

In the Matter of

ENVIRONMENTAL PROTECTION AGENCY
REGION 7
KANSAS CITY, KANSAS

and

LOCAL 907, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Case Nos. 12 FSIP 79
and 12 FSIP 81

ARBITRATOR'S OPINION AND DECISION

Local 907, American Federation of Government Employees (AFGE), AFL-CIO (Union) and the Environmental Protection Agency, Region 7, Kansas City, Kansas (EPA or Employer) filed separate requests for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119.

After an investigation of the requests for assistance, which arose during bargaining over the relocation of EPA's Region 7 Regional Office to a site approximately 20 miles from its current location, the Panel directed the parties to submit their dispute to the undersigned, Panel Member Martin H. Malin, for mediation-arbitration.^{1/} The parties were informed that if a settlement was not reached during mediation, I would issue a binding decision to resolve the dispute. Accordingly, on May 18, 2012, I met with representatives of the parties at the site of the new building in Lenexa, Kansas, and conducted a mediation-arbitration proceeding. Although potential compromises were explored, a voluntary settlement was not reached during the mediation portion of the proceeding. Accordingly, I am required to issue a final decision resolving the parties' dispute. In

^{1/} In addition, in accordance with the authority granted the Panel by the Federal Labor Relations Authority in *U.S. Immigration and Naturalization Service and National Border Patrol Council, American Federation of Government Employees, AFL-CIO*, 55 FLRA 69 (January 12, 1999), the Panel ordered the Employer to maintain the *status quo* until the parties' impasse is resolved.

reaching this decision, I have considered the entire record in this matter, including the pre-hearing statements of position submitted by the parties.

BACKGROUND

The Employer's mission is to promote and protect the environment. Employees work closely with state counterparts on a variety of programs that include clean water activities and hazardous waste clean-up. The Union represents approximately 200 bargaining-unit employees, GS-4 through -14, mainly in non-professional administrative support positions, except for the 38 attorneys in the Office of Regional Counsel (ORC) who are the focus of the parties' impasse.^{2/} The parties are covered by a collective-bargaining agreement (CBA) which was to have expired on August 1, 2010, but whose terms and conditions continue in effect until negotiations over its successor are completed.

ISSUES AT IMPASSE

The parties essentially disagree over: (1) whether ORC bargaining unit attorneys should have enclosed private offices at the new location; and (2) the size of the offices.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union proposes that each staff attorney, regardless of grade, receive an enclosed private office of 96 square feet, with a ceiling, four walls and a door that locks. Its proposal essentially would continue the practice that has been in place

^{2/} Approximately 650 EPA employees, grantees, and contractors are housed in the current building, which has five floors. The new building has two floors. The lease for the current building recently was extended until November 1, 2012, to permit completion of construction at the new location. The Employer is scheduled to begin lease payments at the new location on that same date but if occupancy occurs prior to November 1, 2012, lease payments will commence with occupancy.

in Region 7 since June 1999 when the Regional office moved to its current location. The decision to assign each staff attorney to enclosed private offices, regardless of grade, "was based upon the nature of the work of staff attorneys," i.e., as confirmed in a July 6, 2009, email by the Employer's Deputy Regional Counsel (and current Chief Negotiator), attorneys were provided private offices because of "the confidential nature of settlement negotiations in which [] attorneys are involved on a daily basis." Thus, unlike the Employer's proposal, the Union's is "based upon a real need for the *status quo*." It should also be adopted because "the common practice for EPA regional attorneys,^{3/} federal service attorneys in the Kansas City Metropolitan area, and attorneys in private practice in the Kansas City Metropolitan area, is private enclosed offices."

While the two most common criteria the Panel uses in assessing the merits of proposals, demonstrated need and comparability, favor the adoption of the Union's proposal, "the Employer's proposal to change the *status quo* of private enclosed offices for each staff attorney to cubicles must fail." Given the "very substantial change in working conditions" the Employer is proposing, it bears the burden of demonstrating that the change is necessary. The Employer, however, has not met its burden for a number of reasons. The current space standards set forth in 41 C.F.R. § 102-79.10 obligate executive agencies "to improve productivity of their workers in designing workspace and to provide a workplace environment that supports program operations and meets the needs of the occupant agencies." Management's decision to move the staff attorneys into cubicles is inconsistent with this regulatory requirement based on the "real experience of the most experienced attorneys in Region 7" because it would "impede[] attorney productivity." In this regard, "attorney work entails frequent phone calls and meetings with outside parties" as well as periods of intense concentration. Cubicles would not provide the quiet space necessary to do the EPA's work, and requiring employees "to go to an enclave or conference room every time one needs to make a confidential phone call limits efficiency and productivity."^{4/}

3/ Attorneys in 8 out of the 10 EPA regional offices currently are assigned private offices.

4/ The inability to have confidential discussions in cubicles, among other things, was the subject of the testimony of one of the Union's witnesses during the arbitration hearing.

The experience of Region 7 attorneys that they are most productive in enclosed private offices also is consistent with the findings of recent studies of open floor plan offices.^{5/}

Additionally, private offices are necessary "so that attorneys can safeguard confidential information and communications." In this connection, staff attorneys must maintain an active license at all times to be employed at the EPA, and the Rules of Professional Conduct require them to safeguard client communication or risk disciplinary sanctions. Single private offices are "the only practical way to ensure client confidentiality is not waived," particularly when there are visitors, opposing counsel, guests and other non-EPA individuals "routinely within our office or within earshot on the phone." Moreover, the Federal Rules of Evidence address the waiver of attorney-client privilege and work-product protection because of disclosure. In accordance with Rule 502, "inadvertent disclosure of confidential information does not operate as a waiver in a proceeding so long as the holder of the privilege or protection took reasonable steps to prevent disclosure." The Employer's proposal undermines staff attorneys' ability "to defend inadvertent waivers where enclosed private offices would have prevented such disclosures" by placing them in space in which "all conversations can be heard."

The Union observes that the building previously served as corporate headquarters for the restaurant chain Applebee's. The Union contends that the Applebee's attorneys used the same workstations that the Agency is proposing to give the EPA attorneys and found that they could not function in them because they were too noisy. The Union maintains that when Applebee's brought in experts to recommend ways to attenuate the noise for its attorneys, the experts rated floor-to-ceiling walls as the most effective method available.

The regulations concerning space standards also require that "cost analysis consider both facility costs and human

The witness had 25 years of attorney experience at EPA and had worked in a cubicle prior to Region 7's move to its current location in 1999.

^{5/} See "The Rise of the New Groupthink," *New York Times*, January 15, 2012 (citing studies that show that workers are more productive in a private workspace).

capital costs over a substantial time period."^{6/} Hence, the current cost analysis should consider not only the costs to improve the new building but also those associated with the loss of productivity "by an office made up almost entirely of GS-14s and GS-15s - the highest graded employees in the Regional office." Even if the Employer's estimate that it would cost a total of \$532,000 to construct private offices for the attorneys is accurate, the salaries for 1 year for staff attorneys are in excess of \$4.2 million, and "the cost would be spread over a 20-year lease." Under the circumstances, therefore, it is clear that "any rational life cycle cost analysis" that considers facility and human capital costs "would conclude that cost should not be the deciding factor as to whether to construct staff attorney offices."

The other reasons the Employer has given for why it cannot continue the *status quo* by providing staff attorneys with enclosed private offices involve insufficient space, the effect of air flow on employee health and safety, Leadership in Energy and Environmental Design (LEED) certification, inconsistency with the building's open-plan design, an EPA Headquarters "functionality analysis," and reductions in space. None of these reasons are valid. The Union has consulted a registered architect who has designed an alternative floor plan containing 99 square foot offices for 38 staff attorneys in the wing of the building in question (wing 2.4), demonstrating that management's claim that it cannot provide 96 square feet of workspace is untrue. Moreover, the meaning of the Employer's assertion that there is insufficient space in the building for each staff attorney to be assigned a 96 square foot office because that "would allow little or no flexibility for future change" is unclear. Similarly, its allegation that implementation of the Union's proposal may impede air flow to the new building and have an adverse impact on employee health and safety also "is not supported by the facts." Not only is the contention inconsistent with the drawing and affidavit from the Union's registered architect but there are already conference rooms in wing 2.4 that are enclosed. In addition, heating and air conditioning for the facility comes in through the floor and can be supplied to an office by changing carpet tiles. While the Union admits that its proposal may require changes to the sprinkler system, lighting and return air vents, the Program of

^{6/} See 41 C.F.R. § 102-79.110.

Requirements (POR) for the building issued by the General Services Administration on October 13, 2010, "required enclosed private offices for attorneys, so the building must have the capacity for enclosed private offices or it could not have been awarded the bid."

Furthermore, "LEED certification is not inconsistent with private offices." EPA's regional offices in Regions 1, 8, 9 and 10 all have LEED certification even though staff attorneys in Regions 1, 8 and 10 have enclosed private offices. In the Union's view, "LEED should be used to enhance the work environment, not create an environment where workers are unhappy and unproductive." As to the Employer's contention that the Union's proposal would be inconsistent with the building's open-plan design, the need for private offices for attorneys in wing 2.4 is based on sound business reasons and "would not affect the rest of the building." Thus, management's refusal to make an exception to the open-plan design for the staff attorneys elevates "form over function." In addition, the "functionality analysis" provided by EPA Headquarters contains no "explanation or support" for enhancing the workspace of only 15 attorneys. Rather, it "directly conflicts" with the Deputy Regional Counsel's previous representation that all staff attorneys need private offices for business reasons. Moreover, any attempt by the Employer to apply the "draft Work Space Guidelines" in the current situation should be rejected because negotiations with respect to them have not been completed between EPA and AFGE at the National level. Finally, the Union has "stressed throughout the negotiations" its belief that supervisors in wing 2.4 also need larger private offices to conduct their work and, consequently, made an offer to compromise overall square footage for attorney offices. The Employer's decision to provide its managers with smaller open-design offices is irrelevant to the issue of whether it should be required to maintain the *status quo* of private enclosed offices with four walls, a locking door and a ceiling for every staff attorney in Region 7, regardless of grade.

2. The Employer's Position

The Employer proposes that: (1) the 15 staff attorneys who meet the functionality analysis performed by the Regional Counsel as having the types of work which reflect particular sensitivities/regular need for confidentiality receive DIRTT-manufactured workstations; (2) the remaining 23 staff attorneys

receive Hermann Miller-manufactured Canvas workstations^{7/}; and (3) all 38 staff attorneys receive Bluetooth-enabled telephone headsets. Regardless of the type of workstation, the staff attorneys' workspace would be 80 square feet. EPA's "primary goal" in relocating to the new building is "to ensure that Region 7 employees are appropriately equipped to perform their part in carrying out the mission of the Agency - protecting human health and the environment." In achieving its goal, the considerations management has taken into account include the following: (1) President Obama's 2010 directive to federal agencies to reduce expenditures on real estate and associated operating expenses; (2) EPA's Agency-wide 20-percent space reduction goal in response to the President's directive; (3) a recent charge to Agency management by the EPA Administrator "to redesign EPA work space at leased offices across the country using an approach that is more efficient, collaborative, and technologically sophisticated so as to reduce the Agency's physical and environmental footprint"; (4) the size and design of the building leased by GSA for EPA Region 7; and (5) budget constraints.

In response to these considerations, the Employer released 20,000 square feet of space included in the original lease for the new building, thereby reducing the available space by 13 percent. EPA Region 7 management also accommodated the interests of the exclusive representatives of its two bargaining units that there be an assigned workspace for every employee by developing a plan to relocate a limited number of employees to two other EPA facilities in the Kansas City metropolitan area and to reduce workstation sizes. Consequently, the workstations of EPA managers have been reduced anywhere from 21 to 65 percent of their current size, and the average reduction from current workspace size for all of EPA Region 7's staff employees, other than the 38 staff attorneys, will be approximately 15 percent. Consistent with the charge of the EPA Administrator, "the design of the new building is open, collaborative workspace, focusing on efficient use of space and a healthy and productive work environment" with the added goal of attaining the highest LEED certification, LEED Gold, which "complements the mission of

^{7/} The DIRTT-manufactured workstations have higher panels than the Hermann Miller-manufactured Canvas workstations. They also have lockable doors, while the Hermann Miller-manufactured Canvas workstations have lockable filing space without doors.

EPA." Among other things, the building's open workspace environment improves air quality and the availability of daylight, and lowers energy consumption. Aside from the staff attorneys that are the subject of the parties' impasse, none of EPA Region 7's other employees, including managers, first-line supervisors and non-supervisory staff, will have workstations "capped with a ceiling that abuts" the cubicle panel walls. In addition, the new building has approximately 35 conference rooms and more than 40 smaller enclosed private enclaves "to accommodate needs for privacy." Wing 2.4, which will be occupied solely by the 55 members of the ORC (except for two workstations assigned to the Region's two unions), has 4 enclosed conference rooms and 12 private enclaves. The density of employees and employee workstations will be considerably less than any other wing. Furthermore, the entire building has a noise-masking system (pink noise), will have noise-attenuating acoustical tile "clouds" and acoustical panels at seated voice levels, and will be equipped with high-quality Herman Miller-manufactured systems furniture.

The Employer maintains that the experience of the Applebee's attorneys is not relevant. The Employer argues that the Applebee's attorneys' workstations were located in high-density, high-traffic areas with much higher noise levels. They were in an atrium area near the employee cafeteria and a Pepsi fountain; the atrium opened to a training center with tables, chairs and a coffee bar. The Employer urges that the Agency attorneys' wing will have much less traffic, much lower density of workstations, more acoustical clouds, acoustical panels at seated voice level and pink noise.

As indicated above, the Employer's final offer would maintain the open-office design and work area space reductions that will apply to all of the other occupants of the building. It also conforms to the heightened security needs of the 15 staff attorneys identified in its functionality determination as requiring space to ensure confidentiality of sensitive documents and communications by assigning them enclosed DIRTT workstations, whose panels have a height of 86 inches, and are constructed with demountable floor-to-ceiling glass partitions and lockable doors. Providing all 38 staff attorneys with Bluetooth-enabled telephone headsets would augment the noise-masking system the building is already equipped with by eliminating the need to use the speaker phone to have both hands free during a conversation, and the additional noise-attenuating

acoustical tile "clouds" and enhanced sound-absorbing material the Agency has decided to install. Moreover, in connection with its space consolidation plan, management is offering employees the ability to telework "up to full time." Its final offer should be adopted because, "taken together, these features and benefits will allow these employees, even when they have need for increased privacy and confidentiality, to effectively and efficiently perform their duties."

The Union's position, on the other hand, "fails to recognize the other means by which management is seeking to address concerns over privacy and confidentiality and diminishes the work of management and other staff who also engage in highly demanding, important and complex work." While the statements of the Union's attorney witnesses, both during bargaining and the arbitration hearing, indicate that their previous experiences in cubicles was distracting and less productive than in their current private office space, it took place in space that "was not designed as an office building and admittedly was not ideal workspace." In contrast, the staff attorneys in EPA Region 7 will be moving to a "state-of-the-art, LEED certified modern office building." Nor has the Union supported its assertion that private, enclosed floor-to-ceiling walled offices are necessary for staff attorneys to safeguard client confidentiality and communications or to meet bar licensure/legal requirements. Both the current and new buildings are secure and guarded and do not permit visitors to wander around unescorted. In addition, the client of the staff attorneys is the Agency itself, and it is only other EPA staff that will have unrestricted access to staff attorney work areas. EPA attorneys in Regions 6 and 9 and in EPA Headquarters currently are housed in open workstations and/or shared offices without any of the adverse consequences the Union predicts. The Agency also is unaware "of any EPA attorney ever having been subject to loss of licensure or other sanction because of the nature of his/her workspace."

A decision to maintain the *status quo* for staff attorneys in Region 7 also would have national implications, as every EPA office around the country and EPA Headquarters is facing upcoming consolidation moves, including Regions 9 and 4 in the very near future. In this regard, it could result in "major budget ramifications" by minimizing the degree to which future space reductions could be initiated; it could impede the Agency's ability to tailor space allotments based on the

specific circumstances of each Region; and it "could minimize the opportunity for increased common, collaborative and open spaces." Finally, the Union and management have similar interests in providing quality workspace to legal staff, *i.e.*, both sides want to ensure that attorneys can meet their ethical and legal obligations regarding confidentiality and to ensure that they have adequate workspace to perform their jobs. For the foregoing reasons, however, the Arbitrator should conclude that "these goals can be achieved other than by constructing new private floor-to-ceiling walled offices for all staff attorneys."

CONCLUSIONS

After carefully reviewing the arguments and evidence presented during the mediation-arbitration proceeding, I shall not order the adoption of either party's final offer. Rather, I shall order that all 38 attorneys in the bargaining unit be placed in DIRTT workstations with all noise attenuating measures offered by the Agency and Bluetooth headsets.

The Union contends that the *status quo* consists of 96 square foot offices with floor-to-ceiling walls for each attorney. In the Union's view, the Employer wishes to change the *status quo* and, consequently, bears a heavy burden to justify the proposed changes. While the Union's description of the *status quo* is literally accurate, it does not present the entire picture. Under the Union's proposal that all attorneys receive 96 square foot offices with floor-to-ceiling walls in the new facility, the attorneys will be the only employees to have such work areas. SES-level managers and even a presidential appointee will have 80 square foot DIRTT workstations. Providing the staff attorneys with 96 square foot floor-to-ceiling walled offices when no other person working at the facility has such a work area would itself be a change in the *status quo*. The utility of the general principle that a party seeking to change the *status quo* bears the burden of justification is considerably less in a case of this nature.

The parties' dispute focuses on two issues: the size of the work areas and the type of work area. With respect to size, the Union seeks to maintain the 96 square feet that each attorney currently has while the Employer offers each attorney 80 square feet. Very little attention was paid at the hearing to the size

of the work areas. The Employer averred without contradiction that no one else at the facility will have a larger work area than 80 square feet. The reduction in the size of the work areas is consistent with the Presidential directive to agencies to reduce expenditures on real estate and associated operating expenditures. Although additional square footage would likely make for a more comfortable work area, there is no evidence that an 80 square foot work area will impede any attorney's ability to accomplish his or her job. On the record before me, I will award the attorneys 80 square foot work areas.

The overwhelming bulk of the evidence presented at the hearing concerned the type of work areas the attorneys will receive, i.e., whether they will have floor-to-ceiling walls or something else. To construct floor-to-ceiling offices would require the installation of a sprinkler in every office, something that is not needed with moveable work stations. It would also require changes to the electrical system as, currently, the power boxes are in the floor, something that cannot be done with conduit in a wall. The HVAC system would also be affected. Although supply can be provided to offices with floor-to-ceiling walls because the supply is under the floor, the returns are in the ceiling and, if floor-to-ceiling walls are constructed, each office will need its own return. The HVAC system modified to accommodate 38 floor-to-ceiling walled offices will consume considerably more energy to operate. The entire facility's HVAC system will have to be rebalanced. Furthermore, such structural changes will require the Agency to secure new permits from the City of Lenexa which could lead to delays in completion of the build-out and delay the move.

Balanced against these negatives, the Union has offered concerns that fall into four categories: visual privacy, security, audio privacy and ability to concentrate. I shall address each in turn.

Visual privacy is a significant concern because staff attorneys work with confidential documents. These can include massive paper case files in Superfund and other complex cases. They also include confidential electronic documents, such as when evaluating FOIA requests and checking documents for confidential business information and other confidential information exempt from disclosure. The Herman Miller Canvas workstations have 57-inch walls and clearly would not provide visual privacy as almost all adults are tall enough to see over

them. In contrast, with the DIRTT workstations, most adults are unable to see over their 86-inch walls. The DIRTT workstations provide a measure of visual privacy not available with the Herman Miller Canvas alternative.

The need for security complements the need for visual privacy. Attorneys are obligated to safeguard confidential documents with which they are working. The Herman Miller Canvas workstations do not have lockable doors. Instead, they have lockable file drawers. The security provided by lockable file drawers is inferior to the security provided by a lockable door. For example, an attorney working with confidential material in a Canvas workstation who has to leave the workstation, even momentarily, will have to move the material to a file drawer and lock the file drawer. Upon return to the workstation, the attorney will have to retrieve the material from the locked file drawer. This is far less efficient than simply locking the door. In contrast, the DIRTT workstations provide physical security because they have lockable doors.

Audio privacy is very important because attorneys engage in numerous confidential conversations with opposing counsel, others within the Agency (*i.e.*, their clients) and witnesses and others outside the Agency. Such conversations may take place in person or by telephone. Concern extends to the privacy of what the attorney is saying as well as to what other participants in the conversation are saying.

With respect to telephone conversations, the use of Bluetooth headsets will greatly increase the privacy of what participants in the conversation other than the attorney are saying. The need to use speakerphones should be reduced significantly. Speaker phones will still be needed when multiple individuals are on the call from the same office, but they will no longer be needed simply to free up the attorney's hands for note taking and other matters.

The Employer has recognized that the Canvas workstations do not provide sufficient audio privacy. This is why the Employer is placing managers and others who have a need for audio privacy, including 15 of the staff attorneys in DIRTTs rather than Canvas workstations. Within the DIRTTs, audio privacy is assisted by the higher walls and enhanced by the acoustical panels set at seated voice level. Although, according to the Employer, the panels will not absorb completely conversations

over a speaker phone, they will absorb conversation using a Bluetooth headset to the point where it will not be audible outside the workstation. Audio privacy is enhanced further by the use of pink noise, which projects sound at the human range of hearing and attenuates the conversation to the point where the specific words used cannot be understood. Based on the record before me, I conclude that the DIRTTs, but not the Canvas workstations, provide for audio privacy.

Finally, there is the ability to concentrate. Unlike the concerns with physical privacy, security and audio privacy which seek to safeguard what the attorney is working on from being observed or overheard by others, concern with the ability to concentrate seeks to insulate the attorney from distraction or interference emanating from the work, primarily conversations, of others. Apparently the Applebee's attorneys found the DIRTTs unsatisfactory in this regard.

I am unable to give the Applebee's attorneys' experience a good deal of probative value however. The Applebee's attorneys' workstations were in an area that saw much more traffic and much more external noise than the proposed EPA attorneys' wing. Indeed, Applebee's' experts recommended placing a ceiling on the atrium cafeteria as the second most effective way to abate noise in the attorneys' workstation. There is no evidence that the Applebee's attorneys were provided with Bluetooth headsets or that Applebee's used a pink noise system. The Applebee's environment is insufficiently comparable to the proposed environment for the EPA attorneys to support meaningful projections concerning the EPA environment.

For the same reasons that the DIRTTs proposed by the Employer appear to provide for audio privacy, they also appear to insulate attorneys working within them from outside noise that can interfere with their ability to concentrate. The higher walls of a DIRTT provide greater noise attenuation than the other workstations. The double clouds and seated voice-level acoustical panels will further keep the noise confined to the interior of the DIRTT. The noise will be reduced by the use of Bluetooth headsets which will lessen the need to use speaker phones. The distracting effect of others' conversations will be reduced further by the muffling resulting from the pink noise system. On the record developed, I find it more likely than not that attorneys working in DIRTTs will have sufficient protection from external noise to be able to carry on their work without

reduced productivity.

On the other hand, the record does not support a similar conclusion with respect to Canvas workstations. Whereas it is 4 feet from the top of the DIRTT walls to the ceiling, it is 6½ to 7 feet from the top of the Canvas walls to the ceiling. There is a much greater area over the top through which noise may intrude. Moreover, someone who wishes to converse with an attorney working in a DIRTT has to enter the attorney's work area and the individuals can close the door for greater privacy and thus greater insulation for others from the noise of their conversation. A person wanting to speak to an attorney working in a Canvas workstation can simply speak to or at the person over the cubicle wall. Indeed, this appears to be what the Employer envisions because the Employer maintains that a major advantage of the Canvas workstations is that they will foster an open and collaborative work environment. But one person's open and collaborative work environment is another person's chaotic work environment. The ability to talk at colleagues over a partition instead of physically going into their "offices" or talking to them on the phone or via electronic messaging may foster collaboration in some environments but in a small to mid-sized law office it is more likely to foster chaos.

The Employer proposes to provide 15 attorneys DIRTTs and the others Canvas workstations. This is a significant change from the *status quo* regardless of how the *status quo* is defined. It is not only physically different from what the attorneys have now, it also divides the attorneys into two groups and determines that only one of those groups merits the privacy, security and concentration advantages of the DIRTTs. That is a major change from the current environment in which all attorneys have private offices with floor-to-ceiling walls.

The Employer did not introduce the functional analysis on which it relies to justify this major change from the *status quo*. The Employer described in detail the job responsibilities of some of the attorneys in the favored group of 15, *i.e.*, those involved in criminal prosecutions, those handling personnel matters and those handling ethics matters. With respect to the others, the Employer gave its conclusion that the nature of the work they handled did not warrant the enhanced privacy, security and insulation from distraction provided by the DIRTTs. Notably missing, however, was any specific analysis of the work performed by the remaining 23 attorneys to show that they do not

need those enhanced privacy, security and insulation features. This is in direct contradiction to the Employer's own analysis in 2009 that concluded that all of the attorneys warranted retaining their private offices and therefore warranted exemption from the Agency's relocation of employees to cubicles to free up space for additional conference rooms.

The Employer's failure to justify providing something less than a DIRTT workstation to 23 of the attorneys is understandable in light of the Employer's perspective on this case. To the Employer, the Canvas workstations foster an open and collaborative work environment, the DIRTTs are exceptions to that openness and collaboration and thus any such exception must be justified. From that perspective, justification could be found only for 15 of the attorneys. However, as discussed above, for attorney work environments, the Canvas workstations are more likely to foster chaos than openness and collaboration. Indeed, in this environment and on the record developed, I am unable to find any substance behind the claim of fostering an open and collaborative environment. The Employer's devotion to it seems to be blind to the functional needs of this particular work group.

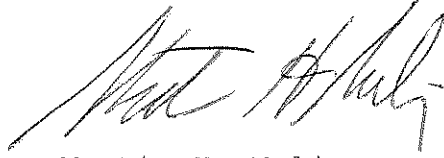
Moreover, there is absolutely no evidence of a need to foster greater openness and collaboration among this group of attorneys. Rather, the evidence from both parties makes it clear that there is a high degree of collegiality and collaboration among all attorneys in the Office of Regional Counsel and there is absolutely no reason to believe that having the ability to shout at a colleague over a cubicle wall will enhance that collegiality and collaboration.

Providing every bargaining unit attorney with a DIRTT workstation will not necessitate the structural changes, permitting delays or increased energy consumption that providing offices with floor-to-ceiling walls will incur. There is simply no justification for relegating approximately 60 percent of the bargaining unit attorneys to inferior workspaces that will likely interfere with their abilities to perform their jobs.

DECISION

The Employer will provide each bargaining unit attorney with a DIRTT workstation of at least 80 square feet,

with enhanced clouds, acoustical tiles at seated voice level,
pink noise and Bluetooth headsets.

A handwritten signature in black ink, appearing to read "Martin H. Malin". The signature is fluid and cursive, with the first name "Martin" and last name "Malin" clearly distinguishable.

Martin H. Malin
Arbitrator

June 6, 2012
Chicago, Illinois