ARBITRATION OPINION AND AWARD

In the Matter of the Arbitration
between
CENTRAL TEXAS VETERANS HEALTH CARE

Grievant: C. Bell

and FMCS Case No.: 12-56471-3

AMERICAN FEDERATION OF GOVERNMENT
WORKERS, LOCAL 2109

BEFORE: PILAR VAILE, ARBITRATOR

APPEARANCES:

For the Department:	Jay Butala Labor Management Specialist
For the Union:	Virgie Hardeman AFGE Local 2109
Place of the Hearing:	Central Texas Veterans Health Care Facility (CTVHCF) Research Building, Room 1R03 Temple, TX
Date of Hearing:	March 26, 2014
Date of Post-hearing Briefs:	Rcvd. May 9, 2014
Date of Award:	July 23, 2014
Relevant Contract/Other Provisions:	MA Articles 2, 17, 41 & 43; also misc. law, government wide regulation and Department policies concerning Workers Compensation
Contract Year:	2011-2016
Type of Grievance:	Contract/Controverted Continuation of Pay (COP)

AWARD SUMMARY

The Union alleges the Department violated the parties' Master Agreement (MA or CBA) and/or various law, regulations and/or policies, by inappropriately controverting or challenging employee Christine Bell's claim for worker's compensation through the Texas Department of Labor. The Union has established by a preponderance of the evidence that the Department's letter of controversion violated Article 2 the MA and FECA Regulation §10.211 because the Department did not notify the Employee of its decision of and basis for controversion. The Union has failed to establish by a preponderance of the evidence that the Department violated the either the MA or workers compensation regulation by controverting the claim on the basis of alleged "willful, misconduct" by Bell. According, as discussed below, the grievance is sustained in part and denied in part, with remedy as described below.

Pilar Vaile, Arbitrator

ISSUES

In its Opening Statements, the Department defined the issue as follows:

Did the Department properly controvert Employee Bell's workers compensation claim and, if not, what is the appropriate remedy?

At arbitration, the Union accepted this statement of the issues but also raised "notice issues" and "defamation of character" in the manner in which the Department controverted the claim. Thereafter, in its Post Hearing Brief, the Union raised a number of additional issues suggested by the argument and evidence presented at arbitration, which will be enumerated below under "Merits."

The Arbitrator declines to adopt, wholesale, the Union's late-proffered framing of the issue, because the Department has not had an opportunity to respond. However, the undersigned notes that many of the facts and contentions raised throughout the grievance process and arbitration reflected elements of the Union's later framing of the issue. Additionally, the Arbitrator notes the Union's claims concerning notice and defamation to relate directly to the primary allegation, that the controversion was improper.

As such, the undersigned will address defamation, notice, fraud/false statements, and other relevant allegations as part of the over-all issue as identified by the Department and accepted by the Union, which the undersigned refines as follows:

1. Did the Department's controversion of Employee Bell's workers compensation claim violate the Master Agreement and any relevant statutes; government-wide regulations; or internal policy that is consistent with the Master Agreement?
2. If not, what is the appropriate remedy?

PERTINENT CONTRACT AND OTHER LANGAUGE

NATIONAL AGREEMENT

Article 2 Governing Laws and Regulations

Section. 1 – Relationship to Laws and Regulations

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

Section 2 – Department Regulations

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

Article 17 Employee Rights

Section 1- General.

A. In an atmosphere of mutual respect, all employees shall be treated fairly and equitably … It is therefore agreed that the Department will endeavor to establish working conditions that are conductive to enhancing and improving employee morale and efficiency.

…

F. Recognizing that productivity is enhanced when employee morale is high, managers, supervisors, and employees shall endeavor to treat one another with utmost respect and dignity.

G. An employee who exercises any statutory or contractual right shall not be subjected to reprisal or retaliation, and shall be treated fairly and equitably.

Section 8 – Dignity and Self Respect in Working Conditions

Employees, individually and collectively, have the right to expect, and to pursue, conditions of employment witch promote and sustain human dignity and self-respect.

Article 41 Worker's Compensation

Section 1 – General

The Office of Workers' Compensation Program (OWCP) is administered by the U.S. Department of Labor (DOL). Employees should consult the DOL for guidance on applicable laws, DOL regulations and precedents if issues arise that are not covered herein.

Section 2 – Counseling

A. The Department agrees that when an employee sustains an injury … in the performance of duties, and reports it to the Department, the supervisor and/or the appropriate Department official will immediately inform the affected employee of his/her rights under the Federal Employees Compensation Act (FECA)…

Section 3 – Procedure for Filing Claims for Workers' Compensation Benefits.

…

B. The Department shall [when a job-related injury is reported] assure the employee is provided the proper forms and assist the employee in filling them out…
   1. CA-1 is the appropriate form for reporting a traumatic injury…

C. The appropriate sections of these forms should be filled out by the employee and given to the supervisor as soon as possible, but no later than 30 calendar days from the date the employee notifies the Department of the injury or illness…Supervisory action on CA-1 and CA-2 forms shall be completed within five working days after the employee completes his/her portion of the form. For all forms, the Department must complete the appropriate parts of the form(s) and transmit them to the DOL, OWCP, within the time limits set out by the DOL.

Section 4 – Posting of Employee Rights

The Department agrees to post a notice on all Department controlled bulletin boards advising employees of the appropriate HR office room/building location for filing Workers' Compensation claims. The notice will also include HR office telephone numbers and/or the Departments OWCP Specialists office telephone number for obtaining information/assistance relevant to Worker's Compensation claims. The Department further agrees to distribute annual notice to all employees providing them the same information.

Section 5 Election of Benefits Options

…

B. OWCP (DOL), not the Department, decides if an employee has a compensable injury and what benefits he/she is entitled to under FECA …

…

D. An employee with a job-related traumatic injury/illness may elect to receive 45 days of COP if the claim is filed within 30 days of the injury …

E. If the employee's claim for compensation is disallowed by the DOL, OWCP, any of the 45 days of COP that were previously granted will be converted to sick leave, annual leave, and/or LWOP …

Article 43 Grievance Procedures

Section 4 – Jurisdiction

If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision.

Section 10 – Multiple Grievances

Multiple grievances over the same issue may be initiated as either a group grievance or as single grievances at any time during the time limits of Step 1. Grievances may be combined and decided as a single grievance at the later steps of the grievance procedure by mutual consent.

FEDERAL EMPLOYEE COMPENSATION ACT, REGULATIONS

§10.200 What is continuation of pay?

(a) For most employees who sustain a traumatic injury, the FECA provides that the employer must continue the employee's regular pay during any periods of resulting disability, up to a maximum of 45 calendar days. This is called continuation of pay, or COP. The employer, not OWCP, pays COP. Unlike wage loss benefits, COP is subject to taxes and all other payroll deductions that are made from regular income.

(b) The employer must continue the pay of an employee, except for Postal Service employees pursuant to 5 U.S.C. 8117 and as provided below in paragraph (c) of this section, who is eligible for COP, and may not require the employee to use his or her own sick or annual leave, unless the provisions of §10.200(c), §10.220, or §10.222 apply. However, while continuing the employee's

pay, the employer may controvert the employee's COP entitlement pending a final determination by OWCP. OWCP has the exclusive authority to determine questions of entitlement and all other issues relating to COP.

(Emphasis added.)

§10.211 What are the employer's responsibilities in COP cases?

Once the employer learns of a traumatic injury sustained by an employee, it shall:

(a) Provide a Form CA-1 and Form CA-16 to authorize medical care in accordance with §10.300. Failure to do so may mean that OWCP will not uphold any termination of COP by the employer.

(b) Advise the employee of the right to receive COP, and the need to elect among COP, annual or sick leave or leave without pay, for any period of disability.

(c) Inform the employee of any decision to controvert COP and/or terminate pay, and the basis for doing so.

(d) Complete Form CA-1 and transmit it, along with all other available pertinent information, (including the basis for any controversion), to OWCP within 10 working days after receiving the completed form from the employee.

(Emphasis added.)

§10.220 When is an employer not required to pay COP?

An employer shall continue the regular pay of an eligible employee without a break in time for up to 45 calendar days, except when, and only when:

…

(f) The injury was caused by the employee's willful misconduct, intent to injure or kill himself or herself or another person, or was proximately caused by intoxication by alcohol or illegal drugs;

…

(Emphasis added.)

DOL PUBLICATION CA810

(A Handbook for Employing Agency Personnel)

Section 3-6 Statutory Exclusions

Sometimes the circumstances of a case raise the issues of willful misconduct, intention to bring about the injury or death of oneself or another, or intoxication. If any of these factors is

established as the cause of the injury or death, benefits must be denied. Agency or OWCP personnel must assert and prove these factors.

a. *Willful Misconduct*. The question of deliberate willful misconduct may arise when the employee violated a safety rule, disobeyed other orders of the employer, or violated a law. Because safety rules have been established for the protection of the worker rather than the employer, simple negligent disregard of such rules is not sufficient to deprive an employee or beneficiary of entitlement to compensation. Disobedience of such orders may destroy the right to compensation only if the disobedience is deliberate and intentional as distinguished from careless and heedless.

(Emphasis added.)

DFEC 2-0804 (Division of Federal Employee's Compensation Procedural Manual)

Section §14 Statutory Exceptions

a. Willful Misconduct, Intoxication, or Intention to Bring About Injury or Death to Self or Another. Where the questions of "fact of injury" and "performance of duty" are decided affirmatively, consideration must also be given to the question of whether the injury or death was caused by the willful misconduct of the employee, by the employee's intention to bring about the injury or death of self or of another, or if intoxication of the injured employee was the proximate cause of the injury or death (see 5 U.S.C. 8102). The CE has authority to decide these questions when these factors were not the cause of the injury. Otherwise, the CE has no authority to decide these questions adversely to the claim and must not in any way notify or imply to the claimant or the representative that the claim has been or will be denied because of one of these factors.

(1) The claimant enjoys an affirmative defense against these factors. The OWCP must overcome such defense. Adverse decisions must always be made at an adjudicative level above that of the CE.

…

b. Willful Misconduct.

(1) The question of willful misconduct arises where at the time of the injury the employee was violating a safety rule, disobeying other orders of the employer, or violating a law. Safety rules have been promulgated for the protection of the worker--not the employer--and, for this reason, simple negligent disregard of such rules is not enough to deprive a worker or the worker's dependents of any compensation rights. All employees are subject to the orders and directives of their employers in respect to what they may do, how they may do certain things, the place or places where they may work or go, or when they may or shall do certain things. Disobedience of such orders may destroy the right to compensation only if the disobedience is deliberate and intentional as distinguished from careless and heedless. A distinction is also made in respect to orders which relate to the manner in which assigned tasks are to be done, as distinguished from other activities which are merely incidental to the employment. It is necessary, therefore, that the evidence be unusually well developed before any steps are taken to disallow a claim because of willful misconduct.

…

(4) Violation of a Law.

(a) In these cases the official superior should be required to submit a statement citing the particular law which was allegedly violated, stating what legal action was taken by the authorities to prosecute the employee for this violation, and showing the results of such action.

(b) In disability cases, a statement from the injured employee should be requested, describing the particular act in which the employee was engaged at the time of the injury, with an opinion whether this was a part of the employee's assigned duties and any explanation justifying the violation of the law.

(Emphasis added.)

BACKGROUND AND UNDISPUTED FACTS

This matter was heard at the CTVHCF, Research Building, Room 1R03 on May 9, 2014. At arbitration, all parties were given the opportunity to present and respond to relevant oral and documentary evidence, and all witnesses testified under oath as administered by the Arbitrator. Thereafter, the undersigned received post-hearing briefs on May 7 and May 9, 2014, and the record closed on May 9, 2014. Thereafter, the Arbitrator requested a two-week extension of time for the Award, which the Union granted; the Arbitrator failed to forward to the Department.

Most of the facts are not in dispute, only their application under the governing contract and legal provisions. Texas Veterans Administration (Department) Employee Christine Bell (Employee or Bell) was in an automobile accident on January 19, 2012. As a result she suffered displacement of lumbar intervertebral disc without myelopathy; displacement of cervical intervertebral disc without myelopathy; bilateral hip contusions; and contusions of face, scalp and neck. (Un. Ex. 7.)

At the time, the Employee was driving an Department vehicle, on Department business as a licensed social worker. Bell attempted to change lanes to avoid the vehicle in front of her, but her vision was obscured by the rising sun and she struck the diver to her side. (Dept. Ex. 14, Traffic Incident, attached as Exhibit therein.) At the scene of the accident, Employee was cited for "Chang[ing] Lanes when Unsafe."

On the basis of this traffic citation, the Department—through its agent Daniel Salinas, an HR Benefits Specialist—controverted the employee's claim for workers compensation, on grounds of "willful misconduct and violation of the State of Texas Driving Code," by letter to the

DOL dated January 30, 2012. (Dept. Ex. 14.) The Employee did not receive notice of the Department's controversion of the claim until on or by March 11, 2012, when she received notification from the DOL dated March 6, 2012 that her claim was controverted but granted. The Union did not receive notice of the Department's controversion of the claim until the employee brought the DOL notice to the Union, on March 15, 2012.

The citation was ultimately dismissed on August 8, 2012 for lack of evidence. (Un. Ex. 8.) In the meantime, the Employee received 45 days of COP. (Dept. Ex.15, reflecting regular pay from Jan. 20, 2012 - Mar. 2, 2012.) In late 2012 or early 2013, the Employee filed an EEOC complaint regarding a lateral transferred. At the EEOC hearing or deposition, the Employee's supervisor represented that the transfer was somehow an accommodation due to the Employee's inability to drive. (Un. Exs. 9-10.) Information concerning this EEOC issue was not provided to the Department before arbitration, and a separate grievance was not filed on it.

The Union grieved the matter to Step 2 on April 12, 2012, which the Department denied on May 4, 2012. (Dept. Exs. 2-3.) The Union then grieved the matter to Step 3 on May 11, 2012, which the Department denied on May 11, 2012, and to the Union filed a Reply on June 5, 2012. (Dept. Exs. 3-5.) Thereafter, on June 6, 2012, the Union filed its Notice to Invoke Arbitration. (Dept. Ex. 6.) Thereafter, the undersigned received notice of assignment as Arbitrator through the FMCS on June 26, 2012. The undersigned spent a number of months attempting to schedule this matter and at several points tried to return it to the parties for failure to prosecute. (See Arbitrator's email and letter correspondence records.) Arbitration was finally scheduled on December 24, 2013, for March 26, 2014. (Id.)

COP is authorized for up to 45 days. There are over 30 OWCP claims currently pending, four of which are currently being or about to be grieved. (Testimony of Virgie Hardeman, Steward of Record.) The Union perceives an ongoing problem with the Department failing to provide adequate assistance to employees filing OWCP claims, and inappropriate controversion of such claims. However, the instant grievance is not filed as a representative or multiple grievance. See MA Article 43.10.

No claim of non-grievability or non-arbitrability was raised by the Department at or before Step 3 of the grievance, although such claims were raised at arbitration.

The Department employee who controverted the Employee's workers compensation claim—HR Specialist Dan Salinas—is no longer with the Department.

PARTIES' POSITIONS

The Union argues that the Department violated 18 USC 1922, and derivatively the Master Agreement (MA or CBA), by failing to give Employee Bell notice of its intent to controvert the claim. It also argues the Department violated 18 USC §1922 by failing to notify the DOL that the citation on which it relied had been dismissed; defamed Bell's character by citing willful misconduct; and caused Bell mental/emotional harm by creating a fear of adverse employment consequences, and thereafter discriminating against Bell for a perceived disability. It characterizes the Department's actions in all regards as "reckless" and an "abuse of authority" since there was no evidence that the Employee knowingly changed lanes unsafely, or intended to cause the injury at issue. Finally, the Union notes that there are over 30 OWCP claims currently pending, four of which are currently being or about to be grieved or arbitrated.

The Union prays for the following relief (1) that the Department cease and desist similar alleged misconduct; (2) joint Labor/Management training by an agreed upon third party, on workers' compensation rights and obligations, including free training from the DOL in how to properly fill out a CA-1; (3) appropriate corrective action against the Department agents responsible for making false allegations when challenging employees claims, and provide written notification to AFGE Local 2109 of the action taken; (4) improvement of the OWCP link on the Department's intranet website, in collaboration with the Union; (5) that the Agency Director send all bargaining unit employees a signed email with a link to the improved OWCP webpage, an admission by the Department of the specific violation of the CBA and the agreement to cease and desist of all unlawful or inappropriate actions and behaviors; (6) a statement or legal opinion by the arbitrator that the Department, through Daniel Salinas, was guilty of abuse of authority and in violation of 18 USC 1922; and (7) any other relief deemed appropriate by the Arbitrator "to make the employees affected whole." (Union Post-Hearing Brief at 14.)

The Department argues as a threshold matter that the grievance was untimely because not filed within 30 days of when the Employee or the Union should have know of the facts on which it is based. It also argues that its conduct did not violate federal law or the Master Agreement and, as mitigation in the event a violation is found, that the Employee received 45 days of COP, so there was no harm or damage. As to remedy, the Service also argues that there is no evidence the CA-1 was not filled out correctly; Mr. Salinas is no longer an employee with the Department, and disclosure of any corrective action would constitute a violation of that employee's privacy,

in any event; the Agency already has an OWCP link and no evidence was presented as to how this remedy is would have prevented or even mitigated the instant grievance; a signed email by the Department Director admitting violations of law would be unreasonable under the facts, and would not resolve grievances at the lowest possible level but rather elevate it to the highest level; and that "any other relief" specified in the grievance is non-specific and unjustified.

The Service did not have an opportunity to respond to the Union's remedy request for a statement or legal opinion by the arbitrator that the Department, through Daniel Salinas, was guilty of abuse of authority and in violation of 18 USC 1922; or the apparent expansion of the "any other relief" claim to now extend to all "employees affected" and not limited to "the employee" Bell. These were added in the Union's Post Hearing Brief. (Compare Brief to Un. Ex. 1, Grievance Form.) The undersigned presumes, based on the Department's statements and argument at arbitration, that it would also object to these requested remedies.

DISCUSSION, ADDITIONAL FINDINGS AND CONCLUSIONS

I. Procedural Issues

A. Burden of Proof

As the undersigned noted at arbitration, the Union must prove by a preponderance of the evidence that the National Agreement was violated and that the remedy it seeks is appropriate. The Union argued that the Service bears the burden of proof to establish it had justification to controvert the claim, but that claim was rejected by the undersigned at the outset of arbitration. While the Department or the DOL must substantiate willful misconduct in denying COP, that standard does not govern the instant grievance/arbitration proceeding.

B. Timeliness

At arbitration, the Department raised timeliness for the first time, asserting that the DOL letter dated March 6, 2012 would have been received no later than March 11, 2012, and that therefore the grievance filed on April 12, 2012 was untimely. See MA Article 43.7.

However, the Department's challenge regarding timeliness is itself untimely under the MA, since not raised at or before Step 3. See MA Article 43.4. Additionally, the undersigned

accepts as credible Ms. Hardeman's testimony that the Union itself did not receive the DOL letter until March 15, 2012. Therefore the Arbitrator finds and concludes the Union did not learn of the basis for the grievance until March 15, 2012, and that it was thereafter timely filed, assuming this non-grievability challenge was timely asserted.

C. Late Raised or Impermissible Evidence

At arbitration, the Union raised for the first time evidence of an EEOC case concerning the Employee's late 2012/early 2011 request for lateral transfer. The evidence was introduced in response to Department questions concerning proof of potential harm resulting from the Department's alleged misconduct. (Un. Exs. 9-10.) The Service objected to the evidence and the Union responded that the evidence did not exist when the grievance was first filed, but may be added to the existing grievance because it relates to the same events/misconduct.

The Arbitrator finds the evidence is not sufficiently clear to establish the Employee was improperly discriminated against based on her supervisor's false belief that she needed an accommodation because she could not drive. There is also not sufficient explanation of how an "accommodation" or her ability to drive is relevant, other than as a generalized and somewhat ambiguous illustration of potential harm. As such, Exhibits 9-10 are received over objection for the very limited purpose of illustrating potential harm to the employee based on the Department's conversion of her claim, if a violation is found.

II. Merits

A. Introduction

As discussed above in the "Issues" Section, the Union raised and framed a number of new issues based on the evidence presented at arbitration. They are as follows:

1. Did the Agency, through its agent Daniel Salinas HR Benefits Specialist, abuse its authority to controvert the OWCP claim of the grievant without meeting the parameters set forth by law to determine willful misconduct?

2. Did the Agency violate any applicable provisions of the Master Agreement (contract) and any other applicable sections of laws and regulations to include Federal Employee Compensation Act (FECA) Part 2-810 CFR Part 10, Memorandum (00E-003012) Prohibiting Retaliation or Reprisal against

employees, Memorandum (900-51-10) Employee Responsibilities and Conduct, when it failed to notify the grievant that her claim had been challenged/controverted?

3. Does the Agency have to comply with laws, i.e. FECA 10.220 and CA810 to substantiate a legitimate reason to challenge/controvert an OWCP claim, or is HR Labor Relations Specialist Jay Butala correct that the Agency reserves the right to challenge any claim because the DOL will determine if the challenge is legitimate?

4. Was the character of the grievant defamed by the arbitration accusation implied when the Agency challenged her OWCP claim on grounds of "Willful Misconduct"?

5. Does the unjustified challenge/controversion of the OWCP claim of the grievant fit the description of, "*willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report … shall be fined under this title or imprisoned not more than one year, or both,*" as it is outlined in 18 USC 1922, and if so will the arbitrator write a legal opinion to the fact?

6. Did the Agency intend to cause the grievant financial and emotional hardship by challenging her claim, forcing her to payback all COP paid, use of annual leave and or sick leave, incurrence of all medical costs and cost of damage to federal property and their party property, and if not what was their intention of controverting the claim?

See Union Post Hearing Brief at 4 (underline emphasis added by undersigned, italics in original Although argumentative, this list of issues is helpful to the Arbitrator to better understand the exact nature of the Union's claims, so its elements will be referred to in the discussion below. However, the Arbitrator believes discussion of the merits is better organized as follows: whether the conduct violated the contract; whether it violated other law; if so was harm established; and if so, are the remedies requested appropriate.

B. Alleged Contract Violations

As an initial matter the Arbitrator disposes of a number of claims that fail as a matter of law. First, the Union asserts a violation of Article 17, the Union-cited portions of which reference treating employees fairly, equitably, and with the utmost human dignity, self-respect. These provisions are too vague and ambiguous as they relate to the instant record. Even assuming the Department acted inappropriately in controverting Bell's OWCP claim, there is no evidence it improperly singled the Employee out, acted in retaliation, or acted with an intent and purpose to deny Bell fair and equitable treatment, or her human dignity and self-respect. Indeed, the record reflects a Union perspective that the Department is actually engaged in similar conduct in number of similar cases as a matter of a questionable but cost-effective business practice or model. Accordingly, the cited Article 17 provisions have no bearing in this case.

Next, the Union asserts a violation of Article 41, concerning the Workers Compensation Program. Little or no evidence was presented in support of the Union's assertions that the CA-1 here was filled out improperly; that CA-1s in general are being filled out improperly; and/or that the Department has failed to provide adequate assistant to many or all OWCP applicants. There was also evidence that the Department has posted a notice on its bulletin boards, as well as maintaining a link on its intranet website, although the Union may quibble with the latter's adequacy. (Testimony of Hardeman, and HR Specialist Susan Magno.) Accordingly, no violation of Article 41 is established.

Nonetheless, the Arbitrator takes arbitral notice of the contents of the CBA, specifically Article 2, which requires the parties to abide by Federal statutes, government wide regulations predating the CBA, and Department policies that are not inconsistent with the CBA. Because the Union has clearly alleged a violation of federal law and regulation and Department policy, this Article is clearly implied although never formally identified by the Union. The undersigned concludes that a violation of Article 2 will be established by a preponderance of the evidence if the Union establishes, by a preponderance, violation of federal statutes, government wide regulations predating the CBA, and/or Department policies that are not inconsistent with the CBA.

C. Alleged Violations of Laws/Regulation/Policy

Again, as an initial matter the Arbitrator disposes of a number of claims that fail as a matter of law. First, the Union asserts a violation of 5 USC § 7116(a) – NLRA- Unfair Labor Practices. That provision prohibits interference with, restrain or coercion of employees in the exercise of their rights under the NLRA. See Id. ("of any right under this chapter") (emphasis added). The Union introduced no evidence of a violation of the NLRA, so this alleged violation is dismissed.[1]

Next, the Union cites a number of FECA regulations, some or parts of which have no bearing or have already been dismissed. Specifically, as noted above, little or no evidence was presented in support of the Union's assertions that the CA-1 here was filled out improperly; that CA-1s in general are being filled out improperly; and/or that the Department has failed to provide adequate assistant to many or all OWCP applicants. It is also undisputed that Employee Bell has received all 45 days of COP. Finally, the regulations make clear that the Department "may controvert the employee's COP entitlement pending a final determination by OWCP," which "has exclusive authority to determine questions of entitlement and all other issues relating to COP." (Testimony of Hardeman, and HR Specialist Susan Magno; see also Dept. Ex. 15, and Un. Ex. FECA Reg. §10.200(a).)

Accordingly, no violations of FECA Regulations §10.200, §10.205, §10.206, §10.210, §10.221, or §10.222 are established. Additionally, no violations are established under FECA Regulations §10.211(a)-(b), (d); §10.220(a)-(e), (g). Having dismissed the claims for which there was little or no evidence, the Arbitrator is left with the following FECA Regulation violations to address:

- §10.211(c), the employer's responsibility to inform the employee of any decision to controvert COP and/or terminate pay, and the basis for doing so; and
- §10.220(f), that an employer is not required to pay COP where the injury was caused by the employee's willful misconduct.

Also remaining are the CA810 § 3-6 and DFEC 2-0804 § 14 claims related to the Department's alleged misuse of the "willful misconduct" exception to payment of COP.

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[1] At arbitration, the Union also cited 5 USC 7114. (Un. Ex. 16.) The Arbitrator deems that claim withdrawn since not discussed in its Post-Hearing Brief.

As to FECA Regulation §10.211(c), it is undisputed that the Department failed to inform Employee Bell about the Department's decision to controvert her COP, or the basis for doing so. Accordingly, a violation of FECA Regulation §10.211(c) is established by a preponderance of the evidence.

Turning to FECA Regulation §10.220(f), and the related CA810 § 3-6 Manual and DFEC 2-0804 §14 Procedure Manual, substantial question is raised in this Arbitrator's mind as to whether the Department acted properly in controverting Employee Bell's COP claim. It is clear to this Arbitrator that a citation for unsafe lane change would not ultimately be found by the DOL to rise to the level of substantiating "willful misconduct" sufficient to deny an employee COP. As both CA810 § 3-6 and DFEC 2-0804 §14 make clear, "willful conduct" includes a violation of a safety rule or violation of law. Arguably, improper lane change under State traffic law amounts to violation of both a safety rule and a law. However, both CA810 § 3-6 and DFEC 2-0804 §14 also make clear that "willful conduct" does not include "simple negligent disregard of such rules," and only includes disobedience of such rules "if the disobedience is deliberate and intentional as distinguished from careless and heedless." See CA810, §3-6(A), and DFEC 2-804, § 14(b)(1). The DFEC also provides that the employee "enjoys an affirmative defense against" willful misconduct. See DFEC 2-804, § 14(a)(1).

However, there are limits to this analysis. First and foremost, the CA810 and the DFEC 2-804 are handbooks and procedure manuals, not government-wide regulation. In other words they provide guidance but are not in and of themselves binding statements of law. It is also true that the Department has a right to controvert claims; there is no express obligation to update its controversion with proof of the dismissal of the citation; and the ultimate decision rests with DOL. Additionally, while DFEC 2-804, § 14(b)(2)(a) states "[i]n these cases the official superior should be required to submit a statement citing the particular law which was allegedly violated, stating what legal action was taken by the authorities to prosecute the employee for this violation, and showing the results of such action," and that was not done here, it is notable the provision uses the word "should" rather than "shall." This choice of language likely reflects the fact that the parties can only submit what they have, and the DOL Claims Examiners rely on the record that exists before them at the time. (Magno testimony.) Here, the citation was not dismissed until about seven (7) months after the Department filed its controversion and about

five (5) months after all COP benefits were paid, and there is no evidence the Department received a copy of the citation's dismissal.

Accordingly, there is insufficient record to establish the Department violated workers compensation law—and derivatively Article 2 of the CBA—in the manner in which it applied the phrase "willful misconduct," or in failing to notify the DOL that the citation was ultimately dismissed. Although the Arbitrator is not pleased with the Department's conduct, there is also insufficient evidence that acted in actual "abuse of discretion." That is a high standard, and there is no evidence that the Department has been put on notice that the course of conduct typified by this case is improper; and insufficient evidence of a concrete pattern of misconduct involving misuse of traffic citations to deny COP claims. The Union has also failed to provide any case law supporting the proposition that the type of technical "niggling" the Department has engaged in here amounts to abuse of discretion as a matter of law.

Finally, the undersigned finds the Department has not defamed the employee or filed any false or fraudulent reports or statements.

D. Harm

Having concluded that the Department has violated FECA regulation §10.211(c), by failing to inform Employee Bell of its decision to controvert her COP and/or the basis for doing so, we turn to harm. The Department argued throughout that even if the Union established a violation of some sort, it did not establish any harm to the Employee since her claim was granted and she received all 45 days of COP.

The Arbitrator concludes that sufficient harm is established by violation of regulatory rights. Regulatory rights are not necessarily premised on economic damages, and it is sufficient that the employee be in the class of people intended to be protected by those regulation. The threat of loss of benefits and resulting anxiety may support a remedy in some cases, but do not here because the grievance was filed after all COP was received and the claim granted. Treating employees differently thereafter—such as in regards to transfers—may also support a remedy in some cases, but no nexus was established here between the found violation and the EEOC claim.

E. Remedy

Based on the foregoing many of the remedies sought are inappropriately broad and/or punitive, or simply unfounded. The only remedy appropriate to these circumstances is a cease and desist order, as provided in the Award below.

AWARD

For the reasons stated above, the grievance is sustained in part and denied in part. As remedy, the Department is directed to cease and desist controverting claims without providing the affected employee with the notice required under FECA Regulation § 10.211(c). The Arbitrator also strongly encourages, but cannot require, the Department to seek DOL training in application of the term "willful misconduct" if this is a frequent issue between the parties.