorry. NWSEO did
11 not submit any proposals for post-implementation
12 bargaining after the grievance they filed. Or,
13 actually, after Mr. Longenecker's March 22, 2013
14 e-mail.
15 THE ARBITRATOR: Very good. So stipulated?
16 MS. CIOFFALO: Or after the Agency --
17 MR. HIRN: Yes. But I don't know why I'm
18 stipulating to it. I think the theory is we should
19 have bargained over a repudiated agreement, and we
20 don't see any need to --
21 MS. SMITH: It's a fact that we're just trying
22 to --
THE ARBITRATOR: I'm not -- right --

MS. CIOFFALO: In its post-implementation bargaining when you have to stop an illegal practice or contractual provision --

MR. HIRN: If it was illegal, fine. Then we would -- we waived our rights then, right.

MS. CIOFFALO: That's all we --


MS. CIOFFALO: They waived their rights, all right.

THE ARBITRATOR: Stipulation is -- stipulation is --

MR. HIRN: -- accepted, it's over something that's not covered by the agreement so we have a right to mid-term bargain over health and safety matters at any time. To the extent not covered by the agreement.

THE ARBITRATOR: All right. We're still on the Agency's case. Do you have any other witnesses?

MS. SMITH: We have another witness who's on her way down, so if you want to go off the record until she comes.
THE ARBITRATOR:  Fine. We're off the record.

(Off the record.)

THE ARBITRATOR:  All right. We're back on the record.

May I have your name, please?

THE WITNESS:  Hi, my name is Laura Furgione.

THE ARBITRATOR:  Ms. Furgione, my name is Mariann Schick. I'm the arbitrator that the parties have selected to decide this dispute between them. You are being called as a witness on behalf of the Agency, and Agency counsel will ask you some questions, and then Union counsel will have some questions for you, and they're going to go back and forth until they've had all their questions answered. I may have a few questions for you at the end. If, while Agency counsel is questioning you, if counsel for the Union has some objection, and he says objection, would you please stop testifying, let me rule on the objection.

If I sustain the objection, I'm not going to permit you to continue on that particular point. But if overrule it, I will. Okay? Do you have any
objection to taking an oath?

THE WITNESS: No.

THE ARBITRATOR: Would you raise your right hand?

Whereupon,

LAURA FURGIONE called as a witness, and having been duly sworn or affirmed, was examined and testified, as follows:

DIRECT EXAMINATION:

BY MS. SMITH:

Q. Good afternoon, Ms. Furgione, how are you?
A. I'm fine, thanks.

Q. Can you please state and spell your name for the record?

Q. Are you currently employed?
A. I am.

Q. Where are you employed?
A. Right here.

Q. What is your position?
A. I'm the deputy director the Weather Service.
Q. How long have you been in that position?
A. I started July 2010, so that's three and half years.

Q. What's your series and grade level?
A. I'm an SES.

Q. What is an SES?
A. Senior executive service.

Q. What are your duties and responsibilities?
A. So, as the deputy director of the Weather Service, I act in the director's absence, and I'm also responsible for the mission of the National Weather Service, protection of life and property, our operations across the nation.

Q. Did you ever act for the assistant administrator for an extended period of time?
A. I did. In between Jack Hayes, and Dr. Uccellini, who's the current director, I was the acting director. That was May 2012 through February 2013.

Q. So what position did you hold before becoming deputy assistant administrator?
A. I was NOAA's assistant administrator for the
office of program planning and integration.

Q. How long have you been with the Weather Service?

A. With the Weather Service, 18 years -- 18 and half years.

Q. Other than deputy assistant administrator, what positions have you held?

A. So, prior to PPI, I was the Alaskan region director, and prior to that, the Alaskan region deputy director, the meteorologist in charge for the Weather Forecast Office in Juno, Alaska, the warning forecast meteorologist for Morehead City, North Carolina, trying to go backwards in my career. Aviation meteorologist at the Alaska aviation weather unit, intern WFO Fairbanks, Weather Forecast Office in Fairbanks, intern at Weather Forecast Office in Kodiak, Alaska, and then an intern in Honolulu, Hawaii, all corners except for Caribou.

Q. Okay. Can you please explain the structure of the Weather Service?

A. Sure. The Weather Service -- it's easy to describe the structure by looking at basically the 16
executive members, so when I say 16, I talk about six, six and four. Six regional directors, six office directors, here in headquarters, and then the AA, the DAA, the CFO and then the incept director, that's the National Center for Environmental Prediction, basically doing our modeling and central forecast guidance.

THE ARBITRATOR: What does AA stand for and DAA stand for?

THE WITNESS: Yes, I apologize. So, the director of the Weather Service basically has two titles, one is director of the Weather Service, but the more formal title is assistant administrator for weather services, that's the NOAA title that we have, so that's AA, and so I would be NOAA's deputy administrator for weather services.

THE ARBITRATOR: So, you're the DAA.

THE WITNESS: DAA.

THE ARBITRATOR: Very good.

BY MS. SMITH:

Q. What are the regional director's duties and responsibilities?
A. So, we have six regional directors, six regions, and they're primarily responsible for their region, in their area of responsibility, and that includes the forecast warnings, the operation's facilities, and financial management, so each of those six regional directors are also financial -- they have responsibility for their financial management center.

Q. Do they report to you?

A. Yes.

Q. What role do they play in procurement?

A. So, the regional directors, they have -- they can procure items up to a million dollars, and then it has to come up Louis or myself -- Dr. Uccellini or myself, and the smaller budget items typically will go down to the budget officer or even the individual offices, say a Weather Forecast Office can procure items for their office -- smaller dollar items.

Q. Okay. So in that Weather Forecast office who would be the person procuring these items?

A. Usually someone that has -- if they have a purchase card -- a government purchase card, the
credit card, so almost all of our electronic
technicians have credit cards to procure items for
the maintenance of our observational equipment, as
per their duties. The meteorologist in charge often
will have a credit card, but not all of them. It
kind of depends, it varies from office to office.
Sometimes that responsibility will be delegated to
the administrative support assistant, the ASA's, so
it really kind of varies per office.

Q. Are either the electronic technicians or the
ASA's in the bargaining unit?
A. The electronic technicians and the ASA's are
members of the bargaining unit.

Q. So, as act -- well, as deputy assistant
administrator, do you interact with the bargaining
unit?
A. Yes.

Q. And how do you interact with them?
A. Well, I -- we interact through Dan Sobien,
and most often I'll interact with Steve Pritchard as
well -- Steve's the representative for the
headquarters office here.
Q. And what issues do you interact with them regarding?

A. It depends on the topic, but obviously change in working conditions, those kinds of issues. We've been working with Steve most recently on our headquarters reorganization and also on the National Water Center.

Q. So when you became deputy assistant administrator, were you aware of any financial management challenges in the Weather Service?

A. Most definitely.

Q. And what -- did any of those challenges involve appropriations issues?

A. Yes.

Q. Can you describe those issues?

A. So, in August of 2011, I received an OIG inquiry, and so that -- that requires me to begin an investigation, and so I initiated an investigation on the allegations of mis-appropriate use of the -- of our appropriations, so, it was a reprogramming that was alleged -- the allegations were regarding a reprogramming. Those -- that initial investigation
ended in November of 2011 and that did support the allegations of mis-appropriate use of our appropriated funds, and our CFO was then placed on indefinite administrative leave.

Q. And were there changes -- did NOAA -- did the Weather Service institute any changes as a result of the investigation.

A. Obviously, putting our CFO on administrative leave, we didn't actually do that, the NOAA administrator did that, and then they elevated the investigation to the department, so it was the department and NOAA that continued a more thorough investigation. The CFO from the National Marine Fisheries, another line office within NOAA, was on detail here then as the acting CFO.

Q. So, I'm going to show you a document. It's U 8, a very famous document right now, it's been marked as Union Exhibit 8. Have you seen that document before?

A. I have.

Q. What is this document?

A. So, this is an e-mail from John Longenecker
to our six office directors and our six regional
directors, cc'd to the XO's Dennis Staley, myself and
Louis.

THE ARBITRATOR: What are XO's?

THE WITNESS: Those are executive officers.

THE ARBITRATOR: Okay.

THE WITNESS: And John is basically -- the
e-mail is titled personal use items, and John is
saying that basically, it says here, please ensure
you communicate with your staff, that the use of
appropriated funds for personal use items is not
authorized, so he's telling them they cannot use
appropriated funds for personal use items.

BY MS. SMITH:

Q. When did you first learn about this issue?

A. Probably a couple days -- I don't know the
exact date, but a couple of days before this e-mail
came out.

Q. And who did you learn about this issue from?

A. John made me aware of this issue.

Q. And before you had a conversation with John
about this issue, did you know that Weather Service
employees were using appropriated funds for paper plates, plastic cups and utensils?

A. I did not.

Q. And how did you react when you found out?

A. I was surprised.

Q. Why were you surprised?

A. So, the experience that I have in the Weather Service, particularly coming from a hurricane-prone region, Morehead City, when I worked at the Weather Forecast Office in Morehead City, we were only able to use appropriated funds for emergency conditions, so if it was an emergency, we procured like cots and blankets, and those kinds of things, and even water bottles, in case the water became non-potable, but otherwise, we knew that we couldn't use those funds for personal items.

Q. Did you discuss this issue with anyone besides John?

A. Louis and Dennis Staley, so pretty much just the folks in the assistant administrator's office.

Q. Did you know about an MOU between NWSEO and the Weather Service, relevant to this issue when you
found out about it?

A. I did not, when we first started discussing it.

Q. When did you find out?

A. After this message went out.

Q. Do you know who you found out from?

A. It was either Steven Cooper and I know Mickey Brown was part of the e-mail exchange as well.

Q. And who is Steven Cooper?

A. Steven Cooper is our acting regional director in the southern region.

Q. So what did -- what was your understanding of that memorandum of understanding, when you learned about it?

A. It was my understanding that there was an agreement between Mickey and Dan, I believe, that then did allow the use of personal -- procurement of personal use items.

Q. What happened after Mr. Longenecker sent this e-mail?

A. So, there was a lot of e-mails going back and forth, people just questioning, and that's really how
it was initiated, folks taking appropriations law training, due to this shadowing of our misuse of appropriated funds; the financial matters that we had been dealing with, they started questioning as they would go through the appropriations law course, questioning our actions, because obviously they didn't want to get in trouble for doing something wrong.

Q. Okay. Do you know if NWSEO was notified about Mr. Longenecker's e-mail?
A. I believe they were.

Q. Were you involved in that?
A. No.

Q. Do you know who was involved in notifying NWSEO?
A. I assume it was either David Murray or John.

Q. Okay. Are you aware of any penalties associated with the unauthorized expenditures of appropriated funds?
A. Yes.

Q. What are they?
A. So, there can be disciplinary action, up to
being removed from federal service, you could also have imprisonment. So, pretty serious, and in fact, since we had just experienced our CFO being put on administrative leave, folks were pretty scared, and didn't want to have that same situation -- be put in that same situation.

Q. So would the Weather Service be responsible for these penalties, or the individuals?

A. Not necessarily the Weather Service as a whole, or the Weather Service in general, but those individuals, so that's why we have authority -- spending authority and financial controls in place, so folks do have the authority to spend, and part of that authority is the responsibility in making those judgments, so it would be the individual that made the purchase or authorized those expenditures.

MS. SMITH: I don't have any more questions for this witness.

CROSS EXAMINATION:

BY MR. HIRN:

Q. Laura, you talked about an e-mail exchange from Mickey Brown?
A. I think so. I mean, so, we got the e-mail, I can't remember if it was from Steven Cooper or from Mickey Brown.

Q. And what did it say?

A. They were just showing -- they were just -- it was an attachment, here it is, I think it said, was an attachment, with the MOU.

Q. And what did they say about the cancellation -- what did this e-mail say about the cancellation of the purchasing of the disposables?

A. I don't think the e-mail said anything -- it basically said, here it is, with the -- with the MOU attached.

Q. Here it is --

A. As in, we had been -- someone brought up the point that we believe there's an MOU with NWSEO which would be, you know, an appendix, or part of the CBA, and then it was either Mickey or Steven that sent the actual -- an electronic version of this MOU.

Q. Okay.

THE ARBITRATOR: Any re-direct?

MS. SMITH: I don't have any.
THE ARBITRATOR: Thank you very much for your testimony. You may discuss -- yes, you're done already. You may discuss your testimony with Agency counsel. Do not discuss it with any other witness. Very good. If they release you, you're free to go.

MS. SMITH: You're free to go.

(Off the record.)

THE ARBITRATOR: All right. Anything further from the Agency?

MS. SMITH: We have two documents, that we want to take Arbitrator --

THE ARBITRATOR: Arbitrator notice?

MS. SMITH: Arbitrator notice of. The first is Exhibit I, which is in that document.

THE ARBITRATOR: Have you shown it to Union counsel?

MS. SMITH: I can show it to him, I'm sorry.

THE ARBITRATOR: And what's the other one?

MS. SMITH: It's coming to you. And there was discussion earlier -- is there an objection or do I need to make a proffer?

MR. HIRN: I don't care.
1  THE ARBITRATOR: Okay. So this is --
2  MS. SMITH: I --
3  MR. HIRN: I think people should present their
4    case any way they want to present it.
5  THE ARBITRATOR: Okay. So, I, and this is HHS
6    is what?
7  MS. SMITH: That's M.
8  THE ARBITRATOR: M.
9  MS. SMITH: Yes.
10  (The documents referred to were marked for
11    identification and received into evidence as Agency
12    Exhibit Numbers I and M.)
13  THE ARBITRATOR: Okay. Agency M. We're on
14    the record?
15  MS. SMITH: Yes.
16  THE ARBITRATOR: Okay. Can you just, for my
17    edification, what is the relationship between an HSS
18    pandemic influenza plan and the Department of
19    Commerce?
20  MS. SMITH: So, the pandemic continuity of
21    operations plan references this HSS appendix --
22  MS. CIOFFALO: Yes, it's the pandemic annex
1 references that agencies are to follow guidelines
2 within this HSS plan --
3 THE ARBITRATOR: Okay.
4 MS. CIOFFALO: For the prevention of the
5 spreading of disease.
6 THE ARBITRATOR: Got it.
7 MS. CIOFFALO: So, to the extent that we need
8 to refer to that in briefs.
9 THE ARBITRATOR: Very good.
10 MS. CIOFFALO: And we just found it offline,
11 it will be available.
12 THE ARBITRATOR: All right. So, we've
13 admitted Agency Exhibit A, and B, and E, and J and K
14 and M.
15 MS. SMITH: I, too.
16 THE ARBITRATOR: I. Okay. Admitted. I is
17 NOAA Homeland Security program office, influenza
18 information and planning fact sheet. So, we have not
20 MS. SMITH: Those are just copies -- those are
21 Joint exhibits for the most part.
MS. CIOFFALO: Yes, so just extra copies.

There's nothing in there that -- yes.

THE ARBITRATOR: Very good. Okay. Does the
Agency have any further part of its case?

MS. SMITH: No. No further witnesses.

THE ARBITRATOR: Okay. Agency rests. Does
the Union have any rebuttal?

MR. HIRN: No.

THE ARBITRATOR: Union has no rebuttal. All
right. Is it your pleasure to make closing arguments
or to submit post-hearing briefs?

MS. SMITH: Post-hearing briefs.

THE ARBITRATOR: Post-hearing briefs. All
right, you can have any time period you want. How
long will it take to get the transcript? Okay.
Let's figure at least the end of the year, you know,
everybody's not getting any work done, to work,
nobody does at this time of the year. You tell me --

MR. HIRN: I take objection to that.

THE ARBITRATOR: Today? But once everybody --
she's going back home, and, you know this is the last
piece of business I'm doing before Christmas, I'll
tell you that. So, you know, you tell me how long
you need because it's certainly going to take me more
than 30 days to get an opinion to you, because my
schedule is just tremendously busy, so, you tell me
what kind of time period you want, based on the fact
that you're really not going to get the transcript
until probably the first of the year.

MS. SMITH: We discussed, I think it was
February, before Birmingham -- we had discussed I
think the 14th -- Valentine's Day -- does that work?

MR. HIRN: What day of the week is that?

THE ARBITRATOR: Friday.

MR. HIRN: Sure. Is that -- why don't we --
the case in Birmingham is when?

MS. SMITH: That starts on the 18th. I think
it might be the 19th -- yes, I was upset about that,
because it's the middle of the week.

THE ARBITRATOR: Are you two trying another
case together?

MR. HIRN: Yes.

MS. SMITH: Yes.

THE ARBITRATOR: So you want to submit this
before Birmingham or after Birmingham?

MS. SMITH: The plan was before.

THE ARBITRATOR: Before Birmingham? So, why don't I say that briefs are to be post-marked to me by no later than February the 14th -- okay, briefs post-marked and -- okay, no later than February 14th, you should exchange your briefs with each other, please attach copies -- any citation, you know, because it gets to be too much, you know, stuff I can pull up on the internet, you know, it's one thing, but it's easier if I don't have to pull it up on the internet, and some of this stuff I know that people have been citing to me I can't even find it on the internet, so attach every little piece of paper -- I'm happy to have pieces of paper and recycle, I'm very big on recycle.

Okay.

MS. SMITH: So you want post-mark or you want electronic copy as well?

THE ARBITRATOR: Well, you know, you're going to -- you can send an electronic copy, that's fine with me, but I think, you know, you're going to have
extensive submissions, so those I don't want to have
to sit there and download everything, so, you know,
it's probably just as easy to post-mark it.

MR. HIRN: Would it at all be convenient for
you to have manipulatible copies of our briefs that
you can paste Union's argument, Management's
argument --

THE ARBITRATOR: Yes. I don't know how good I
am at that, but you can try it --

MR. HIRN: I've had Arbitrators ask for that
before so that they can just --

THE ARBITRATOR: Yes, that would be fine, so,
if you could send me the electronic versions not in
.pdf format, and then I can, you know, see if I can
manipulate it. Sometimes it's easier for me, I just
type it, because I'm a fast typist, you know. All
right. Any other house-keeping?

MS. CIOFFALO: When you say post-marked, UPS
and or mail?

THE ARBITRATOR: Anything that just shows you
got it out on the 14th, you know, and if you need
extensions just consult with one another, I know that
you're all busy attorneys, and if something comes up, and you know -- I'm sure counsel, well, you work with each other all the time, so I'm sure you can extend courtesies to one another, but generally I'm fairly sympathetic to that, unless it looks like counsel is just, you know, dragging their tushes, but that usually isn't the case.

MS. SMITH: Just to wrap up, we owe you the links to the red book --

THE ARBITRATOR: Yes, you owe me the links to the red book, which is Arbitrator A 1, and you're going to send me Exhibit E --

MS. SMITH: The 2007 --

THE ARBITRATOR: The 2007 Exhibit E, and also send it to Mr. Hirn.

MS. SMITH: Hard copy.

THE ARBITRATOR: Yes.

MS. SMITH: Okay.

THE ARBITRATOR: Yes.

MS. SMITH: What about the links?

THE ARBITRATOR: No, the links you're just going to send me an e-mail, and say here are the
links, and that's A 1. And you have my address to
send the transcript to, okay? Anything else?

MR. HIRN: You would be able to find that on
the link in the GAO table of contents -- you can
hyperlink 7 through 123, for the section on
entertainment expenses, and you can just be able to
click on that, whether than having to scroll through
500 --

THE ARBITRATOR: Okay. Yes. And to the
extent that --

MR. HIRN: It will not be -- you may find it
easy to use.

THE ARBITRATOR: Yes, and if you find, you
know, that in your briefs, that there are particular
sections of the red book that are relevant, you know,
in this proceeding, certainly cite me to those
sections so that I can pull them up, and if I have
any problems -- you obviously are far more adept at
this technical stuff than I am, so I will simply
e-mail you and say, I can't figure this out, and you
can worry about it, you know. Anything else?

MR. HIRN: I want to ask once more about the
issue we were discussing earlier today, about what really is at issue here, is it just the legality of this, or is the Agency making the argument that maybe can get out of Mr. Kensky's e-mail that this thing would no longer be in effect anyway?

MS. SMITH: Richard, you're asking us for our legal argument before we submit our briefs. I mean --

MR. HIRN: Yes. I'm asking -- I mean, you're not supposed to hide the ball.

MS. CIOFFALO: We stipulated to the issues, you've read the grievance response, you found everything in the documents --

MR. HIRN: But that's -- should I assume that if an argument that has not been made in the grievance response will not be made in the briefs?

MS. CIOFFALO: I don't know what you can assume.

MR. HIRN: So, that's not really helpful.

That's not really --

THE ARBITRATOR: I mean, look.

MS. CIOFFALO: We have it in our brief, yes.
I mean, that's what I can say --

THE ARBITRATOR: I know, and you're going to be restricted, obviously to the evidence that is in the record here. You know, we've got -- it seems to me from what I've heard of the evidence, that the decision was that it violated appropriations, and that wasn't because, gee, 2009 is over, you know, that's my understanding of what I heard today.

They had a situation where, obviously, appropriations law had been violated, this CFO comes in, and in his view, appropriations law would be violated, and he cuts it off, and then consequences flowed from that. So, that's what I heard.

MS. CIOFFALO: Agreed. But what we're not going to do is preclude any other arguments that the Agency may be able to make. That we're not going to do, but yes, correct, that is the testimony.

MR. HIRN: Well, you're not supposed to make an argument for the first time in a post-hearing brief. I mean, I -- you know --

THE ARBITRATOR: It's a little late in the game to start raising other --
MS. CIOFFALO: What do you want me to say?

I'm not going to give you that the Agency's not going to include anything in its post-hearing briefs, it's not written, but --

THE ARBITRATOR: No, no, but you should -- I mean it would seem to me you should be able to say what your position is. I just stated what it seemed the evidence shows your position is, but you know, it seems to me, because you're counsel for the Agency, you should be able to make a determination -- look, we either have two defenses that we're raising, or one defense.

You know, I mean, I can't force you to do it, but -- you know, it seems to me that you know by now what the basis of your defense is. We are where we are.

MS. SMITH: I don't have the authority to state that at this time.

THE ARBITRATOR: Okay. That I understand.

Having worked for the government, that I understand.

So --

MS SMITH: And she's my boss.
1 THE ARBITRATOR: So, expound on whatever you
2 want based on the record, you see from the record,
3 and you can expound --
4 MR. HIRN: Okay. Sandbagging will be --
5 THE ARBITRATOR: Sandbagging -- right, right,
6 right.
7 MS. CIOFFALO: We're not trying to be evil
8 here or anything. I just -- I'm not at liberty to
9 discuss --
10 MS. SMITH: Based on our earlier discussions
11 today about rabbits, there were a lot of rabbits
12 today, Richard.
13 MR. HIRN: Really?
14 MS. SMITH: Yes.
15 THE ARBITRATOR: I was -- I don't remember
16 rabbits. Was I --
17 MS. SMITH: Sandbagging.
18 THE ARBITRATOR: Oh.
19 MR. HIRN: What possibly would lead you to --
20 MS. SMITH: Well, we can go off the record if
21 you want to and --
22 THE ARBITRATOR: Well, before we go off the
record, let me just say that it was a pleasure
working with all of you, you're obviously, you work a
lot together, and it was a pleasure, and I thank you
all or your patience, because it's been a long day,
and thank you for putting up with my frustration.

I just get frustrated sometimes, because I
don't -- it's second nature to all of you, but it's
not second nature to me, and I'm like back on square
one, and you've gone around the monopoly board
already, so, you know that's why I've got to focus
in, so I can catch up.

All right. Thank you for everything today
and I wish you all a wonderful holiday.

MS. SMITH: Same to you.

THE ARBITRATOR: And safe trip up to
Massachusetts.

MS. SMITH: Thank you.

(Whereupon, the arbitration was adjourned at
5:30 p.m.)
CERTIFICATE OF REPORTER

I, Patricia Edwards, do hereby certify that I took the stenographic notes of the foregoing proceedings and the same were reduced to typewriting under my direction; that the foregoing is a true record of said proceedings; that I am neither related to nor employed by any of the parties to the action herein; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, not financially or otherwise interested in the action.

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**Notes:**
- The page contains a list of terms related to meetings, methods, and various other concepts.
- The document appears to be from a arbitration context, given the terms `arbitration` and `counsel`.
- Terms like `MEMBER` and `MEMBERS` are highlighted, indicating a focus on the roles of members in a meeting.

---

**Context:**
- The page seems to be a legal document discussing arbitration and membership roles.
- Terms such as `MEMBER`, `MEMBERS`, `MEMORANDUM`, and `MEETING` are repeated, suggesting a formal setting.

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**Footer:**
- The footer contains a contact number and a website, indicating Merrill Corporation.
- The footer is likely for contact purposes and more information about the company.

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**Additional Notes:**
- The document is from December 19, 2013, and is page 29 of a larger document.
- The terms used are typical of legal and arbitration documents, indicating a structured and formal discussion.
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