

In the Matter of

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION
AND REVIEW
FALLS CHURCH, VIRGINIA

and

CHAPTER 224, NATIONAL TREASURY
EMPLOYEES UNION

Case No. 15 FSIP 65

ARBITRATOR'S OPINION AND DECISION

Chapter 224, National Treasury Employees Union (Union or NTEU) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Social Security Administration, Office of Disability Adjudication and Review (ODAR), Falls Church, Virginia (Employer or Agency).

Following investigation of the request for assistance, arising from negotiations over procedures and appropriate arrangements related to new numeric production standards to be implemented by the Employer under a new performance appraisal system, the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned. The parties were informed that, if a complete settlement of the issues at impasse were not reached during mediation, a binding decision would be issued to resolve them.

Consistent with the Panel's procedural determination, on July 28 and 29, 2015, I conducted a mediation-arbitration proceeding at the Panel's offices in Washington, D.C. During the mediation phase, the parties were able to resolve a number of issues, but they were unable to reach agreement on the more divisive matters. Thus, I am required to issue a final decision imposing terms for these disputed issues in accordance with the Statute and 5 C.F.R. § 2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record, including documentary evidence submitted prior to and during the

hearing, testimony from witnesses, and post-hearing statements of position.

BACKGROUND

ODAR's mission is to render decisions affecting claimants' rights to, and amounts of, benefits under the Social Security laws applicable to those with disabilities. The Union represents a bargaining unit consisting of approximately 1,550 professional (attorneys and paralegals) and non-professional employees who work in 168 Hearings Offices within 10 Regions; 5 National Hearing Centers (NHC); and 2 National Case Assistance Centers (NCAC). Attorneys in the bargaining unit are generally known as "decision writers" (DWs) and they draft decisions at the direction of Administrative Law Judges (ALJs) who decide benefits eligibility *de novo* based on an evidentiary hearing or written record. There also are a small number of paralegals in the unit who also are decision writers.

The parties' current collective-bargaining agreement (CBA) went into effect on June 2, 2014, for a duration of 4 years. With the implementation of the new CBA, employees transitioned from a pass/fail performance evaluation system to a three-level rating system for each of four performance elements. The ratings are as follows: Level 5, outstanding contribution; Level 3, successful contribution; and Level 1, not successful. In Article 21, Performance, Section 4.D, the parties agreed that "if the Agency decides to use numerics as performance standards, it will notify NTEU and bargain to the extent required by law."

Four months after the CBA was implemented, the Union received notice that management intended to incorporate numerics into critical element number 4, "Achieves Business Results," for the attorney and paralegal DW positions. Using a numerical standard known as the Decision Writers Productivity Index (DWPI), the Employer intends to rate employees on how long it takes them to draft ALJ decisions. The DWPI is based on completion time averages for various categories of cases (varying in difficulty) computed from national statistics for the bargaining unit showing total numbers of decisions issued and total number of work ("in the seat") hours. The DWPI is enumerated as a percentage of the average taking all cases together.

Under the Employer's plan, a score higher than 120 percent on the DWPI productivity index will indicate consideration for a Level 5 rating of "outstanding contribution" for the element; a

score of 80 to 120 percent will be indicative of a Level 3 rating of "successful contribution." A score below 80 percent will warrant consideration of a Level 1 rating of "not successful" that may result in the initiation of a Performance Assistance (PA) plan.^{1/}

Use of the DWPI reflects a management effort to address a longstanding, and massive, backlog of SSA disability cases (1 million cases). This type of numeric standard has been in place in another SSA component, the Appeals Council, for a number of years with reported success. The Appeals Council is the last administrative review level where claimants request review of ALJ decisions. According to the record there are about 600 attorneys performing reviews in the Appeals Council in three work locations all in the Baltimore-Washington area.

The Employer's decision at issue is to extend the DWPI system to the 1,550 employees in the hearing-level ODAR units represented by NTEU: to DWs in Hearing Offices (except senior attorneys) and the NCACs immediately, with a determination to be made later about including senior attorneys and NHC DWs.

While DWs and ALJs both work in the ODAR Hearing Offices, the DWs are not supervised by the ALJs but, rather, by group supervisors. These supervisors are responsible for work assignments and at least formally stand between the DWs and ALJs and may be called upon to address situations of incomplete ALJ instructions. They may or may not be attorneys. At the NCACs there are no ALJs and the cases come from Hearing Offices experiencing overflows. Cases are also shifted between Hearing Offices so even in those offices, a DW may be drafting for an ALJ located elsewhere in addition to or instead of an ALJ in the same office.

Across Hearing offices, and among ALJs, there is variability in the degree and mode of contact between DWs and the ALJs for whom they are drafting decisions, this seemingly depending primarily on the preferences of the ALJ. There is

^{1/} According to a "Letter of Intent," dated February 23, 2015, the Employer plans on a 3-year phase-in period of DWPI percentages for the "successful" and "not successful" levels. In this regard, starting with the performance year for FY 2016, on October 1, 2015, the Successful "minimum" will be 70 percent. That will increase to 75 percent the following year and to 80 percent the year after that.

also great variability in the nature, quality and completeness of ALJ instructions.^{2/} Additionally, some ALJs are more inclined to deny benefits than others, increasing the writing time for their DWs since, as a general rule, declinations take more effort to write than approvals.

Still other differentiating factors are a function of the external environment. States vary in the availability of no or low-cost medical care causing a situation where, in some states, claimants have voluminous medical documentation while in others they have little. And, according to employees, there are perceived differences in the rigor with which SSA decisions are reviewed by federal courts depending on location. Where courts are more rigorous ALJ decisions need to be more thorough to withstand review.

The working conditions of the two other bargaining-unit groups (who will not be immediately impacted by DWPI) have their own further distinctions. In the NHCs, the approximately 150 attorneys are each assigned to one ALJ with whom they are co-located and by whom they are directly supervised. They are essentially law clerks, often performing duties in addition to decision writing such as conducting pre-hearing case reviews, and drafting interrogatories. The responsibility for other duties also characterizes the other group, GS-13 senior attorneys, who perform non-decision-writing duties to a significant degree.

During FY 2015 the Employer began calculating DWPIs for bargaining unit employees and making the scores available to employees for only educational purposes. According to data provided to the Union about 25 percent of BUEs have ratings below 70 percent.

ISSUES AT IMPASSE

The parties' remaining disagreements are over: (1) the functions of a joint committee they have agreed to establish to review DWPI and its implementation, and the timing and length of the committee's work; (2) the weight to be given to DWPI when DWs are evaluated and the extent of supervisory discretion to consider factors other than the DWPI in evaluating an employee

2/ The record documents management efforts to address inadequate ALJ instructions but also the challenges posed by the statutory independence that ALJ's possess. Hence the problem persists.

on the critical element; (3) the timing of formal discussions with employees concerning the DWPI initiative and the parties' MOU; (4) whether the Agency should be required to follow commonly accepted and recognized statistical protocols in developing the DWPI numerics; (5) the extent of the Employer's obligation to provide employees and the Union with documentation of factors that may have an impact on an employee's performance, such as ALJ instructions; (6) the description of illustrative factors beyond an employee's control; and (7) whether employees challenging a DWPI score that is deficient within 20 points should have the right to utilize a peer review panel.

PARTIES' PROPOSALS AND POSITIONS

1. The Union's Position

The Union proposes the following provisions for inclusion in the MOU:

MEMORANDUM OF UNDERSTANDING

The purpose of this MOU is to address the Agency's decision to use the Decision Writer Productivity Index, hereinafter referred to as "DWPI," as an indicator in determining an employee's appraisal rating for the Achieves Business Results critical element in the Performance Assistance and Communication System (PACS). The implementation of DWPI will be in accordance with applicable law, Government-wide rules and regulations, the SSA-NTEU National Agreement, and any other applicable Memoranda of Understanding. The DWPI will not be used as a performance management tool in FY 15.

IMPLEMENTATION

1. NTEU and the Agency will form a joint committee (Committee) to review the Agency's DWPI metric for validity and conformance with commonly accepted statistical practices including analysis of adverse impact on protected classes of employees. The Committee will recommend the use of an independent entity or qualified individual outside the Agency to perform this validation. The information generated by the committee including the results of any studies and all the source data used in the analysis will be provided to NTEU. The Committee will review the DWPI

and related information and report its findings in writing back to the respective parties. The Committee will also engage in a detailed review of all established categories in the DWPI, including adjustments for Grade level and NCAC, NHC, and Hearing Office attorneys. The Committee will include four (4) bargaining-unit employees selected by the Union and a number not to exceed four (4) selected by the Agency. The primary criteria for Committee involvement will be experience drafting decisions. The Committee will hold its first meeting no later than September 1, 2015, and will complete its work no later than September 21, 2015. The Committee will operate on a consensus decision making basis, attempting to reach decisions that are acceptable to all parties.

If the committee determines that the application of DWPI creates a disparate impact based on the application of the DWPI for FY 2015, the Agency agrees to take appropriate steps to ensure its compliance with all statutory and regulatory criteria including the option of delaying implementation. After the completion of its work the Committee will meet monthly via technology for up to six (6) months to discuss methods to improve the application of DWPI and any other appropriate metric as they relate to: 1) ALJ instructions, templates and consistency, 2) the DWPI as it is currently constructed, including review of all data used to construct the DWPI and the establishment of categories, including regional differences, 3) downtime, 4) how to best utilize the DWPI as a performance indicator to reduce the Agency's backlog of cases and improve efficiency, 5) evaluate training and workload assignment practices, and 6) the impact of the DWPI on the quality of decisions.

3. The DWPI is a performance indicator and is one consideration in the Business Results critical element. The DWPI will not be the sole basis for performance ratings in that element. Supervisors must consider other performance documentation and include such sources in the appraisal. Supervisors will have the authority and may conclude that an employee's performance in the Business Results critical element was successful or outstanding even though an employee does not achieve a particular DWPI range. Managers and supervisors will not use DWPI data to compare one

employee to another or to suggest that one employee's production is too low compared to others. Furthermore, where the DWPI is used to evaluate employees, the Agency will carry the burden of proof in any grievance or arbitration hearing that the DWPI data is valid and accurate. The DWPI will be applied in a fair and equitable manner and will take into account all job functions the employee is expected to perform including the actual amount of time available to perform such functions. The following are examples of authorized time spent performing other duties and responsibilities which shall not adversely affect employees' ratings: pre-hearing reviews, post-hearing reviews, time providing legal assistance and advice to staff, attending office meetings, preparing required reports, use of leave, and official time.

4. Formal Discussions. At least 30 days prior to implementation of this initiative, the Agency will apprise all impacted bargaining-unit employees of the initiative and this MOU via formal discussions, conducted in accordance with 5 U.S.C. § 7114(a)(2)(A) and Article 7 of the parties' National Agreement. During the formal discussions, the Agency will explain the MOU and answer any questions.

5. The Agency agrees that DWPI statistical data that is used to measure employee production will be compiled using commonly accepted statistical techniques recognized as valid by the statistical community, including an analysis of adverse impact.

9. In any grievance about the rating or application of DWPI, dispute, and for purposes of rebuttals and self-assessments pursuant to Article 21, the Agency will, upon request by the employee or by NTEU on the employee's behalf, provide copies of all disputed ALJ instructions in all cases that were drafted by the employee during the relevant performance period as well as other documents maintained in its system of records including time reports and leave records that would impact DWPI.

12. Article 21, Section 5.G.1 provides that the Agency will consider factors that affect performance that are beyond the control of the employee. The following circumstances will be considered as outside the

control of the employees in the application of the DWPI, but is not limited to:

C. increased difficulty and/or complexity, including but not limited to, voluminous or extremely lengthy cases (for example, cases with large amounts of medical documentation or other evidence, which exceeds 1000 pages).

21. If an employee does not achieve a Fully Successful or an Outstanding Contribution rating in the Achieves Business Results Critical Element and the employees DWPI score is within 20 points of the appropriate rating level due to the deficiency in numeric, the employee may request that a Peer Review Panel of three (3) qualified peers in the same job series, and of equivalent or higher grade, will review case assignments to the employee, and any other supporting documentation submitted by the employee. The committee will make recommendations to the RCALJ, or equivalent thereof, concerning the rating and/or any modification to case assignments or assistance to the employee that should be provided. The Union and the Agency will jointly decide on a list of qualified peers and the Agency will select in a non-prejudicial manner three (3) peers from that list to review the information and make a recommendation. An employee who wishes to use this peer review process does not waive his or her right to file a grievance. The Agency agrees to waive Step 1 and 2 in these situations, and allow the employees to file immediately at Step 3. Employees who are selected and volunteer on the peer review panel will be authorized duty time and such time used will be deducted from the DWPI calculation.

At the outset, the Union contends that the DWPI is a fundamentally flawed numeric, developed by management absent consideration of the varying circumstances under which DWs perform their work. In this regard, the Union complains that the Employer intends to use as performance indicators, numerics that were initially developed by an ALJ, who is not an efficiency expert or statistician, that were applied to employees in another bargaining unit who have different duties, are under a different supervisory scheme, and write decisions that are unlike those drafted by NTEU bargaining-unit DWs. Using a "one size fits all" approach, the Employer has decided to use similar mathematical formula, based upon the calculation

of general time values from various categories of cases. The DWPI, however, fails to take into account any differences by Region or by particular office where the times to write decisions vary based upon the size of the medical evidentiary file to be reviewed by the DW or the clarity of the instructions given by ALJs who direct the attorneys on how to write decisions. Rather than considering these critical factors when developing numerics to establish the time it should take a DW to draft a decision, the Employer's approach is to "bake into" the DWPI numeric average processing times for the various types of decision writing.

Even before the DWPI is implemented there is evidence that it will impose unrealistic expectations upon DWs and, consequently, will jeopardize their ability to perform at the level expected. In this regard, the Employer has been tracking DWPI since October 1, 2014 for bargaining-unit employees purportedly so they will have a sense of how their performance will measure up against the soon-to-be imposed numerical standard. Based upon the data provided to the Union, approximately 25 percent of the DWPI scores of DWs fall below 70 percent, a failing score according to the Employer's standard. The Union submitted the data to an expert in the field of statistical analysis who reported that "the DWPI scores of female [DWs] are lower than the scores of male writers by a statistically significant margin." The report also established that ODAR Regions have statistically different DWPI scores which place the DWs at a disadvantage; in this regard, in some Regions, there is more medical evidence contained in case files which takes longer to review and, consequently, longer to write decisions. The Union's expert also demonstrated in his report that there is a statistically significant relationship between DWPI scores and salary because as the scores for productivity increase, salary decreases. A logical cause is that the higher paid workers are over 40 years of age, based upon the Federal system that correlates salary to longevity. Therefore, it is reasonable to conclude that the Employer's numerical standards are likely to adversely affect employees in the over-40 age group. None of the expert's testimony has been rebutted or controverted by the Employer.

It is against this backdrop of inappropriate application of numerics developed for employees in a different bargaining unit and the Employer's failure to consider factors that affect employees' ability to meet the standards that the Union proposes procedures and arrangements for employees who are likely to be adversely affected by the DWPI. While both parties would agree

to the formation of a joint labor-management committee to review the Employer's use of DWPI, the Union proposes that the committee meet prior to implementation, during the period from September 1 to September 21, 2015, to consider the validity of the DWPI and undertake specific examinations with respect to whether DWPI conforms with commonly accepted statistical practices, including analysis of adverse impact on protected classes of employees. Furthermore, the Union proposes that a qualified expert may be engaged by the committee to perform the validation study. In the event that the committee determines that the application of the DWPI creates a potential disparate impact on protected classes based upon data, the Union proposes that the Employer take steps to ensure compliance with statutory and regulatory criteria, including consideration of delaying implementation of the DWPI. The Employer has acknowledged that it performed no validity analysis of the DWPI; rather, management describes the DWPI as a simple mathematical calculation based upon assumptions that the decision-writing function is "fungible" and creates nationwide averages for certain categories of cases. Uncontroverted evidence provided by the analysis and report of the Union's expert shows that certain categories of employees, notably women and those over 40, are likely to suffer disparate treatment in the application of the DWPI. Clearly, this information, as well as the Employer's failure to consider Regional differences when developing the DWPI, warrant further investigation as to whether the DWPI should be used as a performance standard in the "Achieves Business Results" critical element.

The Union proposes that the DWPI should be "one consideration" when rating employees on the Achieves Business Results critical element. It objects to the DWPI being the "primary" consideration as the Employer proposes because, as the Union has demonstrated through uncontroverted evidence, there are significant concerns with the numerics of the DWPI and, therefore, other important factors should be considered that affect an employee's ability to meet DWPI quotas. To ameliorate the inequity of using the DWPI as a performance indicator, supervisors should be required to take into consideration other circumstances when rating employees on the critical element, including all job functions the employee is expected to perform. Among those additional considerations to be factored into an employee's rating are such as matters as Regional discrepancies in work performance, including significant differences in the amount of medical evidence in certain cases, different state laws with respect to access to health care, and varied District and Appellate Court rules which DWs must contend with when

writing an "unfavorable decision." During the hearing, Union witnesses provided testimony that the lack of clarity of ALJ instructions to DWs is sometimes an impediment to case writing. Those who have non-attorneys as supervisors may not be able to obtain from them clarification on the instructions or guidance on legalities and, as a result, valuable time is spent by the employee attempting to discern the ALJ's directive on how the case should be written.^{3/}

With respect to formal discussions on the DWPI initiative, the Union proposes that they take place 30 days prior to implementation so that employees have an understanding of the change that is about to occur and an opportunity to receive, directly from the Employer, an explanation of those changes.

The Union proposes that the DWPI statistical data used to measure employee production be compiled using commonly accepted statistical techniques recognized as valid by the statistical community, and include an analysis of adverse impact. The Employer's in-house development of the DWPI, without any outside statistical validity review, has raised legitimate concerns that there are significant flaws with the validity of the system. Although the Employer extolls the uncomplicated and simplistic nature of the numerics used in the development of the DWPI, the Union's expert witness was able to discern disparity among gender and age categories in the application of the Employer's DWPI. The initiative warrants further and thorough examination and the Union's proposal seeks to compel it.

The Union has a reasonable expectation that grievances and other challenges by employees are likely to result from the Employer's implementation of the DWPI. It proposes, therefore, that the MOU include a provision that would require the Employer to provide copies of disputed ALJ instructions, as well as other documents maintained in its system of records, that may be used in grievances and other disputes concerning an employee's rating or application of DWPI. The Union denies the Employer's contention that the matter is covered by Article 21, Section 5.B.3 of the CBA,^{4/} which allows employees to bring to the

3/ As indicated above, many DWs do not have direct access to the ALJs for whom they write decisions.

4/ Article 21, Performance, Section 5B, Monitoring Performance and Communications, provides in pertinent part, as follows:

attention of supervisors matters affecting performance that are outside an employee's control and have that information placed in the employee's SSA-7B file. The CBA was negotiated before the Employer notified the Union of its intent to use numerics as performance indicators and, therefore, the Union did not contemplate, when it agreed to the CBA provision, that documents may be needed to rebut performance actions and other matters related to the implementation of a DWPI. Moreover, the Union lacks confidence that supervisors consistently will include in an employee's SSA-7B file written statements from employees addressing matters outside of the employee's control that may affect performance.

The Union also proposes that there be an affirmative requirement for management to consider factors affecting performance that are beyond the control of the employee and those factors should include the effect of voluminous or extremely lengthy cases, *i.e.*, cases with large amounts of medical documentation or other evidence that exceeds 1000 pages. During the hearing, the Union demonstrated that the effect of inadequate ALJ instructions, additional legal research required of attorneys by ALJs, complex cases, and voluminous case files would create significant DWPI score differences for many attorneys. While the Employer asserts that these factors already are "baked in" to the DWPI, the Union maintains that they further increase the amount of time it takes to draft decisions and, unless they are considered by appraisers, employees are likely to suffer ratings in the element that do not accurately reflect the realities of what it takes to produce a work product.

The Union proposes to establish peer review panels to assist employees who, due to the deficiencies in the numerics, did not achieve a Fully Successful or Outstanding Contribution rating in the Achieves Business Results element and whose DWPI scores are within 20 points of the appropriate rating level. The panels would make recommendations to management concerning the rating, and suggest modifications to case assignments or

3. An employee may inform his/her appraising official in writing, which includes email, of factors beyond his/her control that have affected his/her performance. The appraising official will consider such factors when evaluating performance for the appraisal period. The written documentation will be placed in the employee's SSA-7B Extension File or equivalent.

other assistance to employees. Employees who elect to use the peer review process would not waive any right to also initiate a grievance which may be filed at Step 3 of the parties' negotiated grievance procedure. The Union contends that there will be an increase in the number of employees who challenge their performance appraisal ratings once the DWPI is implemented. Another bargaining unit experienced increased grievance activity when DWPI was implemented for its attorneys and those employees did not have to contend with Regional differences in the content and complexity of case files, unclear ALJ instructions or supervision by non-attorneys all of which befall DWs in the NTEU bargaining unit. Permitting employees to use a peer review process may avoid the time-consuming process of being placed on a performance action plan. Such a process, and a streamlined grievance procedure to address DWPI issues, is not covered by Article 21, which includes assistance for employees experiencing difficulties in performance. At the time the CBA was negotiated, a DWPI was not contemplated by the parties and, therefore, any claim by the Employer that the Union's proposal is covered by the CBA should fail.

2. The Employer's Position

The Employer proposes the follow wording for inclusion in the MOU:

MEMORANDUM OF UNDERSTANDING

The purpose of this MOU is to address the Agency's decision to use the Decision Writer Productivity Index, hereinafter referred to as "DWPI," as a consideration in determining an employee's appraisal rating for the Achieves Business Results critical element in the Performance Assistance and Communication System (PACS). The implementation of DWPI will be in accordance with applicable law, Government-wide rules and regulations, the SSA-NTEU National Agreement, and any other applicable Memoranda of Understanding.

1. NTEU and the Agency will form a joint committee (Committee) to review the Agency's use of DWPI. The Committee will include twelve (12) bargaining-unit employees selected by the Union and a number not to exceed 12 selected by the Agency. The Committee will hold its first meeting via technology no later than September 1, 2015. The Committee will review issues

as they relate to the use of DWPI under the Achieves Business Results Critical Element including topics such as:

- A. Judge's instructions, templates and consistency.
- B. The DWPI as it is currently constructed. This includes:
 - 1. A review of all data used to construct the DWPI and the establishment of the categories, including regional differences.
 - 2. Downtime.
- C. How to best utilize the DWPI as a performance indicator to reduce the Agency's backlog of cases and improve efficiency.
- D. Evaluate training and workload assignment practices.
- E. The impact of the DWPI on the quality of decisions.

The Committee will make its recommendation to the Agency and to the Union. If the Committee cannot reach consensus on an issue, it will be acknowledged in its report. Neither party will be required to follow the recommendations and/or findings of the Committee. Neither party waives any statutory or contractual rights.

The Committee will meet monthly via technology for up to six months beginning no later than September 1, 2015. Meetings will be scheduled for one hour. The frequency and duration of the meetings may be increased by mutual consent. The Committee is expected to present its report to the parties within 30 days of its last meeting.

2. The DWPI is a performance indicator and is the primary consideration in the Business Results critical element but will not be the sole basis for an employee's performance rating in that element. Supervisors may conclude that an employee's performance in the Business Results critical element

was successful or outstanding even though an employee does not achieve a particular DWPI range.

3. No later than October 31, 2015, the Agency will apprise all impacted bargaining-unit employees of the initiative and this MOU via formal discussions, conducted in accordance with 5 U.S.C. § 7114(a)(2)(A) and Article 7 of the parties' National Agreement.

9. In accordance with Article 21, Section 5.B.3, an employee may inform his/her appraising official in writing of factors beyond his/her control. The following circumstances may be considered as outside the control of the employees as relates to DWPI:

- A. adequacy of ALJ instructions including illegible, confusing and/or non-policy compliant instructions,
- B. legal research requested by individual ALJs,^{5/}
- C. difficult or complex cases.

The Employer agrees to establish a joint labor-management committee as a vehicle for addressing Union concerns regarding the implementation of the DWPI. The parties' proposals for a joint committee differ, however, in two significant areas – the timing for the committee to complete certain work and whether the committee members or an outside contractor should analyze the impact of the DWPI on protected classes of employees. The Employer contends that if the committee were required to meet initially on September 1, 2015, and complete its work by September 21, 2015, as the Union proposes, there would be insufficient time for it to review and make recommendations on the topics included in the Union's proposal. Furthermore, it is unclear in the Union's proposal whether the committee members are expected to meet full time during that 3-week period and the venue for their meetings. The Employer is opposed to the committee members working full-time on committee work due to the impact on public service. Moreover, meeting via technology, rather than in person, would be a more appropriate use of time and financial resources. The other major area of disagreement is the Union's proposal that the committee, or an outside contractor, analyze the impact of the DWPI on protected classes of employees, apparently within the same 3-week time frame. There would be limited value in analyzing "incomplete data"

^{5/} The parties have reached agreement on A and B.

since the DWPI would be implemented on October 1, 2015. The Employer has committed to provide the Union with data once the DWPI has been in place for 6 months. To be meaningful, any analysis of data should take place once the DWPI has been in effect for the better part of the performance year.

The parties disagree over whether DWPI, as a performance indicator, should be the "primary consideration" in the Achieves Business Results critical element as the Employer proposes or merely "one consideration" as the Union proposes, and whether supervisors have a mandate or an option to consider other performance documentation when rating employees on the element. The Union also would require that other time spent by employees, including pre and post-hearing review, providing legal assistance and advice to staff, attending office meetings, preparing required reports, use of leave and official time will not adversely affect an employee's rating on the element. Management has repeatedly conveyed to the Union that the DWPI will not be an absolute numeric. Rather, managers have discretion to consider factors in addition to DWPI scores for those employees who may be on the cusp of achieving a specific performance rating on the element. The Employer's proposal balances the use of the DWPI as the primary rating factor with management discretion to increase a rating when the employee's contributions so warrant. The Union's approach would restrict the Employer's ability to implement a numeric and it diminishes the importance of the DWPI in determining an employee's rating under the Achieves Business Results element.

With respect to the timing of formal discussions with employees on the implementation of the DWPI, the Employer's proposal that they take place by October 31, 2015, is consistent with the contract deadline for issuing performance plans for the fiscal year 2016 appraisal period. Thus, formal discussions which take place by October 31, 2015, would be contemporaneous with the issuance of employee performance plans and, therefore, would better enable managers to explain, and employees to understand, the impact of the DWPI on the appraisal process.

As to DWPI data and the Union's proposal that the DWPI be compiled using commonly accepted statistical techniques and include an analysis of adverse impact, the Employer asserts that the DWPI should continue to be compiled from information concerning employee case production and hours of work. The data is not compiled based on a statistical model but, rather, it is simply retrieved from current SSA systems. There is no basis

for changing the model. Management has agreed to provide the Union with data concerning employee race, national origin, gender, age and disability, by June 1, 2016, at a point when the DWPI has been implemented for several months and an assessment of the DWPI on protected categories of employees could be made. Until then, there is no basis for adopting NTEU's proposal.

The Union proposes that "in any grievance, dispute, and for purposes of rebuttals and self-assessments pursuant to Article 21" concerning the rating or application of DWPI, the Employer would be required to produce copies of "all disputed ALJ instructions" in cases drafted by the employee during the relevant performance period as well as other documents maintained in a system of records, including time reports and leave records that would impact the DWPI. The proposal would be an unreasonable burden on management which, potentially, could be compelled to produce hundreds of ALJ instructions used by an employee during the appraisal period. There already is a process in place, through Article 21, Section 5.B.3 of the CBA, which allows employees to bring to management's attention matters beyond the employee's control that are likely to affect performance. The contract provision allows written documentation of those concerns to be placed in the employee's SSA-7B file, to which the employee has access. Furthermore, the Union has a statutory right to information. There already are contractual and statutory provisions in place that would allow employees and the Union to have access to information claimed to impact employee performance under the DWPI; no further provision is necessary in the MOU.

The Employer maintains that, with respect to matters outside an employee's control which may affect performance, the employee has a role to bring such matters to the attention of management, as set forth in Article 21, Section 5.B.3 of the CBA, and the appraising official has an obligation to consider those factors when evaluating the employee's performance. The Employer's proposal recognizes the shared responsibility of employee and manager. The Union's provision should not be adopted because it fails to recognize employees' obligation to bring matters outside of their control to the attention of their supervisors.

The Union proposes a process for peer review that would be available to any employee who does not achieve a fully

successful or outstanding rating in the Achieves Business Results element and where the employee's DWPI score is within 20 points of the appropriate rating. The Employer opposes Peer Review Panels because the Union has not articulated how they would function within the context of Article 21, Performance, of the CBA, which includes a performance assistance process for employees whose performance is marginal or failing. There is no apparent value added by a peer review process. The Employer maintains that management, and not a peer review panel, is in the best position to determine whether an employee's contributions warrant a rating other than that based solely on the DWPI.

OPINION

The Employer's decision to apply numerics to a new ODAR bargaining unit reflects the urgency it feels to raise productivity and either correct or remove low performers. The sense of urgency is understandable. The backlog of disability cases is huge, drawing steady pressure on SSA leadership to do something to address it. Instituting a way to measure decision-writing time has been urged on ODAR management for some time.^{6/}

However, it is necessary to carefully compare the different contexts since the Employer's confidence about its move being successful rests heavily on the Appeals Council precedent. As it turns out, there are quite significant differences between the Appeals Council attorneys and the bargaining-unit DWs. That the latter are to a great extent dependent for their efficiency on ALJs is the major one. But, additionally, this is a much larger and more dispersed workforce subject to a variety of work processes, supervisory approaches and legal environments. This makes the extension of the DWPI look to the Arbitrator like an effort to standardize production in a very non-standardized context. There are many ways to imagine how this could lead to comparing apples to oranges, to the detriment of employees whose ALJs, supervisors and/or case assignments make their production time longer outside the average.

^{6/} A 2010 audit report provided by NTEU recommended "measure[ing] the time DWs take to draft decisions" noting that no measurement was then taking place. Obviously that recommendation was not agreed to at the time.

The Agency urges that, given the large case pool (800,000 per year), the long, tough cases and difficult ALJs will be balanced by easy and cooperative ones, making the Union's worst case scenarios far-fetched, especially since no problems have been noticeable this year. In its view, given the large data pool, accounting for all the variations is "baked in." The Employer also argues that the wide band for a satisfactory score provides ample flexibility to manage variations, and that existing procedures in the contract will offer adequate protection for those with *bona fide* complaints.

However, all of this remains speculative given the many variables in play. The Arbitrator does not view the current year as a reliable test for either success or failure of the DWPI for at least two reasons. Employees and supervisors have known that the DWPI will not "count" for 2015 ratings. Also, supervisors received no training on applying the DWPI this year so, possibly, have not been fully sensitized to the significance of non-standard procedures and case assignment methods.

The Arbitrator's conclusion is that this situation calls for as much caution as can be reasonably imposed since the Agency is determined to move forward on October 1. The compromise to be ordered is premised on the need for: (1) monitoring and documenting the roll-out of the DWPI in this bargaining unit; (2) conveying total clarity about the fact that this numeric is not determinative of ratings and that supervisors must consider other factors alongside it^{7/}; (3) assuring that employees have access to the proof they need to support a claim that a rating is unfair, taking administrative

^{7/} The Agency's failure to agree on this notwithstanding, I think the issue is semantics. The Agency wants to say that the DWPI is the "primary" factor; this allows for secondary factors. Article 21.5.G.1 *already* requires supervisors to consider factors beyond an employee's control when doing performance ratings. And here, the Agency has agreed that a supervisor has authority to give a rating different than what the DWPI score would suggest, *i.e.* to not weight the DWPI over other factors. The language being adopted from the Union's proposal similarly says the DWPI cannot be the "sole" consideration and other factors must be given consideration as well. This is the clear direction that supervisors and employees need.

burden into account^{8/}; and (4) demonstrating affirmative interest in whether factors out of employees' control (including impermissible ones like gender, race, age and so forth) are skewing the results in such a way that the DWPI is not a consistently valid measure of the level and quality of employees' efforts.

Until now it appears that the Employer has been satisfied with not hearing or noticing any problems as opposed to asking questions and seeking answers. But important issues are raised by both the employee experience described in testimony and an initial expert analysis performed for the Union based on 2015 data. That analysis suggests that the DWPI may have a disparate impact on protected classes of employees. The analysis also corroborates the regional differences in DW performance times predicted by Union witnesses. As one way to encourage a more active Agency interest in its methodology, language is being ordered concerning statistical methodology that is no more than a requirement that "the Agency ensure the accuracy of its selected measurement techniques" as "valid and objective." See American Federation of Government Employees and U.S. Department of Health and Human Services, Social Security Administration, Vallejo District Office, 35 FLRA 1276 (1990)(Proposal 4), where the Federal Labor Relations Authority held that a substantively identical proposal merely required the agency to ensure the

8/ The discussion of instructions and PII at the mediation-arbitration was confusing but the Agency now confirms that, under Article 14.2, employees are entitled to copies of any material placed in their 7B files which necessarily must include the names of any case/s provided to the supervisor by the employee to document a factor beyond their control under Article 21 section 5.B.3. This is important since employees explained they themselves are prohibited by privacy rules from retaining or creating documents with this information. Even so, the ability to defend oneself should not be completely dependent on an employee realizing "in real time" that a case they have worked on might undermine their performance rating. That realization might not come until the employee is surprised by a lower than expected rating at the end of the year. Therefore, employees need to be able to request access at the grievance stage to ALJ instructions even if they did not think to request that they be noted in their file earlier in the year.

accuracy of its selected measurement technique and, therefore, was determined to be a negotiable procedure under section 7106(b)(2) of the Statute because it did not concern the establishment of performance standards themselves.

The joint labor-management committee offers a framework for the parties to earnestly look at how the DWPI works in practice with the two initial groups within the bargaining unit; hopefully, the parties will use it in that manner.^{9/} The committee should be interested in comparing DWPI scores across regions and examining the RNOGAD data the Agency has agreed to provide by June 1, 2016.

Labor, management and employees, I am sure, agree on the importance of making SSA's disability benefits program work successfully for its intended beneficiaries. Employees also no doubt want a performance system that sets clear but reasonable expectations and fairly rewards achievement. The disagreement here is over whether the Agency has chosen a tool and an approach that will achieve those two sets of interests. A joint effort to resolve the outstanding questions, while holding employees harmless as much as possible, is the object of this award.

DECISION

The parties shall include the following compromise wording in their Memorandum of Understanding to resolve the issues at impasse:

MEMORANDUM OF UNDERSTANDING

The purpose of this MOU is to address the Agency's decision to use the Decision Writer Productivity Index, hereinafter referred to as "DWPI", as a consideration in determining an employee's appraisal rating for the Achieves Business Results critical element in the Performance Assistance and Communication System (PACS). The implementation of

^{9/} Optimally, the DWPI will not be extended further in the bargaining unit until and unless there is broad satisfaction that this numeric standard will contribute to a valid measure of performance for everyone.

DWPI will be in accordance with applicable law, Government-wide rules and regulations, the SSA-NTEU National Agreement, and any other applicable Memoranda of Understanding. The DWPI will not be used to evaluate employee performance for the FY-2015 performance appraisal year.

(U.1/A.1.) NTEU and the Agency will form a joint committee (Committee) to review the Agency's use of DWPI, including its projected and actual impacts and possible ways to improve its application. The Committee will include up to 12 bargaining-unit employees selected by the Union and a number not to exceed 12 selected by the Agency. The Committee will hold its first meeting on or about September 15, 2015, and conclude its work by July 15, 2016, unless extended by mutual agreement. Meetings will take place using technology and will convene monthly, unless the members determine other scheduling and venues. The Committee will operate on a consensus decision making basis, attempting to reach decisions that are acceptable to all parties. If the Committee cannot reach consensus on an issue it will be acknowledged in its report. The Committee will review issues as they relate to the use of DWPI under the Achieves Business Results Critical Element including topics such as:

- Judge's Instructions, templates and consistency;
- The DWPI as it is currently constructed, which includes:
 - A review of all data used to construct the DWPI and the establishment of the categories, including regional differences.
 - Downtime and assigned duties other than decision writing;
- How to best utilize the DWPI as a performance indicator to reduce the Agency's backlog of cases and improve efficiency;
- Evaluate training and workload assignment practices;

- The impact of the DWPI on the quality of decisions;
- The RNOGAD data that the Agency has agreed to provide to the Union by June 1, 2016; and
- Any extension of the DWPI to HC attorney decision-writers and senior attorneys in the bargaining unit.

The Agency shall provide the Committee with data necessary for the Committee to conduct its review, appropriately redacted, where necessary, to prevent the disclosure of personally identifiable information. This includes the RNOGAD data that the Agency has agreed to provide to NTEU by June 1, 2016.

The Committee may recommend particular data-collection (*e.g.* survey, *etc.*) that it believes would be useful in assessing the impact of DWPI.

The Committee will report its findings and any recommendations in writing to the respective parties on a schedule determined by the Committee but no later than July 15, 2016 unless agreed otherwise by the parties. The information generated by the Committee, including the results of any studies, and all the source data used in the analysis will be provided to NTEU.

U.3/A.2. The DWPI will not be the sole basis for an employee's performance rating in the Achieves Business Results critical element but will be considered with other factors including any factors beyond the employee's control that may have impacted the time needed to complete assignments. Supervisors may conclude that an employee's performance in that element was successful or outstanding even though an employee does not fall within a particular DWPI range.

U.5/A.4. DWPI performance measures will be developed using data and methodologies recognized as valid in the statistical community.

U.4/A.3. Formal Discussions. No later than October 1, 2015, the Agency will apprise all impacted bargaining-unit employees of the initiative and this MOU via formal discussions, conducted in accordance with 5 U.S.C. § 7114(a)(2)(A) and Article 7 of the parties' National Agreement. During the formal discussions, the Agency will explain the MOU and answer any questions. The discussions may be conducted telephonically and/or as part of regularly scheduled unit or group meetings. Subject to workload considerations, impacted bargaining unit employees will be given a reasonable amount of time to review the MOU prior to the discussions. The Union shall have the right to be present for any formal discussion and to ask questions.

U.9/A.7. In any grievance about the rating or application of DWPI, the Agency will, upon request by the employee or by NTEU on the employee's behalf, provide copies of all disputed ALJ instructions in cases that were drafted by the employee during the relevant performance period as well as other documents maintained in its system of records.

U.12/A.9. Article 21, Section 5.G.1 provides that the Agency will consider factors that affect performance that are beyond the control of the employee. The following circumstances will be considered as outside the control of the employees in the application of the DWPI, but is not limited to:

- increased difficulty and/or complexity, including but not limited to, voluminous or extremely lengthy cases (for example, cases with large amounts of medical documentation or other evidence, which exceeds 1000 pages).

Mary E. Jacksteit
FSIP Chairman

August 28, 2015
Takoma Park, Maryland