

In the Matter of Arbitration Between
AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES,
LOCAL 2910

AND

THE LIBRARY OF CONGRESS

FMCS Case No. 06-0727-58282-A
Alleged Fire Safety Violations

OPINION AND AWARD OF
BARBARA B. FRANKLIN, ESQ., ARBITRATOR

Having been duly appointed by the Federal Mediation and Conciliation Service, the undersigned arbitrator held a hearing in this matter at the Library of Congress in Washington, D.C. on December 11, 2006. The Parties were afforded full opportunity for the examination and cross-examination of witnesses and the introduction of relevant exhibits. All witnesses testified under oath and the proceedings were transcribed by a court reporter. Timely briefs were filed and served on February 20, 2007.

APPEARANCES

For the Library: Danna C. Ponce, Labor Relations Specialist

For the Union: Barbara Kraft, Esq.

ISSUES

At the beginning of the hearing, the parties could not agree on the issues to be decided; each party submitted suggested issues concerning the Library's obligation to correct alleged safety hazards pertaining to a service elevator and the elevator mechanical room in the James Madison Memorial Building, as described in the Union's grievance. In addition, the Union submitted a third issue concerning whether it could file a grievance

to correct such safety hazards “whether or not the Office of Compliance (or other third party agency) has determined to take action on that hazard or with respect to other matters covered by Article 33.” After the record was complete, however, the parties agreed to withdraw their proposed issues and to stipulate to the following:

Was the Union’s grievance to enforce Article 33, Sections 1, 2 and 8, appropriate in the circumstances of this case?

RELEVANT PORTIONS OF PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 33. WORKING CONDITIONS

Section 1. The Parties acknowledge that the Congressional Accountability Act of 1995 (CAA) authorizes the Office of Compliance (OOC) to enforce Occupational Safety and Health Administration (OSHA) health and safety standards at the Library. The Parties further acknowledge that the CAA provides that the Library and its employees are covered by and shall be afforded the rights and protections therein.

Section 2. The Library agrees to provide a safe and healthful work environment for its employees. This shall be accomplished through the provision of a work environment that is free from recognized hazards that are likely to cause death or physical harm. The Library shall take whatever actions are necessary, including requests to the Architect of the Capitol (AOC) and Congress, to remedy any serious unsafe or unhealthful condition. Such remedy shall be in accordance with the CAA. Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to the CAA that are applicable to his/her own actions and conduct.

Section 3. The Library shall promptly investigate employee reports of unsafe or unhealthful working conditions that pose a threat or danger to the health and safety of employees. Any employee or representative of employees may call attention to alleged unsafe or unhealthful conditions and request an inspection of such conditions by Safety Services or the OOC.... Timely response and reporting of investigations shall be in accordance with the CAA.

Section 8. Fire Safety

The Library agrees to take all necessary actions within its control to provide a reasonable degree of fire safety in Library buildings and structures. These actions may include requests to the Congress and AOC for funding and authorization to correct structural and other problems associated with life, safety, and fire protection in the Library buildings and structures....

ARTICLE 36. NEGOTIATED GRIEVANCE PROCEDURE

Section 1. The purpose of this article is to provide for a mutually acceptable procedure for the prompt and equitable settlement of grievances. This shall be the exclusive procedure available to all members of the bargaining unit, either individually or jointly, and to the Guild in its own name and on behalf of the bargaining unit and to the Library for matters which fall within its coverage.

A grievance is any complaint:

- a. by an employee concerning any matter relating to a condition of employment of the employee;
- b. by the Guild concerning any matter relating to a condition of employment;
- c. by an employee or the Guild concerning:
 1. the effect or interpretation or a claim of breach of this Agreement, or
 2. any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment; or
- d. by the Library....

Section 2.

A. Excluded from the definition of grievances against the Library and therefore nongrievable under this article are the following matters:

1. the content of any published Library policy, except that a grievance may include the application of a policy;
[All other exclusions refer to specific personnel actions.]

BACKGROUND AND FACTS

The Union represents 1700 professional employees at the Library of Congress (the Library), including those employees who work in the James Madison Memorial Building. The parties have had a collective bargaining relationship for over 30 years.

The Architect of the Capitol (AOC) is a separate agency established by Congress to maintain, operate and preserve the facilities in the legislative branch, including the Library. The Congressional Accountability Act of 1995, 2 U.S.C. § 1341 (the CAA), established the Office of Compliance (OOC) to enforce health and safety standards under

the Occupational Safety and Health Act (OSHA) in Legislative Branch facilities, including the Library. OOC has a statutory obligation to conduct periodic inspections, at least once during each session of Congress, to determine the Library's compliance with those standards. These biennial inspections can take months to complete. The Union is not privy to inspection reports issued by OOC to the Library and to Congress; the OOC report that is made available to the public regarding the findings of those inspections is published approximately two years after the inspection. Union representatives participate in the biennial OOC inspections. In addition, upon the request of the Library or an employee of the Library, OOC must inspect and investigate reported health and safety violations.

For almost 30 years the Library has maintained a Health and Safety Committee, with equal representation from labor and management. The structure and operations of the Committee are set forth in Article 32 of the current collective bargaining agreement. Among other duties of the Committee outlined in Article 32, Section 1 is the obligation to "conduct health and safety inspections of all facilities on an annual basis as a minimum and more frequently as deemed necessary." Nan Ernst, a Union steward, is the Union's representative on the Health and Safety Committee and served as its chair during the period at issue here. According to Ms. Ernst, the Committee performs about a hundred inspections a year. Since the passage of the CAA, the Union has sometimes reported claimed safety and health hazards to the OOC and has also filed 17 grievances over alleged hazards.

On February 1, 2006, OOC began its biennial inspection of the Library's Madison Building on the top, or seventh, floor. Ms. Ernst represented the Union on the inspection

team. The seventh floor contains only mechanical facilities, such as the HVAC system for the building and the elevator mechanical rooms. Accordingly, only employees of the Architect of the Capitol, who service those systems, work there. The Library did not send a representative to the seventh floor inspection because none of its employees work on that floor; however, Ms. Ernst did participate in that inspection along with two representatives from the AOC's office and two representatives from OOC.

While inspecting the elevator mechanical rooms in the four quadrants of the Library, the inspectors found that one of them lacked a smoke detector. Although the elevators are color-coded on other floors, they are not color-coded on the seventh floor and there was confusion as to which elevator mechanical room did not have a smoke detector. According to Ms. Ernst, the consensus was that it was the room in the red quadrant, or core.¹ During the inspection, Ms. Ernst asked one of the representatives from the AOC's office if the recent renovation of the service elevator had added the ability to lock that elevator out of service (generally referred to as "recall and capture") during a fire emergency. He responded that he would check and get back to her.

On February 8, 2006, Ms. Ernst filed a grievance on behalf of the Union, alleging that the Library had violated Article 33, section 1, 2, and 8 of the collective bargaining agreement based on evidence from the inspection that: (1) there was no smoke detector in the elevator machine room for the red core; and (2) the newly renovated freight elevator had not been programmed to go out of service during fire emergencies. As a remedy, the grievance requested that:

The Library of Congress takes whatever action are necessary to complete the following:

¹ The Library later determined that there was a smoke detector in the mechanical room for the red core but had not at that time checked the mechanical room for the yellow core.

1) install smoke detectors in the Madison Building re core elevator machine room, per NFPA code requirements

2) discontinue the use of Madison red core elevators for potential elevator evacuations until a smoke detector is operational in the red core machine room; discontinue the use of red core areas of rescue assistance as staging areas for assisted evacuations until smoke detector is operational; redirect employees to Areas of Rescue Assistance in yellow, green, and blue cores until smoke detector is operational

3) program the freight elevator to recall and capture in place on the ground floor during fire emergencies; provide signage that freight elevator is not to be used in fire emergencies

4) notify the Library's Office of Security and Emergency Preparedness (OSEP) that the red core areas of rescue assistance are temporarily out of commission and ensure that OSEP provides this information to the emergency evacuation team and Library employees so that no one assembles in the red core awaiting rescue until it is safe to do so

In its Report and Decision on the Grievance, dated March 9, 2006, the Library stated:

It is the position of the Library that the Congressional Accountability Act of 1995 (CAA) authorizes the Office of Compliance (OOC) exclusively to enforce the Occupational Safety and Health Act of 1970 (OSHA) at the Library, and that pursuant to Article 33, Section 3 of the Collective Bargaining Agreement (CBA), the OOC, not the office of Workforce Management through the negotiated grievance procedure, is the proper authoritative body to address the alleged safety violations. Further, it is the position of the Library that it is in compliance with CBA Article 33, Sections 1, 2, and 8.

On March 15, 2006, the Union invoked arbitration on the fire hazard grievance.

On April 14, the Union requested information as to whether smoke detectors were installed in the elevator mechanical rooms for all four quadrants of the Madison Building and whether the freight elevator in that building was programmed to lock out of service during fire evacuations. It also requested clarification of the Library's position that the OOC is the exclusive agency authorized to enforce health and safety standards. In that

regard, the Union asked the Library whether it was its position that the Union had no right to file a grievance on unsafe working conditions. When the Library denied the information request, the Union filed a grievance and later invoked arbitration on that issue as well.²

Sometime during the week before the hearing in this case, the OOC inspector told Ms. Ernst that he had neglected to include the missing smoke detector in the report he had initially made to the Library, but that it had been remedied and he would include that information in the report that would be sent to Congress. However, he did not tell her which core had the missing detector.

At the hearing, Robert Browne, Chief of the Library's Safety Services Division, testified that the Library notified him about the grievance in this case, after which he contacted the OOC "and our fire safety manager examined the mechanical area with him and found that the recall was not proper to meet the requirements of the upgrade that they had just completed." He then requested that the AOC bring the service elevator in the Madison Building up to the current code. The AOC assured the Library "that they will complete the renovation on that this year...."

Rick Parker, the Library's Fire Safety Manager, testified that in February 2006 he checked the elevator mechanical rooms in the red and blue cores and discovered that both had smoke detectors. He said that he had been asked to look at the red core and that he had also looked at the blue because it was on the way. In September 2006, when he checked all four elevator mechanical rooms, he found that all had detectors.

² That arbitration was assigned to a separate arbitrator. Prior to the opening of the hearing in the instant matter, the Union requested that the two grievances be consolidated. In a ruling dated October 31, 2006, I held that I did not have jurisdiction to adjudicate the grievance based on the information request because

At the conclusion of the testimony presented by both parties, the Union withdrew the first and second issues it had submitted to the Arbitrator, and the parties stipulated to the issue set forth above.

POSITIONS OF THE PARTIES

The Union

Both the Federal Labor-Management Relations Statute (the Statute) and the collective bargaining agreement broadly define grievance as any complaint concerning any matter relating to a condition of employment. Elevator safety and fire safety are matters that undisputedly relate to conditions of employment. Therefore, the Union's grievance was proper under the Statute, the parties' agreement and applicable case law. It was also appropriate in the circumstances of this case because it sought to enforce obligations of the Library expressly set forth in Article 33, that is, to take whatever actions are necessary, including requests to the AOC and Congress, to remedy serious unsafe or unhealthful conditions and to provide a reasonable degree of fire safety. Moreover, under Article 33, section 1, which acknowledges that the Library's employees are afforded the rights and protections of the CAA, the Library is required to furnish a work place free of recognized hazards. The grievance was an attempt to enforce Article 33, not OSHA.

As remedy, the Union requests an order requiring the Library to post a notice notifying bargaining unit employees of the award.

that matter was before another arbitrator. According to the Library, the Union withdrew that case on December 11, 2006, the date of the hearing in the instant case.

The Library

Although the parties stipulated to the issue at the conclusion of the hearing, the Library objects now to the substitution of a different issue, stating in its brief to the Arbitrator that it agreed to the stipulation “in deference to the Arbitrator’s broad authority to frame the issue(s) of this case[.]” As the Union has withdrawn its grievance and never amended its grievance to include a violation of Article 36 (Negotiated Grievance Procedure) of the bargaining agreement or a repudiation of that agreement under the Statute, there is no case or controversy to be adjudicated. There is no provision in the collective bargaining agreement that allows for advisory decisions. Accordingly, the grievance is moot and the Arbitrator no longer has jurisdiction over the matter.

Principles of fairness permit issues of jurisdiction to be raised at any time and they may be raised now, despite the fact that the Library stipulated to the issue. In view of the fact that the Union withdrew its substantive grievance, the arbitrator would exceed her authority by framing and deciding an issue that was neither contained in the grievance nor appealed to arbitration.

Even if the grievance is not moot and the arbitrator has proper jurisdiction, the grievance is not appropriate under the circumstances of this case for the following reasons: (1) the requested remedy would conflict with the CAA, in violation of Article 33, Section 1, because it would compel the Library to take corrective action not within its authority and in an area not within its jurisdiction; and (2) the Union should have requested an inspection by the OOC of the elevator mechanical room and the service elevator, as it agreed to under Article 33, Section 3. The Library neither refused the grievance nor challenged the grievability of the Union’s original claim. Rather, it

investigated the three alleged contractual violations and dismissed them on the merits, informing the Union that in the circumstances of this case it should have requested an inspection by the OOC under the CAA. The Union's past grievances are distinguishable in that they involved health and safety concerns that were within the Library's authority to abate, they were located within the Library's jurisdiction and control, and they requested as a remedy that the Library take all necessary actions "within its control" to abate the alleged hazard.

DISCUSSION AND ANALYSIS

The Arbitrator has Jurisdiction to Rule on the Stipulated Issue

In determining that the grievance is not moot and, therefore, that I maintain jurisdiction to determine the issue stipulated by the parties at the close of the hearing in this case, I first give full credence to that stipulation. In so doing, I respectfully disagree with the Library that it voiced its objections off the record to the substitution of an agreed-upon issue for those previously submitted. My handwritten notes taken during that period show that after the Union stated it would withdraw its first and second submitted issues and that the Arbitrator should decide its third submitted issue, as revised by the Arbitrator, that was "OK with Library." Admittedly, my notes of this discussion do not constitute record evidence and cannot be relied upon as conclusive evidence of the Library's position at that time. However, my recollection of that discussion, in concert with my contemporaneous notes, inform my judgment that the stipulated issue entered into the record reflected the Library's agreement that I should have jurisdiction to resolve that issue. I see no reason to divest myself of jurisdiction simply because the Library apparently changed its position after the close of the hearing.

The Library asserts that, after withdrawing the issues contained in its original grievance, the Union never amended that grievance to allege a violation of Article 36 so as to reflect the new stipulated issue. The Library further contends that, accordingly, the grievance is moot and there is nothing before the Arbitrator to decide. As both parties indicate, I assisted them in determining the wording of the substituted issue when they initially could not agree on the language. Everyone involved in that discussion was focussed on the statement of issue and no one questioned its consonance with the grievance. Significantly, both parties did agree to a joint stipulation of the issue. The Library raised no objections on the record. Had the question of jurisdiction been raised at that time, the wording could have been revised to conform to the wording of the grievance or the grievance could have been amended to incorporate the substituted issue. Contrary to the Library's contention, the Union did not withdraw the underlying grievance, thereby leaving nothing before the Arbitrator to decide. Rather, it maintained its position throughout that one of the issues to be decided was whether it had the right to file a grievance to enforce Article 33.

It should be understood that this was not a new issue, raised for the first time in the hearing of this case, such that the Library could claim that it was surprised and thereby harmed by its inability to respond. Rather, the Library first suggested that a grievance was inappropriate in its March 9, 2006, Report and Decision on the Grievance, where it stated that "the OOC, not the Office of Workforce Management through the negotiated grievance procedure, is the proper authoritative body to address the alleged safety violations." The Union then requested a clarification of the Grievance Decision on April 14, 2006. In this request for clarification, the Union asked "is it your position that

the Guild has no right to file a grievance on unsafe working conditions under Guild CBA Article 36, Negotiated Grievance Procedure?” The request for clarification was attached to the information request that, when it was denied by the Library, became the subject of a grievance assigned to another arbitrator. During discussions off the record concerning the substituted issue, the Union made known its intention to withdraw that grievance, which it did that day. Accordingly, even assuming that the Library’s failure to respond to the request for clarification was originally before the second arbitrator, by the time the stipulated issue was put into the record there was no longer an impediment to my considering the issue of whether the Library improperly denied the Union the right to grieve. See footnote two, above. In contrast to the facts of this case, where the parties agreed to place before the arbitrator an issue that had been raised earlier but had not been decided, the decisions cited by the Library in its post-hearing brief involved cases where the withdrawal or resolution of a grievance did in fact render the alleged violations moot because there was no remaining controversy to be adjudicated.

To deny the Union an opportunity for an answer to the stipulated issue on the ground that it had not formally amended the grievance in this case would, in my opinion, excessively elevate form over function. I note that it is not unusual for a statement of issues to change during the course of a hearing when the evidence places the dispute in sharper focus. See Elkouri & Elkouri, *How Arbitration Works*, 6th ed., at page 296. Further, the FLRA has found that arbitrators may rule on any matter raised during the processing of a grievance, unless the matter is excluded by the applicable collective bargaining agreement. Department of the Treasury, IRS and NTEU Chapter 65, 57 FLRA 942, 946 (2002). As noted above, the issue of whether a grievance was

appropriate in the circumstances of this case was clearly raised during the processing of the grievance. See also Veterans Affairs, Medical and Regional Center, Togus, Maine and AFGE Local 2610, 55 FLRA 1189, 1191 (1999) (an arbitrator’s interpretation of a stipulation of issues is accorded the same substantial deference as an arbitrator’s interpretation and application of a bargaining agreement). As the Supreme Court stated in Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960), “the judicial inquiry ... must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.... Doubts should be resolved in favor of coverage.”

Based on the above, I conclude that by agreeing to the stipulated issue, the parties accorded the Arbitrator jurisdiction over that issue, despite the Union’s failure expressly to amend the grievance to allege a violation of Article 36 of the parties’ agreement.

The Grievance Was Appropriate in the Circumstances of this Case

From its earliest decisions, the FLRA has held that the Statute requires agencies – and specifically, the Library – to bargain to the extent of their discretion even if that discretion is limited to making requests or recommendations to an entity that has decision-making authority. Library of Congress and Congressional Research Employees Association, 15 FLRA 589 (1984); AFSCME, AFL-CIO, Local 2477 and Library of Congress, 7 FLRA 578 (1982), enfd. sub nom. Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983). Article 33 of the parties’ collective bargaining agreement reflects the parties’ understanding of the limits of the Library’s discretion and its obligation to act, to the extent of its ability, to abate hazards in the workplace. As examples, Article 33, Section 1 acknowledges the enforcement authority of the OOC under the CAA;

Section 2 requires the Library to “take whatever actions are necessary, including requests to the [AOC] and Congress, to remedy any serious unsafe or unhealthful condition[;]” and Section 8 requires the Library “to take all necessary actions within its control to provide a reasonable degree of fire safety in Library buildings and structures.” Thus, although it is the AOC that maintains and operates the Library’s facilities and OOC inspectors who are tasked with inspecting for hazards in those facilities, the Library has agreed that it too has certain contractual obligations with regard to monitoring its facilities and taking necessary steps to maintain fire safety.

The scope of the duty to bargain implies a concomitant obligation to process a grievance that seeks to enforce a negotiated provision unless it can be shown that the grievance does not conform to the language of the provision in question or seeks to enforce it in an improper manner. In this case, the Library raises two specific objections to explain why the grievance was not appropriate.

First, it contends that the remedy sought by the Union “is fatally flawed” because it would have compelled the Library to take corrective action that would conflict with the CAA, which established the OOC as the exclusive authoritative body to enforce OSHA health and safety standards in Library facilities. The language of the grievance referred to by the Library is ambiguous in that it seeks to require the Library to “take[] whatever actions are necessary” to correct the alleged hazards. The quoted language – which precedes the specific actions sought as a remedy – can be read, as the Library asserts, to compel the Library itself to take the various actions that follow it, such as installing smoke detectors and programming the freight elevator to recall and capture. It also can be read, however, to require the Library to take whatever actions are necessary to ensure

that those measures are effectuated. In the latter reading, the Library would be required to take some action, but not necessarily that of actually installing the corrective devices itself if that task were within the control of a third party.

If there was nothing else in the grievance to inform my judgment, I might well agree with the Library that the simplest reading of the remedy section demonstrates that the grievance seeks to compel action by the Library that is outside its authority. However, the remedy sought must be read in the context of the allegations contained in the entire grievance. Consequently, the remedial demand must be read together with the language of Article 33, sections 1, 2 and 8, the contractual provisions the grievance sought to enforce. Those provisions, as explained above, clearly recognize the authority of the OOC to enforce health and safety standards at the Library and the authority of the AOC to remedy unsafe or unhealthful conditions in accordance with the CAA. In addition, they recognize that the Library also has certain obligations to provide a safe and healthful work environment, including – in Sections 2 and 8 – requesting that the AOC take action to correct serious hazards.

In determining what the remedy section of the grievance intended by the language “takes whatever actions are necessary,” I find it particularly significant that Article 33, Section 2 also includes the language “[t]he Library shall take whatever actions are necessary” and further defines that requirement to include “requests to the Architect of the Capitol...and Congress, to remedy any serious unsafe or unhealthful condition.” Similarly, Section 8 elaborates on the obligation of the Library “to take all necessary actions” by adding the words “within its control[.]” Inasmuch as the grievance specifically cites those sections of Article 33 and uses almost identical language that in

Article 33 further limits the Library's obligations, I conclude that the grievance did not require actions that were outside the Library's control and authority.

The Library also argues that the grievance sought a remedy that it could not provide because the alleged fire safety hazard was located in the seventh floor mechanical area, a location that was maintained solely by the AOC and that the Library has no control over. It contends that the Union could have achieved its goal had it requested an inspection by the OOC, which has the authority under the CAA to compel the AOC to act. I do not find this argument persuasive.

First, although the alleged hazards were physically located in the seventh floor mechanical area, the safety concerns cited by the Union had implications for employees throughout the Madison Building. As the Union stated in the grievance, smoke detectors in the machine room are required by code when elevators are used for emergency evacuations. The elevators serviced by the seventh floor mechanical rooms go from the sub-basement level of the Library to its sixth floor, areas that are indisputedly within Library control. Robert Browne, the Chief of the Library's Safety Services Division, testified that although Safety Services does not have access to the seventh floor mechanical rooms, it could, if alerted to a situation that posed a grave danger to Library employees, notify the AOC and then put into place some practice to prevent employees from using the area in question. Jared Zingman, an emergency management specialist for the Library, testified that, in an emergency situation, the Library Police and the Fire Department can override locked elevators to evacuate disabled employees, at which time they would check whether there was a smoke detector in the elevator. Moreover, an undetected fire on the seventh floor could have disastrous results for the entire building.

Thus, although the actual premises of the seventh floor may be outside the control and authority of the Library, fire hazards on that floor could affect Library employees throughout the building. Accordingly, the grievance seeking to correct an alleged fire hazard on that floor was appropriate.

Similarly, the portion of the grievance that sought to correct the failure of the freight elevator to recall and capture also pertains to a safety matter affecting employees throughout the building. Indeed, both Mr. Browne and Mr. Parker, the Library's Fire Safety Manager, testified that the freight elevator was not compliant with code standards because it did not have the recall and capture capability to protect employees from using the elevator during a fire emergency and that the AOC has plans to correct this omission during its current renovation program at the Library.

Further, the Union reasonably decided to file a grievance rather than request an inspection because it knew that the OOC had just concluded its biennial inspection. Because it does not receive reports of OOC inspections that were sent to the Library and reports to the public often take several years, the Union had no way of knowing whether its concerns were being addressed. In this regard, I find it significant that, according to Mr. Browne, the Safety Services Division did not learn that the service elevator was not compliant with code until "after we were contacted by Ms. Ponce letting us know there was a grievance referencing this elevator." He agreed that he looked into the issue "as a result of the grievance[.]" The record also establishes that, after the grievance was filed, the Library investigated whether there was a missing smoke detector in either the red or blue core mechanical rooms and later determined that by September there were smoke detectors in all cores. Thus, it is clear that the grievance alerted the Library to these

possible hazards before it was notified as a result of the OOC report. In view of my finding above that the Library had obligations under Article 33 with regard to correcting such hazards, the Union's grievance appropriately – and, as it turned out, effectively – attempted to enforce those obligations.

The Library's fear that permitting such grievances would allow an arbitrator or the FLRA to determine whether a violation of OSHA standards exists is misplaced. In situations like the one that generated this grievance the appropriate inquiry would be whether the Library had taken "all necessary actions within its control," not whether it had actually abated the alleged hazard.

The fact that the Union incorrectly identified the missing smoke detector as in the red core and evidence that the AOC had plans to renovate the freight elevator to include recall and capture do not render the grievance inappropriate. The Union filed the grievance based on the information it had at the time and the Library did not correct the Union's misunderstanding in response to its request for information. It was only at the hearing that the Union could be certain that measures had been taken to correct the hazards it had identified. Based on this knowledge, it withdrew the portions of the grievance pertaining to those hazards.

Having found that the grievance appropriately alleged violations of Article 33, it is also clear that these allegations involved a matter relating to a condition of employment, so as to satisfy the requirements of Article 36, which sets forth the definition of a grievance. Further, as the Library concedes, the grievance concerned a matter that is not expressly excluded by Article 36. Thus, despite the wording of Article 33, Section 1, it should have been treated no differently than other grievances filed in the

past over health and safety matters. Consequently, by stating, and continuing to argue, that the substance of this grievance could not be addressed through the negotiated grievance procedure, the Library violated Article 36 of the collective bargaining agreement.

A Notice Posting Remedy is Appropriate in this Case

Arbitrators may use their wide remedial discretion to order the posting of a notice to remedy a violation of an agreement or the Statute. See, e.g., NAFW, Local R3-32 and Department of the Air Force, 913th Air Wing Willow Grove Air Reserve Station, 61 FLRA 127 (2005) (Willow Grove); General Services Administration and AFGE, Council 236, 53 FLRA 925 (1997) (GSA). Such remedies are often imposed when the arbitrator finds a statutory violation that would have merited a notice posting if it had been processed in an unfair labor practices hearing. E.g., GSA. However, in Willow Grove, where the arbitrator had ordered the union to post a notice to remedy violations of both the Statute and the parties' agreement, the Authority set aside all the statutory violations, retaining only one contractual violation, but nonetheless required the union to post a modified notice. The Authority will find an award deficient and set aside an order requiring a notice posting if the content of the notice is too broad – for example, if it awards relief to persons not encompassed by the grievance. Environmental Protection Agency, Region 2 and AFGE, Local 3911, 59 FLRA 520 (2003).

I conclude that an order requiring the Library to post a notice informing unit employees of this award is appropriate. Given the unusual procedural posture of this case, where the other allegations of the grievance have been withdrawn, no other remedy

is available and it is important that unit employees recognize their rights to file grievances over safety and health matters.

Despite the unavailability of other remedies, this was not a de minimis violation. The Library's incorrect response to the Union that a grievance was not appropriate and its failure to apprise the Union that it had in fact taken steps to correct the alleged hazards caused the Union to invoke arbitration, with the ensuing effort and expense of preparing for and conducting the hearing and drafting post-hearing briefs. The fact that the Union withdrew the substantive allegations regarding safety after it learned that the Library had taken measures to correct the hazards is strong evidence that arbitration would not have been necessary had the Union had this knowledge during the processing of the grievance. Instead of cooperating with the grievance procedure in that manner, the Library rested on its belief that the grievance was inappropriate. Further, and perhaps more importantly, the Library's position raised questions of whether the Union and the employees it represents could continue to have confidence that, after a bargaining relationship of almost 30 years, they could rely on the negotiated agreement to protect their workplace safety. Because of the centrality of the grievance procedure to collective bargaining, the employees have a right to know that their confidence can be restored. Accordingly, I will order the Library to post an appropriate notice in places where it normally posts information for unit employees.

In so doing, however, I will modify the language proposed by the Union. In particular, the Union had requested language stating "We will abide by Article 33, Sections 1, 2 and 8 of the Agreement." In view of evidence that the Library did act, to the extent of its authority, to comply with those provisions, I conclude that the notice

should not contain this language. I have also revised proposed language indicating that the Library had asserted that the Union had no authority to file the grievance. The Library denied the grievance based on its appropriateness but did not contend the Union had no right to file it; in fact, it processed the grievance and participated fully in the arbitration. A contrary message should not be conveyed to employees.

AWARD

The grievance is sustained. The Library shall post the attached Notice, or a mutually agreed-upon variant of that Notice, for sixty (60) consecutive days, in all places where it normally posts information for unit employees.

Dated:
Washington, D.C.

Barbara B. Franklin, Arbitrator

