

**In the Matter of:**

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

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***ARBITRATION***

***December 19, 2013***

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**MERRILL LAD**

1325 G Street NW, Suite 200, Washington, DC  
Phone: 800.292.4789 Fax: 202.861.3425

IN THE MATTER OF

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NATIONAL WEATHER SERVICE

EMPLOYEES ORGANIZATION,

Union,

CASE NO. 13-02394-1

v. Arbitrator Mariann

Schick, Esq.

U.S. DEPT. OF COMMERCE,

NATIONAL OCEANIC AND ATMOSPHERIC

ADMINISTRATION,

Agency.

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Arbitration Proceeding Before

Arbitrator Mariann Schick, Esq.

Silver Spring, Maryland

Thursday, December 19, 2013

11:34 a.m.

Job No. 1-242710

Pages 1 - 274

Reported by: Patricia A. Edwards, RPR

1                   ARBITRATION PROCEEDINGS

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3                   Held at the offices of:

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5       U.S. Department of Commerce

6       1325 East West Highway

7       Silver Spring, Maryland 20910

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9       Pursuant to Agreement, before Patricia A.

10       Edwards, Registered Professional Reporter, and Notary

11       Public in and for the State of Maryland.

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A P P E A R A N C E S

ARBITRATOR:

MARIANN E. SCHICK, ESQUIRE  
2401 Pennsylvania Avenue, Apt. 8B31  
Philadelphia, Pennsylvania 19130  
Telephone: (215) 765-3455  
E-mail: schickarb@comcast.net

ON BEHALF OF THE UNION:

RICHARD J. HIRN, ESQUIRE  
Attorney at Law  
5335 Wisconsin Avenue, Northwest, Suite 440  
Washington, D.C. 20015  
Telephone: (202) 274-1812  
E-mail: richard@hirnlaw.com

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ON BEHALF OF THE AGENCY:

NIA SMITH, ESQUIRE  
MONIQUE CIOFFALO  
U.S. Department of Commerce  
Office of the General Counsel  
Employment & Labor Law Division  
1315 East West Highway, Room 5106  
Silver Spring, Maryland 20910  
Telephone: (301) 713-2527 x110  
E-mail: nia.smith@noaa.gov  
Monique.cioffalo@noaa.gov

ALSO PRESENT:

JOHN LONGENECKER  
DANIEL A. SOBIEN

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1 P R O C E E D I N G S

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

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

10 MR. HIRN: Richard Hirn.

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

13 MS. SMITH: Nia Fripp Smith.

14 MS. CIOFFALO: And Monique Cioffalo.

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

21 (The documents referred to were marked for  
22 identification and received into evidence as Joint

1 Exhibit Numbers 1 through 5.)

2 THE ARBITRATOR: Joint 1 is the collective

3 bargaining agreement of October 25, 2001, which is

4 still in full force and effect, correct?

5 MR. HIRN: Yes.

6 THE ARBITRATOR: Very good. Exhibit -- that's

7 J1. J2 A and B is a two page document which is the

8 grievance. J3 A and B is the employer response to

9 the grievance. J4 is the memorandum of understanding

10 which is at issue. And J5 is the submission

11 agreement which states the issues as framed by the

12 parties, and just for convenience sake, I am going to

13 read it into the record, so we all know exactly what

14 the issues are we are dealing with today.

15 One, did management violate the parties'

16 September 25, 2009 memorandum of understanding when

17 the acting CFO issued a memorandum on March 26, 2013,

18 directing subordinate managers not purchase

19 disposable cups, plates, utensils and other items.

20 Number two, if management did violate the

21 parties' September 25, 2009 memorandum of

22 understanding when the acting CFO issued a memorandum

1 on March 26, 2013, directing subordinate managers not  
2 to purchase disposable cups, plates, utensils and  
3 other items, was that an act an unfair labor  
4 practice, in violation of 5-USC, Section 7116(A), 1  
5 and 5.

6 Three, if management did violate the parties'

7 September 25, 2009 memorandum of understanding when  
8 the acting CFO issued a memorandum on March 26, 2013,  
9 directing subordinate managers not to purchase  
10 disposable cups, plates, utensils and other items, or  
11 committed an unfair labor practice in violation of  
12 5-USC Section 7116(A), 1 and 5, by doing so, what  
13 shall the remedy be. And this is signed by both  
14 counsel, so those are the stipulated issues before  
15 me.

16 Inasmuch as this is a contract violation case,

17 the burden rests with the Union to go forward, and  
18 Mr. Hirn, would you like to make an opening  
19 statement?

20 MR. HIRN: Thank you.

21 THE ARBITRATOR: Very good.

22 MR. HIRN: Ms. Schick, the National Weather

1 Service Employees Organization, whose acronym is  
2 NWSEO, is certified to represent a nationwide  
3 bargaining unit of all 3600 non-supervisory,  
4 non-managerial, non-confidential Weather Service  
5 employees, most of whom who are employed at the  
6 nation's 122 Weather Forecast Offices, which are  
7 located everywhere from Fairbanks, Alaska to Guam, to  
8 Caribou, Maine, to San Juan, Puerto Rico, or in 13 --

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

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

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

16 MR. HIRN: Okay. No, that's okay. And these  
17 all -- the forecast offices are staffed 24 hours a  
18 day, seven days a week, and they issue, you know, the  
19 routine weather forecast that AcuWeather, or Weather  
20 Channel then calls their own, but they come from our  
21 clients, and the -- as well as warnings of severe  
22 weather. The River Forecast Centers, 13 River

1 Forecast Centers, operate about 16 hours a day, and  
2 they issue the flood warnings for different river  
3 basins, Susquhanna River Basin is one such example.

4 And these River Forecast Centers are  
5 co-located with the Weather Forecast Offices. There  
6 are 12 smaller Weather Service Offices in 12, maybe  
7 15 in remote parts of Alaska, and the Pacific, there  
8 are a number -- there are Tsunami Warning Centers in  
9 the Pacific and in Alaska, there are major national  
10 Forecast Centers with which you may be familiar, such  
11 as the National Hurricane Center in Miami, and if  
12 you've ever watched the movie Twister with Helen  
13 Hunt, they had that storm center -- that's a storm  
14 prediction center in Oklahoma that does prediction  
15 for major tornado outbreaks, severe storms.

16 There are a couple of other National Forecast  
17 Centers around the country which operate 24/7, and  
18 then there is the National Weather Service  
19 headquarters here in Washington, which is mostly  
20 administrative employees, but there are some  
21 operational units here, and as well as southern  
22 regional offices -- regional measuring direct offices

1           throughout the country. So that's our market.  
2       In 2009, Weather Service management grew  
3           concerned about the impact of the potential H1-N1  
4           influenza pandemic. They were worried about -- they  
5           were concerned, as was the Union, about the impact it  
6           might have on employees and Agency operations. The  
7           evidence today is going to show that, even when fully  
8           staffed, there's only a minimum number of forecasters  
9           necessary -- on the staff to maintain 24/7 coverage  
10          and, as a result of budgetary constraints, there are  
11          300 bargaining positions that are still vacant -- are  
12          vacant now, creating difficulties in ensuring that  
13          there is sufficient staffing.  
14       As a result of these minimum staffing policies  
15          and profiles, there is an adverse impact, you will  
16          hear, on office's operations if there is more than  
17          one employee sick at one time. So, management  
18          initiated discussions with NWSEO about preventative  
19          measures that might be taken to mitigate the impact  
20          that the influenza threat on Weather Service  
21          employees and facilities.  
22       On September 29, 2009, the Agency's chief

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

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

21 As he will explain, most of the forecast  
22 offices, the Weather Service offices, the RFCs and



1 other operational units, are in standalone buildings.  
2 They are not part of the larger federal building or  
3 complex, there are no cafeteria facilities, and the  
4 typical operation shift is eight hours long, which  
5 does not include a meal break.

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

13 So, although the title of the MOU, Joint  
14 Exhibit 4, refers to the implementation of the H1-N1  
15 preparedness action, the language of the agreement is  
16 worded more broadly and is not limited to the  
17 particular H1-N1 outbreak that was expected in 2009  
18 and '10. In their testimony, both from Mr. Brown and  
19 Mr. Sobien, will say that they agree that this MOU  
20 was not time-limited, and was intended to protect the  
21 health of the staff on an on-going basis and in  
22 future years, in particular the use of the words will

1 and hereafter provide, demonstrate the agreement was  
2 not intended to -- was indeed intended to continue  
3 indefinitely, and is not limited to the 2009-10  
4 influenza season.

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

13 In early April of this year, the Union  
14 learned, through unofficial channels that the acting  
15 chief financial officer of the international Weather  
16 Service, sent an e-mail to all subordinate managers  
17 on March 26, ordering them to cease purchasing  
18 tissues, paper towels, disposable cups, plates and  
19 utensils, because such purchase was, ostensibly,  
20 against appropriations law. In support of this  
21 claim, the acting CFO cited a Comptroller General  
22 decision from the Coolidge Administration, in which

1 the Comptroller General wrote that federal agencies  
2 cannot use appropriated funds to provide their  
3 employees with lab coats or other protective  
4 equipment because these were, ostensibly, personal  
5 expenses.

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

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

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

16 Several days after Dan filed this grievance,  
17 management representative Stan Kensky -- Stan is  
18 sitting over here -- sent the Union our first  
19 official notice that the Agency was no longer going  
20 to comply with the September 25, 2009 MOU. Stan  
21 wrote that, quote, the Weather Service has taken  
22 steps to terminate what we consider to be illegal and

1       improper activity, i.e., providing personal use items  
2       to Weather Service employees, pursuant to our 9/25/09  
3       Memorandum of Understanding. Mr. Kensky claimed  
4       that, quote, the necessity for such no longer exists,  
5       close quote, because a committee of the World Health  
6       Organization, quote, declared an end to the 2009  
7       H1-N1 pandemic globally, although Mr. Kensky did note  
8       that it is likely that the 2009 H1-N1 virus will  
9       continue to spread for years to come.

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

1       this case here, to protect against the spread of  
2       colds and flu.

3       Management continues to rely on this 1924

4       Comptroller General decision, which involved the  
5       purchase of laboratory coats, which states that  
6       appropriated funds cannot be used to purchase items  
7       for the personal comfort and protection of federal  
8       employees. Initially, it must be remembered that the  
9       decisions of the Comptroller General are not  
10      authoritative case law. The Comptroller General's  
11      decision are advisory only. The Comptroller General,  
12      and the General Accounting Office which he heads,  
13      formerly -- well, now the Government Accountability  
14      Office --

15      THE ARBITRATOR: It's not GAO anymore?

16      MR. HIRN: Well, GAO -- they still use the  
17      acronym, but they changed it from Government  
18      Accounting Office to Government Accountability  
19      Office. But the GAO, whichever it's called, is only  
20      -- is part of the legislative branch, and the  
21      comptroller's decisions are not binding on executive  
22      agencies, they're not binding on the courts, and the

1 FLRA has made clear that these decisions are not  
2 binding on them, and -- and as a result, not binding  
3 on an Arbitrator. But nonetheless -- nonetheless,  
4 recent decisions of the Comptroller General fully  
5 support the expenditure of funds in this case. This  
6 is not the Coolidge administration anymore.

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

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

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

19 MR. HIRN: I'm not --

20 THE ARBITRATOR: Let me see what it is first.

21 If it's --

22 MR. HIRN: I'm not introducing it yet, I

1 referred to something and I'm just going to mark it  
2 for identification.

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

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

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

19 MR. HIRN: You have to be --

20 THE ARBITRATOR: This doesn't establish that

21 MR. HIRN: You have to be a government agency  
22 to buy from the GSA.



1 THE ARBITRATOR: Well, I presume you'll have  
2 some evidence on that or something. Okay.

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

16 For example, in 1982, the Comptroller General  
17 approved purchase of paper napkins, now being denied  
18 for Weather Service employees, for lunchtime use by  
19 IRS employees, who, like maybe Weather Service  
20 employees, were unable to leave facilities for meals  
21 in the time allotted. The Comptroller General wrote  
22 that the purchase of paper napkins in this case

1       helped to ensure productivity and morale or service  
2       center employees.

3       But perhaps the most clearly analogous

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

21      Now, if there is any doubt left about the  
22      propriety of federal agencies purchasing disposable

1 cups, plates and utensils for employees, we are also  
2 going to present evidence that all of these materials  
3 are available to federal agencies in the General  
4 Services Administration supply catalogue. There, in  
5 the chapter kitchen and break-room supplies, there  
6 are pages of disposable flatware, disposable  
7 dinnerware, paper napkins for purchase, and face --  
8 as well as facial tissues which were at issue in the  
9 -- which are covered by our 2009 MOU.

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

21 Title 5 of the U.S. Code section 901 provides  
22 that agencies may establish within the limits of

1        appropriations available, health service programs to  
2        promote and maintain the physical and mental fitness  
3        of its employees. Such a health service program can  
4        include treatment of on the job injuries, in  
5        emergency situations, pre-employment and other  
6        physicals, and quote, preventive programs related to  
7        health.

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

1 communicable diseases and promotion of environmental  
2 hygiene.

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

21 It's our view that if the Agency is legally  
22 authorized to expend funds to immunize headquarter

1 employees against influenza, it is certainly entitled  
2 to spend funds in other ways to prevent employees in  
3 the field from contracting influenza by the use of  
4 common dishware and utensils. As will be seen from  
5 the photographs of break-rooms that we will introduce  
6 from several of forecast offices, employees are  
7 resorted to using -- to sharing and hand-washing  
8 common dishware because there are no dishwashers  
9 installed in those offices. As a result, the Weather  
10 Service may indeed be in violation of OSHA sanitation  
11 regulations that state common drinking cup and other  
12 common utensils are prohibited.

13 In sum, the grievance also alleges, as you  
14 heard yesterday that we allege the management  
15 committed an unfair labor practice in violation of  
16 this statute by repudiating the September 2009 MOU.  
17 Now, an isolated or discreet violation of the  
18 collective bargaining agreement is not, of course, an  
19 unfair labor practice, but a repudiation of an  
20 agreement is, and the contractual violation arises to  
21 the level of an unfair labor practice when two  
22 criteria are met. When the breach is clear and

1 patent, and two, when the provision goes to the heart  
2 of the parties' agreement. The Agency acts at its  
3 peril, according to the FRLA, if it repudiates a  
4 provision in the belief that the provision is  
5 illegal. A violation may be found, even if the  
6 agreement being repudiated is not necessarily the  
7 parties' master collective bargaining collective  
8 agreement.

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

19 Now, in sum, we believe the evidence will show  
20 that the Agency's claim that the MOU is illegal,  
21 their legal argument on that is so insubstantial, and  
22 that the evidence will show that the real reason why

1       it repudiated this MOU is simply to save money.  
2       Coincidentally, this repudiation happened at the same  
3       time as the sequestration was imposed last March, and  
4       the Weather Service was under significant financial  
5       pressures at the time, and initiated a hiring freeze  
6       and took lots of other actions to cut back. We  
7       believe the evidence will show that that was the real  
8       reason, and in fact, we will have evidence that, in  
9       early April, the meteorologist in charge of the Green  
10      Bay forecast office sent his staff an e-mail, telling  
11      them that the office would no longer buy these  
12      materials, pursuant to the MOU, and his e-mail  
13      telling the staff said nothing about any alleged  
14      illegality or impropriety of the agreement, but  
15      merely said that it was being done in response to the  
16      tightening and uncertainty of the Weather Service  
17      budget.

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

20      THE ARBITRATOR: Very good. Thank you very  
21      much. Ms. Smith, do you wish to make opening now or  
22      do you want to reserve until the employer's case



1 opens?

2 MS. SMITH: I'll make it now.

3 THE ARBITRATOR: Very good.

4 MS. SMITH: As we discussed, good morning, my

5 name is Nia Fripp Smith. I have the privilege of

6 representing the National Oceanic and Atmospheric

7 Administration of the U.S. Department of Commerce.

8 As you said earlier, the parties have agreed to

9 resolve three issues, the facts presented today will

10 show that management terminated its provision of

11 disposable cups, plates and utensils because doing so

12 was illegal. The practice was in plain violation of

13 federal appropriations law which had to stop without

14 a delay, as a result the Agency could not and cannot

15 comply with the September 2009 MOU to the extent that

16 it requires it to provide disposable items for the

17 personal use of Weather Service employees.

18 Today you will hear that in 2012 and 2013, the

19 Weather Service, and frankly, the entire federal

20 government was facing significant financial

21 management challenges, as opposed to budgetary

22 challenges. Yet, the Weather Service was working

1 diligently to move through these challenges. One  
2 step in that process was requiring training regarding  
3 appropriations law and the appropriate use of federal  
4 funds, which as we all know, Congress appropriates  
5 the funds and decides what we should do with them.  
6 And you know, just as a side note, we'll get into  
7 appropriations, but I don't think anybody here is an  
8 expert and I'm sure no witness testifying is an  
9 expert on appropriations law, however, there are  
10 people who have been significantly trained who will  
11 testify.

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

1 to make sure the practice ceased.

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

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

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

1 presented any proposals.

2 THE ARBITRATOR: NWSEO never what?

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

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

18 Thank you.

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

21 MR. HIRN: Which would be Dan Sobien.

22 (Off the record.)

1 THE ARBITRATOR: Our first witness for the  
2 Union is Dan Sobien. And Mr. Sobien, do you have any  
3 objection to taking an oath?

4 THE WITNESS: No.

5 Whereupon,

6 DANIEL A. SOBIEN

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

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

11 THE WITNESS: Yes.

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

22 So, very good.

1 DIRECT EXAMINATION:

2 BY MR. HIRN:

3 Q. Dan, what is your education?

4 A. I have a bachelors degree in meteorology and  
5 an MBA.

6 Q. And where are those degrees from?

7 A. My bachelors degree is from Florida State  
8 University and my MBA is from Amarillo Aeronautical  
9 University.

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

13 A. 1991.

14 Q. And where was that?

15 A. In Del Rio, Texas.

16 Q. And what were you hired to do?

17 A. Well, I was an intern. It was really a  
18 training type job. I mean, I launched balloons, I  
19 did numerous other things, took observations, general  
20 technician work, but it was training for, you know,  
21 future employment.

22 Q. And did there come a time when you were

1 promoted from the internship?

2 A. Yes.

3 Q. And when was that?

4 A. That was 1994.

5 Q. And did you remain Del Rio?

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

8 Q. Have you received any promotions since then?

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

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

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

19 THE ARBITRATOR: But you work --

20 THE WITNESS: But I do Union work. I mean,  
21 theoretically, and I have been called in to work from  
22 time to time, but --

1 THE ARBITRATOR: Your job now is to be  
2 president of the Union?

3 THE WITNESS: Yes.

4 THE ARBITRATOR: Very good.

5 BY MR. HIRN:

6 Q. What was your first Union office?

7 A. My first Union office was steward in Tampa.

8 Q. And when was that?

9 A. '97, maybe '98.

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

12 A. Yes. Shortly after that, I was the  
13 vice-chairman of the southern region, then around  
14 2000 I became the chairman of the southern region,  
15 vice-president of the Union a few years after that,  
16 and I've been the president since 2006.

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

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



1 I was on the negotiating team.

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

4 A. Department-wide?

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

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

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

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

17 A. The heads -- the presidents of all the major  
18 unions within the Department of Commerce are on the  
19 labor side, and on the management side -- well, my  
20 co-chairman is the CFO for the Department of  
21 Commerce. And generally, it is HR-type people or  
22 Agency heads from the Department of Commerce that

1 represent management side. It's not actually a  
2 negotiating body, it's more like a  
3 pre-decisional-type body where we try to work out  
4 problems before they become problems.

5 Q. And how often does this meet?

6 A. Quarterly. Although, sometimes we have  
7 interim meetings.

8 Q. How many employees does the NWSEO represent  
9 at the National Weather Service?

10 A. At the National Weather Service? About 3600.

11 Q. And what is the geographic scope of the  
12 bargaining unit?

13 A. It -- well, you said it best in your opening  
14 statement. We are -- we actually have one office in  
15 the southern hemisphere, Samoa, as far east as Guam,  
16 which is almost in Asia, north of Barrow, Alaska,  
17 Caribou, Maine and then San Juan, and every place  
18 in-between, there's over 150 offices in between,  
19 various facilities, most of which are the weather  
20 forecast offices.

21 Q. And how many weather forecast offices are  
22 there?

1           A. 121.

2           Q. 121.

3           A. Or 122. I think it's 121.

4   THE ARBITRATOR: It gives me an idea.

5           BY MR. HIRN:

6           Q. And what are the hours of operation of these  
7   offices?

8           A. They are 24 hours a day, seven days a week,  
9   all holidays, they never close. It's an  
10   emergency-type function.

11          Q. And what is the responsibility of these  
12   offices?

13          A. Well, they issue, you know, all the weather  
14   warnings. The weather forecast offices specifically  
15   issue tornado warnings, severe thunderstorm warnings,  
16   winter storm warnings, they issue hurricane warnings  
17   after -- beyond the immediate coast and any kind of  
18   inland type areas that need hurricane warnings. They  
19   essentially issue any type of weather warnings  
20   specific to the geographical location that they're  
21   responsible for. They also issue more generalized  
22   weather forecasts that are used by industry commerce

1 and just the economy in general.

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

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

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

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

19 Q. Every day or just --

20 A. No, seven days a week.

21 Q. Are there any smaller Weather Service offices  
22 in remote locations that are not fully forecast

1 offices?

2 A. Yes. The only ones I know of are very remote  
3 locations in Alaska and some of the South Pacific  
4 Islands which are in Hawaii.

5 (Off the record.)

6 BY MR. HIRN:

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

9 A. Yes.

10 Q. And are there any employees here?

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

12 Q. Are there any operational employees here?

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

22 THE ARBITRATOR: The crawler on the bottom of

1           your TV screen?

2           THE WITNESS:   Yes.

3           THE ARBITRATOR:   Okay.

4           THE WITNESS:   When it says a warning came

5           from --

6           THE ARBITRATOR:   Right, right, right.

7           THE WITNESS:   And it's disseminated by that

8           group that's in this building.  They didn't issue a

9           warning -- the forecaster in Dodge City or Chicago or

10          wherever issued that, but they electronically got it

11          and made sure that it got to everybody and

12          double-checked and triple-checked it.

13          There's another unit in this building.  I'm

14          not 100 percent sure if it's 24/7, but it's an

15          operational unit, much like the WFO or perhaps EON,

16          and it's called the NOP, the National Operations

17          Center.  And, in fact, now that I think about it, I

18          think they're only 24/7 when there is a big event

19          going on.  And their duties primarily are to collect

20          the warnings and information and coordinate them, and

21          so there's one location where people can go and if

22          the media or the president or whoever wants that kind

1 of information they can get it from them.

2 BY MR. HIRN:

3 Q. Are there any larger centralized forecasting  
4 units?

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

16 They come from what's called a national  
17 center, and they are collectively grouped all into a  
18 group called the national center for environmental  
19 prediction, which is in the Washington, D.C. area but  
20 a few miles away, it's not in this building. So,  
21 yes, we have a larger, national centers, with  
22 specific customers or duties like the hurricane

1 center, there's the aviation weather center that  
2 forecasts for aviation groups, you mentioned the  
3 storm prediction center, that's primarily looking at  
4 tornados and severe thunderstorms.

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

8 Q. Where is the bulk of bargaining employees  
9 found?

10 A. They are in the weather forecast offices.

11 Q. And have you visited many forecast offices?

12 A. I've probably been to a quarter or a third of  
13 them.

14 Q. Are these buildings generally part of a  
15 larger complex or are they standalone?

16 A. Of all of those that I've ever been to,  
17 Sacramento was the only one that was in like a  
18 government complex, and that was a state government  
19 complex, California state government. The Tulsa  
20 office was in a separate office commercial building,  
21 but almost all of them are standalone buildings,  
22 maybe 4,000 to 5,000 square feet.



1 THE ARBITRATOR: When you say almost all of  
2 them, almost all of them that you visited, or almost  
3 all of them are --

4 THE WITNESS: All the ones --

5 THE ARBITRATOR: That are in the bargaining  
6 unit?

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

10 THE ARBITRATOR: All right.

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

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

21 BY MR. HIRN:

22 Q. And do the employees have access to

1           cafeterias in these buildings?

2           A. No.

3           Q. And --

4           A. With the possible exception of Sacramento.

5           That one might have, I don't know.

6           Q. Where do employees eat then?

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

20                 So, they get pretty disgusting after a while.

21          Q. And where do employees get their food or  
22          prepare their food?

1           A. You know, it --

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

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

13 BY MR. HIRN:

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

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

22 MR. HIRN: I'll move the admission of Union

1 Exhibits 2 through 4.

2 THE ARBITRATOR: Ms. Smith, any objection?

3 MS. SMITH: Who took the pictures?

4 THE WITNESS: Are you asking me or him?

5 MS. SMITH: Yes.

6 THE ARBITRATOR: No. She's asking you --

7 MS. SMITH: I mean, somebody --

8 THE ARBITRATOR: Do you want to do voir dire

9 on this? Do you know who took the pictures?

10 THE WITNESS: I believe our steward in each  
11 office.

12 THE ARBITRATOR: Okay.

13 THE WITNESS: That's where I get them from, so  
14 I assume they took them.

15 MS. SMITH: So before today, have you seen the  
16 pictures?

17 THE WITNESS: Yes. Not all of them, actually.

18 I saw Duluth, but I did not see Monterey or Mobile,  
19 but I saw the e-mails, but I didn't look at them on  
20 my e-mail.

21 MS. SMITH: I don't know about 4. He doesn't

22 have any personal knowledge. I mean, you're saying

1           that this is what Mobile looked like when you saw it?

2       THE WITNESS: That is Mobile, yes. I mean,

3           this is a typical WFO. We asked our stewards to go

4           take pictures of their kitchens and e-mail them.

5           They e-mailed them over to Richard, they copied me, I

6           looked at the Duluth one. I didn't go in and open

7           all of them because I know what a WFO looks like.

8       THE ARBITRATOR: You've been personally to

9           these three, or --

10      THE WITNESS: No, I've been to Mobile. I've

11           never been to Duluth or Monterey.

12      THE ARBITRATOR: Okay. But these were

13           received in response to your request of some stewards

14           to take pictures?

15      THE WITNESS: My stewards in these offices.

16      MR. HIRN: And his testimony was that this is

17           typical of a weather forecast office.

18      THE ARBITRATOR: Understood. Do you have any

19           objection to 2 and 3?

20      MS. SMITH: I'm fine with it.

21      THE ARBITRATOR: Okay. Very good. The

22           Union's 2 through 4 are admitted into evidence.

1           (The documents referred to were received into  
2           evidence as Union Exhibit Numbers 2, 3 and 4.)

3           BY MR. HIRN:

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

6           MS. SMITH: Objection, asked and answered.

7           MR. HIRN: I don't remember that.

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

10          MR. HIRN: No, that's not the -- I mean it's a  
11          24 hour operation. I didn't ask what the typical  
12          shift was.

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

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

21                    But in some offices, they might work nine  
22          hours a day, and then throw in eight hour a day

1 shifts in there so they only work, you know, less  
2 days in a week, but an eight hour day is a, you know,  
3 eight hours a day is easily divisible by 24 is how  
4 things are usually calculated out.

5 BY MR. HIRN:

6 Q. Is a meal hour scheduled during these  
7 operational shifts?

8 A. No. Meal hours aren't scheduled for the  
9 operational folks.

10 Q. And when do employees eat?

11 A. If it's a really busy day, you don't eat.  
12 There -- but typically, you know, you have a sandwich  
13 next to you, and you eat it, and you're looking at  
14 the radar, and you pick it up, and take another bite,  
15 and you're looking at the radar, and it's just back  
16 and forth like that.

17 Q. Are there break-rooms exhibited in these  
18 pictures?

19 A. Yes.

20 Q. And are there dishwashers in these  
21 break-rooms?

22 A. No. I've never seen a dishwasher at a WFO.

1           Q. Are employees allowed to leave premises  
2 during operational shifts for meals?

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

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

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

22           Say, for instance, it's an office that does



1 upper air balloon launches, they might actually have  
2 three people there for most of the day, but if they  
3 don't do that, they might only have two people there  
4 at any given time of the day. And in fact, there are  
5 some offices that well, I think that answered your  
6 question.

7 Q. Is this number sufficient to run operations  
8 during severe weather?

9 A. No.

10 Q. How many employees does it take to -- well,  
11 what happens during severe weather?

12 A. They call somebody in on overtime.

13 Q. Okay. How many employees does it take to  
14 cover a typical two-person, 24/7 forecast office?

15 A. Okay. Okay. So, if you have two people on  
16 every shift, and the shifts are eight hours a day,  
17 that means you would have three shifts, during the  
18 day, so it would take six people for the two people  
19 -- seven days a week, that's 42 shifts. If you have  
20 10 forecasters, five days a week, to cover eight hour  
21 shifts, that's 50 shifts. However, those forecasters  
22 are given annual leave, so that knocks that down to

1 45 shifts.

2 So, if you have 10 forecasters, you'll have  
3 45 shifts to cover 42 that you need, but that doesn't  
4 count training, or if somebody gets sick, and it also  
5 doesn't count that the way the shifts run, if  
6 something -- every week your shift is moving, and if  
7 you're on, say, a midnight shift, and the guy who is  
8 out is mostly on the day shift, you can't take the  
9 guy who's been, you know, who's been working two  
10 midnight shifts to work a day shift and then go back  
11 to his midnight shifts, so it takes away that  
12 flexibility. So, really, you need more than 10  
13 people to run the two shifts a day, 24 hours a day,  
14 seven days a week.

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

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

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

22 I'm not sure how this is relevant to the issues.

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

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

19 MS. SMITH: Just being present at the office  
20 doesn't mean you're healthy or -- I think that's too  
21 far tangential to be -- and when you're talking about  
22 staffing woes and -- I mean, I think it's bringing up

1 other issues that just aren't relevant. I mean, we  
2 can stipulate that, yes, everybody wants everybody to  
3 come to work, and how many people need to be there,  
4 but --

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

9 MS. SMITH: He's essentially said that.

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

17 Overruled.

18 BY MR. HIRN:

19 Q. Okay. I'm not quite sure where I left off,  
20 so I apologize if I'm repeating myself. When a  
21 forecast office is fully staffed, does it generally  
22 have enough in excess of the minimum number of

1 forecasters to cover a 24/7 operational --  
2 operations?

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

6 Q. Is even now the Weather Service fully  
7 staffed?

8 A. No.

9 Q. And why is that?

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

13 THE ARBITRATOR: You mean vacancies were --

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

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

21 They made a conscious decision a couple of  
22 years ago to increase that amount of lapsed labor to

1 help balance their books. Then sequester came along  
2 and they increased it further, and then NOAA, our  
3 parent organization, declared a hiring freeze across  
4 the books, which increased it even further in the  
5 Weather Service. There were some ways around the  
6 hiring freeze but the Weather Service rarely took  
7 advantage of that.

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

10 THE WITNESS: The sequester was part of the FY  
11 13, but I think it didn't start until January 1st.  
12 I'm looking at him because I'm not --

13 MR. HIRN: Sequestration and budget control --

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

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

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

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

21 THE ARBITRATOR: Can you stipulate? Do you  
22 know? Because if you both know, since you're both,

1       you know, you're more familiar with the federal  
2       government than I am, but --

3       MS. SMITH: Well, this goes back to my  
4       objection, because the point is, we have to have a  
5       related issue with respect to hiring, which we're  
6       getting to far afield in it. So, to the respect that  
7       we're talking about why the Agency hired and didn't  
8       hire people, that's not relevant.

9       THE ARBITRATOR: Okay. But he's testified to  
10      the sequestration and I need a date. Can you  
11      stipulate to approximately what it was?

12     MS. SMITH: I believe that it was in the  
13      spring.

14     THE ARBITRATOR: Spring of 2013?

15     MS. SMITH: Yes.

16     MR. HIRN: March, it was March.

17     THE ARBITRATOR: Okay, can you stipulate March  
18      of 2013, spring of 2013.

19     MR. HIRN: Well, in fact it wasn't spring, it  
20      was winter, March 1st was winter.

21     MS. SMITH: 21 days shy.

22     THE ARBITRATOR: Okay. I'm going to take

1       judicial notice that it occurred approximately in  
2       March of 2013. When was the hiring freeze that you  
3       were just testifying to?

4       THE WITNESS: That was right around the same  
5       time.

6       THE ARBITRATOR: Okay. I just want to get  
7       dates, I don't want to go back and read the  
8       transcript, now that I know the time frame that  
9       you're talking about.

10      THE WITNESS: March 27th.

11      THE ARBITRATOR: Okay. Counsel, try to  
12      refrain from testifying.

13      MR. HIRN: I think that's an undisputed fact

14      THE ARBITRATOR: Well, but you're not here to  
15      testify about facts, okay, so, refrain from  
16      testifying, get it through your witness, or we'll get  
17      it by stipulation.

18      MS. CIOFFALO: And if I may object, I need  
19      testimony about what the intentions of the Weather  
20      Service matters when I don't think that Mr. Sobien  
21      can competently testify as to what the weather -- why  
22      the Weather Service did anything or they



1 intentionally did.

2 I mean, I think some of this testimony is  
3 getting largely opinionated.

4 THE ARBITRATOR: I can't have you double-team.

5 One of you needs to handle each witness.

6 MS. CIOFFALO: Okay. I'm sorry.

7 THE ARBITRATOR: So, this witness -- okay.

8 Very good.

9 MR. HIRN: I'm sorry. Did I ask -- please  
10 correct me if I did -- did I ask a question about  
11 management's intent?

12 MS. CIOFFALO: No, it's just part of what he  
13 testified.

14 COURT REPORTER: Okay. You need to keep your  
15 voice up.

16 MS. SMITH: Okay.

17 THE ARBITRATOR: All right. To the extent  
18 that you know because of something that you heard  
19 expressed by a manager as to what their purpose was,  
20 you are certainly free to testify about that. You  
21 don't know what management's intent was unless  
22 somebody said something to you. Okay. You may have

1 an opinion, okay, but I'm not here to hear your  
2 opinion.

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

8 THE WITNESS: Okay, well --

9 THE ARBITRATOR: And not just suppose it.

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

13 THE ARBITRATOR: Okay.

14 THE WITNESS: Everything I said before was  
15 their intent.

16 THE ARBITRATOR: Very good.

17 BY MR. HIRN:

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

20 A. Yes. All employees in a weather forecast  
21 office and I believe in the RFCs also are emergency  
22 essential. The regional headquarter employees are

1 all essential, there are some people in this building  
2 that are emergency essential. Most of the National  
3 Weather Service -- probably over 80 percent of the  
4 National Weather Service is.

5 But everybody in a weather forecast office  
6 is.

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

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

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

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

22 Q. When the government shut down earlier this

1 fall, due to a lapse in appropriations, did these  
2 Weather Service emergency essentials -- were they  
3 required to work?

4 A. Yes.

5 Q. Did there come a point in time when the  
6 Weather Service feared that its operations would be  
7 in danger from the H1-N1 influenza pandemic that was  
8 expected during the 2009 flu season?

9 MS. SMITH: Objection. He can't testify as to  
10 what management expected, and that was the question.

11 THE ARBITRATOR: Do you want to try and  
12 re-phrase, perhaps, you know?

13 MS. SMITH: And I object that it's complex, as  
14 well. His paragraph.

15 THE ARBITRATOR: Okay. It's -- you know, all  
16 right -- try not to lead the witness and get your  
17 testimony in, but if you can re-phrase --

18 MR. HIRN: Well, first of all, with regard to  
19 preliminary foundation questions, which is undisputed  
20 this is, there's no dispute that the Weather Service  
21 was concerned about H1-N1.

22 THE ARBITRATOR: Whether they're concerned or

1 not, the operative fact is, is did there come a time  
2 when in fact negotiations commenced about the H1 --  
3 there were concerns raised by management, whatever.

4 BY MR. HIRN:

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

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

15 THE ARBITRATOR: And the time period is what?

16 THE WITNESS: That was in 2009, in the fall of  
17 2009. Late summer, early fall.

18 THE ARBITRATOR: Okay.

19 BY MR. HIRN:

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

22 A. At the time, the chief negotiator for the

1 National Weather Service was Mickey Brown, who was  
2 the deputy director of the eastern region. We went  
3 to his office in Long Island and had a meeting with  
4 some folks from our side and some folks on their  
5 side, where we discussed the issue and negotiated an  
6 agreement.

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

10 A. Yes.

11 MS. SMITH: Objection.

12 THE ARBITRATOR: Basis?

13 MS. SMITH: I object to the second part of  
14 that question, did they negotiate an agreement. I  
15 think he's already testified that there was an  
16 agreement. Was the purpose of the agreement, what  
17 Mr. Hirn just said, I think is the question of fact,  
18 so there is a fact late in the second half of his  
19 question that has not been established. In other  
20 words, he never got -- he never got his testimony  
21 about management's intent or if management was scared  
22 about the H1-N1 virus.

1           All we know Mr. Sobien testified to, that  
2           management expressed concerns, they negotiated, but  
3           the purpose is what we haven't -- which is in the  
4           premise of Mr. Hirn's question, has not been  
5           established.

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

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

13          THE ARBITRATOR: Well, but I think --

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

16          THE ARBITRATOR: But Mr. Hirn, you're leading  
17          your witness. You're leading your witness, so, I  
18          know, I think you -- I think you're seasoned enough,  
19          obviously, to be able to re-phrase the question as to  
20          certainly what is the Agency's understanding as to  
21          what the MOU was about what management told him. I  
22          mean, obviously, anything -- any admission that was

1       made to him by any manager as to what their concerned  
2       comes in, and anything as to yes, were you concerned  
3       about the H1, and that's why we want the MOU, or what  
4       was the Agency's understanding, and what was the  
5       Agency's understanding based on.

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

18              I think I'm a seasoned enough arbitrator to  
19      know, looking at what the issue is, whether you have  
20      hiring issues, you know, that may be something else.  
21      I need to focus on what you have said the issues are  
22      before me.



1                   Okay, go ahead, Mr. Hirn.

2           BY MR. HIRN:

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

6                   A. That was Mickey Brown.

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

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

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

19                  A. Well, obviously -- well, again, my  
20           understanding was that they were directed to do that  
21           and I'm assuming that came from OBM, I'm not 100  
22           percent sure on that. The -- the reason is because,

1       you know, an epidemic would be catastrophic to the  
2       operations of the National Weather Service. If in  
3       fact, we had these discussions, so, you know, what  
4       are you going to do if many offices close down.

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

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

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

1 for the employees of the National Weather Service.

2 Q. Was the agreement limited to just the  
3 2009-2010 weather season?

4 A. No.

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

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

13 Q. And what language was that?

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

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

21 THE WITNESS: Can I -- the -- I did a little  
22 research before this. What's referred to as the 2009

1 virus doesn't just deal with what happened in 2009.  
2 The H1-N1 virus even today, and ten years from now,  
3 we refer to as the 2009 H1-N1, so, your question, I  
4 don't know if it dealt with --

5 THE ARBITRATOR: Okay. Here's my question.

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

8 THE WITNESS: Right.

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

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

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

22 THE ARBITRATOR: Okay.

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

20 THE ARBITRATOR: Was the proposal from one  
21 particular side they go on beyond this H1 concern, or  
22 were both parties saying, yes, we have to have this

1 go on?

2 THE WITNESS: The -- I would characterize it  
3 as jointly agreed to. I think we brought it up  
4 initially but I'm not going to swear to that. I'm  
5 not 100 percent, but clearly, it was like, yes, this  
6 is something we have to do, jointly.

7 THE ARBITRATOR: Okay. Okay. Sorry, Mr.

8 Hirn. That was just something I had to clarify for  
9 myself.

10 BY MR. HIRN:

11 Q. Who in the forecast office is responsible for  
12 ordering supplies such as these?

13 A. You know, every office is a little bit  
14 different, and they have different people doing it.  
15 I would say, if there was a, you know, inside the  
16 bell curve kind of person who usually would do this,  
17 would be the administrative support assistant, or the  
18 ASA, I'll refer to him as.

19 Q. Is that a bargaining unit employee?

20 A. Yes.

21 Q. And --

22 A. Most of the time, there are a few locations

1           that are not.

2           Q. And have you communicated with any ASA's to  
3           find out where they ordered these materials from?

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

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

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

1           they are. So, it's -- think of it as the supermarket  
2           for federal agencies.

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

5   THE ARBITRATOR: We'll mark this as U5. I'm  
6           marking this for the purposes of identification, it's  
7           a multi-page document, so I'm marking it as U5a, U5b,  
8           U5c, and U5d, U5e, U5f, U5g, U5h, U5i, U5j.

9           (The document referred to was marked for  
10          identification as Union Exhibit Number 5A-J.)

11       BY MR. HIRN:

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

14          A. Yes.

15          Q. And where did you find that?

16          A. I found it on the -- well, I did a Google  
17          search. When the Arbitrator asked about who can  
18          purchase from GSA, I did a little Google search, and  
19          found their -- I don't know what you would call it --  
20          we call it directives in the National Weather  
21          Service, but it is essentially a description of  
22          everybody who can buy from the GSA, a description of



1           what the GSA is, and the --

2           Q. And where on the internet did you find this?

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

7           THE ARBITRATOR: What difference does it make?

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

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

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

16          We can stipulate to this.

17          MR. HIRN: Okay. Those --

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

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

22          THE ARBITRATOR: U5 is in.

1           (The document referred to was received into  
2           evidence as Union Exhibit Number 5A-J.)

3           BY MR. HIRN:

4           Q. Okay.

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

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

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

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

14          MS. SMITH: All right.

15          BY MR. HIRN:

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

17          THE ARBITRATOR: U6?

18          MR. HIRN: U6.

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

21          (The document referred to was marked for  
22          identification as Union Exhibit Number 6.)

1 BY MR. HIRN:

2 Q. Do you recognize this document?

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

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

7 THE ARBITRATOR: You have some voir dire?

8 MS. SMITH: Yes.

9 THE ARBITRATOR: Okay. Go ahead.

10 VOIR DIRE:

11 BY MS. SMITH:

12 Q. Have you seen the entire supply catalogue?

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

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

16 A. No.

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

18 A. Well, I'll tell you, it starts at 157 and  
19 goes through -- well, there are just various  
20 different pages. It's -- it ends on 224, but there  
21 at least 224 pages of this catalogue, I'm guessing  
22 well over 400 or 500, I mean, it's a huge catalogue,

1 but nobody really uses the catalogue anymore, they go  
2 online and get things off of it like this.

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

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

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

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

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

20 THE WITNESS: I think -- I'm not going to  
21 swear to it, but, you could have probably pulled off  
22 many more pages.

1 THE ARBITRATOR: Okay. Well, these are  
2 certain pages that you pulled off, and counsel is  
3 going to stipulate that these are the pages from the  
4 supply catalogue. U6 is in.

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

7 DIRECT EXAMINATION (resumes):

8 BY MR. HIRN:

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

13 A. Yes.

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

19 MS. SMITH: Okay.

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

21 THE ARBITRATOR: Well, we -- it's not in -- so  
22 -- it's a document that says at the top forwarding

1 message?

2 MR. HIRN: Yes.

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

5 MR. HIRN: Yes.

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

8 BY MR. HIRN:

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

10 A. Yes.

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

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

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

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

20 THE WITNESS: Meteorologists in charge are  
21 often what we refer at the MIC as the -- as the top  
22 supervisor in a weather forecast office.

1 THE ARBITRATOR: Very good.

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

4 THE ARBITRATOR: Very good. Okay.

5 BY MR. HIRN:

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

8 A. We filed a grievance.

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

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

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

18 8 --

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

22 BY MR. HIRN:

1           Q. Yes. What is CRH -- do you know what the  
2 acronym CRH slash NWSH stand for?

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

9 THE ARBITRATOR: Very good, thank you.

10 BY MR. HIRN:

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

15           A. Yes, I did.

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

21           A. Yes, that's the -- I was -- I guess -- I  
22 believe this -- I don't recall if anybody actually



1 sent it to me, but this is the e-mail that was the  
2 basis of the MIC in Green Bay's e-mail, and  
3 apparently this went to, as you can see from the  
4 headers, all the regional offices of the National  
5 Weather Service, and then that was further  
6 distributed down.

7 (The document referred to was marked for  
8 identification as Union Exhibit Number 8.)

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

11 THE ARBITRATOR: Any objection?

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

13 THE ARBITRATOR: Very good.

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

16 BY MR. HIRN:

17 Q. And do you know John Longenecker?

18 A. Yes.

19 Q. And who is John Longenecker?

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

22 Q. After you received the grievance -- after you

1 filed the grievance in this case, did you receive  
2 some acknowledgement from management that they did in  
3 fact instruct managers to cease purchasing these  
4 supplies?

5 A. Yes.

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

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

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

14 THE ARBITRATOR: Who is Stan Kensky?

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

20 THE ARBITRATOR: Very good.

21 BY MR. HIRN:

22 Q. Did you respond to Mr. Kensky?

1           A. Yes, I did.

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

6           A. Yes, I do.

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

9           BY MR. HIRN:

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

12           A. Yes, it is.

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

15           THE ARBITRATOR: Any objection?

16           MS. SMITH: No.

17           THE ARBITRATOR: 9 and 10 are in.

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

20           BY MR. HIRN:

21           Q. Did you ever discuss this grievance with  
22 management in person?

1 A. Yes, I did.

2 Q. And where was that?

3 A. In this building on the 18th floor.

4 Q. And with whom did you discuss it?

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

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

16 THE WITNESS: Bill Hopkins and Dave Solano,  
17 and that's S-O-L-A-N-O.

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

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

22 THE ARBITRATOR: Very good.

1 BY MR. HIRN:

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

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

20 Q. Does management take any action to protect  
21 their managers and other employees from catching the  
22 flu every year?

1           A. Yes.

2           Q. And could you tell us what that is?

3           A. Yes. On the ninth floor in this building,  
4 you could go right now and get a free flu shot. You  
5 could also go right now and get a free cholesterol  
6 screenings, and blood sucrose screenings. People in  
7 this building do get free health -- you know, things  
8 that help promote their health, which is good, but,  
9 it seems they're interested in keeping themselves  
10 healthy, but not so much their employees, but maybe  
11 that was something I should have kept to myself,  
12 sorry about that.

13           Q. The -- I will ask you to look at a page from  
14 the internet from the NOAA website which has been  
15 marked for identification as Union Exhibit 11; is  
16 that right?

17 THE ARBITRATOR: Yes.

18           (The document referred to was marked for  
19 identification as Union Exhibit Number 11.)

20 BY MR. HIRN:

21           Q. And ask you if you have seen this before and  
22 know anything about this health service?

1           A. I -- in fact, I have in fact went there this  
2 morning just to check it out, because, while I come  
3 to this building frequently, I've never actually been  
4 there, and it looks like a small doctor's office,  
5 there's nurse practioners there, I actually talked to  
6 two of them this morning, so, yes.

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

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

11          Q. Yes.

12          A. That would be the SSMC campus facility.

13 THE ARBITRATOR: In Silver Spring.

14 THE WITNESS: In Silver Spring.

15 BY MR. HIRN:

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

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

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

1 services?

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

8 Q. And directing your attention --

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

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

14 BY MR. HIRN:

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

19 A. Yes.

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

22 BY MR. HIRN:



1 Q. And how did you obtain this document?

2 A. This was on the counter up there, and when I  
3 was speaking to the nurses they handed this to me.

4 Q. And what did they -- did they explain this to  
5 you?

6 A. They said it -- they said it's some of the  
7 services that they offer, it's by no means the  
8 totality of it, but it gives an idea of the -- for  
9 this specific concern, diabetes, and related  
10 cardio-vascular disease, some of the stuff that they  
11 do.

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

14 THE ARBITRATOR: Any objection?

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

17 MR. HIRN: Well, I think that the point is, if  
18 they're saying we can't provide -- we can't spend  
19 federal funds on personal -- things that may be  
20 personal items to prevent employees from getting the  
21 flu, but we can spend funds to give them -- to give  
22 headquarters employees flu shots, and other kinds of

1 health preventative things, and glucose tests --

2 MS. SMITH: But this is a legal question.

3 THE ARBITRATOR: So then it doesn't go to  
4 relevance, it's a legal question.

5 MS. SMITH: But why do we need this in the  
6 record?

7 THE ARBITRATOR: Because his legal point is  
8 that it's legal based on the argument he just made.

9 MS. SMITH: But what does it have to do with  
10 the common cold? This is about weight, blood  
11 pressure, waist measurement, and cholesterol --

12 THE ARBITRATOR: Because it's the Union's  
13 argument that these are things of personal concern  
14 that the Agency is spending money on, and therefore  
15 it undercuts the Agency's argument that they can't  
16 spend money on the napkins, and other disposable  
17 things because it violate appropriations law.

18 MS. SMITH: We haven't really related those  
19 issues in a health way, we've taken it for granted.  
20 But no one has testified that there is a health need  
21 for a plastic knife as opposed to a disposable one.  
22 That's not a fact that's been established.

1 THE ARBITRATOR: I understand, but counsel is  
2 still putting his case on, and this is part of his  
3 argument, and that may be something you'll raise in  
4 your brief if he doesn't ever establish it, but it's  
5 arguably relevant to counsel's case and I'm admitting  
6 Agency 11 and 12.

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

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

14 MS. SMITH: That hasn't been established.

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

20 BY MR. HIRN:

21 Q. Dan, I'm going to show you what will be  
22 marked as Union Exhibit -- well, let me back up. Is

1           there a cafeteria in the next door building?

2           A. Yes.

3           Q. Is that part of the NOAA campus?

4           A. Yes.

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

7           A. Yes, sometimes.

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

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

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

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

19          THE WITNESS: Okay. The -- what is referred  
20          to as the Silver Spring metro complex. It's -- it's  
21          four buildings that -- that the -- mainly, I'm sure  
22          there are other clients, too, but mainly the Weather

1 Service and NOAA headquarters are located at, well,  
2 actually I think the NOAA headquarters might be  
3 downtown, but most of the NOAA facilities are within  
4 this complex.

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

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

13 THE ARBITRATOR: Any objection?

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

16 THE ARBITRATOR: Okay. Very good. Over  
17 counsel's objection, I am admitting Union 13.

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

20 BY MR. HIRN:

21 Q. Operational employees at the forecast offices  
22 and the River Forecast Centers, and the smaller

1 WSO's, are they offered free flu shots at the  
2 government's expense?

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

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

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

18 A. Yes.

19 Q. And where did you look into that?

20 A. I went to the CDC website.

21 MS. SMITH: I'm going to object on relevance

22 we well. The e-mail that terminated the practice was

1 in March. Whether there is flu now is irrelevant.

2 THE ARBITRATOR: Okay. What's your argument?

3 MR. HIRN: Just to go to the extent that Mr.

4 Kensky's letter said that H1-N1 is over, we don't  
5 need it anymore, whatever. If there is any doubt  
6 whatsoever about the continuing effect of the MOU, if  
7 -- and I haven't necessarily heard this argument  
8 other than in communication from Mr. Kensky's e-mail,  
9 that it's -- that the H1 -- that the MOU is only  
10 applied to the threat from the 2009 strain of  
11 influenza, this evidence will show that this year's  
12 flu -- almost all of the flues that around this year,  
13 is the 2009 H1-N1.

14 THE ARBITRATOR: Okay. But if in fact the MOU  
15 -- let's take what his argument is, this MOU was  
16 limited to the 2009 influenza outbreak. Whether  
17 we're in another influenza outbreak that happens  
18 fortuitously, you know, to be the same as not,  
19 doesn't matter. From what he expressed, the Agency's  
20 position is this was limited to 2009, it's done, it's  
21 four years later, we're done. Your argument is this  
22 is a broader MOU.

1           `       Even if the influenza virus that is coming  
2       around this year was totally different, your argument  
3       would be the same, it doesn't matter which strain is  
4       coming around, this is still in effect.

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

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

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

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

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



1 the virus is the issue, it's not --

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

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

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

15 MR. HIRN: Can I -- well, maybe this will help  
16 to clarify things. In the grievance denied, and in  
17 the discussions with Agency counsel, we have not  
18 heard the Agency to argue that the MOU is no longer  
19 in effect, other than it's illegal. We're -- I'm  
20 only addressing this based on what I saw was an  
21 implication from Mr. Kensky's e-mail. I am not sure,  
22 and it's not clear to me because I haven't done it in

1 the greivant's denial, that they're taking the  
2 position that if it was legal, the agreement is no  
3 longer in effect because it expired on its own terms.  
4 If we can get that clarified, that might save a lot  
5 of time.

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

15 I can't look at these documents now. If I --  
16 you know, I'm going to let counsel proceed on this  
17 line of questioning -- I may find it irrelevant, you  
18 may be right, but I just can't make a definitive  
19 statement at this point and we're just going to have  
20 to take up more time if -- you know, we argue more  
21 about it. We'll get it in, it may or may not be  
22 relevant, you may be right.

1                   You may be right -- I just can't -- so I'm  
2                   going to let you go --

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

6           MS. SMITH:   Counsel is testifying.

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

9                   (Off the record.)

10          THE ARBITRATOR:   Okay.   We had hoped -- there  
11                   had been an objection raised by counsel for the  
12                   Agency to permitting counsel's current line of  
13                   questions regarding the current virus strain that's  
14                   going around.   We had hoped that perhaps we might get  
15                   some stipulation as to whether the Agency's defense  
16                   was simply that the MOU was rejected because it was  
17                   illegal and they never should have entered into it,  
18                   or was the basis of the Agency's position also that  
19                   it really was executed for the 2009 virus and 2009 is  
20                   over, so the parties really couldn't stipulate off  
21                   the record, so I advised them the parties that I'm  
22                   going to give counsel for the Union latitude, because

1 he is not quite clear what the Agency's position is  
2 and therefore if he feels there is something  
3 indicative in a response he's gotten from the Agency  
4 that may be an issue, he needs to explore that in his  
5 examination, and I'm going to give him that latitude.  
6 So, with that said, counsel, feel free to ask  
7 whatever question you want.

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

10 THE ARBITRATOR: That's fine.

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

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

15 BY MR. HIRN:

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

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

1 Q. Which flu strain?

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

11 Q. And what is the Union Exhibit that's been  
12 marked for identification as Union Exhibits 14 and  
13 15? Are these the materials you found in the CDC  
14 website?

15 A. Yes.

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

18 MS. SMITH: We didn't identify them.

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

21 MR. HIRN: 14 is the -- it says flu Centers  
22 for Disease Control.

1 THE ARBITRATOR: Okay. U14 --

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

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

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

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

8 MR. HIRN: Yes.

9 THE ARBITRATOR: Any objection?

10 MS. SMITH: No.

11 THE ARBITRATOR: U14 and 15 are in.

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

15 BY MR. HIRN:

16 Q. Okay. Now, I apologize for -- if this is a  
17 repeat, but I think there was some lack of clarity as  
18 to whether you did testify to this or not, so let me  
19 go back and ask you. The second paragraph of the  
20 2009 MOU, what was the intent of providing the  
21 tissues, the disposable paper plates, cups and  
22 utensils?

1           A. For the health of the employees.

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

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

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

22           Q. I have no further questions and I marked for

1 identification earlier on in my opening this printout  
2 from the GSA website on the lab-coats --

3 THE ARBITRATOR: Did this witness print this  
4 out?

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

8 THE ARBITRATOR: Just take judicial notice of  
9 it?

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

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

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

21 MR. HIRN: Well, we have another witness. We  
22 have -- we're calling the management negotiator to



1       testify.

2       THE ARBITRATOR: I know, but she's entitled to  
3       do cross.

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

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

8       MS. SMITH: Yes, that's great.

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

15       THE WITNESS: Gotcha.

16       THE ARBITRATOR: Okay. Very good.

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

21       THE ARBITRATOR: Well, I'm wondering at this  
22       rate if we're even going to get done today. But, you

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

11 If it looks like we can finish if I stay til  
12 5:30 or 6:00, I'll stay til 5:30 or 6:30. Okay. All  
13 right. We're breaking for lunch.

14 (Whereupon, at 1:20 p.m., a luncheon recess was  
15 taken.)

16  
17  
18  
19  
20  
21  
22

1           A F T E R N O O N   S E S S I O N           2:10 p.m.

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

6       CROSS EXAMINATION:

7       BY MS SMITH:

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

10          A. I'm fine.

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

14          A. That's correct.

15          Q. Do you bring your food from home?

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

22               And in addition, like everybody else in the

1 office, we have like TV dinners and stuff in the  
2 freezer, just in case you got stuck there and  
3 couldn't go home.

4 Q. You don't get free food at a WFO? How much?

5 A. Well -- sometimes I didn't pay, if that's  
6 what you're -- I mean, what --

7 Q. To your knowledge, does the Agency provide  
8 you free food?

9 A. Oh, no, no. Well --

10 Q. On a regular basis.

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

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

16 A. Three.

17 Q. Building three. And you went to the  
18 cafeteria and you paid for the food there, right?

19 A. Yes, however they had paper napkins and  
20 plastic forks, and I wasn't sure who paid for those.

21 Q. Okay. Well, do you know who runs that  
22 cafeteria?

1 A. I have no idea.

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

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

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

12 A. Yes.

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

15 A. The whole implementation plan?

16 Q. Uh-huh.

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

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

22 A. I was concerned with the portion of it --

1 Q. That's not my question. My question --

2 THE ARBITRATOR: Answer her question.

3 THE WITNESS: Okay. So what was the question?

4 BY MS. SMITH:

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

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

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

10 A. No.

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

14 A. You know, washing your hands, certainly not  
15 re-using plates or -- I mean I grew up in the  
16 restaurant business, so I know there's some very  
17 strong standards for sterilizing plates to re-use,  
18 you can't just wash them and put them back out again.  
19 You know, plastic utensils, the gelled alcohol  
20 supposedly kills a good amount of germs. You know,  
21 I've heard about using your hands to cover your mouth  
22 when you sneeze, but I'm not here as a health expert

1 by any means.

2 But I am here as -- as a reasonable citizen  
3 that obviously doesn't want to get sick either, so  
4 I've been able to research some of this stuff and  
5 answer it the best that I could.

6 Q. In your research, did you come across any  
7 information about agencies are supposed to react to  
8 pandemics?

9 A. How agencies are -- I never researched that.

10 Q. You're not familiar with the NOAA pandemic  
11 influenza and continuity of operations plan, you're  
12 not familiar with that?

13 A. I have heard of it, but I've never read it.

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

16 A. I don't.

17 Q. Okay. And you're not a purchase card holder?

18 A. No.

19 Q. So you can't buy anything in the GSA  
20 catalogue?

21 A. That is correct.

22 Q. Only a purchase card holder can.

1           A. That is correct.

2       THE ARBITRATOR: Can you keep your voice up,  
3       because I'm having a little trouble hearing you.

4       MS. SMITH: I'm sorry.

5       BY MS. SMITH:

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

8           A. That is correct.

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

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

13          Q. And, so --

14          A. It's subsidized.

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

18          A. That is correct.

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

21          A. No. That -- first of all, it's specifically  
22       the 2009 H1-N1 virus -- I think there might be more



1 -- I've seen it specifically referred to that way, so  
2 there might be more than one H1-N1, and, no, clearly  
3 the outbreak didn't end, or we wouldn't be having the  
4 outbreak we're having right now.

5 Q. Well, what's your definition of an outbreak?

6 A. What is your definition of an outbreak?

7 Q. I'm not testifying, so my definition's not  
8 relevant.

9 A. Of course you're not. I mean, an outbreak is  
10 when a lot of people are getting sick.

11 Q. Are a lot of people getting sick right now,  
12 to your knowledge, in the Weather Service?

13 A. Yes, yes. Based on my research on the CDC  
14 website, it's higher than average amounts of cases  
15 being reported, and like I said before, just last  
16 night, I saw an article from a local newspaper -- not  
17 a newspaper, a TV station, in the Tampa area that a  
18 27 year old woman died from the H1-N1 virus; I mean  
19 she was fine like a week or so ago, and now she's  
20 dead, so -- so -- so I mean, I'm not an expert, I  
21 can't tell you what an outbreak is, but in my head --

22 Q. You know that the definition of a pandemic is

1 an outbreak, something that happens quickly and  
2 spreads fast, it's not something that is always  
3 around.

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

6 (Off the record.)

7 BY MS. SMITH:

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

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

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

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

19 MR. HIRN: But I mean --

20 THE ARBITRATOR: New testimony he may discuss,  
21 yes.

22 MR. HIRN: Okay. Our next witness is going

1 to be Mickey Brown, who is the eastern region  
2 director, and I think, Monique, or --

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

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

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

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

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

13 (Off the record.)

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

16 MR. HIRN: We're calling Mickey Brown.

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

19 THE WITNESS: Yes.

20 THE ARBITRATOR: Mr. Brown, my name is Mariann  
21 Schick, and I'm the arbitrator that the parties have  
22 selected to settle this dispute between them. You

1 are being called as a witness on behalf of the Union,  
2 and you're going to be questioned by Union counsel  
3 and then by Agency counsel, and I'm going to let the  
4 attorneys go back and forth until they've had all  
5 their questions answered, and I may have a few  
6 questions at the end.

7 Do you have any objection to taking an oath?

8 THE WITNESS: No.

9 Whereupon,

10 MICKEY BROWN

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

13 DIRECT EXAMINATION:

14 BY MR. HIRN:

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

18 A. Yes. I've been with the National Weather  
19 Service for about 25 years now, started in 1988 as a  
20 meteorologist intern in Meridian, Mississippi, went  
21 to the hurricane center for about a year, then as a  
22 general forecaster in the New York city office,

1 senior forecaster in the New York city office, came  
2 to the eastern region headquarters as the regional  
3 transition meteorologist, then I was promoted to the  
4 chief of the meteorologist services division, and in  
5 my current position as deputy director for the  
6 eastern region.

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

9 A. Correct.

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

12 A. Correct.

13 Q. Please tell us in capsule summary what your  
14 responsibilities were, you know, what kinds of stuff  
15 have you done for management in the way of labor  
16 relations?

17 A. Sure. It started -- as deputy director for  
18 the eastern region, part of my responsibilities is to  
19 represent management in regional labor issues, I'm  
20 management's representative to the labor council,  
21 back in the early, I guess late 1990's, early 2000's,  
22 I was part of the negotiating team management side

1 for the current collective bargaining agreement.  
2 Somewhere in, I guess it was 2007-ish, I became chief  
3 negotiator for the agency when the person who was  
4 doing the job and left to go somewhere else.

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

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

12 MR. HIRN: A hostile witness.

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

18 BY MR. HIRN:

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

1 eastern region, correct?

2 A. Correct.

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

7 A. Correct.

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

11 A. Management.

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

14 A. During that time frame, a direction came from  
15 the office of personnel management to the agencies to  
16 have contingency plans in place for pandemic  
17 influenza outbreaks. NOAA took that guidance and  
18 turned that into what I believe is called the NOAA  
19 pandemic influenza plan, or annex. That -- we were  
20 requested from the NOAA level to notify our Unions of  
21 NOAA's intent to implement that plan, or annex, and  
22 that's when I gave notice to NWSEO of management's

1 intent to implement that plan.

2 Q. Did the parties negotiate any provisions or  
3 -- any provisions that went above and beyond that  
4 which management had intended to implement in its own  
5 contingency plan?

6 A. I think -- above and beyond what management  
7 intended to implement. I think the main thrust of  
8 the negotiation was to get that plan implemented. If  
9 it covers other contingencies, so be it.

10 Q. Well, let me direct your attention to the  
11 second paragraph. Do you recall that second  
12 paragraph.

13 A. I don't have the document in front of me, but  
14 I do -- but I know what we're referencing.

15 Q. And that is the provision of --

16 THE ARBITRATOR: Why don't you -- we're going  
17 to have counsel read to you that second paragraph,  
18 just so it's in the record, and we all know what  
19 we're talking about, the same thing.

20 MS. SMITH: And he has access to the  
21 documents. We sent him these documents in advance,  
22 so if you want to refer specifically to the document.



1 Mickey, do you have them printed out?

2 MS. CIOFFALO: I don't know if he printed them  
3 out.

4 THE WITNESS: I can go print them out if you  
5 give me a minute.

6 THE ARBITRATOR: Sure, why don't you take a  
7 minute and go do that?

8 MS. SMITH: Wait, wait, wait. Mickey, wait.

9 Not all of the documents. It's Exhibit A, Exhibit B,  
10 Exhibit C, Exhibit E --

11 MR. HIRN: Well, Mickey, I only need to ask  
12 you about the MOU itself.

13 MS. SMITH: Which is Exhibit C.

14 MS. CIOFFALO: It's Exhibit C. If we need the  
15 others later you can print them out later. No, I'm  
16 sorry, it's Exhibit C.

17 THE ARBITRATOR: It's Exhibit C, print out  
18 Exhibit C. Okay.

19 THE WITNESS: Okay. One second.

20 THE ARBITRATOR: Very good. Okay. We'll go  
21 off the record.

22 (Off the record.)

1 THE ARBITRATOR: Okay. We're back on the  
2 record. The witness is back in the room. Do you  
3 have what Agency counsel sent you as -- she denoted  
4 as Exhibit C that she mailed you or faxed you,  
5 whatever it was, which is the memorandum of  
6 understanding? Which is one of our Joint exhibits.

7 THE WITNESS: Yes.

8 THE ARBITRATOR: Okay. Very good.

9 BY MR. HIRN:

10 Q. Mickey, if I'm correct, these two paragraphs,  
11 the provisions here, these are not what was included  
12 in the Agency drafted implementation plan, correct?  
13 These were something you guys, you and Dan  
14 negotiated, correct?

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

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

22 A. Not to my knowledge, no.

1 Q. Right. This was the product of the  
2 conversations between you and Dan, correct?

3 A. Correct.

4 Q. Okay. With regard to the second paragraph,  
5 was the primary intent of the second paragraph to  
6 provide these matters as a convenience to employees,  
7 or rather was it intended to limit the potential to  
8 transmit the cold, flu and other illnesses in the  
9 workplace?

10 A. It was not an intent for the primary use of  
11 -- the primary use of the employee, it was to have  
12 available to the office when they were needed, when  
13 employees needed to use them, to ensure the  
14 operations of the office.

15 Q. What are the consequences to the Agency if  
16 multiple employees at a Forecast Office or River  
17 Forecast Center are out sick at the same time?

18 A. If the office doesn't have enough people to  
19 cover shifts, then responsibility for forecasting at  
20 that office, or all the responsibility associated  
21 with that particular office are transferred to their  
22 backup office, which places the burden on their

1 backup office to do the backup office's primary job  
2 and their job as backup.

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

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

7 Q. When you were negotiating the second  
8 paragraph, was there any discussion that the promise  
9 to provide these materials was limited to only the  
10 2009-2010 influenza season?

11 A. Not that I recall, no.

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

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

19 Q. Do you recall receiving the e-mail from John  
20 Longenecker instructing regional offices and  
21 subordinate managers not to purchase these supplies  
22 anymore?

1 A. Yes.

2 Q. Were you surprised when you received that?

3 A. Yes.

4 Q. And why were you surprised?

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

9 Q. And why did you believe that?

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

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

16 A. I would say we did, yes.

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

21 A. Without checking the records, because I don't  
22 deal directly with purchasing, from that perspective,

1 I would say that's a reasonable statement, yes.

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

5 A. Yes.

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

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

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

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

17 Q. How about the hiring freeze?

18 A. There is a hiring freeze in place.

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

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

22 MR. HIRN: I have nothing further.

1 THE ARBITRATION: Okay. You are now going to  
2 be cross-examined by Agency counsel.

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

6 THE ARBITRATOR: Very good.

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

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

11 (Off the record.)

12 THE ARBITRATOR: Okay. Back on the record.

13 You have the documents printed out now?

14 THE WITNESS: Yes, I do.

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

17 CROSS EXAMINATION:

18 BY MS. SMITH:

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

21 A. Okay. Thank you.

22 Q. You discussed this continuity of office plan

1 earlier, the pandemic annex. Do you have Exhibit A  
2 in front of you, what the Agency marked as Exhibit A?  
3 Is that the plan that you were referring to earlier?

4 (The document referred to was marked for  
5 identification as Agency Exhibit Number A.)

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

9 BY MS. SMITH:

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

13 A. The line offices within NOAA.

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

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

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

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

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



1 A. Okay.

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

4 BY MS. SMITH:

5 Q. Have you seen this document before?

6 A. Say again, please?

7 Q. Have you seen this document before?

8 A. Yes.

9 Q. What is this document?

10 A. That was a memo that Bob Byrd -- or Robert  
11 Byrd issued, who at the time was the chief financial  
12 officer for the National Weather Service, issued  
13 around the time that the influenza plan for NOAA was  
14 put out.

15 Q. Do you remember if this plan of action was  
16 completed at the same time as the memorandum of  
17 understanding you were discussing before?

18 A. It's within the same timeframe if I remember  
19 correctly.

20 MR. HIRN: Is it customary for opposing  
21 counsel to get a copy of the exhibits that are --

22 MS. SMITH: Oh, I'm sorry. Yes.

1 MS. CIOFFALO: Sorry about that.

2 BY MS. SMITH:

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

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

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

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

12 MS. SMITH: A and B.

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

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

18 BY MS. SMITH:

19 Q. Now you talked about the intent of the MOU on  
20 cross examination. Was the purpose of the MOU to  
21 prevent the spread of the common cold among Weather  
22 Service staff?

1           A. I don't -- I would -- I would say, it  
2           --probably not the common cold.

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

4   THE ARBITRATOR: Which document are you  
5           referring to?

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

7   THE ARBITRATOR: Oh.

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

10   THE ARBITRATOR: The MOU, okay.

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

16   BY MS. SMITH:

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

19           A. There are many things that can interrupt  
20           operations. There could be sickness, there could be  
21           facility problems, there could be weather; there's a  
22           number of things that can prevent operations, or I

1           should say prevent -- interrupt operations.

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

4           MR. HIRN: Objection.

5           THE ARBITRATOR: Basis?

6           MR. HIRN: That's just leading.

7           THE ARBITRATOR: Well, but I mean --

8           MS. SMITH: It's already in evidence.

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

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

14          BY MS. SMITH:

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

16                 A. An outbreak of some type of virus.

17                 Q. Who determines that a pandemic has occurred?

18                 A. I would assume the Center for Disease  
19                 Control.

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

22                 A. Not to my knowledge.

1           Q. So, at the time that you signed the MOU, do  
2           you know if the Weather Service employees were  
3           purchasing disposable cups, plates and utensils?

4           A. Can you repeat that question?

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

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

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

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

18          MS. SMITH: Before.

19          THE ARBITRATOR: Before the MOU was signed?

20          THE WITNESS: I'm sorry, I'm going to have to  
21          ask for one more clarification. Could I have that  
22          question repeated?

1 THE ARBITRATOR: Yes. What she's asking is,  
2 before you entered into the MOU, were these items  
3 being purchased by employees of the Agency, on behalf  
4 of the Agency, acting in their official capacity, to  
5 provide these items? That's her question.

6 THE WITNESS: Yes.

7 BY SMITH:

8 Q. And do you know why they were being  
9 purchased?

10 A. Yes. It was a result of a directive that we  
11 have in place to address continuation of offices  
12 during significant weather or disasters.

13 Q. Okay. Do you know what the number of that  
14 directive is?

15 A. Not off the top of my head.

16 Q. Can you take a look at Exhibit E, please?

17 A. Yes.

18 (The document referred to was marked for  
19 identification as Agency Exhibit Number E.)

20 BY MS. SMITH:

21 Q. Is that the directive that you're referring  
22 to?

1           A. Yes.

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

4       THE ARBITRATOR: Okay. Any objection?

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

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

11      MR. HIRN: Yes.

12      THE ARBITRATOR: Yes.

13      MR. HIRN: Is that a problem?

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

17      THE ARBITRATOR: Very good.

18      BY MS. SMITH:

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

20           A. Yes.

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

1           MOU?

2                   A. Yes.

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

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

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

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

19       THE ARBITRATOR: May I suggest this to the  
20          Agency, that we'll hold the record open to give you  
21          an opportunity to submit Exhibit E that would have  
22          been in effect prior to the execution of the MOU? It



1 looks like it would have been in effective as of June  
2 2007.

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

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

11 MS. SMITH: The relevance of the document?

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

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

21 THE ARBITRATOR: Okay. But this directive  
22 gives you the changes as of 2011.

1 MS. SMITH: But those changes didn't -- that  
2 -- none of these changes reference the authority that  
3 this delegation gave to the Weather Forecast Offices  
4 to purchase these items. The authority didn't  
5 change, the specific provision changed.

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

8 MS. SMITH: It does.

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

11 MS. SMITH: Okay.

12 BY MS. SMITH:

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

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

20 THE ARBITRATOR: Just -- sure, I mean, you'll  
21 have it for your testimony. We are going to submit  
22 the substitute -- the 2007 document, but so that

1           counsel can ask you questions now, why don't you go  
2           do that?

3           THE WITNESS:   Okay.   Thank you.

4           THE ARBITRATOR:   And we'll go off the record.

5           (Off the record.)

6           THE ARBITRATOR:   All right, back on the  
7           record.

8           BY MS. SMITH:

9                   Q.   So, have you reviewed page four?

10                   A.   No.   Any paragraph in particular?

11                   Q.   3.33.

12                   A.   Okay.

13                   Q.   What does this paragraph give Weather Service  
14                   employees the authority to do?

15                   A.   Based on the opinions of -- based on opinions  
16                   issued by the Comptroller General to permit the  
17                   expenditure of funds for lodging by securing hotel  
18                   accommodations for emergency situations --

19           THE ARBITRATOR:   I can read the document.   You  
20           know.   Is there anything other than the words to the  
21           document as to your understanding as to what this  
22           document does, or -- I mean, essentially, counsel,

1 the document speaks for itself.

2 BY MS. SMITH:

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

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

10 MS. SMITH: Okay.

11 BY MS. SMITH:

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

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

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

20 THE ARBITRATOR: Very good.

21 BY MS. SMITH:

22 Q. And what kind of emergencies were you

1 referring to?

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

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

9 A. Not necessarily. That was not my  
10 understanding.

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

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

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

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

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

21 Brown.

22 THE ARBITRATOR: Very good. We're now going

1 to have re-direct from Union counsel.

2 RE-DIRECT EXAMINATION:

3 BY MR. HIRN:

4 Q. Mickey, have you ever taken sick leave when  
5 you've gotten a cold?

6 A. Rarely, but yes.

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

10 A. Yes, I have. Yes, I have.

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

13 A. Yes.

14 Q. Does sick leave cost the government money?

15 A. I would -- I guess it does because of the  
16 employees being paid for sick leave.

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

19 A. Correct.

20 Q. And if you have a lot of sick leave at a  
21 Forecast Office, or a Forecast Center, that's going  
22 to impact operations, correct?

1 A. It does, yes.

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

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

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

9 THE ARBITRATOR: Anything further?

10 MS. SMITH: Yes.

11 RE-CROSS EXAMINATION:

12 BY MS. SMITH:

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

15 A. No.

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

19 A. Yes.

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

22 A. They do.

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

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

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

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

22 A. I think it's part of operations -- I mean,



1       it's part of -- managers understand when sick leave  
2       comes up.

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

5               A. To prevent people from taking sick leave?  
6       Not to my knowledge.

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

8       THE ARBITRATOR: Anything further?

9       FURTHER RE-DIRECT EXAMINATION:

10       BY MR. HIRN:

11               Q. Yes. Mickey, at a Forecast Office, when you  
12       are doing rotation schedules for forecasters, or the  
13       interns in the HMT's and upper air shift, one does  
14       not commonly schedule extra people in advance in the  
15       anticipation that there might be sick leave, correct?  
16       You only schedule the minimum staff that is  
17       operationally necessary, correct?

18               A. That's correct.

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

22               A. Yes.

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

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

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

13 A. The majority of the time correct, yes.

14 MR. HIRN: That's all.

15 THE ARBITRATOR: Anything further?

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

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

1 all right?

2 Very good, thank you.

3 THE WITNESS: Very good, thank you.

4 THE ARBITRATOR: Thank you. Okay. We just  
5 finished with the testimony of a witness, and we had  
6 referenced Agency Exhibit E. Did you want to admit  
7 Agency Exhibit E -- the 2007 version of it?

8 MS. SMITH: Yes, I do.

9 THE ARBITRATOR: All right. Would you have  
10 any objection, counsel? Fine. I'm going to leave  
11 the record open and you will send Exhibit E -- send  
12 it directly to me, because I am going to take my  
13 exhibits with me. Have you been given a copy of  
14 exhibits?

15 Okay, very good, so you'll send them to me  
16 and to counsel and we will -- at the time of receipt  
17 they will be considered part of the record, so --

18 MR. HIRN: This is not --

19 THE ARBITRATOR: That copy is not being  
20 admitted into the record. E will be sent to us, the  
21 2007 version. All right. Mr. Hirn, another witness?

22 MR. HIRN: No, we rest, thank you.

1 THE ARBITRATOR: All right. The Union rests.

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

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

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

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

21 If I overrule the objection, I'm going to  
22 permit you to keep testifying on that point, but if I

1 sustain the objection, I'm going to cut you off on  
2 that. Do you have any objection to taking an oath?

3 THE WITNESS: No, I do not.

4 Whereupon,

5 JOHN LONGENECKER

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

8 DIRECT EXAMINATION:

9 BY MS. SMITH:

10 Q. Good afternoon, Mr. Longenecker.

11 A. Good afternoon, ma'am.

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

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

16 THE WITNESS: My name is John Longenecker,  
17 J-O-H-N, L-O-N-G-E-N-E-C-K-E-R.

18 Q. Are you currently employed?

19 A. Yes, I am.

20 Q. Where are you employed?

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

1 Enforcement.

2 Q. What's your current position?

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

5 Q. What are your duties and responsibilities?

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

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

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

14 Q. And what positions did you hold?

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

17 THE ARBITRATOR: Okay. You're going to have  
18 to keep your voice up, because I'm right next to you.

19 I imagine Mr. Hirn must be having a great deal of  
20 difficulty unless his hearing is a lot better than

21 mine. But please do keep your voice up. Okay.

22 BY MS. SMITH:

1 Q. How long were you deputy CFO of the Weather  
2 Service?

3 A. I was deputy CFO from September 2012 til  
4 November of 2013.

5 Q. How long were you -- you said that you -- I'm  
6 sorry. We didn't get to your positions. You talked  
7 about your billet. What positions did you hold?

8 A. So, I was acting chief financial officer from  
9 September 2012 to May of 2013, and then I was acting  
10 chief of operations from August of 2012 til November  
11 of 2013.

12 Q. Okay. What was your series and grade level?

13 A. The series and grade level was a GSA 15 301.

14 Q. And was that the same position for all of the  
15 -- was it the same series and grade levels for all  
16 the positions?

17 A. Yes, even though they were acting SES's, you  
18 do not change series or grade.

19 Q. And what's an SES?

20 A. Senior executive staff.

21 Q. What were your duties and responsibilities as  
22 deputy CFO for the Weather Service?

1           A. As deputy CFO, it was my responsibility to  
2 carry out the actions, or the desires of the chief  
3 financial officer and any functions associated with  
4 that position.

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

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

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

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

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

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

22          Q. And when you were in that position, who was



1 in the acting -- or, I'm sorry -- who was the deputy  
2 assistant administrator?

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

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

8 A. Yes, I had five.

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

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

15 Q. How many regional directors?

16 A. There are six.

17 Q. How many office directors?

18 A. Five.

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

22 A. The regional directors.

1 Q. Was it the same for the office directors?

2 A. The office directors manage their funds, yes.

3 THE ARBITRATOR: Keep your voice up.

4 THE WITNESS: Sorry.

5 BY MS. SMITH:

6 Q. Did you interact with the regional directors?

7 A. Yes.

8 Q. How.

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

12 Q. How many employees are in the Weather  
13 Service?

14 A. Roughly five thousand.

15 Q. How many of those employees are in the  
16 bargaining unit?

17 A. Just over three thousand, I believe.

18 Q. And what's the name of the bargaining unit?

19 A. National Weather Service Employees Union, or  
20 NWSEO.

21 Q. Did you interact with NWSEO?

22 A. Yes, I did.

1 Q. How?

2 A. Through either phone calls and direct  
3 communication and e-mails as well.

4 Q. And with whom did you most interact?

5 A. With Dan and Richard.

6 Q. Before the Weather Service --

7 THE ARBITRATOR: Can you give me their last  
8 names?

9 THE WITNESS: Richard Hirn and Dan Sobien.

10 THE ARBITRATOR: Right.

11 BY MS. SMITH:

12 Q. Before the Weather Service, where were you  
13 employed?

14 A. I was employed with Department of Commerce  
15 NOAA, under the office of program planning  
16 integration.

17 Q. And how long have you been with NOAA?

18 A. I've been with NOAA for over 22 years.

19 Q. How long have you been in the federal  
20 government?

21 A. Over 30.

22 Q. What's your educational background?

1           A. Educational background?

2           Q. Yes.

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

5           THE ARBITRATOR: What's a Masters certificate?

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

8           THE ARBITRATOR: Okay.

9           BY MS. SMITH:

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

12           A. The biggest challenge facing the CFO's office  
13           was the continuation of the -- I won't say fallout,  
14           but the follow-on actions from the internal  
15           investigation -- the decision memorandum from both  
16           Dr. Lubechenco and Dr. Blank, the corrective actions  
17           required by them, and then of course being September  
18           when I took over we were looking at how to position  
19           ourselves for execution for Y13, at the time looking  
20           at a pending continuing resolution as well as the  
21           budget control act sequestration potential issues  
22           coming up.

1 THE ARBITRATOR: Are you going to explain who  
2 these doctors are -- I have no idea what you're  
3 talking about. Thanks.

4 MS. SMITH: I do. Yes.

5 BY MS. SMITH:

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

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

9 THE ARBITRATOR: K-O?

10 THE WITNESS: No. C-O.

11 BY MS. SMITH:

12 Q. And who was that?

13 A. She was the NOAA administrator at the time.

14 Q. And the other person that you mentioned?

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

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

20 A. The gist of the decision memorandum was  
21 basically their interpretation of the results of the  
22 internal investigation as to what corrective actions

1           they wanted to have done for the Agency as well as  
2           the department, to ensure that the failures within  
3           the Weather Service do not occur again, or at least  
4           the similar types of occurrence, so essentially the  
5           internal investigation did find, you know,  
6           anti-deficiency act violation, of which the letter  
7           was forwarded to the President with several of these  
8           names on it --

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

12           THE WITNESS: Yes.

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

21           THE WITNESS: In 2011, well even prior to  
22           that, there was several employees that felt the use

1 of programmatic funds were not being appropriately  
2 utilized the way in which Congress intended it, they  
3 had supposedly raised their concerns within the  
4 Weather Service, nothing was done about it, they then  
5 went to the office of the Inspector General, the  
6 office of the Inspector General referred the case  
7 back to NOAA for investigation.

8 THE ARBITRATOR: Kind of like whistle-blower.

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

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

19 THE WITNESS: They found that the funds were  
20 being misused, inappropriate use of funds,  
21 mismanagement of funds, was some of the terminology  
22 they used within the report.

1 THE ARBITRATOR: Okay. Okay. So that was the  
2 biggest thing you were facing when you came in.

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

7 THE ARBITRATOR: Okay. Now I understand.

8 BY MS. SMITH:

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

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



1 restructuring will take effect hopefully in the 15  
2 budget.

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

12 Anyway, and along with that we were looking  
13 at, you know, headquarters restructuring or  
14 restructuring the leadership in order to manage to  
15 the new program structure. You know, the decision  
16 memorandum also required us to look at communication  
17 methods so that any employee who questioned anything  
18 within the department or you know within the  
19 individual line offices or agency would have a path  
20 to go forward whether it's through your current chain  
21 of command, and if you're not getting any results  
22 that you feel are warranted for your concern, you

1       have the ability then to go direct to other leaders  
2       within the department if not the OIG of course,  
3       always was an avenue.

4       There was requirements for training, for  
5       appropriation of law training, specifically for every  
6       employee associated with any kind of financial  
7       matters, the department set up a four hour training  
8       course that every employee had to take -- that  
9       training course was deemed not adequate for most of  
10      the Weather Service employees that were financial  
11      managers. We required them to take a week long  
12      training course, and that was approved through the  
13      deputy under-secretary as well.

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

21             Q. Thank you. Let's talk about the  
22      appropriations law training that you mentioned. Have

1           you taken this training?

2           A. Yes, I have.

3           Q. How many times?

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

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

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

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

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

21          Q. I'm going to move forward Joint exhibit --  
22 well, actually it's the Union Exhibit, just to

1 minimize exhibits. It's Union Exhibit 8. Have you  
2 seen this document before?

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

4 Q. What prompted you to create this document?

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

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

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

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

22 Q. Do you remember who brought those concerns to

1 your attention?

2 A. I do not which regional director it was.

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

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

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

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

19 Q. And who are the XO's?

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

22 Q. Okay. Now, why did you send it to the

1 regional directors and the office directors?

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

4 Q. Responsible for what, just to be clear?

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

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

11 A. Correct.

12 Q. And what did she say?

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

15 Q. And the deputy CFO was who?

16 A. Marie Laverne at the time.

17 Q. And what did she say?

18 A. She agreed as well.

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

22 A. Yes. After I sent it, I discussed it with

1 several individuals, including the chief resource  
2 manager, which is Ring Wiley downtown, as well as the  
3 deputy chief of staff, Jackie Bright.

4 Q. And what did Ms. Wiley say?

5 A. She said I did the right thing and we need to  
6 move forward. And also had a discussion with General  
7 Counsel as well to verify it.

8 THE ARBITRATOR: To verify what?

9 MS. CIOFFALO: Objection. We cannot disclose  
10 any attorney client privilege information.

11 THE ARBITRATOR: But as I understood it, part  
12 of your defense was is that Mr. Longenecker consulted  
13 with counsel as a result of when he took this action.

14 MS. SMITH: I mean, he consulted with them,  
15 but --

16 MS. CIOFFALO: It's not part of the defense.

17 I mean, he consulted with attorneys, I mean, but  
18 that's not part of the defense.

19 THE ARBITRATOR: It's not part of the defense  
20 that this was -- that you repudiated the MOU because  
21 of this citation in here which he has three Com Gen  
22 4339 1924?

1 MS. CIAFFOLO: But I mean, whether or not the  
2 witness consulted with counsel is not germane to the  
3 issue. I mean, his conversations with counsel are  
4 protected -- attorney client protected information --  
5 it's not, you know -- Mr. Longenecker took action  
6 based on whatever knowledge and counsel that he has  
7 received. I don't think that the Agency should be --  
8 I don't think -- you know, I don't think that that  
9 waives attorney client privilege in any way.

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

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

18 THE ARBITRATOR: Oh, so you --

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

21 THE ARBITRATOR: Are we going to get this red  
22 book -- I mean --



1 MS. SMITH: It's very big. It's three  
2 volumes.

3 MR. HIRN: It's about 1500 pages.

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

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

18 MS. CIOFFALO: Absolutely, we will.

19 THE ARBITRATOR: Okay.

20 THE CIOFFALO: We plan to address the legal  
21 question substantively in our post-hearing brief;  
22 we're trying to stick to just the facts of what

1 occurred here, for the purposes of witness testimony.

2 THE ARBITRATOR: Okay. Well, since you went  
3 and did your own research, I guess it's not necessary  
4 to get into the question of what counsel may have  
5 advised you, so it's really moot. Okay. Go ahead,  
6 continue.

7 BY MS. SMITH:

8 Q. So, what happened after you sent this March  
9 26, 2013 e-mail? What happened in the agency?

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

19 THE ARBITRATOR: Who's he?

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

22 BY MS. SMITH:

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

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

19           By that time, we'd already received a  
20 grievance from the National Weather Service Employees  
21 Union for sending out this notification. That  
22 grievance was then, you know, and action was taken on

1       it. Unfortunately at that time we did not, I guess  
2       follow the appropriate steps, which was later  
3       informed to me, that we should have notified NWSEO  
4       prior to sending this out, because of the prior  
5       agreement, but as I stated, I did not -- was not  
6       aware of that prior agreement before doing it, nor  
7       was I aware that this was a requirement to notify  
8       them, so the notification then went out after the  
9       grievance was received

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

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

18           Q. And they're in the bargaining unit?

19           A. Yes.

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

22           A. There is. You know, within the commerce

1 acquisition manual, it clearly states you are not  
2 authorized to do personal items, they call out some  
3 of the items, specifically those discipline actions  
4 that are referenced in there; it either goes to the  
5 department of administrative order, which will allow  
6 removal from your position, to, you know, the most  
7 extreme, to basically just losing the credit card and  
8 losing the ability to, you know, spend appropriated  
9 funds.

10 Q. So, who would have to pay these penalties?

11 A. If it was determined that it was an  
12 inappropriate use, then it would be the employee's  
13 liability.

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

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

19 BY MS. SMITH:

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

1           you were referring to?

2           A. Yes.

3           Q. And where are the penalties that you  
4           discussed?

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

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

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

10          THE ARBITRATOR: And this is J? J 19?

11          MS. SMITH: J 19, yes.

12          THE ARBITRATOR: Okay.

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

20                 Card holders and approving officials may be  
21          held personally liable for any action deemed by the  
22          reviewing officials as non-compliant with these

1 acquisition policies and regulations --

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

4 MS. SMITH: Page 19, section --

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

6 THE WITNESS: I'm sorry.

7 MS. SMITH: Oh, that's right.

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

10 THE WITNESS: Yes, ma'am.

11 BY MS. SMITH:

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

13 A. So, page J 18, where it says federal  
14 appropriation law restrictions, in accordance with  
15 the principles of federal appropriation law, the  
16 following items are generally prohibited from  
17 purchases with appropriated funds, as there may be  
18 authorized exceptions of certain items card holder  
19 shall obtain approval from the head of the  
20 contracting officer after legal review and document  
21 the exception prior to the purchase of any of the  
22 following items, and it then goes on to personal

1 expenses and furniture and other types of things that  
2 are of the personal nature.

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

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

12 Q. Can you turn to page 10?

13 A. 10?

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

16 A. J 13.

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

19 A. Yes.

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

22 THE ARBITRATOR: Any objection?



1 MR. HIRN: None.

2 THE ARBITRATOR: Exhibit J is in. Agency J.

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

5 BY MS. SMITH:

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

8 MR. HIRN: No objection to that.

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

11 BY MS. SMITH:

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

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

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

22 A. Okay, I'll skip over to that.

1 Q. Okay.

2 A. Use of a loan and use of government funds  
3 property or personal or other resources for  
4 unauthorized purposes, is that the one you're  
5 referring to?

6 Q. Is that the section you were referring to?

7 A. That is one that could be used in this case,  
8 yes.

9 Q. Okay.

10 A. All right. No further questions for Mr.  
11 Longenecker. Oh, I'm sorry. I just want to enter  
12 K --

13 THE ARBITRATOR: J and K are in. They're in.

14 All right, cross?

15 MR. HIRN: Yes.

16 CROSS EXAMINATION:

17 BY MR. HIRN:

18 Q. John, you said you looked to the red book  
19 when you --

20 (Off the record.)

21 THE ARBITRATOR: Back on the record.

22 BY MR. HIRN:

1           Q. John, did you -- when you read the red book,  
2           did you read any of the cases cited in it in either  
3           of the Comptroller General decisions?

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

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

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

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

18          A. Not for this matter, no.

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

1 for their employees?

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

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

7 A. Correct.

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

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

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

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

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

1           A. Correct.

2           Q. Okay.

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

7       THE WITNESS: We do.

8       THE ARBITRATOR: Did you consult with them?

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

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

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

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

20      THE WITNESS: That is correct.

21      THE ARBITRATOR: Very good. That's all I need  
22      to know.

1 BY MR. HIRN:

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

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

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

10 A. Well, David Murray.

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

13 THE WITNESS: David Murray is our current lead  
14 negotiator.

15 THE ARBITRATOR: Lead negotiator?

16 THE WITNESS: Yes.

17 BY MR. HIRN:

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

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

22 Q. Okay. Now, as the CFO did you ever have the

1 occasional look at sick leave usage at the National  
2 Weather Service?

3 A. Have I ever had the --

4 Q. Yes.

5 A. No.

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

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

9 Q. Maybe a generalized idea?

10 A. No.

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

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

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

21 A. No.

22 Q. Okay. You mentioned the budget control act

1 and sequestration. When did sequestration go into  
2 effect?

3 A. Well, the budget control act was passed in  
4 2011, and that's why we were looking at that with  
5 what needed to be done starting in 2012.

6 Q. But when did sequestration go into effect?

7 A. Sequestration was actually in effect 13.

8 Q. And what -- was there a particular day that  
9 it went into effect.

10 A. I don't remember the exact day off the top of  
11 my head.

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

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

16 BY MR. HIRN:

17 Q. The --- when sequestration went into effect,  
18 didn't the Agency take any number of things to  
19 significantly cut back its expenses?

20 A. We were looking at different things that  
21 needed to be curbed back, in order to ensure the  
22 mission was being accomplished, yes.



1 Q. Okay. You looked at it, but did you actually  
2 take any -- take any actions to limit Agency expenses  
3 at the time, as a result of sequestration?

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

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

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

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

17 THE ARBITRATOR: Cut back on what?

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

21 THE ARBITRATOR: What's the second word you're  
22 saying?

1 THE WITNESS: It's one word, radiosonde, it's

2 a --

3 THE ARBITRATOR: Radiosonde.

4 THE WITNESS: Yes.

5 THE ARBITRATOR: Okay. R-A-D-I-O-S-O-N-D?

6 THE WITNESS: E.

7 THE ARBITRATOR: S-O-N-E. Radiosone.

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

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

10 BY MR. HIRN:

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

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

19 Q. But furloughs never actually took place?

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

22 Q. Well, Congress re-programmed additional

1 funds.

2 MS. SMITH: Objection. We're getting

3 argumentative about what Congress did and what kind

4 of --

5 THE WITNESS: -- supplemental was

6 additional --

7 MS. SMITH: Wait, wait, wait.

8 THE ARBITRATOR: Okay. It's established that

9 apparently there was no furloughs as he said as a

10 result of additional action by Congress which awarded

11 you more money, is that correct?

12 THE WITNESS: Correct.

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

14 BY MR. HIRN:

15 Q. And there was an Agency hiring freeze?

16 A. Sorry?

17 Q. There was a hiring freeze March 27th.

18 A. I don't remember when the hiring freeze memo

19 came out, but it was shortly after sequestration took

20 effect, yes.

21 Q. What was your -- you said you had previous

22 employment with NOAA, you were a NOAA Corps officer,

1           were you not?

2           A. I was.

3           Q. And that's a ship-work position, correct?

4           A. No.

5           Q. You were -- you didn't -- you never sailed?

6           A. I did, for two years.

7           Q. Oh, and what vessels did you sail on?

8           A. The Oregon II was my primary vessel. NOAA  
9           Corps is the seventh smallest unit of service.

10          THE ARBITRATOR: But what does it stand for,  
11          NOAA Corps?

12          THE WITNESS: NOAA is the National Oceanic and  
13          Atmospheric Administration, Corps is just like a  
14          marine corps, it's just like --

15          THE ARBITRATOR: Oh. Okay. Oh, so NOAA  
16          Corps. Gotcha. Thank you very much.

17          BY MR. HIRN:

18                 Q. And those ships were mixed civilian and NOAA  
19          Corps crew, correct?

20                 A. Correct.

21                 Q. And how often did -- how long a voyage did  
22          the Oregon take? Was it like an overnight voyage,

1 six months, voyage?

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

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

9 A. Yes.

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

12 A. Some of the officers were civilians?

13 Q. Yes, engineering department.

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

16 Q. Right. They were civilian employees.

17 A. Yes.

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

22 A. Not to my knowledge, no.

1           Q. I'm going to show you what will be marked for  
2           identification as Union Exhibit 16.

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

5           BY MR. HIRN:

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

8           A. I have seen cups and saucers, yes.

9           Q. And where do you recognize this from?

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

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

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

15          Q. You did not have a wardrobe.

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

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

19          A. Yes.

20          Q. And what did you eat off of?

21          A. Very cheap plates and nothing that was ever  
22          embossed with NOAA emblems or china, or anything like

1           that.

2           Q. Did you have to bring it from home, or did  
3           the Agency supply them to you?

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

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

8           A. Yes.

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

13          A. No, I did not say that.

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

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

18          Q. And when would that be?

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

22          Q. Well, give me an example.

1           A. Well, say, for example, FEMA disaster  
2           response, when you're trying to feed a group of mass  
3           of people who are displaced from their homes and or  
4           community.

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

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

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

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

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

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

21          MR. HIRN: Yes, yes.

22          THE ARBITRATOR: Okay. U 16 is withdrawn.



1           MR. HIRN: I'm sorry, I don't want to stand over  
2           the witness and ask him something.

3           THE ARBITRATOR: Okay.

4           BY MR. HIRN:

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

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

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

14          A. Yes.

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

17          BY MR. HIRN:

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

21          MS. SMITH: Objection. Objection.

22          THE ARBITRATOR: Cross examination.

1 Overruled.

2 BY MR. HIRN:

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

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

7 Q. So --

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

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

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

18 Q. I have no further questions.

19 THE ARBITRATOR: Any re-direct?

20 MS. SMITH: Yes.

21 THE ARBITRATOR: Do you want to submit this  
22 into evidence or no?

1 MR. HIRN: I was just trying to make a point.

2 THE ARBITRATOR: Do you want to withdraw it?

3 MR. HIRN: Sure.

4 THE ARBITRATOR: U 17 is also withdrawn. Did

5 you hear me counsel? He withdrew U 17.

6 MS. SMITH: Okay. That's good.

7 RE-DIRECT EXAMINATION:

8 BY MS. SMITH:

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

13 A. I do not know the statute by number, but it's  
14 just what he said, it was the health services statute  
15 that allows federal government to provide health  
16 services to federal employees in metropolitan areas  
17 such as this and other places where there is a vast  
18 groupings.

19 Q. So, what kind of health services does it  
20 authorize?

21 A. It's basically --

22 Q. Understanding.

1           A. You know, there's usually a nurse available  
2           to deal with immediate needs if necessary, will do  
3           periodic physicals, it will do flu shots, those kinds  
4           of things necessary for ensuring the welfare of the  
5           employees.

6           Q. Now, on direct you also talked about a  
7           conversation with -- I'll withdraw that question.  
8           Now, in terms of sick leave, what's your  
9           understanding of how an agency budgets for sick  
10          leave?

11          A. How an agency budgets for sick leave?

12          Q. Yes. Or does an agency budget for sick  
13          leave?

14          A. It is not written in the budget per se, no.

15          Q. Okay. So, what's the understanding when you  
16          created a budget about sick leave, or employees using  
17          sick leave?

18          A. You create a budget based on FTE account,  
19          which is a federal -- full-time employment, and  
20          essentially each position may not work the full 80  
21          hours, but you have to have so much coverage, and  
22          it's based on the dollar amounts required to ensure

1       that your mission is being accomplished within that  
2       limits, so, whether it's family medical leave,  
3       whether it's sick leave, whether it's some other  
4       thing, you have to have a body to ensure the mission  
5       is getting accomplished.

6           Q. Okay. So the idea of an FTE encompasses sick  
7       leave and annual leave and temporary unavailability  
8       of an employee?

9           A. Correct.

10          Q. In terms of the budget control act, where  
11       does sequestration fall into that, what was the  
12       process?

13          A. Well, the budget control act basically put a  
14       ceiling authorized for discretionary spending across  
15       the government, which required also periodic cuts to  
16       everybody's budget. There were different  
17       interpretations as to what -- whether it had to be an  
18       across-the-board cut, whether it had to be cuts  
19       dictated by the agency --

20       THE ARBITRATOR: This was before  
21       sequestration, right? Or this was sequestration?

22       THE WITNESS: This was sequestration.

1 THE ARBITRATOR: Okay.

2 BY MS. SMITH:

3 Q. So, when you say sequestration, that was a  
4 mandatory budget cut that Congress put into the law  
5 and the budget control act?

6 A. Correct.

7 Q. And it mandated five percent of each account,  
8 is that right?

9 A. Correct.

10 Q. How many accounts does the Weather Service  
11 have?

12 A. Oy vey. I believe it's about 16.

13 THE ARBITRATOR: Accounts is what you're  
14 saying? 16 accounts?

15 BY MS. SMITH:

16 Q. So, can you just explain --

17 A. You probably know better than I do.

18 THE ARBITRATOR: You mean on your PNF?

19 THE WITNESS: PPA structure --

20 THE ARBITRATOR: You mean on the PNL, is that  
21 what you're talking about?

22 THE WITNESS: Well, there are programs, plans

1 and activities, each one of them is --

2 MR. HIRN: These are the lines in the --

3 THE WITNESS: Lines in the --

4 MR. HIRN: NOAA appropriations.

5 THE ARBITRATOR: Okay.

6 MR. HIRN: That the Commerce Department

7 appropriates.

8 THE ARBITRATOR: Very good.

9 BY MS. SMITH:

10 Q. And pursuant to sequestration, NOAA was  
11 required to cut five percent of each of those  
12 accounts, is that right?

13 A. Correct.

14 Q. Okay. Now, Mr. Hirn asked you about your  
15 time at sea. Were you provided food when you were on  
16 a vessel?

17 A. Yes.

18 Q. And why are you provided food?

19 A. Because there were no other options available  
20 to the employee. There was no McDonald's, you know,  
21 you couldn't pull the ship over every day to -- or  
22 during lunch breaks, whatever, so --

1 Q. So there was no option available to get food?

2 A. Correct.

3 Q. There was no option available to get a paper  
4 plate?

5 A. Correct.

6 Q. There was no option available to get a paper  
7 cup, there was no option available to get utensils,  
8 is that right?

9 A. Correct.

10 Q. Is that the same for Weather Service  
11 employees? Do they have options to purchase paper  
12 plates, cups and utensils?

13 A. They do. They're all land-based.

14 Q. Now, you talked about a bona fide need, when  
15 you were talking about the use of appropriated funds.  
16 Can you tell us more about that?

17 A. Bona fide need is a concept in appropriation  
18 law that basically says that anything you do must  
19 have a need that fits within the timeframe that  
20 appropriation is good for, and the intent to which  
21 Congress gave you the funds for.

22 Q. So, to your knowledge, did Congress intend to



1 give Weather Service employees personal plates, cups  
2 and utensils?

3 MR. HIRN: Objection.

4 MS. SMITH: I said to his knowledge.

5 MR. HIRN: The intent of --

6 THE ARBITRATOR: Unless he knows legislative  
7 history, he's not going to know what the intent of  
8 Congress is.

9 Sustained.

10 BY MS. SMITH:

11 Q. Is it your responsibility to ensure that  
12 funds are -- appropriated funds are spent in  
13 accordance with Congressional intent?

14 A. Yes.

15 Q. So, to your --

16 A. As the CFO it was.

17 Q. So, as acting CFO it was your job to make  
18 sure that appropriated funds were spent in accordance  
19 with Congressional intent, is that right?

20 A. Correct.

21 Q. To your knowledge, was it the Congressional  
22 intent to provide paper plates, cups, utensils, or

1 napkins --

2 THE ARBITRATOR: I'm going to -- how does he  
3 know -- you haven't laid a foundation as to how he  
4 knows what Congressional intent is.

5 MS. SMITH: If this was his job to --

6 THE ARBITRATOR: But you still haven't laid a  
7 foundation. I don't know whether he's looking at a  
8 document, he gets a document that says this is the  
9 Congressional intent --

10 MS. SMITH: Okay. Okay.

11 BY MS. SMITH:

12 Q. So how -- when you were acting CFO how did  
13 you know what the Congressional intent was for  
14 appropriated funds for the Weather Service?

15 A. So, NOAA submits a budget to Congress, with a  
16 desire to say, we need X number of dollars to perform  
17 the following things, and for the following purposes.  
18 Congress then will either approve that or will give  
19 you a version of their own with documentation that  
20 will tell you what these funds are to be used for?

21 Q. And how long have you been involved in the  
22 budget process with the federal government?

1           A. Probably over 12 years of my 30 year career.

2           Q. And so, just give us an overview of what the  
3 budget process is for a federal agency.

4           A. So there's basically a two year budgeting  
5 process that every agency goes through. That you go  
6 through, not only your agency, developing the budget,  
7 then it goes through department review, then it goes  
8 on to OMB before it's submitted to Congress, and each  
9 one of those steps will alter the budget if you will,  
10 so to speak, to ensure that it continues to meet with  
11 the bigger picture of the administration, so that  
12 then is submitted to Congress as the President's  
13 budget, as the administration's budget, and those  
14 budgets are then reviewed by committees on the Hill,  
15 and would then be altered or blessed, which I have  
16 not seen a President's budget blessed without  
17 alteration yet, but -- and then those are returned to  
18 us through what's called appropriations, or what's  
19 called an appropriations bill, either through a  
20 continuing resolution, which is what we're currently  
21 under or a full budget.

22           Q. And what's your role in that process? As an

1 acting CFO, what was your role in that process?

2 A. As the acting CFO, it was my responsibility  
3 to develop the budget, through the planning process  
4 and then also to execute the budget to which we  
5 received from Congress, so it was an end to end kind  
6 of process.

7 Q. So based on your knowledge of the budget  
8 process, budget procedures, in your capacity as  
9 acting CFO did you believe that providing these items  
10 was appropriate?

11 A. No, I did not. That's why I sent the memo  
12 out.

13 MS. SMITH: No more questions.

14 THE ARBITRATOR: Anything further?

15 MR. HIRN: Yes.

16 RE-CROSS EXAMINATION:

17 BY MR. HIRN:

18 Q. John, other than large recurrence, like  
19 weather satellites, or radar systems, Congress  
20 doesn't specifically authorize individual purchases  
21 of things that the Agency uses on a daily basis --  
22 you get the video conferencing, the tables we're

1 using, the chairs, the rugs, the map on the wall,  
2 does it?

3 A. To a certain extent, yes, they do.

4 Q. We're going to find this somewhere in --

5 A. You will see under GAO determination that,  
6 yes, in order to manage your program, certain items  
7 are to be expected to be purchased, other things are  
8 not.

9 Q. Where do we see this?

10 A. I've seen GAO determinations on numerous  
11 things.

12 Q. You mean, when you say -- what is a GAO  
13 determination?

14 A. Well, when you look at a --

15 Q. You mean the Comptroller General decisions,  
16 is that what you mean?

17 A. Yes.

18 Q. Yes. No, but Congress didn't -- we won't go  
19 to 2000 -- FY 2013 Congress appropriations act and  
20 Congress didn't say the Weather Service can buy, you  
21 know, 14 radiosonde -- 4000 radiosondes, or the  
22 Weather Service can buy carpeting, or the Weather

1 Service can buy light-bulbs, or the Weather Service  
2 can buy toilet paper, it can't buy toilet paper --  
3 those kinds of individual items that agencies  
4 purchase on a day to day basis, that's not anywhere  
5 in the appropriations law, appropriations bill or the  
6 report accompanying it, is it?

7 A. There is -- I'm trying to think what it says  
8 in the appropriations law, but yes, there is some  
9 degree of understanding that each program will need  
10 to have certain things procured under it -- others --

11 THE ARBITRATOR: Well, let's say, like the  
12 Congressional -- wherever this understanding is might  
13 just say office supplies, for example? I mean, isn't  
14 it correct that you've got discretion to purchase  
15 things you need to run this agency?

16 THE WITNESS: There is, and it says it in  
17 appropriation law, it defines what discretion is, and  
18 limits as to what that discretion is and the  
19 appropriations given for.

20 THE ARBITRATOR: What does it say?

21 THE WITNESS: I don't have it in front of me,  
22 I can't read it --

1 THE ARBITRATOR: How is it limited?

2 THE WITNESS: Well, it basically states that

3 if I give you money for a radar, I'm not going to  
4 expect you to buying carpet for the floor, or  
5 anything else based on, you know, what the intent to  
6 which the funds were given. Now, if I give you money  
7 to basically operate the headquarters type function,  
8 then yes, you would be expected to buy computers,  
9 desks, carpeting, those kinds of things, and that is  
10 in the appropriation law section.

11 BY MR. HIRN:

12 Q. There's nothing in the appropriations act --  
13 2013 appropriations act that says you can buy toilet  
14 paper, correct?

15 A. No.

16 Q. Or paper towels?

17 A. I mean, there's never going to be that detail  
18 in there.

19 Q. Okay. That's --

20 A. But it does clearly state and you know, it  
21 even says in the Congress acquisition manual, that  
22 there are certain things, personal use items are one,

1           that are not authorized within the appropriation law.

2           Q. Is there anywhere that you can show me in any  
3           statute, in any legislative history, in any  
4           Comptroller General decision, in any federal  
5           regulation, that says you can't buy disposable paper  
6           plates, cups, napkins and plastic utensils?

7           A. Yes, by definition of bona fide need, yes.

8           Q. No, no. Is there anything that says those  
9           items?

10          MS. SMITH: I'm going to object to the arguing  
11          with the witness.

12          THE ARBITRATOR: Well, this is cross  
13          examination. He's got latitude and frankly it's not  
14          clear to me why he decided what he did, so I'm going  
15          to allow it.

16          BY MR. HIRN:

17                 Q. Is there anything we can look at where it  
18                 says you can't -- anything other than this general  
19                 you're not supposed to -- you say you can't buy  
20                 personal items, okay, from a 1924 Comptroller General  
21                 decision, that says you cannot buy paper plates,  
22                 paper cups, napkins, tissues, plastic flatware?



1           A. Yes. Within the bona fide need definition.

2           The Weather Service does not have a bona fide need to  
3           buy those items.

4           Q. That's your opinion.

5           A. No it's not my opinion, that is --

6           THE ARBITRATOR: Okay. Stop. Everybody. He  
7           keeps referring to a bona fide need -- is this in a  
8           document somewhere?

9           THE WITNESS: Yes, it's in the appropriation  
10          law and it's also in the red book.

11          THE ARBITRATOR: Okay. Do you have the  
12          document here?

13          MS. SMITH: I have a summary of what it says,  
14          the concept -- do you want me to read it? I mean,  
15          this is my notes.

16          THE WITNESS: The point is --

17          THE ARBITRATOR: No, let me see it. The point  
18          is, quiet.

19          MS. SMITH: The first paragraph refers to the  
20          concept insights --

21          MR. HIRN: I don't know what you're looking  
22          at --

1 THE ARBITRATOR: You will after I look at it.

2 Everybody quiet. Okay. For example, you are showing  
3 me something from --

4 MS. SMITH: That's what I said earlier -- I  
5 said --

6 THE ARBITRATOR: No, you said it was a  
7 summary, I thought it was an Agency summary --

8 MS. SMITH: No, these are my notes.

9 THE ARBITRATOR: Okay, please. Quiet, quiet.  
10 Is there a document in this building that defines  
11 this bona fide need?

12 MS. SMITH: I'm sure that every administrative  
13 office has a red book.

14 THE ARBITRATOR: Is your office in this  
15 building?

16 THE WITNESS: No, it's not.

17 THE ARBITRATOR: An administrative office has  
18 the red book. Is there someone we can look up and --

19 MS. SMITH: We can get it from someone in the  
20 building, I'm sure.

21 THE ARBITRATOR: Yes, let's take a five minute  
22 break. I want to see this bona fide --

1 MS. SMITH: Well, the whole thing --

2 THE ARBITRATOR: I just want to see the  
3 definition of bona fide that this witness keeps  
4 referencing.

5 MR. HIRN: Well, I would suggest that a bona  
6 fide need is a long common law case --

7 MS. SMITH: Yes.

8 THE ARBITRATOR: It probably is, but I --  
9 everybody's referring to this bona fide, and I don't  
10 know what the hell he's talking about, where it comes  
11 from. If it comes from the red book, I'm ready to  
12 look at Chairman Mao, my God. You know, usually,  
13 when people are going to testify to documents, you  
14 bring in an exemplar of the document, you know,  
15 you're all referring to documents and nobody has  
16 thought to bring in a document that he's relying --  
17 that he apparently is saying he didn't interpret and  
18 he looked at a document.

19 I need to see what he's talking about.

20 MS. SMITH: I don't mean to --

21 THE ARBITRATOR: Fine. Don't bring it in.

22 MS. CIOFFALO: No, no, we can get it. Judge,

1 I think the witness testified that based on his  
2 knowledge of appropriation law and, you know,  
3 consulted the red book, that that was the decision  
4 that he made, but I mean perhaps, if you want to  
5 go --

6 THE ARBITRATOR: But he's just told counsel  
7 here, yes, it's defined, because what is bona fide is  
8 defined, and he looked at that, so I want to see what  
9 the hell he's talking about.

10 (Off the record.)

11 THE ARBITRATOR: This is what I am confused  
12 about and I will put it out for counsel, and if you  
13 guys can't clear the record up for me, then maybe I  
14 should ask my own questions, but I have here an  
15 e-mail from an agent of the Agency, who was saying  
16 that, as I understand your testimony, you are -- you  
17 are the expert for the Agency on appropriations, you  
18 deal with the appropriations all the time.

19 You looked at the appropriations law, you  
20 looked at the red book, is that correct, and you  
21 determined that the payment for these items that are  
22 at issue before me are -- the paper goods and things

1       like that -- were deemed personal furnishings,  
2       correct?

3       THE WITNESS: The way that they were  
4       described, the use to me, yes.

5       THE ARBITRATOR: Okay. And we had been  
6       talking about bona fide, is bona fide personal  
7       belongings, or something, or is there bona fide  
8       purpose -- how is bona fide coming up in this?

9       THE WITNESS: So, bona fide need, basically  
10       attaches to the purpose to which you're obligating  
11       the funds. In other words, there has to be a true  
12       bona fide need for using Congressional appropriated  
13       funds, and it has to meet the intent or the purpose  
14       to which --

15       THE ARBITRATOR: Let me ask you this. What  
16       was your thought process? How did you conclude,  
17       looking at these items, that these items violated --  
18       the purchase of these items by the Agency in  
19       accordance with this MOU, violated federal law. Give  
20       me your thought process.

21       THE WITNESS: So, my determination was not  
22       based on knowledge of the MOU, my determination was

1 based on the description that was given to me as to  
2 how these items were being used, which was for  
3 personal nature, in other words it was for an  
4 individual to go into a break-room, grab a plate, put  
5 a sandwich on it, and use that for its own --

6 THE ARBITRATOR: Okay. Now, when you say that  
7 the item was being -- it was presented to you as it  
8 was being used for a personal nature. Did someone  
9 give this to you in a memo, was it verbally?

10 THE WITNESS: This was through a phone call.

11 THE ARBITRATOR: Okay. And who was it who  
12 called you?

13 THE WITNESS: It was during a regional  
14 director's call, and I do not know which regional  
15 director raised the --

16 THE ARBITRATOR: So one of the regional  
17 directors said, what about paper goods that employees  
18 are using at the various offices for their lunches,  
19 and they're going in and using the paper goods -- did  
20 he use the word personal?

21 THE WITNESS: So, as each one of these  
22 regional directors was required to take the

1 appropriation law training class, they were all  
2 coming back and throwing all kinds of things at me,  
3 to say, hey, I don't think this is right, I don't  
4 think that's right. So, one of them raised the fact  
5 that, hey, do you know we're buying paper plates and  
6 utensils and stuff for our break-room, and I'm like,  
7 no, I didn't know that.

8 THE ARBITRATOR: Okay.

9 THE WITNESS: And I said, well, what are they  
10 being procured for, and they said, well, so people  
11 can use them for their lunches and whatever else, and  
12 I said, well that's of a personal nature, that's not  
13 for benefit of --

14 THE ARBITRATOR: And why did you -- why did  
15 you conclude that? What did you base that conclusion  
16 on, that it was something that was personal?

17 THE WITNESS: I mean, I based it on just the  
18 understanding of a plate with a sandwich on it is not  
19 benefitting myself or anybody else in that office --

20 THE ARBITRATOR: Okay. So you just -- it was  
21 your own thinking, it wasn't, gee I looked at a red  
22 book and I saw the word personal defined somewhere.

1 It was your own thought process.

2 THE WITNESS: I mean, I understood from my own  
3 appropriation law training and knowledge of the red  
4 book and things, that there is the definition of a  
5 personal use type item, and they do define things --

6 THE ARBITRATOR: Where is that defined? Can  
7 we -- is there somewhere where that is defined,  
8 because you concluded that, and I'm -- and you're  
9 basing it on your knowledge of appropriation law, and  
10 I'm trying to find out if it's somewhere written  
11 down.

12 THE WITNESS: It is, and I'm used to using the  
13 electronic version where I can search on things, but  
14 here it says, personal expense and furnishings.

15 THE ARBITRATOR: See, now I know I'm older  
16 than you are. I was taught at law school, I learned  
17 how to research by books, and I had a tough time  
18 trying to convert it to computer, and you're just the  
19 opposite.

20 THE WITNESS: Items that are classified as  
21 personal expenses or personal furnishings may not be  
22 purchased with appropriated funds without specific



1 statutory authority.

2 THE ARBITRATOR: Okay. So, let the record  
3 show that he is citing from what we have been  
4 referring to as the red book, principles of federal  
5 appropriation law, the red book, published by  
6 Government Training, Inc., and you are referencing  
7 section 13 of -- let's see if it's a particular  
8 chapter -- four, availability of appropriations  
9 purchase and -- and for the record, the red book  
10 says, items that are classified as personal expenses  
11 or personal furnishings may not be purchased with  
12 appropriated funds without specific statutory  
13 authority.

14 Most of the cases tend to involve government  
15 employees, the theory being simply that there are  
16 certain things an employee is expected to provide for  
17 him paren her end parens self. A prime example is  
18 food covered in detail previously in this chapter.  
19 The rule on personal expenses and furnishings was  
20 stated as follows in three Com Gen 433 1924, personal  
21 furnishings are not authorized as to be purchased  
22 under appropriations, in the absence of specific

1 provisions therefore contained in such appropriations  
2 or such acts if such furnishings are for the personal  
3 convenience, comfort or protection of such employees,  
4 or as such to be reasonably required as part of the  
5 usual and necessary equipment for the work on which  
6 they are engaged or for which they are employed.  
7 This decision is still cited frequently, and  
8 the rule is applied in many contexts. Of course,  
9 over the years, exceptions have evolved, both  
10 statutory and non-statutory. The remainder of this  
11 section explores several categories of personal  
12 expenses.  
13 And then the next -- that was the A  
14 introduction. So, B we have business or calling  
15 cards, C we have health, medical care and treatment,  
16 let's see if there's anything else, and under health  
17 medical care and treatment, we have purchase of  
18 health-related items, rehabilitation act is cited,  
19 office furnishings are cited.  
20 So, what was it -- and E personal  
21 qualification expenses. F, photographs. G, seasonal  
22 greeting cards, I, wearing apparel. Did you consult

1       this section, is this where you got this citation to  
2       the 1924 case from this training, this red book?

3       THE WITNESS: I got it from the red book,  
4       whether it was that particular chapter, or -- I'm not  
5       sure if that's the same citation -- I don't know  
6       which -- I got the e-mail from.

7       THE ARBITRATOR: Well, it's the same -- it is  
8       the same citation to the 1924 opinion. Is there any  
9       other section of the red book you would have  
10      consulted other than personal expenses or  
11      furnishings?

12      THE WITNESS: Yes. Appropriateness of  
13      expenditures which is also --

14      THE ARBITRATOR: Do you want to find that  
15      thing?

16      MS. HIRN: Ms. Schick, while John is looking  
17      at that thing, may I interject, and maybe I don't  
18      need to, but I will anyway, that the section you read  
19      is sort of out of context, it needs to be considered  
20      within the whole body of the case decided later on,  
21      and we will be discussing many cases cited in that  
22      Chapter five --

1 THE ARBITRATOR: I'm just trying -- I'm not  
2 even there yet. I'm just trying to get what he  
3 consulted. You know, I'm still at baby steps.

4 MS. HIRN: I just wanted to make sure that  
5 this is not the final word.

6 THE ARBITRATOR: It's -- from what I see, this  
7 is a training book.

8 MR. HIRN: Well, I would say that the red  
9 book, known as the red book, is regarded as an  
10 authoritative federal --

11 THE WITNESS: The red book is actually  
12 published by --

13 THE ARBITRATOR: You both stipulate this is an  
14 authoritative piece, right.

15 MS. SMITH: Oh, yes.

16 THE ARBITRATOR: Okay.

17 MS. CIOFFALO: Can we enter this into  
18 evidence or you can take judicial notice of it, the  
19 online version, or something like that --

20 THE ARBITRATOR: Wonderful. Show me where I  
21 can get it on line, then.

22 MS. CIOFFALO: We'll submit something after

1 with the address --

2 THE ARBITRATOR: Wonderful. I'm just trying  
3 to --

4 MR. HIRN: We'll find it cited by the federal  
5 courts.

6 THE ARBITRATOR: Great. I'm just trying to  
7 find out what he consulted. He concluded it was  
8 personal, I'm trying to get to the thought process  
9 and conclusion. I'm trying to figure that out.

10 THE WITNESS: So, based on the facts that we,  
11 or I determined that, in my mind, this was a personal  
12 use expenditure, and looking at --

13 THE ARBITRATOR: But before you get there, I'm  
14 trying to get to what you looked at to make that  
15 determination. So we looked at the personal  
16 furnishings, you say I may have looked at that, I may  
17 have looked at, I'm going to find another section --

18 THE WITNESS: So, what I'm saying, is based on  
19 the purpose to which the appropriation was given,  
20 which is what he was trying to get at with purposes  
21 and things --

22 THE ARBITRATOR: And what was the purpose of

1 the appropriation?

2 THE WITNESS: The purpose of the appropriation  
3 is for conducting a Weather Service mission --

4 THE ARBITRATOR: Okay.

5 THE WITNESS: And, to my knowledge, the  
6 Weather Service mission does not include providing  
7 paper plates to employees, and that's what the  
8 determination which I made, but in here it states  
9 that basically --

10 MS. SMITH: Can you tell us what page you're  
11 on?

12 THE WITNESS: Yes, this is 4-6, availability  
13 of appropriations appropriateness --

14 THE ARBITRATOR: You're citing available  
15 appropriations purchase, A, general principles,  
16 introduction, 31 US C section 1301 paren A, end  
17 paren.

18 THE WITNESS: So, simply stated, 31 US C 1301  
19 A states that appropriated funds may be used only for  
20 the purpose or purposes for which they were  
21 appropriated, and prohibits charging authorized items  
22 to the wrong appropriation and unauthorized items to

1           any appropriation.  So, my determination -- my  
2           understanding of what a personal use item was, it was  
3           an unauthorized use of appropriated --

4   THE ARBITRATOR:  Okay.  Before you even get to  
5           that, your -- that's what I'm trying to get at.  What  
6           -- where did you find -- what was your understanding  
7           of a personal use item, and where did you get that  
8           understanding?

9   THE WITNESS:  So, reading the Comptroller's  
10           determination, a personal use item is something that  
11           basically benefits the employee, not the Agency.

12   THE ARBITRATOR:  So, you're saying, reading --  
13           you -- as I understand it, you went to the red book,  
14           correct?  And --

15   THE WITNESS:  Correct.  The electronic version  
16           of the red book has links, if you go to that -- you  
17           hit the link, and --

18   THE ARBITRATOR:  Right.  And somewhere you saw  
19           this 1924 citation.

20   THE WITNESS:  Correct.

21   THE ARBITRATOR:  And you read that Comptroller  
22           General's decision.

1 THE WITNESS: Yes.

2 THE ARBITRATOR: And based on your reading of  
3 that decision you determined these were personal use  
4 items.

5 THE WITNESS: Based on the way it was  
6 described to me as to how they were being used, yes.

7 THE ARBITRATOR: Based on how they were  
8 described to you and your reading of this 1924  
9 decision, you reached a conclusion these were  
10 personal use.

11 THE WITNESS: Correct.

12 THE ARBITRATOR: Okay. That's what I was  
13 trying to get to.

14 THE WITNESS: And I mean, based on -- my  
15 determination was also based on the fact that we just  
16 completed this investigation which found a lot of  
17 misuse and inappropriate use of funds within the  
18 Weather Service --

19 THE ARBITRATOR: Okay.

20 THE WITNESS: So, my actions were quick and  
21 precise to ensure that, you know, protecting the  
22 employees that were potentially liable for making



1       these procurements, as well as ensuring that we were  
2       continuously violating the law as I understood it.  
3       Now, you know, at any time, we could have reversed  
4       that action, but since then we have determined that  
5       the decision was valid.

6       THE ARBITRATOR: Okay. And the section I had  
7       just cited to you, where I was going through the  
8       explanations --

9       THE WITNESS: That's in here.

10      THE WABITRATOR: Okay. Personal things were  
11      -- okay. The section 13 of Chapter four in volume  
12      one of the red book. Do you recall if you reviewed  
13      that section, section 13?

14      THE WITNESS: Yes.

15      THE ARBITRATOR: You did review it?

16      THE WITNESS: Yes.

17      THE ARBITRATOR: Okay. And do you recall my  
18      reading to you, it says that this decision, meaning  
19      the 1924 decision, is still cited frequently and the  
20      rules applied in many contexts, of course over the  
21      years exceptions have evolved, both statutory and  
22      non-statutory, the remainder of this section explores

1 several categories of personal expense. Do you  
2 recall reading that section?

3 THE WITNESS: Yes.

4 THE ABRITRATOR: Did you look at -- did you  
5 personally look and see if there were --exceptions  
6 have evolved, did you read any of the other decisions  
7 other than the one cited here, the 24 decision?

8 THE WITNESS: Yes, but none that would have  
9 applied to -- I mean, I remember reading something on  
10 furniture from an army facility and some other things  
11 that were in there, but nothing that would have  
12 pertained to what I was trying to determine at this  
13 time.

14 THE ARBITRATOR: Okay. How did you get to  
15 those decisions that you said these just don't apply,  
16 the furniture --

17 THE WITNESS: I think it was through the link  
18 to the actual decision which I cited, there were  
19 other decisions, or, you know, related-type decisions  
20 they have --

21 THE ARBITRATOR: Were the links cited in the  
22 decision or was it part of the page on the web -- the

1 website? See, what happens in the law, sometimes if  
2 you have a 1924 decision, you're going to have  
3 decisions cited in the 1924 decision that might be  
4 from 1917 or something, so what I'm trying to find,  
5 were things that you looked at decided after 1924?

6 THE WITNESS: I -- you know, I honestly don't  
7 remember.

8 THE ARBITRATOR: Okay. All right. So now I  
9 -- now I understand at least where you got your  
10 belief, now I'm clear, okay. Very good. Now I'm  
11 clear as to where he got his belief as a result of  
12 which you issued this e-mail. Okay. Now, as a  
13 result of my questions, do you have --

14 MR. HIRN: I think I'm still in the middle of  
15 cross.

16 THE ARBITRATOR: You're still in the middle of  
17 cross. Okay. Fine. And you are free to ask any  
18 questions or questions based on my question. I leave  
19 it to you.

20 BY MR. HIRN:

21 Q. Okay. John, you've never worked in a  
22 Forecast Office, right?

1 A. Correct.

2 Q. And Mickey Brown has worked in a Forecast  
3 Office?

4 A. I do not know that for a fact, but if you say  
5 so.

6 Q. Okay. But you know Mickey Brown was the  
7 chief negotiator for a number of years for the  
8 Weather Service?

9 A. I am aware of that, yes.

10 Q. And, you know, Dan worked in the Forecast  
11 Office for many years, correct?

12 A. I will take your word on that.

13 Q. Right. And --

14 THE ARBITRATOR: Dan's last name for the  
15 record is?

16 MR. HIRN: Sobien.

17 THE ARBITRATOR: Very good.

18 BY MR. HIRN:

19 Q. And isn't it true that in September of 2000  
20 -- now, you determined that it was not a bona fide  
21 need to purchase these disposables?

22 A. Based on the reason to which they were being

1       procured that was described to me.

2             Q. That some regional director told you over the  
3       phone.

4             A. Correct.

5             Q. Okay. But isn't it true that in September of  
6       2009, both Mickey, how had many years in the Forecast  
7       Office, and Dan, who had many previous years in a  
8       Forecast Office, both authorized, representing  
9       management and union -- didn't they -- based on their  
10      experience and knowledge, come to an agreement that  
11      there was indeed a bona fide need for the purchases  
12      of these disposables?

13    MS. SMITH: Objection. Objection.

14    THE ARBITRATOR: Basis?

15    MS. SMITH: He's already testified he didn't  
16      know about the MOU when he made that decision, he's  
17      testified to that at least four times, first of all.

18    THE ARBITRATOR: That's fair.

19    MS. SMITH: Second of all, he doesn't know the  
20      intent of why they entered into the MOU, because he  
21      wasn't involved.

22    THE ARBITRATOR: I think you're making -- but

1 I think you're making argument -- I think it's --

2 MR. HIRN: Well, so is John -- everything John  
3 said goes to argument.

4 THE ARBITRATOR: Yes, but I think -- you know,  
5 obviously, it's left to argument -- what you want to  
6 establish, I think, is these people in the link,  
7 their experience, and I think the rest is argument  
8 for your brief. Okay?

9 MR. HIRN: Okay. But it was to rebut his  
10 argument that there was -- that he was not involved.  
11 Okay.

12 MS. CIOFFALO: Can we object for just a quick  
13 second for a completely unrelated issue? I promise  
14 I'm not going to argue with you, but I want to.

15 MS. SMITH: Do you want to go off the record?

16 MS. CIOFFALO: Yes, we can go off the record.

17 (Off the record.)

18 BY MR. HIRN:

19 Q. John, one quick question. Wouldn't paying  
20 the health club dues of employees be also be a  
21 personal expense?

22 A. The health club dues of the employees?

1           Q. Yes. It was determined that there was a  
2 health plan or something that authorized that based  
3 on a ruling, so, no, that's not a personal expense,  
4 if it is part of an overall health management plan of  
5 an agency.

6 MR. HIRN: Okay. No further questions.

7 THE ARBITRATOR: Okay. Very good. Any  
8 re-direct?

9 FURTHER RE-DIRECT EXAMINATION:

10 BY MS. SMITH:

11           Q. I just want to clarify. I believe during the  
12 Arbitrator's questions, there was a question about  
13 did you rely only on the 1924 decision that you cited  
14 in your e-mail.

15           Did you rely on any other decisions?

16           A. Based on what I reviewed off of that 1924, I  
17 don't know if I would have --

18           Q. But you consulted other decisions besides the  
19 1924 decision, right?

20 THE ARBITRATOR: But his testimony was that  
21 the other decisions weren't relevant, for example,  
22 they were for furniture, and he didn't know what year

1           they were even issued, whether they were cited in the  
2           1924 decision, or whether it was a link that was on a  
3           web page that he was looking at in the red book.

4           MS. SMITH: But he consulted other decisions  
5           beside the 1924 decision.

6           MR. HIRN: But he said he didn't.

7           THE ARBITRATOR: Yes, but -- no, he testified  
8           that he consulted others, we're not sure whether they  
9           were cases cited in the 1924 decision, or whether it  
10          was a link on the web page. He didn't remember.

11          MR. HIRN: But he said that they weren't  
12          relevant.

13          THE ARBITRATOR: He said that they didn't seem  
14          to be relevant. One was about furniture, for  
15          example, and that didn't seem to be relevant.

16          BY MS. SMITH:

17                 Q. But right now, you don't recall every single  
18                 case that you reviewed before you made this  
19                 memorandum?

20                 A. No. As I stated, the majority of my decision  
21                 process was in the way -- from the information in  
22                 which it was presented to me and the way in which



1           these items were being procured, and frankly, I  
2           disagree with what Richard was saying in the sense  
3           that the regional directors had probably even more  
4           experience than Dan or Mickey in regards to how those  
5           WFO's are operating, so, for having a regional  
6           director raise that concern to me stresses that this  
7           is a concern.

8           Q. Okay. So, when you found out about the MOU,  
9           did that change your decision?

10          A. When I found out about the MOU?

11          Q. Yes.

12          A. It did not change my decision. I questioned  
13          whether or not I was still in the right to have that.

14          THE ARBITRATOR: And it was at that point that  
15          you consulted counsel?

16          THE WITNESS: Okay. And as a result of your  
17          consult with counsel, you stuck with your decision.

18          THE WITNESS: Correct.

19          MS. SMITH: Okay.

20          FURTHER RE-CROSS EXAMINATION:

21          BY MR. HIRN:

22          Q. John, you said that you didn't recall which

1 regional director raised the issue about the  
2 disposables, how can you say that they had more  
3 experience than Dan or Mickey?

4 A. Well, I think that by definition, the  
5 regional directors all are the senior people in the  
6 regions that -- regardless which one it was, each one  
7 of them has been with the Agency for quite a long  
8 time and all -- each one of them, to my knowledge,  
9 has worked their way up through WFO's and, you  
10 know --

11 MS. SMITH: Okay. I have nothing further.

12 THE ARBITRATOR: Thank you very much for your  
13 testimony, as difficult as it was dealing with me.  
14 But I was confused. This is something that you deal  
15 with all the time, and I'm a novice, you know, at  
16 this, and so, it's helpful to me if sometimes I have  
17 to take a bull by its horns and, you know, take it  
18 step by step, and I get my question answered. You  
19 may discuss your testimony with both of your  
20 attorneys; you may not discuss it with any other  
21 witness.

22 All right? If counsel will let you go, you

1           may go.

2           MS. SMITH:   Feel free to go.

3           THE WITNESS:   Thank you.

4           THE ARBITRATOR:   I think what I would like to  
5           do, and I'm happy to make the red book an  
6           Arbitrator's exhibit.  I will not require that the  
7           book be admitted, but I will ask the counsel for the  
8           Agency to direct me to the citation on the internet,  
9           and we will make the internet production of the red  
10          book Arbitrator's 1, okay?  And I will admit that  
11          into evidence.

12                           (The document referred to was marked for  
13           identification and received into evidence as  
14           Arbitrator's Exhibit Number 1.)

15          MR. HIRN:   You can find that, just google GAO  
16          red book.

17          THE ARBITRATOR:   GAO red book.

18          MS. SMITH:   I could even text it to you.

19          THE ARBITRATOR:   Great.  Email me.  I don't  
20          have text, then I'll never get it, cause I'll --  
21          it'll be there for months, and I'll say, oh, someone  
22          sent me a message.  Okay, and so that is Arbitrator's

1 1.

2 MS. SMITH: Are we off the record?

3 THE ARBITRATOR: Now we're off the record.

4 (Off the record.)

5 THE ARBITRATOR: All right. The witness has  
6 suddenly left the room. Could somebody explain this  
7 to me, please.

8 MS. SMITH: The parties have entered into a  
9 stipulation, and agreed to stipulate that MWSEO did  
10 submit any proposals after -- I'm sorry. NWSEO did  
11 not submit any proposals for post-implementation  
12 bargaining after the grievance they filed. Or,  
13 actually, after Mr. Longenecker's March 22, 2013  
14 e-mail.

15 THE ARBITRATOR: Very good. So stipulated?

16 MS. CIOFFALO: Or after the Agency --

17 MR. HIRN: Yes. But I don't know why I'm  
18 stipulating to it. I think the theory is we should  
19 have bargained over a repudiated agreement, and we  
20 don't see any need to --

21 MS. SMITH: It's a fact that we're just trying  
22 to --

1 THE ARBITRATOR: I'm not -- right --

2 MS. CIOFFALO: In its post-implementation

3 bargaining when you have to stop an illegal practice

4 or contractual provision --

5 MR. HIRN: If it was illegal, fine. Then we

6 would -- we waived our rights then, right.

7 MS. CIOFFALO: That's all we --

8 THE ARBITRATOR: Okay. Very good.

9 MS. CIOFFALO: They waived their rights, all

10 right.

11 THE ARBITRATOR: Stipulation is -- stipulation

12 is --

13 MR. HIRN: -- accepted, it's over something

14 that's not covered by the agreement so we have a

15 right to mid-term bargain over health and safety

16 matters at any time. To the extent not covered by

17 the agreement.

18 THE ARBITRATOR: All right. We're still on

19 the Agency's case. Do you have any other witnesses?

20 MS. SMITH: We have another witness who's on

21 her way down, so if you want to go off the record

22 until she comes.

1 THE ARBITRATOR: Fine. We're off the record.

2 (Off the record.)

3 THE ARBITRATOR: All right. We're back on the  
4 record.

5 May I have your name, please?

6 THE WITNESS: Hi, my name is Laura Furgione.

7 THE ARBITRATOR: Ms. Furgione, my name is  
8 Mariann Schick. I'm the arbitrator that the parties  
9 have selected to decide this dispute between them.  
10 You are being called as a witness on behalf of the  
11 Agency, and Agency counsel will ask you some  
12 questions, and then Union counsel will have some  
13 questions for you, and they're going to go back and  
14 forth until they've had all their questions answered.  
15 I may have a few questions for you at the end. If,  
16 while Agency counsel is questioning you, if counsel  
17 for the Union has some objection, and he says  
18 objection, would you please stop testifying, let me  
19 rule on the objection.

20 If I sustain the objection, I'm not going to  
21 permit you to continue on that particular point. But  
22 if overrule it, I will. Okay? Do you have any

1 objection to taking an oath?

2 THE WITNESS: No.

3 THE ARBITRATOR: Would you raise your right  
4 hand?

5 Whereupon,

6 LAURA FURGIONE

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

9 DIRECT EXAMINATION:

10 BY MS. SMITH:

11 Q. Good afternoon, Ms. Furgione, how are you?

12 A. I'm fine, thanks.

13 Q. Can you please state and spell your name for  
14 the record?

15 A. Sure. Laura K. Furgione, L-A-U-R-A K  
16 F-U-R-G-I-O-N-E.

17 Q. Are you currently employed?

18 A. I am.

19 Q. Where are you employed?

20 A. Right here.

21 Q. What is your position?

22 A. I'm the deputy director the Weather Service.

1 Q. How long have you been in that position?

2 A. I started July 2010, so that's three and half  
3 years.

4 Q. What's your series and grade level?

5 A. I'm an SES.

6 Q. What is an SES?

7 A. Senior executive service.

8 Q. What are your duties and responsibilities?

9 A. So, as the deputy director of the Weather  
10 Service, I act in the director's absence, and I'm  
11 also responsible for the mission of the National  
12 Weather Service, protection of life and property, our  
13 operations across the nation.

14 Q. Did you ever act for the assistant  
15 administrator for an extended period of time?

16 A. I did. In between Jack Hayes, and Dr.  
17 Uccellini, who's the current director, I was the  
18 acting director. That was May 2012 through February  
19 2013.

20 Q. So what position did you hold before becoming  
21 deputy assistant administrator?

22 A. I was NOAA's assistant administrator for the



1 office of program planning and integration.

2 Q. How long have you been with the Weather  
3 Service?

4 A. With the Weather Service, 18 years -- 18 and  
5 half years.

6 Q. Other than deputy assistant administrator,  
7 what positions have you held?

8 A. So, prior to PPI, I was the Alaskan region  
9 director, and prior to that, the Alaskan region  
10 deputy director, the meteorologist in charge for the  
11 Weather Forecast Office in Juno, Alaska, the warning  
12 forecast meteorologist for Morehead City, North  
13 Carolina, trying to go backwards in my career.  
14 Aviation meteorologist at the Alaska aviation weather  
15 unit, intern WFO Fairbanks, Weather Forecast Office  
16 in Fairbanks, intern at Weather Forecast Office in  
17 Kodiak, Alaska, and then an intern in Honolulu,  
18 Hawaii, all corners except for Caribou.

19 Q. Okay. Can you please explain the structure  
20 of the Weather Service?

21 A. Sure. The Weather Service -- it's easy to  
22 describe the structure by looking at basically the 16

1 executive members, so when I say 16, I talk about  
2 six, six and four. Six regional directors, six  
3 office directors, here in headquarters, and then the  
4 AA, the DAA, the CFO and then the incept director,  
5 that's the National Center for Environmental  
6 Prediction, basically doing our modeling and central  
7 forecast guidance.

8 THE ARBITRATOR: What does AA stand for and  
9 DAA stand for?

10 THE WITNESS: Yes, I apologize. So, the  
11 director of the Weather Service basically has two  
12 titles, one is director of the Weather Service, but  
13 the more formal title is assistant administrator for  
14 weather services, that's the NOAA title that we have,  
15 so that's AA, and so I would be NOAA's deputy  
16 administrator for weather services.

17 THE ARBITRATOR: So, you're the DAA.

18 THE WITNESS: DAA.

19 THE ARBITRATOR: Very good.

20 BY MS. SMITH:

21 Q. What are the regional director's duties and  
22 responsibilities?

1           A. So, we have six regional directors, six  
2 regions, and they're primarily responsible for their  
3 region, in their area of responsibility, and that  
4 includes the forecast warnings, the operation's  
5 facilities, and financial management, so each of  
6 those six regional directors are also financial --  
7 they have responsibility for their financial  
8 management center.

9           Q. Do they report to you?

10          A. Yes.

11          Q. What role do they play in procurement?

12          A. So, the regional directors, they have -- they  
13 can procure items up to a million dollars, and then  
14 it has to come up Louis or myself -- Dr. Uccellini or  
15 myself, and the smaller budget items typically will  
16 go down to the budget officer or even the individual  
17 offices, say a Weather Forecast Office can procure  
18 items for their office -- smaller dollar items.

19          Q. Okay. So in that Weather Forecast office who  
20 would be the person procuring these items?

21          A. Usually someone that has -- if they have a  
22 purchase card -- a government purchase card, the

1 credit card, so almost all of our electronic  
2 technicians have credit cards to procure items for  
3 the maintenance of our observational equipment, as  
4 per their duties. The meteorologist in charge often  
5 will have a credit card, but not all of them. It  
6 kind of depends, it varies from office to office.  
7 Sometimes that responsibility will be delegated to  
8 the administrative support assistant, the ASA's, so  
9 it really kind of varies per office.

10 Q. Are either the electronic technicians or the  
11 ASA's in the bargaining unit?

12 A. The electronic technicians and the ASA's are  
13 members of the bargaining unit.

14 Q. So, as act -- well, as deputy assistant  
15 administrator, do you interact with the bargaining  
16 unit?

17 A. Yes.

18 Q. And how do you interact with them?

19 A. Well, I -- we interact through Dan Sobien,  
20 and most often I'll interact with Steve Pritchard as  
21 well -- Steve's the representative for the  
22 headquarters office here.

1 Q. And what issues do you interact with them  
2 regarding?

3 A. It depends on the topic, but obviously change  
4 in working conditions, those kinds of issues. We've  
5 been working with Steve most recently on our  
6 headquarters reorganization and also on the National  
7 Water Center.

8 Q. So when you became deputy assistant  
9 administrator, were you aware of any financial  
10 management challenges in the Weather Service?

11 A. Most definitely.

12 Q. And what -- did any of those challenges  
13 involve appropriations issues?

14 A. Yes.

15 Q. Can you describe those issues?

16 A. So, in August of 2011, I received an OIG  
17 inquiry, and so that -- that requires me to begin an  
18 investigation, and so I initiated an investigation on  
19 the allegations of mis-appropriate use of the -- of  
20 our appropriations, so, it was a reprogramming that  
21 was alleged -- the allegations were regarding a  
22 reprogramming. Those -- that initial investigation

1 ended in November of 2011 and that did support the  
2 allegations of mis-appropriate use of our  
3 appropriated funds, and our CFO was then placed on  
4 indefinite administrative leave.

5 Q. And were there changes -- did NOAA -- did the  
6 Weather Service institute any changes as a result of  
7 the investigation.

8 A. Obviously, putting our CFO on administrative  
9 leave, we didn't actually do that, the NOAA  
10 administrator did that, and then they elevated the  
11 investigation to the department, so it was the  
12 department and NOAA that continued a more thorough  
13 investigation. The CFO from the National Marine  
14 Fisheries, another line office within NOAA, was on  
15 detail here then as the acting CFO.

16 Q. So, I'm going to show you a document. It's U  
17 8, a very famous document right now, it's been marked  
18 as Union Exhibit 8. Have you seen that document  
19 before?

20 A. I have.

21 Q. What is this document?

22 A. So, this is an e-mail from John Longenecker

1 to our six office directors and our six regional  
2 directors, cc'd to the XO's Dennis Staley, myself and  
3 Louis.

4 THE ARBITRATOR: What are XO's?

5 THE WITNESS: Those are executive officers.

6 THE ARBITRATOR: Okay.

7 THE WITNESS: And John is basically -- the  
8 e-mail is titled personal use items, and John is  
9 saying that basically, it says here, please ensure  
10 you communicate with your staff, that the use of  
11 appropriated funds for personal use items is not  
12 authorized, so he's telling them they cannot use  
13 appropriated funds for personal use items.

14 BY MS. SMITH:

15 Q. When did you first learn about this issue?

16 A. Probably a couple days -- I don't know the  
17 exact date, but a couple of days before this e-mail  
18 came out.

19 Q. And who did you learn about this issue from?

20 A. John made me aware of this issue.

21 Q. And before you had a conversation with John  
22 about this issue, did you know that Weather Service

1 employees were using appropriated funds for paper  
2 plates, plastic cups and utensils?

3 A. I did not.

4 Q. And how did you react when you found out?

5 A. I was surprised.

6 Q. Why were you surprised?

7 A. So, the experience that I have in the Weather  
8 Service, particularly coming from a hurricane-prone  
9 region, Morehead City, when I worked at the Weather  
10 Forecast Office in Morehead City, we were only able  
11 to use appropriated funds for emergency conditions,  
12 so if it was an emergency, we procured like cots and  
13 blankets, and those kinds of things, and even water  
14 bottles, in case the water became non-potable, but  
15 otherwise, we knew that we couldn't use those funds  
16 for personal items.

17 Q. Did you discuss this issue with anyone  
18 besides John?

19 A. Louis and Dennis Staley, so pretty much just  
20 the folks in the assistant administrator's office.

21 Q. Did you know about an MOU between NWSEO and  
22 the Weather Service, relevant to this issue when you



1 found out about it?

2 A. I did not, when we first started discussing  
3 it.

4 Q. When did you find out?

5 A. After this message went out.

6 Q. Do you know who you found out from?

7 A. It was either Steven Cooper and I know Mickey  
8 Brown was part of the e-mail exchange as well.

9 Q. And who is Steven Cooper?

10 A. Steven Cooper is our acting regional director  
11 in the southern region.

12 Q. So what did -- what was your understanding of  
13 that memorandum of understanding, when you learned  
14 about it?

15 A. It was my understanding that there was an  
16 agreement between Mickey and Dan, I believe, that  
17 then did allow the use of personal -- procurement of  
18 personal use items.

19 Q. What happened after Mr. Longenecker sent this  
20 e-mail?

21 A. So, there was a lot of e-mails going back and  
22 forth, people just questioning, and that's really how

1       it was initiated, folks taking appropriations law  
2       training, due to this shadowing of our misuse of  
3       appropriated funds; the financial matters that we had  
4       been dealing with, they started questioning as they  
5       would go through the appropriations law course,  
6       questioning our actions, because obviously they  
7       didn't want to get in trouble for doing something  
8       wrong.

9           Q. Okay. Do you know if NWSEO was notified  
10       about Mr. Longenecker's e-mail?

11           A. I believe they were.

12           Q. Were you involved in that?

13           A. No.

14           Q. Do you know who was involved in notifying  
15       NWSEO?

16           A. I assume it was either David Murray or John.

17           Q. Okay. Are you aware of any penalties  
18       associated with the unauthorized expenditures of  
19       appropriated funds?

20           A. Yes.

21           Q. What are they?

22           A. So, there can be disciplinary action, up to

1       being removed from federal service, you could also  
2       have imprisonment. So, pretty serious, and in fact,  
3       since we had just experienced our CFO being put on  
4       administrative leave, folks were pretty scared, and  
5       didn't want to have that same situation -- be put in  
6       that same situation.

7               Q. So would the Weather Service be responsible  
8       for these penalties, or the individuals?

9               A. Not necessarily the Weather Service as a  
10       whole, or the Weather Service in general, but those  
11       individuals, so that's why we have authority --  
12       spending authority and financial controls in place,  
13       so folks do have the authority to spend, and part of  
14       that authority is the responsibility in making those  
15       judgments, so it would be the individual that made  
16       the purchase or authorized those expenditures.

17       MS. SMITH: I don't have any more questions  
18       for this witness.

19       CROSS EXAMINATION:

20       BY MR. HIRN:

21               Q. Laura, you talked about an e-mail exchange  
22       from Mickey Brown?

1           A. I think so. I mean, so, we got the e-mail, I  
2           can't remember if it was from Steven Cooper or from  
3           Mickey Brown.

4           Q. And what did it say?

5           A. They were just showing -- they were just --  
6           it was an attachment, here it is, I think it said,  
7           was an attachment, with the MOU.

8           Q. And what did they say about the cancellation  
9           -- what did this e-mail say about the cancellation of  
10          the purchasing of the disposables?

11          A. I don't think the e-mail said anything -- it  
12          basically said, here it is, with the -- with the MOU  
13          attached.

14          Q. Here it is --

15          A. As in, we had been -- someone brought up the  
16          point that we believe there's an MOU with NWSEO which  
17          would be, you know, an appendix, or part of the CBA,  
18          and then it was either Mickey or Steven that sent the  
19          actual -- an electronic version of this MOU.

20          Q. Okay.

21          THE ARBITRATOR: Any re-direct?

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

1 THE ARBITRATOR: Thank you very much for your  
2 testimony. You may discuss -- yes, you're done  
3 already. You may discuss your testimony with Agency  
4 counsel. Do not discuss it with any other witness.  
5 Very good. If they release you, you're free to go.

6 MS. SMITH: You're free to go.

7 (Off the record.)

8 THE ARBITRATOR: All right. Anything further  
9 from the Agency?

10 MS. SMITH: We have two documents, that we  
11 want to take Arbitrator --

12 THE ARBITRATOR: Arbitrator notice?

13 MS. SMITH: Arbitrator notice of. The first  
14 is Exhibit I, which is in that document.

15 THE ARBITRATOR: Have you shown it to Union  
16 counsel?

17 MS. SMITH: I can show it to him, I'm sorry.

18 THE ARBITRATOR: And what's the other one?

19 MS. SMITH: It's coming to you. And there was  
20 discussion earlier -- is there an objection or do I  
21 need to make a proffer?

22 MR. HIRN: I don't care.

1 THE ARBITRATOR: Okay. So this is --

2 MS. SMITH: I --

3 MR. HIRN: I think people should present their  
4 case any way they want to present it.

5 THE ARBITRATOR: Okay. So, I, and this is HHS  
6 is what?

7 MS. SMITH: That's M.

8 THE ARBITRATOR: M.

9 MS. SMITH: Yes.

10 (The documents referred to were marked for  
11 identification and received into evidence as Agency  
12 Exhibit Numbers I and M.)

13 THE ARBITRATOR: Okay. Agency M. We're on  
14 the record?

15 MS. SMITH: Yes.

16 THE ARBITRATOR: Okay. Can you just, for my  
17 edification, what is the relationship between an HSS  
18 pandemic influenza plan and the Department of  
19 Commerce?

20 MS. SMITH: So, the pandemic continuity of  
21 operations plan references this HSS appendix --

22 MS. CIOFFALO: Yes, it's the pandemic annex

1 references that agencies are to follow guidelines  
2 within this HSS plan --

3 THE ARBITRATOR: Okay.

4 MS. CIOFFALO: For the prevention of the  
5 spreading of disease.

6 THE ARBITRATOR: Got it.

7 MS. CIOFFALO: So, to the extent that we need  
8 to refer to that in briefs.

9 THE ARBITRATOR: Very good.

10 MS. CIOFFALO: And we just found it offline,  
11 it will be available.

12 THE ARBITRATOR: All right. So, we've  
13 admitted Agency Exhibit A, and B, and E, and J and K  
14 and M.

15 MS. SMITH: I, too.

16 THE ARBITRATOR: I. Okay. Admitted. I is  
17 NOAA Homeland Security program office, influenza  
18 information and planning fact sheet. So, we have not  
19 admitted C, F, G, H and J and L.

20 MS. SMITH: Those are just copies -- those are  
21 Joint exhibits for the most part.

22 THE ARBITRATOR: Okay. Very good.

1 MS. CIOFFALO: Yes, so just extra copies.

2 There's nothing in there that -- yes.

3 THE ARBITRATOR: Very good. Okay. Does the  
4 Agency have any further part of its case?

5 MS. SMITH: No. No further witnesses.

6 THE ARBITRATOR: Okay. Agency rests. Does  
7 the Union have any rebuttal?

8 MR. HIRN: No.

9 THE ARBITRATOR: Union has no rebuttal. All  
10 right. Is it your pleasure to make closing arguments  
11 or to submit post-hearing briefs?

12 MS. SMITH: Post-hearing briefs.

13 THE ARBITRATOR: Post-hearing briefs. All  
14 right, you can have any time period you want. How  
15 long will it take to get the transcript? Okay.  
16 Let's figure at least the end of the year, you know,  
17 everybody's not getting any work done, to work,  
18 nobody does at this time of the year. You tell me --

19 MR. HIRN: I take objection to that.

20 THE ARBITRATOR: Today? But once everybody --  
21 she's going back home, and, you know this is the last  
22 piece of business I'm doing before Christmas, I'll



1 tell you that. So, you know, you tell me how long  
2 you need because it's certainly going to take me more  
3 than 30 days to get an opinion to you, because my  
4 schedule is just tremendously busy, so, you tell me  
5 what kind of time period you want, based on the fact  
6 that you're really not going to get the transcript  
7 until probably the first of the year.

8 MS. SMITH: We discussed, I think it was  
9 February, before Birmingham -- we had discussed I  
10 think the 14th -- Valentine's Day -- does that work?

11 MR. HIRN: What day of the week is that?

12 THE ARBITRATOR: Friday.

13 MR. HIRN: Sure. Is that -- why don't we --  
14 the case in Birmingham is when?

15 MS. SMITH: That starts on the 18th. I think  
16 it might be the 19th -- yes, I was upset about that,  
17 because it's the middle of the week.

18 THE ARBITRATOR: Are you two trying another  
19 case together?

20 MR. HIRN: Yes.

21 MS. SMITH: Yes.

22 THE ARBITRATOR: So you want to submit this

1 before Birmingham or after Birmingham?

2 MS. SMITH: The plan was before.

3 THE ARBITRATOR: Before Birmingham? So, why

4 don't I say that briefs are to be post-marked to me

5 by no later than February the 14th -- okay, briefs

6 post-marked and -- okay, no later than February 14th,

7 you should exchange your briefs with each other,

8 please attach copies -- any citation, you know,

9 because it gets to be too much, you know, stuff I can

10 pull up on the internet, you know, it's one thing,

11 but it's easier if I don't have to pull it up on the

12 internet, and some of this stuff I know that people

13 have been citing to me I can't even find it on the

14 internet, so attach every little piece of paper --

15 I'm happy to have pieces of paper and recycle, I'm

16 very big on recycle.

17 Okay.

18 MS. SMITH: So you want post-mark or you want

19 electronic copy as well?

20 THE ARBITRATOR: Well, you know, you're going

21 to -- you can send an electronic copy, that's fine

22 with me, but I think, you know, you're going to have

1 extensive submissions, so those I don't want to have  
2 to sit there and download everything, so, you know,  
3 it's probably just as easy to post-mark it.

4 MR. HIRN: Would it at all be convenient for  
5 you to have manipulatable copies of our briefs that  
6 you can paste Union's argument, Management's  
7 argument --

8 THE ARBITRATOR: Yes. I don't know how good I  
9 am at that, but you can try it --

10 MR. HIRN: I've had Arbitrators ask for that  
11 before so that they can just --

12 THE ARBITRATOR: Yes, that would be fine, so,  
13 if you could send me the electronic versions not in  
14 .pdf format, and then I can, you know, see if I can  
15 manipulate it. Sometimes it's easier for me, I just  
16 type it, because I'm a fast typist, you know. All  
17 right. Any other house-keeping?

18 MS. CIOFFALO: When you say post-marked, UPS  
19 and or mail?

20 THE ARBITRATOR: Anything that just shows you  
21 got it out on the 14th, you know, and if you need  
22 extensions just consult with one another, I know that

1       you're all busy attorneys, and if something comes up,  
2       and you know -- I'm sure counsel, well, you work with  
3       each other all the time, so I'm sure you can extend  
4       courtesies to one another, but generally I'm fairly  
5       sympathetic to that, unless it looks like counsel is  
6       just, you know, dragging their tushes, but that  
7       usually isn't the case.

8       MS. SMITH: Just to wrap up, we owe you the  
9       links to the red book --

10      THE ARBITRATOR: Yes, you owe me the links to  
11      the red book, which is Arbitrator A 1, and you're  
12      going to send me Exhibit E --

13      MS. SMITH: The 2007 --

14      THE ARBITRATOR: The 2007 Exhibit E, and also  
15      send it to Mr. Hirn.

16      MS. SMITH: Hard copy.

17      THE ARBITRATOR: Yes.

18      MS. SMITH: Okay.

19      THE ARBITRATOR: Yes.

20      MS. SMITH: What about the links?

21      THE ARBITRATOR: No, the links you're just  
22      going to send me an e-mail, and say here are the

1 links, and that's A 1. And you have my address to  
2 send the transcript to, okay? Anything else?

3 MR. HIRN: You would be able to find that on  
4 the link in the GAO table of contents -- you can  
5 hyperlink 7 through 123, for the section on  
6 entertainment expenses, and you can just be able to  
7 click on that, whether than having to scroll through  
8 500 --

9 THE ARBITRATOR: Okay. Yes. And to the  
10 extent that --

11 MR. HIRN: It will not be -- you may find it  
12 easy to use.

13 THE ARBITRATOR: Yes, and if you find, you  
14 know, that in your briefs, that there are particular  
15 sections of the red book that are relevant, you know,  
16 in this proceeding, certainly cite me to those  
17 sections so that I can pull them up, and if I have  
18 any problems -- you obviously are far more adept at  
19 this technical stuff than I am, so I will simply  
20 e-mail you and say, I can't figure this out, and you  
21 can worry about it, you know. Anything else?

22 MR. HIRN: I want to ask once more about the

1 issue we were discussing earlier today, about what  
2 really is at issue here, is it just the legality of  
3 this, or is the Agency making the argument that maybe  
4 can get out of Mr. Kensky's e-mail that this thing  
5 would no longer be in effect anyway?

6 MS. SMITH: Richard, you're asking us for our  
7 legal argument before we submit our briefs. I  
8 mean --

9 MR. HIRN: Yes. I'm asking -- I mean, you're  
10 not supposed to hide the ball.

11 MS. CIOFFALO: We stipulated to the issues,  
12 you've read the grievance response, you found  
13 everything in the documents --

14 MR. HIRN: But that's -- should I assume that  
15 if an argument that has not been made I the grievance  
16 response will not be made in the briefs?

17 MS. CIOFFALO: I don't know what you can  
18 assume.

19 MR. HIRN: So, that's not really helpful.  
20 That's not really --

21 THE ARBITRATOR: I mean, look.

22 MS. CIOFFALO: We have it in our brief, yes.

1 I mean, that's what I can say --

2 THE ARBITRATOR: I know, and you're going to  
3 be restricted, obviously to the evidence that is in  
4 the record here. You know, we've got -- it seems to  
5 me from what I've heard of the evidence, that the  
6 decision was that it violated appropriations, and  
7 that wasn't because, gee, 2009 is over, you know,  
8 that's my understanding of what I heard today.

9 They had a situation where, obviously,  
10 appropriations law had been violated, this CFO comes  
11 in, and in his view, appropriations law would be  
12 violated, and he cuts it off, and then consequences  
13 flowed from that. So, that's what I heard.

14 MS. CIOFFALO: Agreed. But what we're not  
15 going to do is preclude any other arguments that the  
16 Agency may be able to make. That we're not going to  
17 do, but yes, correct, that is the testimony.

18 MR. HIRN: Well, you're not supposed to make  
19 an argument for the first time in a post-hearing  
20 brief. I mean, I -- you know --

21 THE ARBITRATOR: It's a little late in the  
22 game to start raising other --

1 MS. CIOFFALO: What do you want me to say?

2 I'm not going to give you that the Agency's not going  
3 to include anything in its post-hearing briefs, it's  
4 not written, but --

5 THE ARBITRATOR: No, no, but you should -- I  
6 mean it would seem to me you should be able to say  
7 what your position is. I just stated what it seemed  
8 the evidence shows your position is, but you know, it  
9 seems to me, because you're counsel for the Agency,  
10 you should be able to make a determination -- look,  
11 we either have two defenses that we're raising, or  
12 one defense.

13 You know, I mean, I can't force you to do it,  
14 but -- you know, it seems to me that you know by now  
15 what the basis of your defense is. We are where we  
16 are.

17 MS. SMITH: I don't have the authority to  
18 state that at this time.

19 THE ARBITRATOR: Okay. That I understand.

20 Having worked for the government, that I understand.

21 So --

22 MS SMITH: And she's my boss.



1 THE ARBITRATOR: So, expound on whatever you  
2 want based on the record, you see from the record,  
3 and you can expound --

4 MR. HIRN: Okay. Sandbagging will be --

5 THE ARBITRATOR: Sandbagging -- right, right,  
6 right.

7 MS. CIOFFALO: We're not trying to be evil  
8 here or anything. I just -- I'm not at liberty to  
9 discuss --

10 MS. SMITH: Based on our earlier discussions  
11 today about rabbits, there were a lot of rabbits  
12 today, Richard.

13 MR. HIRN: Really?

14 MS. SMITH: Yes.

15 THE ARBITRATOR: I was -- I don't remember  
16 rabbits. Was I --

17 MS. SMITH: Sandbagging.

18 THE ARBITRATOR: Oh.

19 MR. HIRN: What possibly would lead you to --

20 MS. SMITH: Well, we can go off the record if  
21 you want to and --

22 THE ARBITRATOR: Well, before we go off the

1 record, let me just say that it was a pleasure  
2 working with all of you, you're obviously, you work a  
3 lot together, and it was a pleasure, and I thank you  
4 all for your patience, because it's been a long day,  
5 and thank you for putting up with my frustration.

6 I just get frustrated sometimes, because I  
7 don't -- it's second nature to all of you, but it's  
8 not second nature to me, and I'm like back on square  
9 one, and you've gone around the monopoly board  
10 already, so, you know that's why I've got to focus  
11 in, so I can catch up.

12 All right. Thank you for everything today  
13 and I wish you all a wonderful holiday.

14 MS. SMITH: Same to you.

15 THE ARBITRATOR: And safe trip up to  
16 Massachusetts.

17 MS. SMITH: Thank you.

18 (Whereupon, the arbitration was adjourned at  
19 5:30 p.m.)

20

21

22

1

2 CERTIFICATE OF REPORTER

3

4 I, Patricia Edwards, do hereby certify that I  
5 took the stenographic notes of the foregoing  
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10 herein; and, further, that I am not a relative or  
11 employee of any attorney or counsel employed by the  
12 parties hereto, not financially or otherwise  
13 interested in the action.

14

15

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PATRICIA EDWARDS, RPR

16

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21

22

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