

SOCIAL SECURITY
ADMINISTRATION,
BALTIMORE, MD

and

COUNCIL 220,
AMERICAN FEDERATION
OF GOVERNMENT
EMPLOYEES

OPINION AND AWARD

BW-2008-R-0011 IVOL

Appearances

For the Agency	-	Eddie Taylor, Esq. Cathy Six, Esq.
For the Union	-	Martin Cohen, Esq. Victoria Carter
Arbitrator	-	Charles Feigenbaum

The parties to this dispute are the Social Security Administration, Baltimore, MD (SSA or Agency) and Council 220, American Federation of Government Employees (Union). The Arbitrator was selected under the provisions of the parties' National Agreement. The hearing was held at SSA headquarters in Baltimore on March 16 and 17, 2009.

Both parties were represented and had full opportunity to examine and cross-examine witnesses, to offer evidence, and to set forth their positions. A court reporter made a verbatim transcript of the proceeding. All witnesses were sworn. Most of the Union witnesses testified telephonically.

Both parties filed post-hearing briefs. Based on the evidence, the positions

argued by the parties, and the observation of witnesses while testifying,¹ I make the following findings and Award.

ISSUE

The parties did not stipulate an issue. Upon my review of the entire record, I find that the issue is:

Did the Agency's unilateral implementation of the IVOL system violate the National Agreement and the Federal Service Labor-Management Relations Statute (FSLMRS)? If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE NATIONAL AGREEMENT²

Article 7

§3 - Negotiations during the term of this Agreement to add to, amend or modify this Agreement may be conducted only by mutual consent of the parties.

Article 26

§7A - All actions requiring the use of competitive procedures under this Agreement will be announced on the SSA Intranet.

§7C

1. - Vacancy announcements will include, as a minimum:

o. The Servicing Personnel Office (SPO) or the address where the application is to be submitted;

p. Statement that applications must be received in the SPO by the closing date of the announcement, or postmarked no later than that date;

§8A - Who Must File: To be considered for an announced vacancy, an employee must file and sign the appropriate application

§8E - Electronic Application Forms

1. Management will afford bargaining unit employees access and in-

¹ Of course, witnesses testifying telephonically could not be observed visually.

² The terms "National Agreement," "contract," and "Master Agreement" are used interchangeably. In all cases, the reference is to the August 15, 2005, agreement.

struction so that they may use SSA's personal computers to complete automated applications and related forms under this article. Access will be granted to the extent that computers, related computer equipment and computer time are available and such use will not impede Agency operations. For purposes of this agreement, access includes a reasonable amount of time during an employee's working hours to prepare or modify his/her application.

2. The Agency will provide appropriate training on how to file for a vacancy and how to complete a SSA-45. The Agency will continue to make instructional materials on the promotional process available to bargaining unit employees.

§10

B. Promotion committees, selected by management, will be convened to rate applicants against the weights or factors or KSAs.³ The rating will be applied consistently to all applicants.

F. After rating each applicant, the promotion committee may rank the applicants in descending score order

BACKGROUND

This dispute originated with a September 21, 2007, letter from Milt Beever, SSA Associate Commissioner, Office of Labor-Management and Employee Relations (OLMER), to Witold Skwierczynski, President of AFGE Council 220 and spokesperson for the Union General Committee. The letter said it was:

. . . an informational notice regarding the Agency's plans to implement Internal Vacancies on-Line (IVOL). In November 2007, the Agency will enhance the application process for internal SSA vacancy announcements through the use of SSA IVOL. All SSA internal vacancy announcements for the nation will be on one site and will be accessible from home or office.

Employees will be required to apply on-line for all vacancies except in rare instances (e.g., if an employee does not have internet access or is on extended leave). All application materials will be created and transmitted electronically. The on-line application process will offer employ-

³ Knowledges, skills and abilities.

ees conveniences such as automatic application receipts, e-mailed status updates, elimination of postage fees and prevention of lost or misrouted applications. This process also provides a means to electronically rate and rank applicants on the basis of responses to vacancy announcements prepared in a questionnaire format. Employees should continue to follow the instructions in the "How to Apply" section in the vacancy announcement.

This letter does not constitute formal notice under Article 4 of the SSA/AFGE National Agreement since there is no statutory duty to bargain. This is a courtesy informational notice. Article 26 of the 2005 Agreement provides for electronic filing of applications. Therefore, there is no bargaining obligation since this process is covered by the National Agreement. Also, we do not believe that implementation of IVOL will affect the conditions of employment of unit employees so as to trigger a bargaining obligation under the Federal Service Labor-Management Relations Statute. Moreover, even assuming a change, we are unable to identify any reasonably foreseeable adverse impact on unit employees' conditions of employment beyond that of a speculative or de minimis nature.

Mr. Skwierczynski indicated his disagreement in his reply to Mr. Beever, dated September 27. In it, he stated:

SSA's proposals are in conflict with the Master Agreement. The Union does not consent to open the Contract. Therefore, the Agency may not implement this initiative.

Mr. Beever wrote back to Mr. Skwierczynski on October 16. He said that SSA considered:

. . . any impact [of IVOL] on the bargaining unit to be beneficial and certainly not adverse. Therefore, we do not believe that the implementation of IVOL conflicts with the National Agreement. As such, we will continue with our plans for implementation.

There ensued further correspondence between the parties in which the Union alleged that the implementation of IVOL violated both the National Agreement and statute, and the Agency denied any such violations. The Union invoked arbitration on January 3, 2008, and the matter is now properly before me for decision.

The heart of this dispute centers on Article 26, Merit Promotion. Prior to IVOL, the procedure for applying for a competitive promotion, and for rating and ranking candidates was as follows:

- Vacancy announcements were listed on the SSA Intranet. This is an internal online system that most bargaining unit employees can only access at work.
- Employees submitted their applications (SSA Form-45) directly to an SPO or mailed it in to that office.
- A Personnel Office employee (staffing specialist) reviewed applications to sort out those employees who met the minimum qualifications for the position and had the necessary time-in-grade. Those who did not were given no further consideration. The applications of the employees who did meet these requirements were sent to a promotion committee. The committee was composed of one or more persons selected by management, who would rate the applicants based on a set of factors and weights developed for the position.
- After the promotion committee completed its work, the applications would be returned to the staffing specialist, who would check the scores for accuracy and consistency, and compile the BQL. The BQL, along with the applications, were sent to the selecting official, who had the option of interviewing one or more applicants.

Mr. Skwierczynski has been on the Union bargaining team for all six National Agreements, either as a team member or co-chief negotiator. He testified that he was involved in the initial bargaining on Article 26. In the middle phase, he appointed Charles Estudillo, 1st VP for Council 220, to act in his stead. Toward the end of negotiations, when "a handful of outstanding issues" remained, he reengaged on Article 26.

He asserted that the negotiated merit promotion plan in Article 26 is a paper-based system. This is shown in references to addresses to which applications should be submitted, postmarked dates (§§7C, 1.o and p) and also the statement that applications must be signed (§8A). He agreed that Article 26 permitted the use of technology in the application process, in that §8E provides that bargaining unit employees will be permitted to use SSA computers to fill

out application forms and that they will be allowed to do so on work time. He said that the language about use of Agency computers had been in the contract since 1993, and the use of Agency time since 1996.

He said, however, that §8E does not call for using computers for anything other than typing up a resumé and printing it out. It says nothing about transmitting an application electronically and there was no discussion of doing so at the bargaining table and there was no discussion that management was reserving a right to improve or upgrade its use of technology in the application process. He was not present for every Article 26 negotiation session, so there could have been some such discussions in his absence, but he said he would have been informed of any substantive changes pushed for or obtained by management. Any such discussions would have affected the negotiations.

He pointed to the places in the Master Agreement where the parties specifically provided for possible technology changes. These were in Article 3, §§4 and 5 (7b files) and Article 30, §7 (requests for official time). He said management did not request similar language for Article 26. [Mr. Estudillo offered similar testimony. He averred that, during his time at the table, the Union was not told that there were technology adjustments that the Agency intended to make to Article 26.]

Additionally, Mr. Skwierczynski noted §7A, which states that all competitive actions would be announced on the SSA Intranet. There is no mention of any other method of announcement. Nevertheless, under IVOL, vacancy announcements are also posted on an Internet site. This makes the vacancy announcements accessible from an employee's home computer and employees may, therefore, feel less of a need to use SSA time to work on their applications. He said he has been told that in some regions, vacancy announcements are placed only on the Internet, not the SSA Intranet, and he has also received reports from around the country that some employees have been dis-

couraged from using time on the clock for working on their applications. Further, despite the references to a paper-based system in §§7C and §8A, IVOL does not permit the submission of paper applications; applications may only be submitted electronically.

Mr. Skwierczynski stated that IVOL marked a complete change in the rating and ranking of candidates for promotion. It has eliminated promotion committees and substituted an electronic questionnaire instead. This is a twofold problem. First, when there was a promotion committee, the members could check the SSA-45 to correct any obvious mistakes made by a candidate. Second, the Union cannot effectively audit questionable promotion actions as it was able to do pre-IVOL because the Union is no longer given the full promotion package to review. Neither the questionnaire nor the scoring method has been made available to the Union.

He said the Agency did not provide employees with training about IVOL. Not every candidate was aware of the IVOL changes and some filed written applications. They were disqualified from consideration. The deadline for submitting applications used to be a date, verifiable by postmark. Under IVOL, the deadline is tied to Eastern Time, which disadvantages employees in other time zones. Also, while SSA claimed there was less likelihood of applications getting lost under IVOL, applications have been lost when access to the Internet and/or SSA Intranet has broken down.

Teresa Duncan is the President of Local 3448 in Cleveland, OH. She has represented employees with concerns about promotion actions both before and after IVOL. Before IVOL, she would inform Personnel that she wanted to audit the action and would receive all the applications, those on the BQL and those not, the names of the promotion committee members, and a synopsis of how points were assigned based on the SSA-45. This permitted a full review of the action. After IVOL, there was no promotion committee so the Union could not directly ask a promotion committee member to explain something

but would have to use Personnel as an intermediary. The Union was given the BQL, the name of the employee selected and the SSA-45 submitted. The Union was also given the employee's total questionnaire score, but no information about how the employee answered individual questions. This was not enough information for the Union to scrutinize the action as closely as it could before IVOL.⁴

Joyce Ann Parks is a Supervisory Human Resources Specialist at SSA headquarters. She said the Agency implemented IVOL on November 13, 2007; its reason for doing so was to have a quicker, more efficient, paperless, process. She said there are two parts to applying for a promotion under IVOL. There is a self-assessment questionnaire and the SSA-45. The employee completes both and uploads them. The first part of the questionnaire has questions designed to show if the employee has the necessary 52 weeks of time-in-grade. The other questions go to the employee's experience and education, with points assigned for the various questions. Subject matter experts from the Agency component with the vacancy develop these latter questions and rating criteria.

Once the vacancy announcement has closed, a Personnel Office staffing specialist checks the questionnaire to see if the employee has the needed time-in-grade. If so, the staffing specialist reviews the SSA-45 for the sole purpose of determining if the employee meets the minimum qualifications for the position. For those employees deemed eligible (i.e., meet time-in-grade and minimum qualifications) the other questions are electronically scored using the rating criteria. The staffing specialist does not review the subject matter questions or the answers. Employees whose scores exceed a cut-off number are placed on a BQL, which is sent to the selecting official along with the SSA-45s. As was true before IVOL, the selecting official may choose to inter-

⁴ Another local Union president, Loni Schultz, also testified about two instances in which she received inadequate information. She requested additional information from Personnel but

view one or more candidates. She also said that a selecting official could decide to have a promotion committee in the pre-IVOL sense. In her experience, which was limited to headquarters, this happens perhaps 10% of the time.

She said there was no need for an applicant to sign the SSA-45 because the act of submitting it constitutes the signature. An employee having difficulty submitting an application on time because of a computer problem can call a staffing specialist who will hold the vacancy announcement open for that employee alone and close it after the problem is worked out and the employee completes the application. Her office has offered IVOL training four to six times a year for components that call and ask for it.

She said had received Union requests to audit promotions pre-IVOL but not since. If she did receive such a request, she would provide the total package: all applications, the scores for those who did and did not make the BQL, the questionnaire and the answers.

There was telephonic testimony from eight employees who applied for vacancies under IVOL. The essence of their testimonies was:

April Adams, Beechwood, OH. She applied for a CUB (Chicago Upward Bound) position, GS-9 through 12. She was told, about two months after she applied, that she would not be considered for the position because she lacked sufficient time-in-grade, even though she was a GS-12 at the time.

Angela Crawford, Shawnee, OK. In 1999, she applied for a Technical Expert GS-12, received 100 points and made the BQL. Under IVOL she applied for another Technical Expert GS-12 position and was told she had not met the BQL cutoff score of 86 points.

Maria Galvez, Fremont, CA. She unsuccessfully applied for a supervisory position. This was on the last open filing day. She is on Pacific Time and the system would not accept her application because it was

had not yet received a response. This was only a few days before the hearing.

past the IVOL deadline time.⁵

Cheryl Grate and Brenda Durden, New Haven, CT. Both filed paper applications as they had before IVOL and had their applications rejected. They had never heard of IVOL or that they could only file electronically. They stated in this regard that the vacancy announcement gave a mailing address.

Luis Llanos, Cleveland, OH. Months after he applied for a promotion he received an email telling him he would not be considered because he had not submitted (uploaded) a SSA-45. He felt sure he had submitted it. When he questioned Personnel, they told him he had been sent an email about the missing SSA-45. He did not remember ever receiving such an email, and said he would have responded if he had.

Rachel Ravion, Oak Bluffs, AR. There was a vacancy announcement under IVOL for two Claims Representative positions in her office and she applied. There was no training on how to apply, she just had to try to figure it out as she went along. She was told about two months later that she had ranked herself ineligible because she had indicated insufficient time-in-grade. In fact, she did have the time-in-grade needed.

Willette Wilson, Texarkana, TX. She has applied twice for vacancy under IVOL. She said the questionnaire was cumbersome. It had anywhere from 15 to 45 questions, which she found difficult to answer. The questionnaire had to be answered in one continuous process in a limited time period. If not, the employee gets locked out. That is what happened to her with an application she tried to submit on the last day for filing. She had problems with the password. She called Personnel and was told to check the instructions on the vacancy announcement, which was not helpful. She told her manager who suggested she mail her application, but there was not enough time for that.

Ralph Patinella is Senior Advisor to the Associate Commissioner, OLMER. He was on the SSA bargaining team for three National Agreements and was the Agency chief spokesperson in 2005. He said he was involved in the Article 26 negotiations from start to finish in 2000 and 2005. The Agency sought changes to Article 26 in both years. It got incremental changes in 2000 de-

⁵ Because this involved an application for a supervisory position, the Master Agreement does not govern it. I have included mention of it solely as another example of an employee complaint about IVOL.

signed to incorporate technology. In 2005, Article 26 was "pretty much revamped" and SSA was further successful in enhancing technology capabilities.

There was a progression of technology use from 2000 to 2005. In 2000, §7A said that all competitive actions would be "announced and posted throughout the area of consideration," i.e., done with paper, but it also said that vacancies could also be "distributed through electronic mail." In 2005, §7A said "All actions requiring the use of competitive procedures under this Agreement will be announced on the SSA Intranet." This change moved the promotion process toward electronic postings and filling of promotions.

The use of technology or automation in promotion actions was discussed with the Union at the bargaining table. It was one of the Agency's basic themes and it was clearly understood that SSA would use technology wherever it could. In connection with §8E, Electronic Application Forms, the parties discussed the possibility of technology that would permit a signature without actually signing one's name. There were also discussions of online applications with respect to §10.

Mr. Patinella stated that the discussions at the table included the idea that there were technological advances evolving at the time, for which specifics were not available, but which could come to fruition during the term of the contract. The language in §§7, 8, and 10, were included in the Master Agreement so that technological improvements and enhancements could be incorporated in the merit promotion plan.

He acknowledged that while there was language in other provisions of the contract that indicated future technological changes, there was no similar, specific language in Article 26 about the possibility of new technology evolving, or that an IVOL-type process could emerge, or that the parties accepted this. Nonetheless, he said there were unwritten understandings that are reflected in the bargaining history. The anticipation of an IVOL-type process

was covered and understood at the table by the parties, although not with the title "IVOL."

Mr. Patinella had been a staffing specialist in headquarters in the mid- to late 1980s. In that capacity, he sometimes served on promotion committees as the sole member, and sometimes with another management official. He (or they) would review applications for minimum qualifications and rate and rank the applications of the employees who were qualified.

Louis Watley and José Salazar were also members of the SSA bargaining team. Mr. Watley was present for all the discussions on Article 26 in the initial phase, but not after that. Mr. Salazar helped negotiate the 2000 National Agreement and was involved with Article 26 at the beginning and end of the 2005 negotiations.

They testified that throughout the Article 26 discussions, the Agency made the point that it would be moving into an electronic environment to the extent possible, that everything would be going online. Mr. Watley cited §§7 and 8 in this regard and said that the language that was adopted was understood in the context of the move to automation that the parties discussed at the table. Mr. Salazar said that the Agency began in 2000 to make the point to the Union that it was interested in automating. In 2005, the Agency used every chance it had to talk at length about automation, electronic filings and improving the promotion process.

All of the witnesses who were present at the negotiations, Agency and Union, agreed that the main thrust of the bargaining on Article 26 concerned management's intention to end Union participation on promotion committees. It accomplished this. As Mr. Skwierczynski acknowledged, SSA has the sole right to appoint members of promotion committees. Mr. Salazar said that promotion committees still existed under IVOL, in the person of a staffing specialist.

POSITIONS OF THE PARTIES

Union

The IVOL system implemented in November 2007 clearly had significant differences from the then current system contained in Article 26 of the parties' Master Agreement. IVOL required that the application be uploaded online via computer, whereas the existing system provided for the hand delivery and/or hard copy mailing through the United States mail. The new system provided that the rating and ranking of candidates competing for a position be done entirely by a computer program as opposed to a promotion committee made up of one or more actual persons. Vacancy announcements for current employees, formerly available only on the internal SSA Intranet that employees in general had access to only at the worksite, was henceforth available on the external Internet, which employees could access from their homes. This led employees to feel less free to fill out the applications and forms on work time even though theoretically permitted.

The Agency's January 21, 2007, notice to the Union asserted that there was no bargaining obligation under FSLMRS. This was misleading and inaccurate. IVOL marked a significant change in a condition of employment and, as such, was a negotiable matter per 5 U.S.C. 7101 *et. seq.* The unilateral implementation of IVOL was also violative of Article 7, §3, of the Master Agreement. Inasmuch as Article 26 covered in detail the matter of processing applications from current employees for job openings, SSA was not legally permitted to make any changes midterm in this area unless the Union was willing to bargain over the proposed changes. The Court of Appeals for the D.C. Circuit forcefully and fully explained this concept in *Department of Navy, Marine Corps Logistics Base, Albany, Georgia v. Federal Labor Relations Authority*.⁶

⁶ 962 F.2d 48 (D.C. Cir. 1992).

The most probative evidence, the language of Article 26 in the National Agreement itself, indicates that the parties thoroughly covered the topic of how current employees would apply for vacancies. The only mention of computer technology in Article 26 is in §8, which indicates that vacancy announcements would be posted on the SSA Intranet and that the SSA-45 could be filled out, but not submitted, on SSA computers. There is no mention in Article 26 about the parties mutually agreeing to accept future technological developments in this area. In contrast, the words "or electronic equivalent" are present in Article 3, §§5.A. and D. and in Article 30, §7. These show that the parties knew how to express and agree to the concept. Furthermore there is no generic provision applicable to the entire Master Agreement that states that the parties generally accept that new technology might require changes in any and/or all areas of management activity.

Both Mr. Skwierczynski and Mr. Estudillo denied that there was mention at the table that the Agency was seeking language, or otherwise made comments, to indicate that technological changes were expected or anticipated to the merit promotion system during the term of the agreement being negotiated.

Agency witnesses Patinella, Watley, and Salazar, could, at most, point to non-specific discussions at the bargaining table about possible future developments regarding the use of technology in the promotion process. None were able to point to any specific language in the contract that suggested that the rating and ranking process by promotion committees, was seen as likely to be automated in the near future and/or during the term of the National Agreement. SSA's primary interest with regard to Article 26 was to remove the Union from a role on promotion committees.

IVOL is a comprehensive computer and Internet based merit promotion system for current SSA employees to apply for vacancies within SSA. It is not the same as the longstanding, paper-based, merit promotion system that the

parties carefully and in detail negotiated in Article 26 of their contract.

Hence, when management unilaterally implemented IVOL in November 2007 after being explicitly told that the Union objected to its doing so, the Agency violated Article 7, §3, of the National Agreement. The relevant question is not whether IVOL represents a technological advancement or a more efficient system or not. That is irrelevant from the point of view of the alleged violations of both the Master Agreement and the FSLMRS involved in the instant grievance.

Finally, while it is not necessary to show harm to employees to prevail in this case, numerous witnesses did testify as to how they were hurt by the illegal implementation of IVOL.

In view of the impropriety of SSA's implementation of IVOL in November 2007, and the significant harm caused to bargaining unit employees, the Union requests *status quo ante* relief for all bargaining unit members who have been harmed. The Union also requests a full make whole award for the Union as an entity, including a posting that an Unfair Labor Practice has been committed against the Union under 5 U.S.C. 7116 (a) of the FSLMRS, as well as the relief sought in the Union's December 19, 2007, letter to Eddie Taylor, Esq. To wit:

- The Agency shall rescind implementation of "Internal Vacancies On Line" (IVOL) and re-establish vacancy announcements that comply with the negotiated provisions set forth in Article 26 of the parties National Agreement.
- If the Agency continues to proceed with IVOL, the Union requests that all selections resulting from vacancies announced through IVOL be rescinded and vacated.
- Employees will be made whole.
- Any employee suffering lost wages, including overtime, will be reimbursed, including appropriate interest in accordance with 5 U.S.C. 5596.

- The Agency shall pay any and all fees, and/or damages and make personnel record adjustments related to or arising from issues in this case.

Relief here should not be limited to the "priority consideration" indicated in Article 26, §14. Priority consideration applies where an employee's application was unintentionally processed in an erroneous manner. The relief requested here is for a situation in which management intentionally and improperly implemented IVOL. Comprehensive make whole relief, including backpay, is appropriate for employees who lost pay as a result of the SSA's actions.

Agency

A. The IVOL System Is Entirely Compatible With Article 26

The Agency informed the Union on September 21, 2007, of its intent to implement IVOL. At no time did the Union request to bargain. Instead, it demanded that the Agency refrain from implementing IVOL.

In order to automate aspects of the promotion application process, the Agency implemented IVOL in accordance with Article 26, specifically §8E. Essentially, IVOL mirrors the former manual paper application process, only it utilizes today's technology including electronic applications and automated features. Under IVOL, the Agency still adheres to all of the requirements in Article 26, including those set forth in §8E.

IVOL merely provides employees with a means for submitting their applications electronically (online), and it automates the scoring and ranking of the applications. IVOL utilizes an automated self-assessment survey for the scoring and ranking of applications (in addition to the submission of the SSA-45) that prompts the employee to indicate (via "yes" or "no" responses) whether they satisfy the weights and factors necessary for the position. Prior to IVOL, promotion committee members manually scored the SSA-45 against the desired qualifications; now, the scoring of the self-assessment survey under

IVOL is automated. After the BQL is generated, the selecting official can still opt to review the SSA-45s and/or conduct interviews of the candidates, just as prior to IVOL.

Both before and after the implementation of IVOL: (1) job vacancies are announced on the SSA Intranet; (2) applicants complete and submit their applications; (3) staffing specialists review the applications to ensure that all minimum qualifications and time-in-grade are met; (4) applications are scored and ranked against pre-determined weights and factors; (5) BQLs are generated based on the scoring and ranking of the applications; (6) BQLs are forwarded to selecting officials; (7) selecting officials have the option to review the SSA-45s and/or conduct interviews; and (8) the ultimate hiring decisions are made by the selecting officials.

The Union allegation that applicants no longer "sign" the application as required in Article 26, §8(A) is incorrect. That section states that to be considered for an announced vacancy, "an employee must file and sign the appropriate application (as described in the announcement)." This language clearly suggests that employees must follow the directions in the announcement for how to sign the applications. Under IVOL, applicants are advised that by submitting the application electronically, they are signing and certifying the materials. Therefore, although not a wet ink signature, they are instructed that they are signing the application by submitting it through IVOL.

The promotion committees referred to in Article 26, §10, still exist. A major difference between the 2000 and the 2005 National Agreements is that the Union was completely removed from the promotion committee process in 2005. The 2005 National Agreement provides that management will select promotion committees. The Agency may choose whom it will, and it is still the management-selected promotion committee that determines what the relevant weights and factors are for each position. Any applicant who pos-

sesses the requisite KSAs⁷ would receive the same score and rating under IVOL's self-assessment survey as they would have if the SSA-45 was manually scored as in the past. In fact, since Article 26, §10B, requires that the "rating will be consistently applied to all applicants," the automated scoring feature actually comports to the contractual language better than the manual scoring because it eliminates the inconsistencies that could result from manual reviews of the SSA-45s.

Employees are still permitted to work on applications during work hours under IVOL. There is no evidence to the contrary in the record, other than unsupported assertions from the Union. There was no testimony from bargaining unit employees that they were not allowed to complete applications during work hours, or discouraged from doing so.

As required by Article 26, §13, the Union can still perform audits of promotion packages. Ms. Parks testified that if the Union requests an audit of a promotion package, the Agency will provide everything that all of the applicant(s) submitted, even those applicants who did not make the BQL. She also testified that the audit package sent to the Union would include a printout of the questionnaire that the employee completes as part of the application process.

The Federal Labor Relations Authority (Authority) has stated that in interpreting a collective bargaining agreement, its focus will be on the interpretation of the express terms of the agreement and that the intent of the parties must be given controlling weight. See *Department of Health and Human Services, Social Security Administration v. American Federation of Government Employees*.⁸

The answer to the Union argument that if the National Agreement permitted

⁷ Knowledges, skills, and abilities.

⁸47 FLRA 1167 (1993), citing *Internal Revenue Service v. National Treasury Employees Union*, 47 FLRA 1091 (1993).

the submission of electronic application forms, it would have included such language in the Agreement, is to be found in Article 26, §8E. As the Authority held in *DHS*, the express terms of the Master Agreement are the focus for interpretation of contract language. Here, the express language of §8E cannot reasonably be interpreted in a manner other than to suggest that the parties agreed that the Agency could use an electronic application process. Not only does this language expressly permit the use of an electronic application process, but it even provides for appropriate arrangements, i.e., employee access to computers to complete the applications, a reasonable amount of time during work hours to work on applications, and training on how to file for a vacancy.

Further, Agency witnesses testified that the subject of electronic and automated applications was discussed during negotiations for the National Agreement. Mr. Patinella, chief spokesperson for the management bargaining team, stated that the increased use of technology, including the use of electronic application procedures was discussed and anticipated by the parties. Messrs. Salazar and Watley also testified that the Agency and the Union spoke at length about the coming automated processes and electronic applications during the negotiations.

As the Authority held in *DHS*, and as the "parole evidence rule" suggests, extrinsic evidence about the intent of a contractual provision is only necessary when the express language is unclear or ambiguous. The language in §8E is clear and unambiguous; it clearly permits the use of electronic applications.

The argument that §8E only refers to completion of the SSA-45 is invalid. The very first sentence in that section refers to employee use of SSA's personal computers to complete "automated applications and related forms under this article." This language contemplates more than just a single form such as the SSA-45. In fact, it clearly provides for an electronic application system precisely like IVOL.

The fact that a similar provision to §8E was around in previous contracts is of no consequence. That merely suggests that SSA could have set up a system such as IVOL before, which it clearly opted not to do until 2007. Finally, even if it is determined that the express language is not clear on its face, the testimony of the three Agency negotiators was consistent about there being extensive conversations at the bargaining table concerning the SSA's intent to increase its use of technology in many areas, including the promotion application process.

B. The Use of IVOL Constitutes The Exercise Of A Management Right

Unless management elects to bargain, it reserves the right to determine the "technology, methods and means of performing work," see 5 U.S.C. §7106 (b)(1). The Authority employs a two-part test to analyze whether a proposal directly interferes with management's right to determine the technology used in performing work under section 7106(b)(1) of the FSLMRS:

In order to sustain such a claim, an agency must show: (1) the technological relationship of the matter addressed by the proposal to accomplishing or furthering the performance of the agency's work; and (2) how the proposal would interfere with the purpose for which the technology was adopted.⁹

Requiring the Agency to refrain from using IVOL, as suggested by the Union, would clearly satisfy the Authority's test for impermissibly interfering with management's right to determine the technology used in performing work. The technological relationship, and benefits, of IVOL to the Agency's application process, which is part of the Agency's work, is clear. Simply put, IVOL allows the Agency to promote qualified employees much faster and have the promoted employees working on their new assignments quicker.

IVOL also saves the Agency money. It eliminates the need for postage, the

⁹ *American Federation of Gov't Employees Local 1112 v. U.S. Department of Health & Human Services, Social Security Administration, Western Program Service Center, Richmond, California*, 47 FLRA 272, 278 (1993).

need for employees to go to the post office to send off their applications and saves the SSA money by automating the process of rating and ranking the applicants.

A prohibition on using IVOL would clearly interfere with all of the purposes for which management adopted this technology. Without IVOL, all the aforementioned benefits would be undone. Accordingly, to prohibit the Agency from using IVOL, as suggested by the Union, would interfere with management's right to determine the technology used in performing work.

C. There Is No Conceivable Remedy For The Employees Who Testified At The Arbitration

Even assuming for the sake of argument that the testifying individuals were actually harmed by IVOL, examples of their complaints about harm from IVOL involved: missing the filing deadline for a vacancy because of a computer malfunction; missing the filing deadline "by a few minutes"; rejection of an application for unclear reasons; employee candidacy was rejected because he did not submit his SSA-45 although the employee "believes" he did submit it; and employee applications were rejected because they were not filed online.

There was no evidence presented to suggest that any of these employees would have actually been selected for the vacancies for which they applied. Therefore, even if IVOL violates the National Agreement and management did not have the right to implement IVOL, and even if these employees were actually negatively impacted, there is no conceivable remedy for them. All that their testimony establishes is that they (and potentially other bargaining unit employees) ought to have availed themselves of the IVOL training, instructions, and the live support available from Personnel before applying. Further, and still for the sake of argument, even if it is determined that IVOL was not fully negotiated during the bargaining of the National Agreement (and set forth in Article 26), then the only legal remedy would be to or-

der impact and implementation bargaining now. As set forth above, the remedy cannot be to rescind IVOL, as that would prohibit management from exercising a management right.

DISCUSSION AND FINDINGS

The changes that IVOL brought to the Article 26 merit promotion plan range from the trivial to the significant. It is trivial, and not a violation of the National Agreement, that IVOL gave employees access to vacancy announcements via both the SSA Intranet and the Internet. The statement in §7A that "competitive procedures would be announced on the SSA Intranet" did not say that this would be the exclusive method by which vacancies could be announced; it did not prohibit making another option available to employees.

If giving the Internet option to employees meant that they might choose to work on an application at home and not use Agency time, there was no harm done to anyone, and some benefit to taxpayers. It would be another matter if employees were forbidden or discouraged from using work time, but there is no evidence that this happened other than Mr. Skwierczynski's statement that he had received some reports to that effect. However, not one of the employees who testified about their problems with IVOL made that claim and a number of them stated they had used Agency time.

IVOL brought two changes of a more serious nature, and which do violate Article 26. One is the IVOL requirement that all applications may only be submitted online; the other is the change made to the rating and ranking process. Before I discuss these further, I will first say that there is nothing in the wording of Article 26 that would permit SSA to make unilateral changes in the Master Agreement. Neither do I find that the bargaining history referred to by Mssrs. Patinella, Watley and Salazar, gave such authorization to the Agency.

The portions of Article 26 referring to electronic technology that have been

cited to me are §§7A and 8E. These say, respectively, that competitive actions will be announced on the SSA Intranet (§7A) and that management will afford computers and work time to employees so that they may complete "automated applications and forms" (§8E). These provisions do not establish that the parties were agreeing to future technological changes. They say what they say, and no more.

I think it fair to regard §8E as providing room for employees to someday file applications electronically, but this would have to be done in addition to, not instead of, the paper procedure contained in the 2005 National Agreement. To assert that §8E gave SSA the right to make electronic application the exclusive method to be used stretches that provision beyond recognition. Both §§7A and 8E opened the door, or further opened it, to electronic technology in the merit promotion process, but there is nothing in the wording of either provision that gave the Agency the unilateral right to negate the paper-based aspects of the Article 26 merit promotion plan.

There was conflicting testimony at the hearing about whether the parties discussed the possibility of new technology at the bargaining table. Even if I accept the testimony of the Agency witnesses in this regard, which I do here for the sake of argument, that testimony falls far short of showing that the Union understood and accepted that the Agency would be making IVOL-type changes. Whatever the SSA negotiators may have told the Union about the Agency's intentions with regard to future technological changes, Article 26 contains no indication whatsoever that the Union indicated its concurrence.

Mr. Patinella's testimony referred to there being unwritten understandings of this nature that are reflected in the bargaining history, but I do not find evidence of such unwritten understandings in the record before me. What I do have is testimony from Agency witnesses that there were understandings, and opposing testimony from Union witnesses that there were not. There is no evidence to buttress the assertion that there were understandings, but

there is indirect evidence to support the claim there were not.

That evidence can be found in the other places in the National Agreement where the parties made it clear that the Agency had the go-ahead on the introduction of electronic technological changes. The words "or electronic equivalent" are present in Article 3, §§5A and D, and in Article 30, §7. If the parties had agreed that the Agency would be free to make technological changes in the merit promotion plan, one would expect similar language in Article 26. It is not there. The lack of such language indicates to me that there was no agreement on any future IVOL-type technological change.

The Agency also argues that its use of IVOL constitutes the exercise of a management right. That is, under 5 U.S.C. §7106 (b)(1), unless management elects to bargain, it reserves the right to determine the "technology, methods and means of performing work." This claim was not mentioned until the Agency's post-hearing brief and the Union did not have an opportunity to respond. Because I find no merit to this argument, a Union response is not necessary.

The Agency reliance on 5 U.S.C. §7106 (b)(1) is misplaced. The Union did not ask to bargain about IVOL. Its response to Mr. Beever's notification of September 21, 2007, was that IVOL was in conflict with the contract and the Union would not agree to reopen the Master Agreement. This case is not about a Union proposal that would limit SSA with regard to "technology, methods and means of performing work." Instead, this case concerns whether the Agency's unilateral, mid-term, introduction of IVOL violated a valid collective bargaining agreement.

The §7106 (b)(1) management right does not, except possibly in highly unusual and urgent circumstances not present here, permit the Agency to make changes that would violate the terms of an existing labor agreement. Article 26 contains a complete merit promotion plan resulting from bilateral negotiations. The Agency had no right to implement a system that would violate that

agreement in whole or in part.

As mentioned above, IVOL is in conflict with Article 26 in two important respects. First, there is the requirement that applications may only be filed online. This conflicts with §§7C.1 (o) and (p), which clearly refer to paper applications.¹⁰ Despite this, IVOL forbade the use of paper applications. In doing so, it eliminated the very longstanding method well known to employees and specified in Article 26 of the Master Agreement.

I would add here that the manner in which the Agency implemented IVOL exacerbated the problems created for employees. There is no indication that employees were given training at the time IVOL was implemented. Union witnesses testified, without dispute, that they were given no training at all, they just had "to figure it out as they went along." Although Ms. Parks stated that there was training given at headquarters, this was only when specific Agency components requested it. Adequate and timely training could very well have avoided the difficulties testified to by employee witnesses.

The change in the rating and ranking procedure was the most serious violation brought about by IVOL. To begin with, the unilateral introduction of the questionnaire, with its central role in the rating and ranking process, was neither contemplated by Article 26, nor permitted by it.

Under Article 26, the SSA-45 and its review by a promotion committee was the heart of the procedure for rating and ranking applicants. Employees filled out and submitted these forms, which were then scrutinized by a staffing specialist to determine which employees met the minimum qualifications and time-in-grade requirements. The applications of those who did qualify were sent along to a promotion committee.

The promotion committee was composed of one or more persons selected by

¹⁰ As the Union pointed out, submitting an application electronically would mean the application would lack the signature called for in §8A. I would regard the lack of a signature as *de*

the Agency, who would assign point scores based on a review of the education and experience information stated in the SSA-45 as compared to a set of rating criteria. The staffing specialist would then check the scores for accuracy and consistency, and compile the BQL, which was then sent to the selecting official, along with the SSA-45s. All this, of course, came after the staffing specialist separated out those applicants who were not minimally qualified or did not have time-in-grade.

Ms. Parks testified that under IVOL, the staffing specialist reviews the SSA-45 for the sole purpose of determining if the employee meets the minimum qualifications for the position. While a selecting official may decide to have a promotion committee in the pre-IVOL sense, it was her experience that this happens perhaps 10% of the time. Granted, her experience was limited to headquarters, but in the absence of authoritative evidence about what the practice is in the field, I make the extrapolation that promotion committees of the pre-IVOL type are used no more than 10% of the time throughout the Agency. Thus, for the great majority of IVOL actions, there is no review of the SSA-45 as part of the process for determining the BQL that is to be sent to the selecting official.

The Agency disputes the Union claim that there are no promotion committees under IVOL. It argues that there are still promotion committees, with the number of members strictly for management to decide. The Agency may elect to have only one person on the committee, with that one person being the staffing specialist.

The Agency assertion that there is still a promotion committee is, for the most part, incorrect as that term is used in Article 26, §10. In terms of function, there is no longer that kind of a promotion committee for 90% or more of the actions taken under IVOL.

minimus had SSA given employees the choice of submitting applications either electronically or by paper.

In 90% or more of IVOL actions, no person (or persons) does what Article 26, §10, says that promotion committees will do. No person rates and ranks applicants and develops a BQL. No person looks at the SSA-45 as part of the process for determining the BQL. The employee furnishes electronic responses to the electronic questionnaire and those responses determine their scores and whether they make the BQL or not.

The Agency may choose to call the staffing specialist a promotion committee, but the staffing specialist does not do what §10 says the promotion committees will do. For all real intents and purposes, IVOL has largely eliminated the §10 promotion committees, whether composed of one or more persons.

Before I turn to the matter of remedy, there is one other matter to mention. This is the Union's allegation that IVOL has impaired its ability to perform the auditing of promotion actions mentioned in §13. My review of the record indicates to me that there have been some problems, but that they were resolvable under IVOL.

Ms. Duncan testified that she did not receive the information she needed in order to conduct an effective audit. Ms. Schultz also said the information she received was inadequate, but she further said she had requested additional information from Personnel. Because she made her request shortly before the hearing, the record does not show if she finally did receive the information she needed.

Ms. Parks testified she had not received a request for audit information post-IVOL, but that if she did receive such request, she would provide the entire promotion package. This presumably would meet the SSA responsibility to provide information under §13.

The Matter of Remedy

The Agency gravely misunderstood/underestimated the degree to which IVOL conflicted with Article 26. Its unilateral implementation of IVOL also violated

5 U.S.C. 7116 (a) of the FSLMRS.

I sent a "heads-up" emails to the parties on July 25. I informed them of the above finding, that IVOL would have to be discontinued and that SSA would have to post an appropriate Notice. I also indicated I wanted input from them about what other remedies, if any, would be appropriate. I sent another email on July 27, and we had a telephone conference call on July 31. In the second email, I asked for the number of competitive actions affecting bargaining unit employees taken under IVOL from its inception to the present. I was told by SSA in the conference call that the number was 4,768.

During the conference call I asked, and the parties agreed, that they would meet to discuss the possibility of resolving by themselves issues about any further remedies. If they could not, they were to inform me, in writing, of their views regarding: 1) the date that the pre-IVOL process should be reinstated; 2) how to handle actions taken under IVOL in which selections had not yet been made; and 3) what to do with respect to the actions in which selections had already been made.

The parties were not able to reach agreement and I received separate responses from them. Upon consideration of the entire record, including these responses, I reach the following determinations.

AWARD

This grievance is granted. The Agency shall:

1. Discontinue future use of IVOL effective immediately. All new competitive actions subject to Article 26 of the Master Agreement shall revert to the paper process previously in place, except that the Agency may continue to announce vacancies on the Internet as well as the SSA Intranet, and it may allow employees to submit paper SSA-45s or file them electronically. The electronic questionnaires may no longer be used.
2. In the case of actions taken under IVOL but for which selections have not yet been made, the positions shall be re-announced in the

same manner as stated in ¶1. Paper and electronically submitted SSA-45s will be accepted. BQL lists and selections will be made in the same manner as before the introduction of IVOL; the electronic questionnaires will play no part in either the BQL or selection processes.

3. In the case of those actions taken under IVOL and for which selections were made, the following shall apply. The Union shall have 45 days from the date of this Award to either file grievances or request Article 26, §13, audits of actions for employees who applied and were allegedly adversely affected for IVOL-related reasons, such as that the employee filed a paper application or gave an erroneous answer on the questionnaire.

4. The Agency will post the attached NOTICE TO ALL EMPLOYEES on all SSA bulletin boards where bargaining unit employees represented by the American Federation of Government Employees are located.

The Arbitrator will retain jurisdiction for 60 days for the sole purpose of resolving any disputes arising out of the implementation of this Award. However, any grievances concerning individual actions that flow from this Award are to be processed under the normal provisions of Articles 24 and 25, except for the 45-day time period allowed in ¶3, above.



Charles Feigenbaum

~~August 10, 2009~~
Date

NOTICE TO ALL EMPLOYEES

POSTED PURSUANT TO AN ARBITRATION AWARD IN
AFGE COUNCIL 220 AND SOCIAL SECURITY
ADMINISTRATION
CASE NO. BW-2008-R-0011 IVOL

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

In November 2007, SSA implemented a new electronic system called IVOL (Internal Vacancies on-Line) for use in applying for competitive actions and for the rating and ranking of applicants. In doing so, the Agency violated Article 26 of the existing SSA/AFGE National Agreement as well as the Federal Service Labor-Management Relations Statute (FSLMRS).

In the future WE WILL adhere to negotiated provisions of the National Agreement and WILL NOT take actions that would violate or be in conflict with the National Agreement or the FSLMRS.

Social Security Administration

Dated:

By:

Milt Beever
Associate Commissioner,
Office of Labor-Management
and Employee Relations

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL