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BEFORE ARBITRATOR ROBERT T. MOORE

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PATENT OFFICE PROFESSIONAL
ASSOCIATION (POPA),

Union,

THOMAS VALONE,

Grievant,

-vs-

FMCS NO.: 00-01666

U.S. DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK
OFFICE,

DOCKET NO.:
09-9-TV-10

Agency.

- - - - - X

Arlington, Virginia

Thursday, October 28, 2004

Day #4

Pursuant to Notice, the above-entitled hearing was held before ROBERT T. MOORE, ARBITRATOR, at the United States Patent and Trademark Office, Crystal Park 2, 2121 Crystal Drive, Suite 714, Arlington, Virginia, commencing at 1:23 o'clock p.m., there being present on behalf of the respective parties:

APPEARANCES:

On Behalf of the Patent Office Professional Association:

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On Behalf of the U.S. Patent and Trademark
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Also Present: Thomas Valone

* * *

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PATENT OFFICE PROFESSIONAL ASSOCIATION

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P R O C E E D I N G S

THE ARBITRATOR: Mr. Chubb, my name is Robert Moore, and I'm the arbitrator, and the first thing I need to do is swear you in as a witness.

Whereupon,

SCOTT ROBINSON CHUBB, SR.

a witness, was called for examination by a representative on behalf of the Union, and, having been duly sworn by the Arbitrator, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTSON:

Q Please state your name for the record.

A My name is Scott Robinson Chubb, Sr.

MR. ROBERTSON: I have here what I'd like to present as Union Exhibit 9. I only have one copy of it

--

MR. WAY: His c.v. Okay.

MR. ROBERTSON: -- but we can get some copies later on.

(Whereupon, the document was marked as Union Exhibit No. 9, for

identification, and admitted into
evidence.)

BY. MR. ROBERTSON:

Q Is this your current resume?

A Yes.

MR. WAY: And let me just take a look at it.
I just handed it over to him. I didn't get a chance
to glance at it before you asked a question; okay?

MR. ROBERTSON: I'm not going to ask him
anything specifically about it.

THE WITNESS: I actually have more
publications now, but basically, yes, it is.

THE ARBITRATOR: Let's mark this thing.

MR. WAY: He marked it as Union Exhibit 9.

THE ARBITRATOR: Okay.

THE WITNESS: For the record, I am coming
here as a private citizen, of course. I'm testifying as
a private citizen.

MR. ROBERTSON: And we appreciate that.

BY. MR. ROBERTSON:

Q Have you had occasion to file any
applications before the Patent and Trademark Office?

A Yes.

Q And broadly speaking, what was the subject matter of these applications?

A Well, I filed one that was a patent, that was actually awarded a correction to the global positioning system. There is an effect due to the sun that isn't being included. It's not a major effect, but it could have value for tactical things, weapons and so forth.

Also, Talbot Chubb and I -- Talbot is my uncle -- filed several patents in the early nineties related to what was called "cold fusion" at the time.

It was really, in effect -- These were process patents. We did not have a working model, but we had an understanding of something.

Subsequently, some of the material that was in our theory was used actually by the Naval Research Laboratory in a patent, but I was not an author of that patent.

Q Okay.

A The things that I filed -- I don't have the numbers now -- you know, we basically dropped them.

Q In your opinion, does the office -- did the office -- give -- How do I want to word this?

What was the Patent Office's position on cold

fusion at the time you filed these?

A Well --

MR. WAY: For the record, I object on relevance grounds.

THE ARBITRATOR: Overruled.

THE WITNESS: The problem, I would say, really actually didn't begin with the Patent Office.

There was a breakdown in scientific communication that began on May 1, 1989, and I think that the Patent Office was going along with the scientific consensus at the time.

It was unfortunate because the breakdown led to a situation where information did not get out into the peer-reviewed literature.

So, I think that what happened was it was simply a lack of information at the time, and the Patent Office was incapable of assessing it. That's basically what happened. I mean, you know, I didn't have real conversations with them. They cited certain references to newspaper articles and things like this. And given the circumstances, it was understandable because the material was not available.

Q The examiners cited articles to newspapers --

A Yes.

Q -- and the thrust of it was?

A That this was a non-existent phenomenon.

Q Inoperable technology?

A Yes.

Q So, the applications themselves did not appear to be examined on their --

MR. WAY: Objection; leading.

THE ARBITRATOR: Yes. Try again. Don't put it in his mouth. Just ask him the question.

MR. WAY: Just who, what, when, where, how, why.

THE ARBITRATOR: Yes. That sort of thing.

THE WITNESS: I mean, I can make a comment about it.

MR. ROBERTSON: Okay.

MR. WAY: Whoa. I object to his narrative testimony.

THE ARBITRATOR: Well, if they don't get it out of him, I'm going to.

MR. ROBERTSON: Let the arbitrator get it out of him. That's fine.

THE ARBITRATOR: No, no, no, no. Let me just

-- What happened? You say there was a breakdown --

THE WITNESS: Okay.

THE ARBITRATOR: -- in the scientific
community.

THE WITNESS: They misunderstood what we were
looking at.

THE ARBITRATOR: Who is "we"?

THE WITNESS: Talbot Chubb and myself.

THE ARBITRATOR: Okay.

THE WITNESS: They misunderstood -- They
lumped together a bunch of different effects that were
totally unrelated to each other.

The citations, the reasons for doing what
they did, from a scientific point of view, were based
upon a failure -- At the basic time people didn't
understand that there were many different effects at
work.

They lumped together, for example, results by
the Brigham Young University group with the Pons and
Fleischmann group that were totally unrelated.

And they all expected to see certain things.

They expected to see a colder version of conventional
fusion when, in fact, that's not the effect.

It's now understood that the effects that Jones and his group saw were entirely different from what we had been seeing.

THE ARBITRATOR: Jones, they're the Utah group or the --

THE WITNESS: They were in Brigham Young University.

THE ARBITRATOR: Okay.

THE WITNESS: And there was the Pons and Fleischmann group at the University of Utah.

The group at the University of Utah did see a valid effect. It turns out, years after the fact, it's quite plausible that Jones saw a valid effect, but neither effect was related to -- they weren't related to each other.

What was probably more damaging was that people expected to see other things. They expected to see what you see in conventional nuclear fusion, and they didn't see that.

They didn't see high energy particles. In other words, in conventional fusion, you expect to see neutrons and you expect to see tritium.

MR. WAY: Can I see what you're looking at?

THE WITNESS: It's just directions for getting here.

MR. WAY: Oh, okay.

THE WITNESS: It's just directions to the --

MR. WAY: Please don't refer to any documents, or else you have to show it to --

THE WITNESS: Yes. That wasn't a document.

MR. WAY: Well, it's a piece of paper.

THE ARBITRATOR: Well, that's all right. That's all right.

THE WITNESS: Now, the point is -- I mean, I could go into a long explanation, but the Pons and Fleischmann effect was distinctively different from the Jones effect. We were dealing with the Pons Fleischmann effect, and, you know, things just weren't understood.

At the heart of it, we said that there was a materials effect that was really -- The Pons and Fleischmann effect relates to a process that involves a particular kind of material.

And, in fact, in that report, the Navy report, it is documented that if you use the appropriate kind of material, you can reproduce the

Pons Fleischmann effect. And it is a nuclear reaction, but it doesn't have any high energy particles.

THE ARBITRATOR: Okay.

THE WITNESS: And it's a new effect, and it wasn't understood at the time. So that was basically the reason --

THE ARBITRATOR: In other words, something was accomplished, but not at least the common -- well, some broader group of people was looking for?

THE WITNESS: That's right.

THE ARBITRATOR: We'll forget about the great spectrum of mankind. But they were looking for something, they didn't see that, and they didn't appreciate that there was something else --

THE WITNESS: That's right.

THE ARBITRATOR: -- that maybe nobody had expected, but did, was achieved.

THE WITNESS: Yes.

THE ARBITRATOR: Is that what we're talking about?

THE WITNESS: In our process patent, we suggested what was actually seen eventually. We suggested that what you should see is energy and a

different element.

You should have heavy hydrogen being converted into normal helium, garden variety helium, with energy and no high energy particles.

Now that, actually, is not far from a very rarely seen example of a reaction. There is a reaction in conventional fusion that rarely occurs.

It does occur sometimes where you create garden variety helium, but you have high energy gamma rays that are produced, high energy radiation that's produced.

Now what is documented in that report is that

--

MR. ROBERTSON: We haven't introduced this yet.

THE ARBITRATOR: Well, let's put it on the table. Let's get it on the table. Let me thumb through it. So, give it a number. How many copies of this have you got?

MR. ROBERTSON: We only have one at the time.

THE ARBITRATOR: One?

THE WITNESS: It's available electronically, actually.

THE ARBITRATOR: That doesn't do me a bit of good.

MR. ROBERTSON: Okay. We will get you a copy.

THE WITNESS: That is a copy for you.

THE ARBITRATOR: Okay, good.

MR. ROBERTSON: There are two parts, so shall I label it --

THE ARBITRATOR: Put it Union 10A and Union 10B.

(Whereupon, the documents were marked as Union Exhibit Nos. 10A and 10B, for identification, and admitted into evidence.)

THE WITNESS: The first volume is the most important one.

THE ARBITRATOR: Okay. What's the other one?

THE WITNESS: The second volume is a detailed description of a particular series of heat measurements by one of the discoverers of the process, Martin Fleischmann.

MR. WAY: Objection to the grievant whispering to the witness.

MR. VALONE: Well, I can say it out loud.

THE ARBITRATOR: Don't whisper to the witness. I didn't see you, but if you did --

THE WITNESS: I didn't hear what he said. What did you say?

MR. WAY: Well, don't say it.

THE ARBITRATOR: Don't say it --

THE WITNESS: All right. Fine.

THE ARBITRATOR: -- either out loud or in a whisper. Don't talk to the witness. Don't talk to the witness while he's testifying. It could be construed as coaching.

THE WITNESS: Okay.

THE ARBITRATOR: Although there's nothing to suggest otherwise that you're being coached in anything, so proceed on.

THE WITNESS: Oh no, I'm not -- As you will see, I'm an author of that report.

THE ARBITRATOR: I can see.

THE WITNESS: I draw specific attention to the work of Dr. Melvin Miles.

MR. WAY: This is Union 10; is that right?

THE ARBITRATOR: Ten.

THE WITNESS: Now, Dr. Melvin Miles --

THE ARBITRATOR: In two volumes, A and B.

MR. WAY: Two volumes; okay.

THE WITNESS: Dr. Melvin Miles and Dr. Ashraf Imam, they also the ones who were awarded a patent on July 20th for a particular form of alloy, a palladium boron alloy --

THE ARBITRATOR: For use in -- What's it used in?

THE WITNESS: It was actually used to produce --

THE ARBITRATOR: Are they metallurgists?

THE WITNESS: They actually used it in cold fusion experiments. They didn't mention the name "cold fusion" in the patent. It was used to produce excess heat.

The point is -- They don't say it, but you get -- From the nuclear reaction that creates Helium 4, you get more energy out than you would from the normal chemical reaction.

And the amount of energy that you get out --

THE ARBITRATOR: What are you doing in this to get the cold fusion that you're talking about here?

What triggers it? What's the catalyst? What's --

THE WITNESS: It's actually a solid state physics effect. It's very similar to the kind of thing that you get in super conductivity or super fluidity.

What happens is the hydrogens, the deuteriums, the heavy deuterium atoms, first of all, you have to get them into the material.

THE ARBITRATOR: You're going to -- Let me just say, you better slow down a little bit --

THE WITNESS: Oh.

THE ARBITRATOR: -- or, you know, this is -- you're never going to be able to publish this and sell it as an instant lecture --

THE WITNESS: Okay.

THE ARBITRATOR: -- if you keep talking so fast.

THE WITNESS: Okay. What happens is that the deuterium nuclei, which are called deuterons, go into the lattice. Until you reach a critical point, they just normally chemically bond to the underlying material.

At a certain --

THE ARBITRATOR: Okay. For us simpletons, as

in an electromagnetic plating of some sort?

THE WITNESS: Well, it's even more basic than that. Normal chemistry in these materials allows hydrogen just to go in. It just gets soaked in at room temperature.

It goes right in until you get to about 50 percent -- If every other place where it would normally go gets filled, then you start having trouble getting it into the material.

THE ARBITRATOR: Any further.

THE WITNESS: Unless you apply an electric current to it. If you apply electric --

THE ARBITRATOR: Okay.

THE WITNESS: -- current, then it starts to go into the empty sites. And at a certain point, you get all of the sites filled up.

What triggers it is a small fluctuation beyond that. When you start trying to put additional deuteriums into it, the additional deuteriums get stifled. They don't know where to go.

And because of the situation in which you're dealing with a solid --

THE ARBITRATOR: They don't know where to go

because there is no place to go?

THE WITNESS: Right. Basically, yes. But their electrons want to go.

THE ARBITRATOR: Okay.

THE WITNESS: The electrons want to go down to the palladiums. And what happens is the deuteriums, in trying to avoid each other, they become -- they actually start behaving in a distinctly quantum-mechanical fashion.

Now, what I mean by that is, in quantum mechanics you have wave-like effects and you have particle-like effects.

The wave-like effects typically occur when there's actually a very complicated -- well, they typically occur either at low temperature or -- They occur in situations when you can get -- Through electromagnetic effects you can get a whole group of them moving at once. This is what happens, actually, in normal conductors.

Electrons, for example, can move all at once around a piece of dirt, which creates holes, and that creates what effectively looks like a positive kind of charge.

The same kind of thing can happen with these hydrogens. These hydrogens can behave very much like electrons.

They're sufficiently light and they have no core electrons -- that is, no electrons near them. They become intertwined with where their last electron wanted to go.

THE ARBITRATOR: Slow down a little bit.

THE WITNESS: Okay. They become bonded, effectively, with where their last electrons wanted to go, and they become wave-like when this happens.

THE ARBITRATOR: All right. Which is apt to produce energy? In the wave-like form or in the --

THE WITNESS: In the wave-like form.

THE ARBITRATOR: But not in the squirreling around and --

THE WITNESS: Yes.

THE ARBITRATOR: -- I assume some collision, but perhaps they just all avoid each other because --

THE WITNESS: That's exactly right.

THE ARBITRATOR: -- of their own what?

THE WITNESS: That's exactly right. What happens is, in trying to avoid --

THE ARBITRATOR: What's exactly right?

THE WITNESS: In trying to avoid --

MR. WAY: You're exactly right.

THE WITNESS: -- each other --

THE ARBITRATOR: Yes.

THE WITNESS: They try to avoid each other where there is charge. But most of the time when they're around where there's no charge -- and where there's no charge, it can give you the real wave-like effects -- you can get collisions.

But what these collisions do is, rather than these waves colliding at an individual point, they collide at many different points at once.

And in the process, they literally cause all of the charges to move at once. And it's the motion of all of the charges that gives rise to the nuclear reaction.

And you get a wave-like thing -- you get a wave-like species coming out of this. Now, the proof of the pudding --

THE ARBITRATOR: Yes. Let's get to the proof of the pudding.

THE WITNESS: The proof of the pudding is

that the prediction of this wave-like behavior is that the product that you would get would not be found inside the material where this stuff was happening, but it would be found where it could combine with its own electrons, which would be outside or in the boundaries of the place where the thing is happening. And that's been observed.

And the other thing is, for this reaction to occur, you have to get a very specific kind of helium.

You have to get the garden variety kind of helium, so-called Helium 4.

Now --

THE ARBITRATOR: You call it "garden variety" because it's --

THE WITNESS: It's the common one. It's the one you have in helium balloons.

THE ARBITRATOR: And the one that is -- West Texas helium?

THE WITNESS: Yes. As opposed to Helium 3.

THE ARBITRATOR: Which is what?

THE WITNESS: Helium 3 is an isotope. It's a stable isotope of helium. It's got two protons and a neutron. Regular helium has two protons and two

neutrons.

The Helium 3 occurs -- you don't find it as often as the regular Helium 4. The abundance is --

THE ARBITRATOR: Do you also find it in conjunction with drilling in the core -- in the earth?

THE WITNESS: You can.

THE ARBITRATOR: Where do you find it?

THE WITNESS: Yes, you can. You can find it there. It comes as a residual product of conventional nuclear fusion.

THE ARBITRATOR: Oh, all right.

THE WITNESS: In conventional nuclear fusion, you create two potential products. One is Hydrogen 3, which is a proton and two neutrons. The other one is Helium 3 directly, which is two protons and a neutron.

The Hydrogen 3, subsequently through beta decay, which is a process where an electron comes off of a neutron, the Hydrogen 3, or tritium, becomes Helium 3.

THE ARBITRATOR: To what use is Helium 3 put? Not balloons?

THE WITNESS: Nothing, really.

THE ARBITRATOR: Nothing. It has no use.

THE WITNESS: It has no real utility. It's got some scientific interest but it -- Helium 4 isn't useful for anything either, really. Well, for balloons. You could use Helium 3 for balloons also.

THE ARBITRATOR: It would have the lighter-than-air effect?

THE WITNESS: In fact, it would be -- Yes. Yes. It's not as heavy as Helium 4.

THE ARBITRATOR: Is it non-flammable?

THE WITNESS: Yes. Yes. These things don't do anything. Yes. They're inert. So, what we're --

THE ARBITRATOR: I just guess there's no great world demand for helium in any form particularly?

THE WITNESS: No. Dirigibles.

THE ARBITRATOR: Yes. There's no industrial use. You can't inject it, for instance, into a basic oxygen furnace for purposes of doing anything with regards to the molecular structure of steel?

THE WITNESS: No. But helium is useful for cooling things. That's traditionally --

THE ARBITRATOR: Okay. Sure.

THE WITNESS: That's traditionally one of the big uses of helium.

THE ARBITRATOR: Sure.

THE WITNESS: And, in fact, there's a helium reserve that's used very much for cooling. Physicists like it.

THE ARBITRATOR: Helium reserve? You're talking about the old naval helium reserves?

THE WITNESS: Well, the federal government has a reserve of helium that it keeps around. I don't know -- I think -- I only know of it because physicists use it.

THE ARBITRATOR: Well, it used to be that the only helium, natural helium, production was by the United States Navy back when they were big on dirigibles looking for submarines --

THE WITNESS: Well, that's right.

THE ARBITRATOR: -- but it's out in west Texas somewhere, you know?

THE WITNESS: That's right. Sure.

But an interesting thing about this is what you're talking here is a perfect fuel. You're creating heat, and you're creating the most inert element known to man, and that's all you're basically doing.

THE ARBITRATOR: What's the most inert --

THE WITNESS: Helium 4.

THE ARBITRATOR: Helium 4?

THE WITNESS: Yes.

THE ARBITRATOR: Okay.

THE WITNESS: So, there's no pollution.

There's no burning. So, anyhow, the Navy report, the work by Melvin Miles and Ashraf Imam documents that.

THE ARBITRATOR: Now --

THE WITNESS: My work documents how we -- I have a chapter --

THE ARBITRATOR: Is there an abstract in here or --

THE WITNESS: It's just a little forward, unfortunately. There's not a good summary.

THE ARBITRATOR: Is that all? Because, I mean, I can tell you right now that --

THE WITNESS: If you look at Page 107 of --

THE ARBITRATOR: See, here's my trouble. Okay. "At China Lake" -- well, I know where that is -- "Dr. Miles and his collaborators showed that a correlation exists between the rate of excess" -- and here is a fantastic word --

THE WITNESS: Enthalpy.

THE ARBITRATOR: Enthalpy. Now, what
-- I'm supposed to know --

THE WITNESS: That's heat.

THE ARBITRATOR: What?

THE WITNESS: It's heat.

THE ARBITRATOR: Heat?

THE WITNESS: Yes.

THE ARBITRATOR: See, what we badly need is
excess heat.

THE WITNESS: I think he avoided the word
intentionally.

THE ARBITRATOR: Well, maybe he did. I
wouldn't -- "The generation and the quantity of helium
in the gas stream. Such correlation is direct evidence
of the nuclear origin of Fleischmann-Pons effect."

THE WITNESS: There you go. It's just what I
said.

THE ARBITRATOR: Am I -- Let me ask you, when
he says "a correlation," is that using "correlation" as
in a multiple-variant correlation or --

THE WITNESS: No. It's using --

THE ARBITRATOR: -- or is this "correlation"
just a simple one-on-one bang, bang?

THE WITNESS: It's $E=mc^2$. Two deuterons --
If you take the mass of two deuterons and --

THE ARBITRATOR: How about the swinging
balls, bam, bam, and this straight old inertia --

THE WITNESS: Here's what it is.

THE ARBITRATOR: What?

THE WITNESS: There's a specific meaning to
this. If you two deuterons, the mass of a deuteron and
the mass of a second deuteron, and you take the mass of
a Helium 4 nucleus and you subtract them, you get a
positive number.

And if you multiply that number by the speed
of light squared, you get a particular number. It's
23.8 million electron volts is the energy. So, there's
an energy that's released when you create one Helium 4
nucleus, when you assume that it comes from a deuteron
plus a deuteron.

Now, what they did was -- It's very difficult
to measure all the deuterium that's there, but they can
measure the helium within particular limits.

And they can take the amount of helium that
appears in the gas stream and the amount of heat that
is present and they can say the additional helium

created this amount of heat.

THE ARBITRATOR: And they are injecting the additional helium, or the additional helium is being --

THE WITNESS: It's coming from the metal.

THE ARBITRATOR: And there's some way to measure the flow of this?

THE WITNESS: Yes.

THE ARBITRATOR: And there's some way to measure the heat?

THE WITNESS: Yes.

THE ARBITRATOR: And are we talking about things that are in, you know, micro levels?

THE WITNESS: Good question.

The best experiments, actually, aren't the ones in that report. The best experiments have very -- But what we are talking about, typically it's on the order of half a watt of power.

THE ARBITRATOR: A half a watt?

THE WITNESS: A half of watt of excess power.

THE ARBITRATOR: Well, that's a great deal.

THE WITNESS: And then if you take that for a long period of time, you get a lot of energy. If you take it for a long enough amount of time, you get more

energy than is possible without melting the whole thing.

THE ARBITRATOR: Is this theoretical, or has this been done?

THE WITNESS: No. It's been measured. It's been measured.

THE ARBITRATOR: And how long have they kept running?

THE WITNESS: In some cases, months.

THE ARBITRATOR: Creating a half a watt?

THE WITNESS: Yes.

THE ARBITRATOR: Well, that's a lot.

THE WITNESS: It is a lot; yes. Very much. Now, there have been more extraordinary cases where it's been even much more.

To put it in a kind of perspective, typical energies associated with chemical bonds are what they call sort of -- they're on the neighborhood of maybe one to five electron volts. Now, if you were to take -

-

THE ARBITRATOR: Hang on. Stop a minute.

THE WITNESS: Yes.

THE ARBITRATOR: Commissioner Godici, what

was his area of specialization as a patent examiner?

MR. WAY: He said he changed --

THE ARBITRATOR: I know. I know. But what -

-

MR. ROBERTSON: Fish hooks and mousetraps.

MR. WAY: That was at the end.

THE ARBITRATOR: Mousetraps. That's right.

He was in, basically, mechanical stuff. He wasn't much into this.

MR. WAY: At the end; right? He said he moved from a few things, didn't he?

THE ARBITRATOR: Right. Yes, he did. But was he ever into --

MR. WAY: I don't think he was ever into nuclear reactions.

THE WITNESS: I don't think that people expected that you would have nuclear reactions here, but they're there.

THE ARBITRATOR: Yes. You'd have to do a lot of educating, including with me, because you think of nuclear reaction and you think of --

THE WITNESS: High energy particles.

THE ARBITRATOR: -- you think of either the

uncontrolled or the controlled. But controlled is very
-- By God, if you look at a nuclear power plant type of
--

THE WITNESS: Right.

THE ARBITRATOR: -- harnessing in of the
forces with the scare of a meltdown and all that kind
of stuff.

THE WITNESS: Well, you caught it in a
nutshell while people didn't believe it. People were
expecting to see high energy particles.

They were expecting to see something that
would be similar to that. And that was the key. It
took a long time for them to see that there really was
Helium 4.

THE ARBITRATOR: Well, the Brigham Young
people did not try to dampen the enthusiasm with
regards to expectations very much.

THE WITNESS: The burden of what?

THE ARBITRATOR: The Brigham Young --

THE WITNESS: Brigham Young.

THE ARBITRATOR: -- folks did not dampen --
go out of their way to dampen the over-optimistic --

THE WITNESS: Actually --

THE ARBITRATOR: --enthusiasm of --

THE WITNESS: Actually, there was confusion. The Brigham Young people, for a long time, didn't believe that there was such an effect as excess heat. They now do. Steven Jones does now believe it.

THE ARBITRATOR: Well, weren't there some people in Missouri, too? Or am I just confused with --

THE WITNESS: Well there was one professor at Columbia University or -- There was one professor from Columbia, Missouri, who did some of this.

But there's been a real community that's gone far beyond this. The best work has been at SRI.

THE ARBITRATOR: Okay. As fascinating as it is, and I'd love to have lunch with you sometime --

THE WITNESS: Right.

THE ARBITRATOR: -- but right now I've interrupted, so let's get on with your questioning.

MR. ROBERTSON: Okay.

BY MR. ROBERTSON:

Q Did the Patent Office ever reject a test or demonstration of a cold fusion invention to your knowledge?

A Did they ever reject -- Yes.

Q Could you elaborate, please?

A Let's see.

Q What you know.

A Mitchell Swartz had the prime example. In Mitchell Swartz's case, Mitchell Swartz brought his case all the way to the Supreme Court where it was not examined, or they didn't hear the case.

It did go through the Court of Appeals, and I filed an amicus curiae on his behalf in that case.

There have been others. I mean, I don't know the specific numbers of the cases, but it's common knowledge within the field. Mitchell Swartz's case has the most profound documentation associated with it.

Most people just gave up when it was very much just the name "cold fusion" associated with the patents, or they would cite Pons and Fleischmann.

THE ARBITRATOR: For what proposition? For failure?

THE WITNESS: Yes. They would just say -- Mitchell Swartz, for example, showed me something where the fact that he used the reference Pons and Fleischmann led to just the statements that this was a non-existent phenomenon.

Now, the MIT people and SRI have recently gotten a patent. They battled for many years with this, too. I know there were initial rejections.

THE ARBITRATOR: And what did they get a patent for?

THE WITNESS: Their's was for excess heat as well.

THE ARBITRATOR: And --

THE WITNESS: Heat. Creating heat.

THE ARBITRATOR: So, it has been accepted that they did prove --

THE WITNESS: I'm fairly certain it -- I think that that one has been accepted. It may not have been accepted. It's out there right now if it hasn't been.

And as you'll notice, the one that was awarded on July 20th to Melvin Miles and Ashraf Imam doesn't mention cold fusion and it doesn't mention excess -- It talks about heat. I think they talk about excess heat in their abstract.

THE ARBITRATOR: But they describe a --

THE WITNESS: A palladium boron alloy.

THE ARBITRATOR: The palladium boron alloy, was that a part of the original Brigham Young --

THE WITNESS: No. Pons and Fleischmann were the ones. They used just regular palladium. When you put the boron in, it makes a difference, because it separates the palladium crystals and makes them smaller and the compound is better.

THE ARBITRATOR: What are some of the other uses of boron?

THE WITNESS: Oh, man, I don't know.

THE ARBITRATOR: But it is widely used?

THE WITNESS: Yes.

THE ARBITRATOR: As an alloy?

THE WITNESS: No. Boron is a light metal. I'm not exactly sure what they use it all for. It might be used for --

THE ARBITRATOR: It's a light metal?

THE WITNESS: Yes. I think it's a -- Boron is like a -- Isn't it Group 2?

THE ARBITRATOR: Atom-weight, you mean?

THE WITNESS: Yes. It goes lithium and then boron. I think it's Atomic No. 4 or 5.

THE ARBITRATOR: So, it's real light.

THE WITNESS: It's very light; yes. And I think in things like Borax, they'll use it as a cleaning agent, you know. It's reactive.

THE ARBITRATOR: Okay. Oh, yes. All right. Now I remember the stuff. Yes.

THE WITNESS: But in this instance, what the boron served to do was to create a matrix where the palladium could reside.

The particular material was an alloy in which there was sufficiently small amounts of palladium that the palladium would literally just form -- they wouldn't go into individual sites within the boron. You would get little crystals.

And, now, the important point --

THE ARBITRATOR: Little what?

THE WITNESS: Little crystals.

THE ARBITRATOR: Okay.

THE WITNESS: Crystals of palladium.

And the important point in this context was that in order for the process to work, you have to be able to expel the helium. If the helium gets trapped in the metal -- because when it bonds with its electrons, it expands in size -- it cracks the metal and that

destroys the process.

And so, that was actually the motivation for Miles and Imam making these particular alloys.

Now, the interesting thing about these alloys is that they created excess heat every time except once. And the one time it didn't work was when the alloy cracked, which was, again, to be expected.

The point is, in order to get this funny kind of configuration --

THE ARBITRATOR: We're talking about an alloy. Of course, I have visions of a strip of metal, but that's not necessarily what you've got here; right?

THE WITNESS: No. It's a porous medium, really, with palladium inside it.

THE ARBITRATOR: Well, anything could be porous --

THE WITNESS: Yes.

THE ARBITRATOR: -- microscopically, but is it --

THE WITNESS: Yes.

THE ARBITRATOR: -- something you can look at?

THE WITNESS: Yes. It looks like a -- It

just looks like a -- It looks like mostly boron.

THE ARBITRATOR: Well, I --

THE WITNESS: There's another. Carbon is another one. They've actually done this with carbon as well.

THE ARBITRATOR: Yes. All right.

THE WITNESS: In other words, if you were to picture --

THE ARBITRATOR: Slow down. I think she's about to go crazy.

THE WITNESS: I'm sorry.

THE ARBITRATOR: You're going to have to give the court reporter a glossary, you know, of --

THE WITNESS: Okay, I'm sorry.

THE ARBITRATOR: -- terms and then she, in turn, is going to put a lot of parentheses and fill in what --

THE WITNESS: All right. Well, I've probably said enough.

THE ARBITRATOR: All right; okay. Enough is enough. I mean this is -- One, I get your point, and believe it or not I do understand maybe ten percent of it.

But why don't you get on with the reason for Mr. Chubb being here.

MR. ROBERTSON: Thank you very much. I'll show you what I propose as Union Exhibit 11.

(Whereupon, the document was marked as Union Exhibit No. 11, for identification, and admitted into evidence.)

THE ARBITRATOR: Go ahead. Let's not waste time. Go ahead, show him that. I assume he provided this.

MR. ROBERTSON: Actually, I don't believe he's ever seen it.

THE ARBITRATOR: Oh, okay.

MR. WAY: Well, then, I'd --

MR. ROBERTSON: Just relax.

MR. WAY: Well, if he hasn't seen it before, I'd like to have it taken back. I mean, is he familiar with -- If he's not familiar with this document --

THE WITNESS: I haven't seen the document before.

MR. WAY: -- what's the purpose giving it to him?

MR. ROBERTSON: Just relax.

THE ARBITRATOR: Heck if I know. You know, I'm just the --

MR. ROBERTSON: I'm going to ask him to review it.

THE ARBITRATOR: -- arbitrator, but I'm going to tell you, unless there's some real good purpose, it's not going to -- it's going to be water off a duck's back; okay?

MR. WAY: Is there a question, or are you just asking him to review the documents?

THE ARBITRATOR: Yes. Let me read it, too. Let everybody read it. Then you ask the question, and then you object.

By the way, pointing first to the Union, then to the management, then back to the Union.

MR. ROBERTSON: Let me know when. I'm ready.

THE WITNESS: Oh man, I love it. It doesn't surprise me.

THE ARBITRATOR: Okay, just a second.

THE WITNESS: Sure.

(Whereupon, the Arbitrator reviewed the document.)

THE ARBITRATOR: Okay. All right. Now, this is -- Go ahead. Let the record show that this Exhibit 11 is a letter that is dated yesterday, and so I doubt anybody but the Union has seen this before because it has, evidently, been generated for this arbitration.

Anyway, that's what my assumption will be. So, go ahead and ask him some questions.

BY. MR. ROBERTSON:

Q Are you familiar with patent examiner Harvey Behrend?

A I have never met him. I've heard of him.

Q Are you familiar with the report cited in this letter at the bottom --

A I'm familiar with the NAWCWPNS Technical Report 8302; yes.

Q Is that TP 8302?

A Yes. 8302, yes. I have a copy of that report.

Q Are you familiar with any of the facts related in this letter?

A I wasn't aware of what Behrend had said. I am aware of Dr. Miles' work. This is the same Miles of the patent --

THE ARBITRATOR: That's in here.

THE WITNESS: -- with Imam, and I know that he was able to independently verify, you know, heat.

I don't know about -- There has been sporadic evidence that's rare of X-rays. And that's the kind of radiation that Dr. Miles did see on several occasions.

THE ARBITRATOR: He didn't see? It says "Obtained" --

THE WITNESS: He has seen x-rays --

THE ARBITRATOR: -- "anomalous radiation" --

THE WITNESS: Yes.

THE ARBITRATOR: -- and that's the same thing as X-rays?

THE WITNESS: X-rays; yes. Usually, it does not happen, but on occasion it has been observed. The excess heat is normally what's seen.

THE ARBITRATOR: Is that something that is purely an objective measurement, anomalous radiation? In other words, you get a reading off of a --

THE WITNESS: It hasn't been done very precisely in most cases. The evidence normally has involved dental film, which could have outside contamination.

However, in the report, the Navy report, the work by Stanislaw Szpak, they did a more quantitative measurement of anomalous X-rays.

THE ARBITRATOR: But you say like, ordinarily, proof of it would be a dental film exposure?

THE WITNESS: Yes. The kind -- At least in the initial work. I'm not an expert on the X-ray measurements that have been performed.

THE ARBITRATOR: That would be somewhat equivalent to a radiation badge --

THE WITNESS: Right.

THE ARBITRATOR: -- although maybe more sensitive?

THE WITNESS: Right. And the problem is -- Yes. The problem is, of course, the placement of it and any kind of contamination from outside sources.

THE ARBITRATOR: Like my watch, if it were still covered with --

THE WITNESS: Right. But there has been evidence, and, in fact, in the -- I don't recall how carefully his measurements of the anomalous radiation were.

They were probably fairly careful because Melvin Miles has been involved with trying to do these things over many years, and he was initially criticized for using simply --

THE ARBITRATOR: But the heat, how about the reliability of --

THE WITNESS: Very reliable. His measurements of heat are extremely reliable.

THE ARBITRATOR: All right. Go ahead.

BY. MR. ROBERTSON:

Q My question was more about the Patent Office's attitude, particularly Mr. Behrend's that's expressed in here.

A Yes. As I say, it's common knowledge within the field -- although I have not had the experience personally of interacting with Behrend, so you're hearing this second hand --but it's even been published in magazines that Behrend has blocked patents in this area.

THE ARBITRATOR: Now, let me stop here. Is this the man who I've already characterized as to the patent examiner's job is --

MR. ROBERTSON: Yes. We've spoken about him

before in this area.

THE ARBITRATOR: Okay.

MR. WAY: I'm sorry. The patent examiner's job is what? The rubber stamping?

THE ARBITRATOR: Yes. The "Reject" stamp.

MR. WAY: I don't know what you're talking about, but --

THE ARBITRATOR: Okay. Well, I mean, I did not -- I must say I raised it.

THE WITNESS: Well, that's the caricature that Mitchell Swartz has given and others have given of him. But I'm not an expert on that because you're hearing it from me third hand.

THE ARBITRATOR: Is this the man that the grievant was charged with lobbying?

MR. WAY: Exactly.

THE ARBITRATOR: All right. Let's go. You want to get to the -- Well, I think you've made your point. Is there anything else you need to ask this --

MR. ROBERTSON: That's fine. I'm done then.

(Whereupon, Mr. Robertson and Mr. Johnson spoke off the record.)

MR. ROBERTSON: Oh, well --

THE ARBITRATOR: Oh, come on. Go ahead.

Well, don't show it to me, ask.

MR. ROBERTSON: Do we have to?

MR. JOHNSON: Yes.

THE ROBERTSON: You think so?

MR. JOHNSON: Yes, absolutely.

THE ARBITRATOR: Stand by.

BY MR. ROBERTSON:

Q How long have you been studying cold fusion?

A Well, actually, indirectly, you might say it started when I was in graduate school because I'm an expert on palladium hydride. I did my dissertation on palladium hydride in the early eighties.

Part of the reason that I didn't believe it was -- Part of the reason I began to believe in cold fusion was I had that background. I realized in 1989 that it couldn't be a colder version of conventional fusion, but it could be something else.

And beginning in 1989, with my uncle, we started to collaborate on a theory, and that was how I got sucked into it. At another Navy lab, they saw the

things that we suggested, which were Helium 4 and excess heat.

MR. ROBERTSON: I guess what I was trying to do is that I would like to move that he be qualified as an expert.

THE ARBITRATOR: Okay.

MR. ROBERTSON: I'd like to move that he be qualified as an expert in the field. I don't know if that's necessary for your purposes or --

THE ARBITRATOR: Well, he's certainly qualified as active in the field. I don't know who's an expert in this field, frankly. So, it's not like traditionally an expert in fingerprinting, an expert in -- But he is qualified as well-versed and personally active in the field.

Now, are you finished?

MR. ROBERTSON: That's it.

THE ARBITRATOR: All right. In fairness to the Agency, which now gets to cross examine you, I would just tell you that the effect of his testimony is that the United States Navy Research Laboratory takes this area of potential exploitable science seriously and that there is active work going on in this area and

that the United States Patent Office has been reluctant to acknowledge the possibility of anything much useful coming out of it.

Now, that's the thrust of what I get, so that if --

MR. WAY: Can you restate the last part? Reluctant to what?

THE ARBITRATOR: Can you read it back? Oh, I can actually probably do it. I can do it and expand on it.

Reluctant to accept that there's a possibility of anything useful and/or practical coming out of this area of scientific exploration -- to acknowledge the possibility that anything useful or practical can be expected to come out of this work.

MR. WAY: Okay. And how do you find that this is relevant? Which part of the case --

THE ARBITRATOR: No, no, no. I don't know that it's relevant at all. I just say that so that you can focus --

MR. WAY: Okay.

THE ARBITRATOR: -- you know, your cross-examination. Because I allowed him to go very far

afield in technical explanation of this stuff.

MR. WAY: Right.

CROSS EXAMINATION

BY MR. WAY:

Q I was going to ask you about your phone number and points of contact, but it looks like its --

A It's there.

Q -- given in Volume I.

A Yes.

Q Is there a directorate that you work in?

A I work in the -- It's 7000.

Q What does that stand for?

A I can't remember. It's the environmental one, oceans and environment.

Q Oceans and environment.

A I'm coming here, though, as a private citizen.

Q Sure. You said that.

A Yes.

Q Oceans and environment?

A I think it's oceans and environment. You can find out at the Web site. If you go to www.nrl.navy.mil --

Q Okay.

A -- and you look at 7000. I just can't remember --

Q Is that Unit 7000?

A Unit 7000. It's a directorate; yes.

Q And how many employees or scientists work in Unit 7000?

A I would say --

Q Just a ballpark.

A Probably about 500.

Q Five hundred; okay.

A Maybe more.

Q Is this entire unit at -- Where is this located?

A It's located in the Naval Research Laboratory in Washington, D.C., in Monterey, California --

Q Okay.

A -- and also at Stennis Space Center down in -

-

Q Okay. So, the 500 is not just in Washington?

A It's dispersed; yes.

Q So, Unit 7000. And is there a specific sub-unit of 7000?

A I'm in the remote sensing division.

Q Remote sensing division. How many employees work there?

A About a hundred.

Q And are you all under one supervisor or are -
-

A Yes.

Q -- there sub-units under --

A Actually, it's slightly -- No. It's slightly less than a hundred. We have branches. Let's see. There's 7260, 7230, 7220, and 7210, four branches.

Q And what branch are you?

A I'm in -- Well, yes, it's wrong there. I'm now in 7230.

Q What does that stand for? Can you tell us?

A It's coastal physics remote sensing.

Q Coastal physics. For the lay --

THE ARBITRATOR: Excuse me. By "remote," is that satellite, or is --

THE WITNESS: It's satellite. It brings you some satellite. It can be airborne. It can be even on ships where you're looking down with radars and that sort of thing.

THE ARBITRATOR: Sonar?

THE WITNESS: We don't do the sonar. It's mostly electromagnetic in nature.

BY MR. LAY:

Q So, for a lay person then, this is, what, spy satellites? What are you talking about, "coastal physics remote sensing"?

A Well, mostly, I do pure research. So, I'm not involved with that. I do -- I've done geophysics -- I'm actually doing -- Right now, I'm in the process of developing advanced sensors for gravity that make use of advanced technologies.

I'm involved with the use of ultra-cold atoms. Ultra-cold atoms are a new form of matter similar to Bose-Einstein condensates. Well, actually, Bose-Einstein condensate is an example of it. It was actually my background in this sort of thing that got me doing that.

Q And what do these sensors -- They detect gravity; is that what it --

A Gravity gradient is the problem that I'm working on. That would potentially be useful for detecting anomalies below the surface. For example,

you might want to look for caves.

Q Okay. I got you.

THE ARBITRATOR: How about in oil exploration?

THE WITNESS: Yes. In fact, they're using it. They've actually used this kind of stuff in a practical way to detect diamonds even.

THE ARBITRATOR: Diamond pipe or diamond --

THE WITNESS: Clusters of diamonds. Like in South Africa you get these big veins of diamonds, but -
-

THE ARBITRATOR: Pipe.

THE WITNESS: Yes. I guess that's what they call it.

THE ARBITRATOR: Yes. For a good reason they're called pipes. It's volcanic --

BY MR. LAY:

Q Do you -- I'm sorry. Go ahead.

THE ARBITRATOR: That's okay. Proceed.

BY MR. WAY:

Q Do you do this research by yourself, or do you work on a team, or how does that work, advanced sensors for gravity?

A Yes. We have a team. We have what they call -- They refer to it as a 6-1 core program. That's a pure research program. The people involved right now are -- there are about four of us.

I've been spending a considerable amount of time at the National Institute of Standards and Technology --

Q Okay.

A -- collaborating with people there and becoming -- We're sort of coming up to speed in this. It's a new area of technology.

Q So, there's four of you at the Navy Research Labs that work on this?

A Yes. There are two others who were with us and we're working with them, and they're at the Army Research Lab as well.

Q So, four at the NRL, and you work with a few other people at NIST?

A Yes. And also at ARL.

Q Who at NIST do you work with?

A I work with a Paul Julienne, J-u-l-i-e-n-n-e. He's the primary one. I'm involved a little bit with Carl Williams. It's a group called the quantum process

group.

Q And let me see what your sub-unit is again.
7230. How many are there in that unit?

A 7233 is my code. Let's see. There are probably about 30 people.

Q All Ph.D.'s or what?

A Mostly Ph.D.'s. There are a few technicians and computer programmers.

Q And what grade are you?

A I'm the equivalent of a 13.

Q Oh, the Navy has its own ratings?

A We have a new advanced -- Well, we are on an experimental pay scale program.

Q Okay. Well, how good for you.

A Well, sort of.

Q And is there a supervisor above 7233?

A Yes. A Michael Corson.

THE ARBITRATOR: Did you say you're 7230 or 7233?

THE WITNESS: I'm 7233.

BY MR. LAY:

Q And is he also a Ph.D. or what?

A Yes.

Q K-o-r-s-o-n?

A C-o-r-s-o-n.

Q And what grade is he?

A He's the equivalent of a 15.

Q And he supervises about 30 of you, did you say?

A Yes.

Q Do you have his phone number?

A No, I don't. You can get that from the Web site.

Q Okay. The Web site.

A But, as I say, this testimony -- my regular work duties now do not relate to cold fusion in any way.

Q Do you do any experiments involving cold fusion --

A With the ending of that report, that terminated my involvement with this. So, I'm not involved -- My research -- Because of the controversial nature of the field, I am not doing this and I have not been doing this since 2002.

And in fact, even in 2002 -- My involvement really with this began to really be curtailed in the

mid-nineties. We finished that report on our own time.

Q This report here?

A Yes.

Q When was this finished approximately?

A This came out in 2002. And this is also the result of the fact that the funding for the field has been severely curtailed and there has been ridicule even of work in the area.

Q When did the project start?

A It started in 1991. It ran for ten years.

Q Ten years; okay.

A And the funding from the Office of Naval Research basically started to get curtailed around 1998. My involvement with it really ended around 1995 to '96.

I still was permitted to go to meetings and participate in the field. I was technical chairman of ICCF 10, for example. But that was actually done when I was on leave.

Q Can I ask you what ICCF 10 means?

A 10th International Conference on Cold Fusion.

Q When was that?

A That was held in Cambridge, Massachusetts.

Q When?

A In August of 2003.

Q Okay.

A And it was a direct result of those things that --

Q Yes. Let me just follow up on --

A Let me just make a comment about my supervisor and so forth.

Q Well, no. I didn't ask you --

A This is important. It's for the record.

Q Well, I didn't ask you --

A I know, but I would like to make the following comment.

MR. LAY: Well, I object to his narrative testimony.

THE ARBITRATOR: All right. The objection is overruled. Go ahead, make your point.

THE WITNESS: My supervisor has no knowledge of my involvement in this field. My section head does, but all the --

BY MR. LAY:

Q Who is that?

A His name is Richard Mied, M-i-e-d.

Q Okay.

A But all of his --

Q Is he under Mr. Corson, or --

A Yes. Well, he's sort of parallel with him.

He's actually above him and below him.

Q Okay. At the same time.

A But what happened was, as I say, when funding for this area ended -- and this is, again, why I'm here on my own time -- these people -- These people, actually, were largely uninvolved with this effort.

They were -- I mean, Mied is familiar with it. My work with it actually preceded working with him. So, it's really been that long ago.

Q So, let me see if I can follow up on that.

You said you finished the report. Did you finish the report on your own time or everyone --

A Yes. Everyone in the report finished it on their own time. And Frank Gordon, who was the one that put the report out, states that.

Q When did the official time, let's say, end? This being --

A As I say, it was probably '98 --

Q And so --

A -- and there were several -- Ashraf Imam participated a little bit after that. Ashraf Imam had a report that came out in 2001.

Q So, about four years was on your own time?

A Yes. And most of what I had written up, I had written up prior to that, and I combined it at the end.

Q And who ended the funding? The Navy or Mr. Corson or somebody --

A Mr. Corson was never involved with the funding. It was Frederick Saulfeld, the director of the Office of Naval Research, who stopped the funding in 1998.

Q Okay.

A And if you want to -- I mean, he's the one to contact about the funding situation in the program. Actually, Frank Gordon --

Q How do you spell his last name, the director?

A Saulfeld -- he's retired now -- S-a-u-l-f-e-l-d.

Q And he ended the funding?

A He ended the funding. I believe it was '98.

Although, because Ashraf Imam continued, there may

have been funding on a limited basis that I'm not aware of.

Ashraf Imam did have -- As I said, Ashraf Imam had a report come out in 2001.

Q So, Mr. Saulfeld did not see this as a valuable effort?

A Mr. Saulfeld saw it as a valuable effort. He did. The problem was that he was getting criticized.

Q He was getting criticized?

A He was getting criticized for continuing --

Q So, he was getting ridiculed for --

A Yes.

Q -- supporting this?

A Yes. Yes. That's basically what happened.

Q All right. Who --

A You would have to talk to him in greater detail to understand exactly what happened. But I would say there was a New Scientist article, the March 29th issue of New Scientist magazine quotes him to that effect.

Q Now, who was ridiculing him?

A It was actually -- I would say it wasn't that he was getting ridiculed. I would say that there were

people who were associated with the Office of Naval Research who were getting ridiculed, and they complained.

Q To who?

A To him.

Q So, who were these --

A I don't know. You're getting this from hearsay. That's a quote. I believe that was actually stated in the New Scientist magazine article.

Q Did your team try to get funding after Mr. Saulfeld left?

A Yes.

Q And --

A Yes. Well, not my team. I was not doing it. There were people in the laboratory who certainly did try to do it, and I would have been on their programs if it had been funded.

And, in fact, actually, through their effort, DARPA did pick up some funding. We didn't get it. The funding went to SRI International or SRI, and SRI has continued --

Q Is that a private contractor?

A SRI is a multi -- You know, it's a major

company. It used to be called Stanford Research International. SRI has been actually championing the effort since the beginning.

They've had a continuous effort, and they actually have the seminal work in this area.

Q But --

A In fact, there is a report that I would recommend you look at --

Q Can I just follow up?

A Fine.

Q Now, at the NRL, though, no follow-up since the 2002 --

A Well, actually, there has been a follow-up, but it's been in a different area, a related area. Part of the reason of -- Part of the problem here was -

Q What area was that?

A Low energy nuclear reactions. The new term is "low energy nuclear reactions." There are many more phenomena involved than just, in quotes, "cold fusion".

Q Okay.

A And they have an ongoing 6-1 effort to reproduce a form of low energy nuclear reaction that

was discovered in Japan.

Q Is this being worked on in Washington or --

A Yes.

THE ARBITRATOR: What does 6-1 mean?

THE WITNESS: 6-1 is pure research.

THE ARBITRATOR: Oh.

BY MR. LAY:

Q And who's the team working on that?

A The team working on that -- He's under a non-disclosure agreement right now. His name is Graham Hubler.

Q Okay.

THE ARBITRATOR: What does "non-disclosure" mean?

THE WITNESS: He's involved with Mitsubishi Heavy Industries in Japan and he -- I mean, he has given public presentations that have pointed out that he is doing work in this area.

So, you know, this is a follow-on to, I would say, the comment that you made about lack of interest.

No. Basically, what happened was NRL got involved, realized there was something going on.

The current climate was conducive to looking

at other things that were not as controversial.

And the experiment that's being carried out at Mitsubishi is not as controversial, because part of the problem with what was going on was it was very difficult to really say for a long time that you were seeing nuclear reactions, and that is because of the chemistry and so forth and so on.

The group that --

THE ARBITRATOR: Physical chemistry or are you talking about --

THE WITNESS: I'm talking about, first of all, getting the calorimetry, and it took a long time to understand that. It took a long time to understand that helium was being produced.

And then, ultimately, what happened was this group at Mitsubishi Heavy Industries developed a technique where they could monitor very accurately the materials that were being put into their system and were being produced.

And they discovered an entirely different form of nuclear reaction, which is so remarkable that a lot of people have difficulty believing it. But the configuration is very clean.

They were able to show that atom-for-atom they were turning cesium into praeysdium, which is a rather remarkable feat. It involves adding four protons and four neutrons to cesium.

They also showed that they could do the same thing with molybdenum and get strontium out of it. That's the experiment that's going on at NRL.

Q So, when did you first meet Mr. Valone?

A Oh, God. Is it '98? It was when we had the -- It was after I -- I came to the last day of this conference -- you know, the conference that he originally tried to have at the State Department and had here -- or was going to have here and then they moved it to a Holiday Inn.

Q Okay.

A I came to the last day of that, and that's when I met him.

Q Okay.

A So, you have the date. I think that was '98, wasn't it? I don't know.

Q All right. So that's when you met him, at the conference?

A I met him, yes, at the last day of it.

Q Okay.

A I had no knowledge of him prior to that.

Q And you attended as an attendee, not as a presenter or anything?

A Yes. I just attended, and I was just -- Yes.

Q Just curious?

A No, not just curious. One of the presenters was a friend.

Q Who was that?

A Edmund Storms.

Q Has there been a Second Annual Conference on Future Energy that you know of?

A No.

Q Since then, have you kept in touch with Mr. Valone?

A Yes, I have.

Q And how often do you have contact with him?

A I have been in touch with Tom, I don't know, probably once a month or something. I have served on a technical board for the institute, Integrity Research Institute.

Q And since when was that?

A When did I go on that? I don't remember the

date. It was probably 2002.

Q And how often do you have business related to that position? Is it once a month, once a year?

A No. I've just -- You know, basically, maybe once a year, or not even.

Q What does that entail? Reviewing scientific papers or --

A It's actually just been consulting about ideas for potential conferences.

Q Is that a paid position?

A No.

Q Voluntary?

A Voluntary; right.

Q Anything beyond that? Is it just e-mail and telephone contact --

A Yes.

Q -- or in person or what?

A I went and spoke about an ethics in science.

This whole thing, the cold fusion stuff, actually has become a mainstream topic for the ethics in science literature.

There's a particular publication called Accountability in Research where we had a special

collection of articles dealing with not whether or not the phenomenon are real, but why doesn't anybody know about them.

Q Okay.

A And that's actually available on the Web.

Q Now, is this -- When you said you spoke at it, is this at a conference we're talking about or --

A Well, it was a -- The Integrity Research Institute had a conference dealing with ethics in science.

Q When was that? A couple of years ago or --

A Two years ago.

Q Two years ago; okay. Is that in Washington or where?

A That was in -- Yes. And then I also served as a moderator for -- There was a gathering of cold fusion scientists the year before.

Q Is that connected to IRI or some other --

A IRI sponsored it.

Q What was the name of that?

A Low Energy Nuclear Reaction Educational Workshop, LENR.

Q And this is in 2002, did you say?

A You can check with him about the precise date, but I believe it was November of 2002.

Q And when were you contacted about testifying here today?

A Probably about -- Oh, today?

Q Yes. For your testimony.

A For specifically coming and testifying?

Q Yes.

A Originally, I was supposed to come on October 18th, and Tom probably contacted me about that in mid-September, I would say.

Q And how did he -- What did he say --

A Well, early on, I volunteered to give personal testimony if it seemed appropriate.

Q Okay.

A So, we had been in contact. I had known that eventually this hearing would occur.

Q And did he take you up immediately, or --

A Well, you know, he said when the time comes, and then he contacted me.

Q Did he ask you to touch on any specific topics?

A Just my background, basically, and that there

was a valid field --

Q Your educational background?

A No. The field.

Q Experiments?

A Yes. And the field. And then my knowledge of the field.

Q Anything else?

A No.

Q Any other contact besides what you've talked about -- e-mail, phone, this committee?

A Not with regard to this; no.

Q How about in regard to anything else?

A Well, I've seen him socially on several occasions. We've gone out to dinner.

Q How often would you say?

A Again, maybe once every six months or not even.

Q Just yourself, or other friends, or family?

A People involved with the field. Robert Bass in particular. Just mostly informational exchange about what was going on in the field.

Q About every, you said, three months or so?

A More like six months, if then. It might not

have even been that often.

Q Any of your colleagues at NRL join you in these?

A Well, certainly at the LENR conference there were a bunch of people; yes.

Q No. I mean the social occasions.

A Social occasions? No. People involved with the field. Robert Bass, in particular, and --

Q I was just asking about the NRL types.

A No. As I say, there have been NRL people at the IRI gatherings.

Q Now, I'm going to show you an exhibit. Did you ever see this exhibit? I'm showing you what's marked as Exhibit 3. Have you seen that before, or anything with the language contained therein?

A No.

MR. ROBERTSON: Which portion of the Exhibit?

MR. WAY: Exhibit 3 where it says, "Notice, job opportunity, U.S. Patent and Trademark Office hiring 600" and the witness --

MR. ROBERTSON: It's Exhibit 4?

MR. WAY: No. It just says Tab 3, and we're calling it Exhibit 3, and, yes, it does have a marking

on there that says Exhibit 4.

THE ARBITRATOR: Exhibit 4.

MR. WAY: Apparently, it's from the original patent filing, as one of the witnesses stated this came from a patent filing.

BY MR. LAY:

Q I'm showing the first page of Tab 12. The title is Integrity Research Institute Upcoming Event in Cooperation with the U.S. Department of Commerce.

A I have seen that.

Q You have seen that?

A Yes. Wait a minute. In cooperation -- I thought it was under the auspices of.

Q Yes. Okay.

A Under the auspices. Yes, I saw that. That was right before --

Q Let me follow up.

A Okay.

Q I'm showing you the document a little farther in. It looks like it's time stamped 3/23/99, 10:40 a.m., 1 of 3, First International Conference on Future Energy, and the first line says "under the auspices of the U.S. Patent Office; right?"

A That was the one I saw; yes.

Q And how did you -- Was that on the Web that you saw?

A Yes. It was either on the Web or it might have -- I saw -- There was a fax, an announcement, that went out.

Q Oh, a fax or announcement?

A Yes. It was one or the other.

Q One or the other? Okay. Did you --

A I understand it was posted on the Web.

Q Then this is an IRI posting for the conference in '99?

A That was my understanding; yes.

Q And "IRI," by that, we mean Integrity Research Institute?

A Yes.

Q And what was Mr. Valone's involvement with the Integrity Research Institute? He was the president --

A I think so.

Q -- or director?

A Something.

Q President?

A Or something, yes. I think that's what he is.

Q When you have contact with IRI regarding your board position there, your main point of contact is Mr. Valone?

A Yes. That's right.

Q When you saw the "under the auspices," do you remember seeing another flyer or announcement saying "in cooperation with the U.S. Department of Commerce"?

A I didn't see that one.

Q How about something mentioning the Patent and Trademark Office Society? Anything like that?

A I think I learned after the fact about that one. I had heard that that they were trying to go through the Patent and Trade Office Society for it.

Q I'm going to focus you back on the Department of Commerce.

When you saw Department of Commerce in the announcement, what, if any, impression did that make on you?

A I remember that I was surprised, first, because it was supposed to be at the Department of State. In the initial thing, I wasn't really -- There

was like no reaction. I mean, it didn't raise a red flag with me.

I understand after the fact, of course, that it did create a lot of controversy and potential points of conflict; yes.

Q So, initially, you --

A Initially, it was State versus Commerce and then -- I mean, part of what happened here, of course, was Robert Park made a big deal out of it.

Q We'll get to that.

THE ARBITRATOR: Excuse me. Who's Robert Park?

THE WITNESS: Robert Park is the director of public information of the American Physical Society.

BY MR. LAY:

Q Is that a professional association of physicists?

A Yes.

Q It's like the American Bar Association for lawyers?

A Yes. Or the IEEE, or American Geophysical Union, AMA, American Medical Association.

Q So, you weren't involved in the organization

or putting together this conference; right?

A No.

Q Did Mr. Valone discuss with you his efforts in trying to put that conference together or problems that he came across?

A He told me the history of it subsequently.

Q And what did he say?

A That, initially, it was supposed to be at the State Department through something I think is called the "open forum," and that there had been formal requests for review of papers, and then they decided not to have it there.

Q The State Department did?

A Yes. And I saw the thing, the specific thing about "under the auspices of" the Department of Commerce, and subsequently he told me about the Patent and Trade Office Society.

He said the room was supposed to be through them was basically what he said, and then that didn't happen. That's right. But this was quite a bit afterwards.

Q Right.

A This was after -- I mean, as I say, I got to

know Tom during that conference, and it was subsequently maybe even a year or two afterwards I was curious about what had happened.

Q Did he tell you how he dealt with the administrative personnel at the Department of Commerce?

A No.

Q Did he tell you about the PTO taking action against him?

A Well, yes. He told me that he'd been fired, and he asked me if I would help out. Or I actually volunteered. He didn't ask me. I said if there was anything I could do in terms of testimony about the field. So, that was basically it.

Q Did he ever tell you whether he thought it was -- why he thought it was unfair, the firing?

A Well, he said that the Patent and Trade Office Society was sort of like a social group, and he felt, you know, that things had gotten out of hand.

Or, well, that if it hadn't been for the widespread sampling of stuff at his Web site, that it would have been an innocuous event. But because of all the publicity, it wasn't an innocuous event.

I mean, that's the gist of it, as I recall.

Again, that was quite a bit afterwards.

Q A few years ago?

A Well, it might have been a couple of years ago. Like I said, it was quite a bit after the fact.

Q Did he feel that the firing was excessive?

A That they fired him?

Q Yes.

A I don't know. Yes, I suppose.

Q He never expressed that to you, or you don't recall it?

A I don't really recall that he said that it was excessive. I mean, it was sort of like -- I would say what he said was that it was out of line with what happened with the Patent and Trade Office Society.

THE ARBITRATOR: Excuse me. I didn't understand.

THE WITNESS: That it was out of line with the history of the Patent and Trade Office Society events. Something to that effect. I mean it was, you know, that they had had gatherings.

But, seriously, being involved with the government, I know that there's a serious concern about misuse of government funding, and if you get criticism

from outside people, that happens. I mean, I realize how these things work.

BY MR. LAY:

Q I looked at your c.v. What year did you receive your Ph.D.?

A 1982.

Q And it didn't say what --

A Physics.

Q -- school.

A The State University of New York at Stonybrook.

Q Stonybrook?

A Yes.

Q And did you do your undergraduate work as well there?

A At Princeton University in physics.

Q What year?

A I got my Bachelor's in 1975. I got my M.A. at Stonybrook in 1978, and my Ph.D. in 1982. And my area of expertise was hydrogen and metals.

Q And you don't have any misconduct charges against you at NRL?

A No.

Q No criminal convictions or --

A Oh, no, no, no.

Q And Mitchell Swartz, how do you spell his last name?

A S-w-a-r-t-z.

Q It's not S-c-h-w-a-r-t-z?

A No. It's S-w-a-r-t-z.

Q You said he took his case to the Supreme Court. Is that based on a patent rejection or what?

A Yes. The Supreme Court didn't hear it. He didn't have an attorney. He did it as a private citizen.

Q So, they didn't grant --

A Right. He went to the court of appeals, the Circuit Court of Appeals.

Q And that's where it stopped?

A Right.

Q Did they hear his case?

A Yes.

Q Which circuit court was it?

A I guess --

Q Was it somebody from the east coast or --

A Yes. It was the capital, whatever.

Q District of Columbia?

A District of Columbia. You can find that out on the Web.

Q Do you know about what year? Late nineties? Early 2000?

A Probably 2000. It might have been 2001.

Q And you said you have a patent. I guess we could search these pretty easily, but would you know the patent number?

A I don't remember. But it was awarded in '97.

Q Was that on your own?

A No. That was through the lab.

Q But you're one of the named inventors?

A I'm the only inventor.

Q And MIT, they received a patent. Do you know who --

A I don't know actually if they've received it yet. Hagelstein, H-a-g-e-l-s-t-e-i-n, and McKubre, M-c-K-u-b-r-e, I know are on the patent.

Q Your uncle, how do you spell his name?

A Yes. Talbot, T-a-l-b-o-t, Chubb, C-h-u-b-b.

Q And is he at the NRL, too?

A He's retired. He was at NRL up until 1981 or

1982.

MR. WAY: If you just give me a second, I think that's about it.

THE WITNESS: Can I call my wife?

MR. WAY: Yes. We can take a brief recess. I have no objection.

THE ARBITRATOR: Sure.

(Whereupon, a brief recess was taken.)

MR. WAY: No further questions. Thank you.

THE WITNESS: Well, thank you.

THE ARBITRATOR: Have you got anything further?

MR. ROBERTSON: Do we? No.

THE ARBITRATOR: I realize you're here on your own time appearing as a private citizen and in no way for the Naval Research Laboratory.

THE WITNESS: That's right.

THE ARBITRATOR: If you should have any difficulty with regards to this testimony, you be sure and let me know so that I can advise whoever may be giving you any difficulty that, had you not appeared voluntarily and had a subpoena been sought, I would have granted it and compelled your testimony. So,

there you go.

THE WITNESS: I appreciate that. Thank you very much.

THE ARBITRATOR: Good-bye.

(Whereupon, a brief recess was taken.)

Whereupon,

NICHOLAS P. GODICI

a witness, was recalled for further examination by a representative on behalf of the Union, and, having been duly sworn by the Arbitrator, was further examined and testified as follows:

CROSS EXAMINATION

BY MR. JOHNSON:

Q My question to you yesterday was what specific acts did the grievant commit that you considered were violative of 5 CFR 2635.701 Section (b)?

A Well, I did do my homework, and I believe Section (b) has to do with having the -- giving the impression --

THE ARBITRATOR: Oh, you can look at it.

THE WITNESS: I can look at it?

THE ARBITRATOR: Yes.

THE WITNESS: Let me -- I want to get the exact words. I don't want to paraphrase.

MR. JOHNSON: Well, if I may clarify, all I want are the acts.

THE WITNESS: I know.

MR. JOHNSON: Okay.

THE ARBITRATOR: Well, he can look at the text.

THE WITNESS: Section (b) has to do with giving the impression that the government sanctions -- It's actually entitled "Appearance of Government Sanction."

So, the acts would be the brochures or the advertisements or the postings that indicated that the Department of Commerce co-sponsored this conference or this conference was in conjunction with or somehow sanctioned by the Department of Commerce, when, in fact, it's my belief that the Department of Commerce did not.

BY MR. JOHNSON:

Q So, that is the specific act that supports your position that there was a conflict of interest?

A No. You asked me what specific acts were

supported by Section 702(b).

Q Well, if you want me to rephrase it -- not rephrase it -- I'll repeat specifically what I said.

A Okay.

Q The question was, what specific act did the grievant commit that you considered was violative of 5 CFR 2635.702(b).

A Right. And I answered it.

THE ARBITRATOR: He did answer it.

MR. JOHNSON: Okay, okay, okay, okay, okay. Gosh. I'm from Virginia. We don't rush.

THE ARBITRATOR: Well, start.

BY MR. JOHNSON:

Q What specific act did the grievant commit that you considered was violative of 5 CFR 2635.702 Section (a)?

A Again, with respect to Section (a), which is the inducement or coercion of benefits, by going to the Department of Commerce and attempting to reserve or reserving the conference facility, the auditorium and associated rooms and so on and so forth, that would be for the benefit of this organization that apparently Mr. Valone is the president of. So, he would

have used his position in the PTO as a PTO government employee to go to the Department of Commerce, which is the department of which the PTO is an agency in, to attempt to secure the use of those facilities for his organization.

In addition to that, according to the literature with respect to this conference that he was attempting to secure the facility for, there were costs involved to the participants of the conference that apparently would have gone to either Mr. Valone or this organization that he is the president of.

So, those are the acts, the use or the attempted use or the reservations at the Department of Commerce that would have gone toward benefit of him or his organization.

Q Do you see a distinction between misrepresentation and conflict of interest? Reason one and reason two.

A Reason one and reason two?

Q For the removal.

MR. WAY: Can you restate the question?

THE ARBITRATOR: Subsection (a) and subsection (b), or what?

MR. JOHNSON: No. He has explained that to me, I believe.

BY MR. JOHNSON:

Q My question now is, is there a distinction between reason one, conflict of interest, and reason two, misrepresentation? Because it appears to me that he's saying the same thing.

Do you understand my question, or do you want me to repeat it?

A Do you mean in my decision? Are you saying in my decision document? The charges in the decision, is that --

Q Based upon your reasons that you have given as what conflict -- what acts were violative of these sections of the regulation, my question is, do you make a distinction between reason one and reason two?

A I don't understand the question.

THE ARBITRATOR: Okay. Yes, the question is a bit confusing.

MR. JOHNSON: Well, let's go on then. Let's go on.

THE ARBITRATOR: But -- Well, all right. I mean, I think I understand it, and I'm kind of

interested in the answer, so I'll ask it.

MR. JOHNSON: Okay.

THE ARBITRATOR: Do you see a distinction in your decision document -- there are two bases, misrepresentation and conflict of interest --

THE WITNESS: Right.

THE ARBITRATOR: -- and do you see a distinction between the two?

MR. WAY: I think the distinction --

THE WITNESS: If I could --

MR. WAY: The charges were in the proposal.

THE ARBITRATOR: Well, no. I think I've already established that probably Ms. Rose drafted this, so I'll put it this way. Do you personally have an understanding of a distinction between the two?

THE WITNESS: I'd like to look at the decision letter and --

MR. WAY: The decision is at Tab 31.

THE ARBITRATOR: Sure.

MR. WAY: In fact, it's right here. And the proposal is at 21 if you need that.

THE WITNESS: Well, I think there is a difference. I mean, obviously, there's some -- there

may be some overlap.

But, clearly, misrepresentation, which is the second charge, in my mind would be the misrepresentation of the fact that the Department of Commerce was a co-sponsor or sanctioned the event.

In addition to that, I think the grievant also made a misrepresentation when he went to the Department of Commerce as a PTO official and folks at the Department of Commerce, I think, had the belief that he was coming on behalf of the PTO to set up a conference and use the facility.

So, I think that that was, obviously, the impression that he had given down there. With respect to conflict of interest, I think there, what we're talking about is some kind of personal interest or personal gain.

And, clearly, I think that Mr. Valone -- it's clear from my understanding of the record -- advocates and is a president of an organization that had some reason and interest to put on this conference, and, therefore, there's a personal gain from his organization and so on if they got the use of this facility down there. So, I think that there is a

distinction in my mind between the two charges.

Q When did the grievant use his title to obtain the alleged benefits or personal gains that you just referenced?

A Well, all I can do is go by the records in the file, and it's clear that the Department of Commerce's log and receipt log indicated that he was PTO, so that it was clear from their understanding of the contact that Mr. Valone made that he was a PTO employee.

Q Well, being a PTO employee, did that confer his title, whether he was a commissioner, or whether he was an examiner, or whether he was a janitor, or what have you?

A Well, I'm not sure. I don't know -- I have no knowledge of whether he conveyed his title if that's the question.

Q What was the benefit that were or would have been received to Mr. Valone?

A Well, use of this conference facility. I assume that if Mr. Valone had to put on a conference somewhere else, he would have had to have gone to a hotel or somewhere else and would have had to pay for

the space.

So, I think the benefit is that he was attempting to use his position, or at least his employment within the PTO, which is part of the Department of Commerce, to gain access free of charge to this facility for his putting on this personal conference that he has an interest in.

Q Would such benefit have been improper under the Hoover established procedure for a private affair conference?

A I don't know, because I'm not that familiar with the procedures for conferences. I mean, I just don't know.

What I see in the record was that the people at the Department of Commerce had an understanding that this was a PTO event, or at least the person coming there was coming there from the PTO.

Q Well, my question was, and I'll repeat it, would such benefit have been improper under the established procedure for a private affair of such a conference?

MR. WAY: And for the record, objection; asked and answered.

MR. JOHNSON: No. He did not answer would the benefit have been proper or improper.

MR. WAY: Don't address your response to me.

THE ARBITRATOR: Well, try it again. Go ahead. Did you understand the question? The question basically was that -- Basically, it is, do you know what the criteria of the Department of Commerce is for the use by a private organization of its facilities in the Hoover Building?

MR. WAY: And he said no, so I just don't want to build inconsistencies in the witness' testimony.

THE ARBITRATOR: And your answer is no?

THE WITNESS: Correct.

MR. JOHNSON: Okay. Let's go to the next one.

BY MR. JOHNSON:

Q Is there any evidence that Mr. Valone intentionally deceived the Department of Commerce personnel as to the PTO sponsorship?

MR. WAY: Objection, because that has not been charged.

MR. JOHNSON: My goodness.

MR. WAY: Relevance. There's no intent offense charged here. Misrepresentation goes to promoting the conference with the co-sponsorship under the auspices. With respect to DOC, there is no intent offense charged. Their question goes to intent.

THE ARBITRATOR: So that the intent is -- In other words, he's in trouble, even if it was an unintended, simple mistake --

MR. WAY: It could be negligence.

THE ARBITRATOR: -- negligence --

MR. WAY: Right. Some charges have intent. Other charges don't have intent. And conflict of interest, Charge 1 or Reason 1, is not an intent charge.

MR. ROBERTSON: Misrepresentation. Grievant --

MR. WAY: Misrepresentation is an intent charge.

MR. ROBERTSON: Pardon me?

MR. WAY: Misrepresentation is an intent charge. That is charged to.

THE ARBITRATOR: Oh, okay. But wait a minute. All right. Try the question -- What was the

question?

BY MR. JOHNSON:

Q Is there any evidence that Mr. Valone intentionally deceived the DOC personnel as to the PTO's involvement or sponsorship?

MR. WAY: And my objection was relevance, because DOC personnel were involved in Charge 1 and not Charge 2.

THE ARBITRATOR: Charge 1 simply being --

MR. WAY: Getting the room.

THE ARBITRATOR: -- the conflict of interest?

MR. WAY: Exactly.

THE ARBITRATOR: And not --

MR. WAY: The misrepresentation.

THE ARBITRATOR: -- having anything to do with the misrepresentation.

MR. WAY: Which is the postings on the Web --

THE ARBITRATOR: So, you're not saying that he misrepresented -- that he was there representing the PTO?

MR. WAY: That was not what was charged.

THE ARBITRATOR: But just the fact that they assumed he was representing the PTO, even though he did

nothing to foster that misrepresentation --

MR. WAY: No. That's not what we said. What I'm trying to do is adhere to the charges that are in the proposal.

Now, the charges in the proposal are that "His failure to identify the nature of the conference to Agency employees, DOC, and his reserving the space for the conference as a PTO employee represents a violation of the above-cited regulation."

So, his failure to identify. So, that is part of Charge 1. That's his contact with DOC. It is not a part of Charge 2, which reads, "You represented the information promoting the COFE that the conference was co-sponsored by the U.S. Department of Commerce presented in cooperation with the DOC and under the auspices of DOC." So, these are two different charges.

MR. ROBERTSON: However --

THE ARBITRATOR: Okay, okay, okay. Everybody gets to argue this later to me. But, anyway, your objection is to what?

MR. WAY: So, intent would be relevant to misrepresentation, but intent is not relevant as to contact with DOC, dealing with DOC people, trying to

reserve the rooms at DOC.

THE ARBITRATOR: Okay. So, you have objected to a question. What was the question?

MR. WAY: The question was, I believe, what was the evidence of grievant's intent when he was dealing with the Department of Commerce employees?

MR. JOHNSON: Would you like me to restate the question because you --

THE ARBITRATOR: Wait a minute. Is that a fine enough statement of the question?

MR. JOHNSON: No. He has it all confused, and he's confusing what I asked, and he has continued in confusing the two charges.

THE ARBITRATOR: Well, then he's been successful in that. So, you get to ask the question over again. So, ask the question over again, and don't answer until -- Let's let him try one more time with an objection. Okay, question.

BY MR. JOHNSON:

Q Is there any evidence that Mr. Valone intentionally deceived the DOC personnel as to the PTO involvement in the conference?

MR. WAY: There we go.

THE ARBITRATOR: All right, now --

MR. WAY: Intentionally deceived DOC
personnel.

THE ARBITRATOR: -- you object to the thing
because that is asking a question about intent with
regards to Charge No. 1?

MR. WAY: Right.

THE ARBITRATOR: And Charge No. 1 is not
intent-dependent?

MR. WAY: Exactly.

THE ARBITRATOR: Okay. Objection overruled.
Was there any evidence presented to you that Mr.
Valone intentionally deceived the Department of
Commerce people he spoke to?

THE WITNESS: I have no idea what Mr. Valone
said to the Department of Commerce people.

The only thing I had in the record is a slip
from the Department of Commerce that had his name and
the date that he had visited and indicated that it was
PTO.

So, I can -- I'll answer your question. Do I
have any evidence that he intended to? I have no
evidence.

THE ARBITRATOR: Okay. Go ahead.

BY MR. JOHNSON:

Q You stated, Page 3, fourth complete paragraph of your decision, "I have reason to believe that you did this for personal gain." Do you have that?

A In my decision?

Q Right.

A Okay.

Q Page 3, fourth complete paragraph.

MR. WAY: Can you point it out to the witness in that document?

MR. JOHNSON: He has it.

MR. WAY: Well, where is it in that document?

THE WITNESS: The fourth complete paragraph on Page 3?

MR. JOHNSON: Your decision. Page 3; right.

THE WITNESS: I'm on Page 3.

MR. WAY: Because I can't find it.

MR. JOHNSON: "I have reason." It begins with "I have reason."

THE WITNESS: It's not in the fourth complete paragraph.

MR. WAY: What are the words beginning that -

-

MR. JOHNSON: To quote it, "I have reason to believe that you have did this for private gain."

MR. WAY: Well, if you can find it, we can address it.

MR. JOHNSON: It's Page 3, fourth complete paragraph of the decision.

THE WITNESS: Here, here it is, Page 2. "I have reason to believe that you did this" --

MR. JOHNSON: Page 2? Oh, it's Page 2.

THE WITNESS: And it's one, two, three, four

--

MR. JOHNSON: Instead of Page 3, it's Page 2.

THE ARBITRATOR: This is Exhibit what?

MR. WAY: Thirty-one.

MR. JOHNSON: Did you find it?

THE WITNESS: I found it.

BY MR. JOHNSON:

Q My question is, what is your reason?

MR. WAY: For what?

MR. JOHNSON: He said he had reason.

THE WITNESS: Well --

MR. JOHNSON: He said, "I have reason to

believe that you did this for personal gain."

BY MR. JOHNSON:

Q I'm asking what is your reason?

A The reserving of the space at the Department of Commerce would be a benefit that would go to the organization that was holding this conference, which was apparently the organization that Mr. Valone was the president of.

So, there is a benefit. The statute, as I read 703(a), it does not necessarily have to be a financial benefit. It could be anything.

Regardless -- I'm not lawyer -- there is a benefit to him having the use of the facilities of the Department of Commerce.

On top of that, according to the literature that advertised this conference, there was apparently payment to attend some of the sessions of this conference.

Therefore, there was also some money that would obviously change hands. So, I think that there was -- it's true, that there was private gain.

Q Were you presented with any documented evidence to support that reason?

A Yes. There were documents in the file that actually were postings advertising the conversation, and those were documents. And in those documents, it was clear that if you signed up for certain portions of the conference, you owed money.

Q Is it illegal to receive benefits from using the facilities at the Commerce building by a private organization?

A A private organization?

Q Yes.

A If the conference was set up and procured through a misrepresentation that it was a PTO instead of a private corporation, then I think it could be.

I mean, I'm not sure exactly what would happen if Mr. Valone came into the Commerce off the street and said I have no affiliation with the Department of Commerce at all, I'd like to talk about reserving the conference room, and what the arrangements would have been as opposed to going in and saying I'm a PTO employee and I'd like to reserve these conference rooms. I think there's a --

Q Did you understand my question?

A I did, and I'm answering it.

Q Well, it's yes or no whether or not he --

MR. WAY: He doesn't have to limit it to yes or no. Objection.

MR. JOHNSON: Well, he hasn't told us whether it's illegal or not. The question is

--

MR. WAY: He said he doesn't know.

MR. JOHNSON: I didn't hear that.

BY MR. JOHNSON:

Q Is your answer I don't know?

THE ARBITRATOR: Yes. Pretty much he said he doesn't know and why he doesn't know.

MR. JOHNSON: Okay.

THE ARBITRATOR: He doesn't know what would have been the result if Mr. Valone had come in and clearly represented and never mentioned his PTO employment, but that he was a citizen in off the street and was having a function and wanting to rent the -- or have use of the Department of Commerce facilities for this function, and he doesn't know what the Department of Commerce's response would have been.

MR. JOHNSON: No. That's not my question either. I asked was it illegal for a private

organization to receive benefits from the conference.

THE ARBITRATOR: All right. So, you're asking him does he know whether or not there is some sort of federal statute that says no private organization can use a government facility if that organization is going to receive a monetary or other --

MR. JOHNSON: Correct. Right.

THE ARBITRATOR: -- benefit?

MR. JOHNSON: Right.

MR. WAY: But does he know?

THE WITNESS: The answer is I don't know.

MR. JOHNSON: Okay.

BY MR. JOHNSON:

Q What is an agency-endorsed organization?

A Well, again, I don't know if that's a term of art or not. But --

MR. JOHNSON: It's your language.

MR. WAY: Where is it?

THE WITNESS: Well, then, if it's my language, could you tell me where I used it?

MR. JOHNSON: In your decision.

THE WITNESS: Exactly where?

MR. WAY: We'd like a -- It's only fair to

the witness that you cite where exactly it is.

THE ARBITRATOR: Yes. You've got to tell us where Ms. Rose put it.

MR. JOHNSON: On Page 2, next to the last -- It's three lines from the bottom. You know, it's kind of difficult for us to ask you what you mean.

THE WITNESS: It doesn't seem to be too difficult for you to ask me what I mean.

THE ARBITRATOR: Too what?

THE WITNESS: It doesn't seem to be too difficult for you, but let me find it here.

Well, it's easy. I mean, it says right in there. For example, the PTOS. That's the organization. The agency-endorsed organization. Patent and Trademark Office Society is the answer.

BY MR. JOHNSON:

Q I asked you what is an agency-endorsed organization.

MR. WAY: Objection. And he answered.

THE WITNESS: It's right there.

MR. ROBERTSON: He pointed to one. I don't know that that tells us what one is.

THE ARBITRATOR: Well, look, fellas, let me

tell you what. The fitness center, which has a membership fee, but is provided space and so on and so forth, that is an agency-endorsed organization.

The credit union is an agency-endorsed employee activity. So, I mean, i.e., if he doesn't know, I do, and so I'm not at all impressed that he doesn't know.

He really does know, but it is a little, you know -- He needed a little coaching by me to remind him that there are probably a half-dozen of them around here.

While, on the other hand, the space leased out to the deli downstairs has nothing to do with PTO, but has to do with the owner of the building, and it's as a contract.

MR. JOHNSON: Thank you, sir.

THE ARBITRATOR: Okay. That is what you were thinking, wasn't it?

THE WITNESS: Absolutely. Thank you.

BY MR. JOHNSON:

Q Are members of an agency-endorsed organization exempted from the 5 CFR conflict regulations that have been cited in the proposed

removal?

A I would say they are not.

Q What is the relationship between the PTO and the PTOS?

A Well, the PTOS is an agency-endorsed organization.

THE ARBITRATOR: Do you have a follow-up question or are you going to --

MR. JOHNSON: No. I'm going on to the next question.

THE ARBITRATOR: Okay.

MR. JOHNSON: I don't want to belabor this.

BY MR. JOHNSON:

Q Does the PTO require prior approval by the PTO before it can sponsor an affair?

A I didn't hear a couple of the words.

MR. WAY: Yes. Repeat it, please.

BY MR. JOHNSON:

Q Does the PTOS require prior approval by the Patent and Trademark Office, the PTO, before it can sponsor an affair?

A Well, I would think that they do not get prior approval to sponsor an affair such as a picnic or

a lecture or whatever.

Q Are PTO members required to receive prior permission of their TC director in order to participate in a non-duty affair?

THE ARBITRATOR: I'm sorry, but -- I -- Please start over. Not only were you interrupted by your co-representative, but I'm missing some of --

MR. JOHNSON: Okay.

BY MR. JOHNSON:

Q Are PTO members required -- PTOS members, I'm sorry -- required to receive prior permission of their TC director in order to participate in a non-duty or off-duty hour affair?

THE ARBITRATOR: From their what director?

MR. JOHNSON: TC director. Technical center director.

THE ARBITRATOR: Oh, all right.

THE WITNESS: No.

BY MR. JOHNSON:

Q Was the PTOS referenced in any distributed promotion material relevant to the conference?

A I believe not, but just let me check.

MR. WAY: I think Tab 12 has some of the

documents.

THE WITNESS: The answer would be not that I can see.

BY MR. JOHNSON:

Q Do you have any first-hand knowledge of the origin of the Internet posting of Tabs 12 and 13?

A The origin of the -- Could you repeat the question again?

Q Do you have any first-hand knowledge of the origin of the Internet posting of Tabs 12 and 13?

A No.

Q Is there any evidence in the record that Mr. Valone was involved in any way with the Internet postings advertising the conference?

A Well, to the extent that I can see this, at least the IRI -- which Mr. Valone is the president of, it's my understanding -- clearly, that organization is mentioned on these postings.

So, if the question is, was he somehow connected, is there any evidence that he was connected to these postings, the organization that he was president of is clearly part of the postings that are in Tab No. 12.

Q What about Tab 13?

A Tab 13, I don't see any reference to -- Wait. Let me just look. Well, again, in Tab 13, there's a reference to the Integrity Research Institute, so there would be the same connection there.

Q So, there is no evidence of Valone personally, per se, involved; is that true?

A Well --

Q Well, we understand what you said. But is there any Valone per se?

MR. WAY: I think that's been --

THE WITNESS: Personal involvement?

MR. JOHNSON: Yes.

THE WITNESS: Could you further define that?

MR. WAY: My objection is it's been asked and answered.

MR. JOHNSON: Well, I can respond to your objection if you want me to.

THE ARBITRATOR: Okay, go ahead. What's your --

MR. JOHNSON: It's rather common that you would have a hundred people doing something and you charge one person with it. So, common sense would say,

unless you know that person committed the offense, we'd want to know. And that's what we want to know.

Is there any evidence that Mr. Valone, per se, was involved in the posting of Tabs 12 and 13? The company that he has may have done it maybe. Maybe it's not his company. We haven't established that it was his company in fact yet.

THE ARBITRATOR: You mean that he was president of same?

MR. JOHNSON: Yes. Well, we would probably do that, but we're not contesting that. We haven't contested that.

THE ARBITRATOR: See, the question is, you know, assuming that -- And we've had testimony of one other person who, at least now, is a member of the board of directors or consulting or whatever for this organization, that this is an organization.

Therefore, there are other members that some other member may have been responsible for putting it out on the Internet. Do you have any evidence -- I'm asking the witness, do you have any evidence that in fact it was Mr. Valone and not some other non-Patent and Trademark Office individual who put this

thing on the Internet?

Are there any footprints on the Internet message or anything that leads back to Mr. Valone, or is it just included that he done it? I guess that's the question. Is that the question?

MR. JOHNSON: Precisely.

THE WITNESS: I see no footprints that lead back to Mr. Valone.

THE ARBITRATOR: And nothing that you were told in your briefing about this case or anything?

You weren't given anything that does not appear in the decision or the proposal itself that would have reflected on, hey, you know, this was Valone who put this stuff on the Internet?

You don't recall any evidence being given to you or told to you or anything?

THE WITNESS: No. I mean, clearly, what I had was the written record in front of me.

THE ARBITRATOR: Okay. Go ahead. Don't wait. Just plow ahead.

BY MR. JOHNSON:

Q Let me run back to one question.

Is the majority of the members of the Patent and Trademark Office Society federal employees?

A To the best of my knowledge, yes.

THE ARBITRATOR: Is it exclusively PTO employees?

THE WITNESS: Well, I believe that you could probably stay in if you retired or something along those lines. I'm not privy to all their membership criteria. I don't know the answer to that.

THE ARBITRATOR: Are you familiar with your athletic facility?

THE WITNESS: Yes.

THE ARBITRATOR: Can people other than PTO, if they pay the dues and whatnot, join?

THE WITNESS: No.

THE ARBITRATOR: No. It's solely PTO?

THE WITNESS: Yes.

THE ARBITRATOR: Not even if they're neighboring other federal agency employees?

THE WITNESS: No. It's for PTO employees.

THE ARBITRATOR: All right.

BY MR. JOHNSON:

Q What means did the Department of Commerce

take to mitigate the alleged prejudicial damage caused by the Web site posting?

A Would you repeat it again?

Q What means did the Department of Commerce take to mitigate the alleged prejudicial damage caused by the Web site postings, 12 and 13. Or maybe it's just 12.

A What action did the Department of Commerce take --

Q Yes.

A -- to mitigate --

Q Yes.

A I have no idea what you mean by the question.

THE ARBITRATOR: Is there, either in the proposal or the decision letter, an allegation that the misconduct -- I mean, I see where it says that, you know, your misconduct impairs the efficiency of the service.

But is there an allegation that the reputation of the Department of Commerce and/or the Patent and Trademark Office was damaged by the conduct?

MR. ROBERTSON: There is such an allegation.

THE ARBITRATOR: I know that the Union

alleged that there was such an allegation in its discovery papers.

MR. JOHNSON: It's in the proposed removal, I believe.

MR. WAY: You're asking the deciding official about the proposal, though.

MR. JOHNSON: If you look on Tab 21 and look at the first --

MR. WAY: Can you give the witness your copy so I can follow along on Tab 21? I don't have Tab 21. That's my only copy. So, since you're doing the cross, I think it's only fair that you give the witness Tab 21 so I can follow along.

THE ARBITRATOR: What is Tab 21?

MR. WAY: Is there a Page 1 to that? I mean, my Tab 21 has notice of --

MR. JOHNSON: Sorry.

MR. ROBERTSON: They're also not numbered.

THE ARBITRATOR: All right. What are we looking for now? What line?

MR. ROBERTSON: The next to the last page.

THE ARBITRATOR: The next to the last page?

MR. ROBERTSON: Yes.

MR. WAY: Where?

MR. JOHNSON: First complete paragraph. "And misrepresentation of the Agency role was conduct which was prejudicial to the government." Is everybody with us?

THE WITNESS: Pardon me?

MR. JOHNSON: Has everybody found it so far?

THE WITNESS: I see the paragraph that you're referring to.

THE ARBITRATOR: Okay. Do you see the second sentence in that paragraph?

MR. JOHNSON: Correct. May I continue?

THE ARBITRATOR: Yes.

BY MR. JOHNSON:

Q Do you understand the question, or do you want me to repeat the question?

A Well, I'd like you to repeat the question.

Q You'd like for me to repeat the question?

A Yes.

Q What action or means did the Department of Commerce take to mitigate the alleged prejudicial damage caused by the Web site posting?

MR. WAY: I would object on the grounds that

it assumes facts not in evidence. It assumes that DOC had to do something.

MR. JOHNSON: Well, we just asked. You said it.

MR. WAY: Oh, my goodness.

THE ARBITRATOR: Well, I'm not sure, however, that it didn't, by shearing itself of any connection with this and cancelling the use of the auditorium right there, is -- goes a long way toward mitigating and --

MR. WAY: I mean, that was a prudent move, but I don't think they were required to do that.

THE ARBITRATOR: Oh --

MR. JOHNSON: We didn't say it was required.

THE ARBITRATOR: That and the fact that, you know, the notices have to go out that, hey, the Department of Commerce has nothing to do with this, fellas, so we're all going to meet at the hotel.

I mean, that's -- it leads necessarily to something. Let's put it another way. I'm not impressed with either the question or the objection. So --

MR. WAY: Let's move on then.

THE ARBITRATOR: -- I would suggest that we move on.

MR. WAY: That was my intent, so let's move on.

MR. JOHNSON: Well, we only raised it because they raised the issue.

THE ARBITRATOR: Well, you know, you raised the issue about mitigation and --

MR. JOHNSON: Well, is there a requirement that you mitigate your damages --

THE ARBITRATOR: Well --

MR. JOHNSON: Okay. Let's go. Let's go. Whatever.

THE ARBITRATOR: Let me just say, I would not -- I am not going to give you all the time in the world with the Commissioner, so I'm going to do the favor to you of telling you when there are certain things that I am totally unimpressed with and, therefore, we're wasting our time discussing them.

BY MR. JOHNSON:

Q My next question was -- and maybe we can continue with that -- was there any damage to the PTO, the posting?

A Was there any damage to the PTO?

Q Right.

A From which posting?

Q Twelve and thirteen.

THE ARBITRATOR: The Web site stuff. The Internet postings.

THE WITNESS: Well, you know, I think there's an issue and a problem when it referenced that the Department of Commerce is co-sponsoring or sanctioning or whatever the conference, and the PTO is a portion of the Department of Commerce.

BY MR. JOHNSON:

Q Well, there are 14 agencies of the Department of Commerce. Do you think they were prejudiced also if they were not mentioned?

A Well, the Department of Commerce is a large organization. It includes many employees, many organizations.

Q Do you think all of the agencies were prejudiced --

MR. WAY: Objection; argumentative.

MR. JOHNSON: I'm asking him a question.

Does he think that all of the agencies in the

Department of Commerce were prejudiced about these postings.

THE WITNESS: Well, you asked me about the PTO.

MR. JOHNSON: Well, I asked you first about the PTO, and now I'm asking you about the other agencies, because the PTO is only one agency in there.

We can make that argument in a briefing point, too, but I would like to have an answer to that if you don't mind.

THE ARBITRATOR: Okay. If you have an answer, give it.

THE WITNESS: I don't think that the other portions of the organization, NOAA, Census, and so on, would be prejudiced by the posting. The department and its affiliation with the PTO.

THE ARBITRATOR: That's what you feel would be prejudiced in some way or another?

THE WITNESS: Yes.

MR. JOHNSON: Why I'm pausing is because my line of questioning, based upon your sentiment, has changed because I had -- I'll just ask this question.

BY MR. JOHNSON:

Q Do the PTO, DOC, and PTOS have Web sites?

A Yes.

MR. JOHNSON: I'm cutting things down.

THE ARBITRATOR: Okay. Well, while you're knocking things off the list, let me ask him a question.

Does the PTO ever sponsor inventors' fairs or anything in high schools or public schools to foster scientific thought by students and the prospects of invention?

THE WITNESS: We have had, in the past from time to time, exhibits where inventors would come in and set up booths and so on and so forth.

THE ARBITRATOR: Where inventors would?

THE WITNESS: Yes. The people that had received patents during that year and so on. We have -
- Actually, members of the Patent and Trademark Office Society have gone to schools and been judges in science fairs. So, if that's what you mean.

In terms of sponsoring, I don't know if --
Certainly, folks at the PTO have been party to science fairs and so on.

THE ARBITRATOR: But, I mean, as part of your mandate from Congress, is there an educational mandate to educate the public and encourage innovation and invention, so on and so forth, with the general public?

THE WITNESS: I wouldn't say that we have a mandate to do it out of our funds, a portion of our funds.

There's an organization in Akron, Ohio, which is the National Inventors Hall of Fame, and they do a lot of this education, and they'll ask for maybe our assistance and they'll set up an exhibit or a seminar or something like that.

But we normally do it in conjunction with -- The ones I know of, we've done in conjunction with that organization.

THE ARBITRATOR: Any other organizations besides the Inventors Hall of Fame?

THE WITNESS: Not that I'm aware of that would reach out to, you know, kind of the grassroots inventors in terms of exhibits and so on. We sponsor an independent inventors conference where we give information.

THE ARBITRATOR: A what?

THE WITNESS: We sponsor an independent inventors conference, again with the National Inventors Hall of Fame, where we actually give lectures and seminars to inventors on how to go through the process and apply for a patent and so on and so forth.

THE ARBITRATOR: Oh, okay. Is that around the country, or just one location?

THE WITNESS: Well, we do it normally annually, and we pick a different spot. We just had one in Vermont this summer.

THE ARBITRATOR: Let's go off the record while he searches here.

MR. JOHNSON: I'm ready.

THE ARBITRATOR: No. I want to go off the record.

MR. JOHNSON: Oh, okay.

(Whereupon, a brief discussion was held off the record.)

BY MR. JOHNSON:

Q Did the PTO, DOC, or PTOS use their Web site to correct the incorrect posting in Tabs 12 and 13?

A Did the PTO or DOC?

THE ARBITRATOR: Yes. Either one.

MR. JOHNSON: Or PTOS. Anyone.

THE WITNESS: Not that I'm aware of; no.

BY MR. JOHNSON:

Q Did you investigate or make inquiries of the origin of the Internet posting of Tabs 12 and 13?

A What I -- No. What I did was look at the written record when the folder was submitted to me.

THE ARBITRATOR: You just assumed that Mr. Valone had done it?

THE WITNESS: Well, I assumed that this organization -- You asked me earlier did I know whether he did it or someone in his organization.

THE ARBITRATOR: But did you just assume at the time he did it?

THE WITNESS: Well, I assumed that he was somehow affiliated. He may not have been the person who pushed the button that made it go, but he was affiliated.

BY MR. JOHNSON:

Q What particular type of energy-producing technology that was referenced in the Internet posting would reasonably give a reasonable person the impression that the PTO was endorsing it?

A Well, I think the posting actually says that it's in co-sponsorship with the Department of Commerce, and the PTO is a portion of the Department of Commerce.

Q But how many particular types of energy-producing?

A Pardon me?

Q The question was what particular type of energy-producing technology could it be consumed -- or assumed that the PTO was endorsing.

A It has nothing to do with the particular type of technology. The posting actually said, you know, co-sponsored by the Department of Commerce. And the PTO is a part of the Department of Commerce.

Q Am I confusing everybody?

THE ARBITRATOR: No, you're not, but the documents -- You know, what went out on the Internet pretty well speaks for itself, and you can argue to me that nobody in their right mind could draw the conclusion that there was a sponsorship of this particular source of energy, this theory, and therefore it was a groundless thing, but I might add that that would be one of your weakest arguments.

So, I wouldn't dwell on this one much more

either because, you know, it speaks for itself.

MR. JOHNSON: Well, what I was trying to get at is that there was a number of energy-producing technologies, and it was just a conference. It was an exploratory thing. There are a number of technologies that are being available to the public and the IRI, nor was Mr. Valone endorsing any particular one.

It's like going to an automobile conference - - an automobile show. Here's a lot of automobiles, but the sponsor's not making any.

THE ARBITRATOR: I agree with that. They're all a little bit off the -- out of the main stream. I don't know that there's anything wrong with that.

That's something to be argued about in your brief, not with a witness. And, see, you're verging on arguing with him about that. Not that that is altogether wrong, but it is --

MR. JOHNSON: Okay. I'm with you. I'm with you.

THE ARBITRATOR: I'm going to draw my own conclusions.

MR. JOHNSON: Right.

THE ARBITRATOR: I suppose I don't want them to be tainted by his.

MR. JOHNSON: Go ahead?

THE ARBITRATOR: Go ahead; sure.

BY MR. JOHNSON:

Q Does the granting of a U.S. patent mean or infer that the PTO or the DOC endorse the patented invention?

A The PTO doesn't endorse inventions. There's a presumption of validity of a patent once it's issued by the United States Patent and Trademark Office.

Q I think you answered it when you said they didn't endorse it.

Have either the PTO or the PTOS hosted a trademark registration exhibit at the Hoover Building?

A A trademark?

Q Exhibit.

A Exhibit?

Q Yes.

A I don't know. I mean, I'm the patent guy. They may have. I just don't know.

Q Well, has the PTO hosted a patent

registration? Have the Patent and Trademark Office and the Patent and Trademark Office Society hosted a patent registration exhibit at the Hoover Building?

A Do you mean together, the PTO and the PTOS?

Q Well, either one, or jointly.

A Are you saying either one or jointly or --

Q Yes.

A Jointly?

Q Yes.

A The USPTO, not the PTOS, the USPTO, in conjunction with the Department of Commerce held an exhibit in the Hoover Building three or four years ago.

Q That was for patents only?

A It was for homeland security technology that was patented; yes.

THE ARBITRATOR: Homeland technology that was --

THE WITNESS: That was patented technology. In other words, patent holders or patentees.

There were an exhibit in the Hoover Building lobby with maybe six or eight inventors who had patents, and the theme of the conference was homeland security patents, inventions that helped homeland

security.

THE ARBITRATOR: And what was the purpose of that?

THE WITNESS: That was to highlight or demonstrate the U.S. technology in terms of moving forward and finding ways to help make the country safer.

THE ARBITRATOR: Well, was it trying to encourage other people to think about other technology and their own patentable ideas, or was it just to satisfy the curiosity of the people strolling past all the museums and whatnot on the Mall that would find it interesting?

THE WITNESS: No. I think it was to showcase advancements in technology that had to do with stopping terrorism and securing homeland.

For example, there was an exhibit of a new airport luggage screening device that someone had come up with and so on and so forth.

THE ARBITRATOR: Devices for detecting explosive vapors and things of that nature --

THE WITNESS: Exactly.

THE ARBITRATOR: -- and different resolutions

in X-rays and so on and so forth?

THE ARBITRATOR: Yes. But the question is, had the PTO and the Department of Commerce ever co-hosted anything in that exhibit area, and the answer is, yes, I recall one about three to four -- it would have been three years ago right after 9/11.

BY MR. JOHNSON:

Q Was the PTOS involved in any manner?

A Not that I know of; no.

Q Was there one that PTOS was involved in dealing with trademarks?

A I answered that. I don't know of any trademark group.

THE ARBITRATOR: Right here in this building, PTO in conjunction actually with the Inventors Hall of Fame maintains a small museum or exhibit space with regards to patents primarily.

THE WITNESS: Right.

THE ARBITRATOR: Although, I believe I saw a Coca-Cola trademark, so it may also be trademarks. I don't know. But there are occasions when, with an outside group, you do collaborate for purposes of educational or other dissemination of information about

patents and trademarks?

THE WITNESS: Yes. And like I said before, the National Inventors Hall of Fame is one of the organizations that we deal with.

THE ARBITRATOR: And I take it the homeland security exhibit was more a dissemination of information generally about American technology to make us all safer than it was about how to go out and get a patent or anything?

THE WITNESS: Exactly.

BY MR. JOHNSON:

Q Do you know a Richard Fisher?

A I know a Richard Fisher that used to work in the PTO.

Q Do you know where he is now? Oh, he used to work in the PTO, you said?

A Right. He's retired.

Q When did he leave?

A Oh, I'm not quite sure, but I'd say two to three years ago.

Q What was his position when he left?

A He was a group director, an examining group director.

Q Was he under your supervision?

A He was in the chain through the deputy commissioner. He reported to a deputy commissioner.

Q He was under you in the chain?

A Yes.

Q How long was Mr. Fisher a director?

THE ARBITRATOR: What was he -- He was a director of --

MR. JOHNSON: Okay.

BY MR. JOHNSON:

Q What was he a director of?

A He was a director in Technology Center 1700, which is chemical engineering.

Q As a director, did Mr. Fisher have authority to render decisions on proposed disciplinary actions involving suspensions for less than 15 days for patent examiners?

MR. WAY: I would object on relevance unless he can --

MR. JOHNSON: Well, we'll get to it.

THE ARBITRATOR: Well, now, objection overruled.

MR. WAY: Sir, this is really expanding. You

wanted to keep this moving in the right direction, but
--

THE ARBITRATOR: Well, I do, but you're --
Between his slow talking and your objections -- I'll
cut him off, you know, if this isn't going anywhere.
Go ahead.

The question was, you know, did he have
authority to impose discipline of less than 15 days --
that is, the 14 days or less discipline?

THE WITNESS: Yes. I believe he did.

THE ARBITRATOR: Okay.

BY MR. JOHNSON:

Q And that expanded to conflict of interest
matters?

A Yes. I assume so.

Q Do you know whether Mr. Fisher exercised such
authority relative to conflict of interest matters
between 1992 and 2000?

A No. I don't know whether he did or not.

Q If a director under your supervision suspended
a patent employee for multiple incidents of conflict of
interest violations, would the Agency maintain a record
of those actions?

A Suspensions?

Q Yes.

A Yes. I would assume that there would be an employee relations file kept.

Q Has the Agency ever applied 5 CFR 2635.702(a) and (b) as a basis for disciplinary action against a patent examiner before?

A I don't know the answer to that question. I don't know.

Q Do you know a one Gerald Goldberg?

A I know a Gerald Goldberg; yes. Again, a former -- a retiree of the PTO.

Q Is he a director also?

A He was a director before he left the PTO.

Q Was he employed at the PTO before March 9, 1999?

A Before March of 1999?

Q Yes.

A Yes.

Q Did he occupy a position of a director?

A Yes.

Q You were also his above-superior?

A Yes.

Q In making your decision to remove Mr. Valone, did you consider any evidence other than that in the proposed removal file?

A No. I mainly relied on the proposed removal file, the PR file.

Q Were you briefed by anyone on the contents of the proposed removal?

A I may have had a briefing by someone in the employee relations area.

Q Do you recall who that employee was?

A I believe it was Sydney Rose.

Q Do you have any first-hand knowledge of the content of the conversation between Margaret House and the grievant?

A First-hand knowledge?

Q Yes.

A No. I wasn't there. I only see what was in the record.

Q Do you know of anyone other than Ms. House and the grievant who may have had first-hand knowledge of the conversation between Ms. House and the grievant?

A No.

Q I ask the same question relative to Ms.

Hollaway.

A Ms. Hollaway?

Q Yes. Or do you want me to go back and ask you in its entirety?

A The answer is no.

Q Did the grievant inform or tell you directly of the contents of the conversation with Ms. House and Ms. Hollaway?

A No. I've never had a chance to talk to the -

-

Q So, the only information we can say that you know is what was relayed to you in the file?

A Right.

THE ARBITRATOR: House and Hollaway, those are the two people over at Commerce?

MR. JOHNSON: Correct.

THE ARBITRATOR: And who else?

MR. JOHNSON: Just those two.

THE ARBITRATOR: Okay.

BY MR. JOHNSON:

Q And, also, you were not informed about anything between House and Hollaway, were you?

A Informed of anything?

Q Of any conversation between House and Hollaway. I just said there were three people there. There's Mr. Valone-Ms. House, Mr. Valone-Ms. Hollaway, and we assume there was conversation between Ms. Hollaway and Ms. House.

A Right.

Q Were you informed of that conversation?

A There may have been something in the file about an e-mail. I don't recall it. I would have to look through the file. But it would have been in writing in the file, not person -- I wasn't there or anything. I never talked to them.

Q Are you familiar with the Department of Commerce procedures for reserving facilities at the Hoover Building?

A Only after having read this file. But apparently there are some forms. You go to a certain office and then request forms and submit those forms. That's the extent of my knowledge.

Q So, would you tell us just very briefly what is your understanding of these things, since you say you reviewed them, that would be the requirement for a private organization to obtain facilities at the

Herbert Hoover Building?

A Well, I would assume that the private organization would have to fill out a form, and I believe there are forms that were referred to in the record for reserving the facilities.

Q Were the forms in the record, 410, 411, 411A -- Let me withdraw that.

THE ARBITRATOR: I will remind the Agency, I have requested copies of those forms. Do you remember?

MR. WAY: Okay.

THE ARBITRATOR: You don't remember?

MR. WAY: No. But I'll --

THE ARBITRATOR: Okay. I asked -- I believe I did. If I didn't, yes. We discussed them. They're referenced by Ms. -- well, one of the witnesses.

If not labeled, they're identified in the statements of House or Hollaway or someone. The information that's in here references being the necessary reservation forms.

MR. WAY: There weren't any in the record.

THE ARBITRATOR: I know.

MR. WAY: So, we may be able to get you what their existing forms, if any, are.

THE ARBITRATOR: Yes. That's what I asked for.

MR. WAY: I mean, there's no guarantee --

THE ARBITRATOR: They're a government form of some sort.

MR. WAY: Okay. I can follow up on it.

THE ARBITRATOR: And I want to see, because, as you know, you've got some problems here, evidentiary.

MR. WAY: In terms of what?

THE ARBITRATOR: Well, let's put it this way. Due process is more the problem. I'll raise it later. Let's move on with the question.

But do make a note. I do want to see what it was that Mr. Valone was provided and, if I recall testimony, was told to go fetch the necessary information and stuff for.

MR. WAY: Who was telling him to go fetch what?

THE ARBITRATOR: I believe -- Well, I'll have to go back to it, but those forms came up. They were the forms that were necessary to get --

MR. WAY: I remember the forms.

THE ARBITRATOR: -- a reservation, and you filled it out and it called for certain information. And I wanted to see what information it was calling for.

MR. WAY: Okay. We can get you the forms.

THE ARBITRATOR: And he was given those forms if I recall correctly. I thought that he was given those forms. Otherwise, I don't know why they came up. Ms. House or Ms. Hollaway --

MR. WAY: All right. I will --

THE ARBITRATOR: -- one or the other, gave him those forms.

MR. WAY: I will follow up on the forms that you might be talking about.

THE ARBITRATOR: So, I understand that they don't have the forms that he actually filled out, if he filled any out. I don't know. But my question was, well, what did those forms ask for. So, I'd like to see that because --

MR. WAY: All right. I will track down the forms that you might be referring to. We might be able to find what the current forms are maybe, but I don't know what they were at the time because I don't see

that in the record.

THE ARBITRATOR: Yes. This is five years ago. Oh, you don't remember these forms?

MR. WAY: No, no. I don't see them in the record.

THE ARBITRATOR: No, no, they're not.

MR. WAY: Right.

THE ARBITRATOR: That was my problem. They're not.

MR. WAY: Exactly. So, that's what I'm telling you is I'll track down what they -- Whatever the numbers are, I'll track down what I can for you. But I'm not making any guarantees that they are the same as what existed in '99.

THE ARBITRATOR: Well, all right.

MR. WAY: I mean, that's the only reasonable thing; right?

THE ARBITRATOR: We'll get a statement back or call her on the telephone and get Ms. House or Ms. Hollaway to say, well, we changed the forms but it's the same information, or we changed the form and we now ask different information. We'll find out. But I want to see what he was -- what Mr. Valone was asked.

MR. WAY: Okay. With respect to Ms. House and Ms. Hollaway, we're not going to be able to call them because, as we stated --

THE ARBITRATOR: Oh, they're the people who aren't --

MR. WAY: -- they're not available.

THE ARBITRATOR: That's right. They're not available. And so who was it that testified? You had somebody --

MR. WAY: Ms. Teti.

THE ARBITRATOR: Oh, that's right, her. And she was the one that we asked some questions about the forms. And I asked that a blank form be produced. So, I just want to remind you I want to see a blank form.

Okay, proceed.

BY MR. JOHNSON:

Q Based on your knowledge now, since you've received the procedures, did the grievant follow the proper procedures in obtaining the facilities at the Herbert Hoover Building for a private organization?

A He didn't go through with it. I mean, they didn't have the -- They didn't hold the function, so he didn't -- I mean --

Q No. My question is, did they go through the proper procedure?

A The extent of my knowledge is that he visited the Herbert Hoover Building. He was shown the facilities, and I believe he was given forms to fill out in the event that they were going to reserve the building. That's the extent of my knowledge of what happened.

Q So, you cannot say whether or not he followed the proper procedures or not to obtain the contract?

A If you're asking me whether he filled out the forms and turned them in and so on, I don't know.

Q Did the PTO ever submit any document to the Department of Commerce on behalf of the grievant for reservations at the Commerce building?

A No, not that I know of.

Q Did the Agency ever receive any request from the grievant to submit documents on behalf of IRI or anybody else for reservations at the Department of Commerce building?

A Not that I know of.

Q Has the Patent and Trademark Office provided employees notice of the procedures for requests in

reserving facilities at the Hoover Building?

A Not to my knowledge.

Q Did the Department of Commerce follow its own procedures relative to the grievance inquiry for use of the Hoover Building facility?

A I don't know.

Q Do you have any first-hand knowledge that the grievant was made aware of these procedures at any time prior to his removal?

THE ARBITRATOR: What? Made aware of --

MR. JOHNSON: Of the Commerce Department procedures for obtaining facilities at the Hoover Building.

THE WITNESS: Well, I assume when he went down there and inquired about reserving the facility, they told him what he had to do.

MR. JOHNSON: Oh. So, then, there was a question of prior to his removal from the PTO.

THE WITNESS: Well, that would have been prior to his removal.

BY MR. JOHNSON:

Q How about prior to his entry down there? Prior to March 9th, 1999. How about that?

A In other words, did he know what the procedures were?

Q Do you have any first-hand knowledge that the grievant was aware of the procedures on March 9th, 1999 for obtaining facilities at the Hoover Building?

A I don't have any first-hand knowledge.

THE ARBITRATOR: Do you mean on the day he went there?

MR. JOHNSON: Yes.

THE ARBITRATOR: And do you mean did he have knowledge before he got there, or did he get knowledge while he was there?

MR. JOHNSON: Well, my question was, did he have knowledge when he went there. But we know that he --

THE ARBITRATOR: Well, anyway, he doesn't know whether he had any knowledge --

MR. JOHNSON: Right.

THE ARBITRATOR: -- as of or after that date, so --

BY MR. JOHNSON:

Q And you're saying you don't know whether he had any knowledge prior to that or was made aware of it

before?

A I don't know.

Q Did you know whether Ms. House and Ms. Hollaway worked in the same unit at the Department of Commerce?

A Well, I assume that they were somehow affiliated with the office that dealt with the administrative facilities -- administration and facilities.

Q Do you know whether Ms. House and Ms. Hollaway had authority to arrange or approve the use of the Hoover Building facilities for non-Commerce entities?

A Well, I assume that they were involved in the process. I don't know who had the final approval.

Q Is it your understanding that on at least one occasion the grievant stated to either Ms. House or Ms. Hollaway that he was inquiring about the use of the Hoover facilities for a private function?

A I don't know what he said to them. I wasn't there.

Q Did you understand that on at least one occasion the grievant stated to either Ms. House or Ms.

Hollaway that he was requiring -- he was inquiring about the use of the Hoover facilities for a private function?

MR. WAY: And I'm objecting for the record. He asked the same question. The witness has answered.

THE ARBITRATOR: Overruled. Go ahead. It's faster to hear him say it again or whatever variation on it this is. But go ahead, do your thing.

BY MR. JOHNSON:

Q Will you look at the proposed removal?

A Proposed removal; okay.

Q The third paragraph.

A Okay. The question is what?

Q Is it your understanding that on at least one occasion the grievant stated to either Ms. House or Ms. Hollaway that he was inquiring about the use of the Hoover facilities for a private function?

A That's what is contained in the proposed removal. That was from Ms. Focarino. That wasn't from me.

Q Is that from Ms. Focarino, or is that from Ms. Teti?

A Well, the proposed removal is from Ms.

Focarino, this document that you just read from.

Q Where did Ms. Focarino get that information?

A I don't know.

THE ARBITRATOR: Just a second. I'm a little confused.

Commissioner, is your testimony that you did know when Mr. Valone went to the Department of Commerce, the people he dealt with there from administration and facility management or whatever, that he advised them that this was for a private function?

THE WITNESS: I don't know what he advised them of, to be honest with you. I mean, I don't know.

THE ARBITRATOR: All right. And what is it that Ms. Focarino has -- you said told you?

THE WITNESS: No. She didn't tell me anything. In the proposed removal letter of May 7th, on Page 1, if you go to the third paragraph, within the letter it says, "You spoke to Margaret House, support services staff, and asked her about the procedures for reserving conference space for a private function." I assume that's what you're asking me about. But that's in her letter to Mr. Valone.

THE ARBITRATOR: All right.

BY MR. JOHNSON:

Q Did you accept that as a fact or --

A Well, there seems to be some conflict here.

I mean, what I saw was the fact that, if you look at the slips that the personnel at the Department of Commerce filled out, it clearly indicated it was PTO.

THE ARBITRATOR: That's charged to?

THE WITNESS: The slips; yes.

THE ARBITRATOR: Whatever "charged to" meant.

THE WITNESS: Right.

MR. WAY: Well, I think we're getting confused here. Charge 2 is regarding Web postings.

THE ARBITRATOR: No, no, no, no, no. The --

MR. WAY: Oh, charged to as in --

THE ARBITRATOR: As cost.

MR. WAY: Okay. All right.

THE ARBITRATOR: Yes. As in, you know, stick it to the PTO sort of charge versus --

THE WITNESS: Right.

THE ARBITRATOR: But cost type of charge.

BY MR. JOHNSON:

Q Do you find Ms. Focarino an honest person?

A Absolutely.

Q Is there any portion or section of the procedures for obtaining the Hoover Building that require multiple statements of the requester's intended use of the facilities?

A Multiple statements --

Q Of the intended use of the facility; yes.

A I don't know what information would be required in terms of filling out these forms. I just - I don't know. I haven't seen the forms. I've never seen the forms.

Q Well, with respect to the statement in the proposed removal from Ms. Focarino, "Your failure to identify the nature of the agency employee in reserving the space for the conference as a PTO employee represents a violation of the above-cited regulation."

THE ARBITRATOR: Now, we're talking about which, about the proposal or the decision?

MR. JOHNSON: Right, the proposal. The proposal.

THE ARBITRATOR: And that language is found where?

MR. JOHNSON: Page 3, I guess, Line 15.

MR. WAY: What was the language again?

MR. JOHNSON: The language was, quote, "Your failure to identify the nature of the conference to the Agency employees and your reserving the space for the conference as a PTO employee represents a violation of the above-cited regulation."

MR. WAY: Okay. And did you have a question?

MR. JOHNSON: Well, I asked him, how did the alleged failure to identify the conference violate the regulation.

THE ARBITRATOR: That's not what I understood. I understand your question being how many times did he have to --

MR. JOHNSON: Well, that was the first question, and he said he didn't know.

THE ARBITRATOR: Oh, yes, that's right. So, what's the second question?

MR. JOHNSON: How did it violate the regulation. He said he didn't know how many times he was supposed to identify, and then I asked, well, how did it violate the regulation.

MR. WAY: Well, it seems to be self-evident. It says, "Your failure is a violation of the

regulations." So, are you trying to say which -- is it (a) or (b) or --

MR. ROBERTSON: We're trying to get him to reconcile the statement on the first page that says --

MR. WAY: Wait. Mr. Johnson is taking the witness. Both of you can't --

MR. ROBERTSON: I'm not --

MR. WAY: I think you've already approved that there's only one --

MR. JOHNSON: Look. You're holding up the progress.

THE ARBITRATOR: That's all right.

MR. WAY: You're doing enough yourself.

THE ARBITRATOR: That's all right. Go ahead, Mr. Johnson, and let's try to move on and go faster.

MR. JOHNSON: Well, we're trying to establish a statement to reconcile between a private function and the failure to identify.

THE ARBITRATOR: But, see, the memo says -- Commissioner, the memo says, you know, you went in there and you told this lady it was for a private function.

Then over here, it says something about you

failed to identify the nature, i.e., private function.

But, yet, you know, on the face of the first page, it says you did tell them it was a private function.

Now, I, of course, asked the question, you know, what does she mean, "the nature of the function," I believe when she testified, whether he meant about cold fusion or about a private function or what, and I don't remember her answer. I'd have to go back and look at the thing. But --

MR. WAY: Well, if I can just clarify on your point --

MR. ROBERTSON: No. You don't understand.

THE WITNESS: Well, no. But there was something that was stated by the arbitrator --

THE ARBITRATOR: I don't understand?

MR. ROBERTSON: No. I said he's not testifying.

MR. WAY: No, no. Because you stated it was in the first page. Well, the first page only talks about identifying the private function to Ms. House, but it doesn't say anything about identifying for Ms. Hollaway. You know, that was always the Agency's theory is that the private nature wasn't

identified to Ms. Hollaway. Remember? You said --

THE ARBITRATOR: Well, wait a minute. Which one did he -- Which one is the underling of which one?

MR. WAY: I don't know who was the underling, but the first person was called on the phone. That was Ms. House. And apparently that's what the proposal says, that the grievant identified the private nature of the function to Ms. house.

But then Ms. House said, no, you have to talk to Ms. Hollaway. So, grievant went later that afternoon and talked to Ms. Hollaway. And our theory of the case is grievant never identified the nature of the function to Ms. Hollaway.

THE ARBITRATOR: Oh, I see. Okay.

MR. WAY: And the proposal doesn't contradict that.

MR. JOHNSON: And my question was --

MR. WAY: Well, hold on.

THE ARBITRATOR: I had simply by the conference to agency employees, and I wrote down here from her testimony, "Ms. Focarino meant PTO and DOC employees."

"PTO and DOC employees" when I said what

agency employees are you talking about. Now, that's what I wrote down.

But, anyway, we have a transcript and that's why we have court reporters, and so if it is really relevant, and it may be, we'll -- And it probably is. But that's just my notations.

Here, let's see. Okay. I've written down here, "Your failure" -- and I wrote a note -- "he told Ms. House to identify the nature" -- and then I have "cold fusion" -- "of the conference to Agency employees. And Ms. Focarino meant PTO and DOC employees."

Now, that's what I noted down. I don't know whether that clarifies much of anything, but --

MR. JOHNSON: Okay. What I was driving at with the first question was how many times did you have to tell them? I think we will show in our argument and our presentation that Ms. House and Ms. Hollaway were in the same unit.

Now, the question was, if they're in the same unit and work together, have the same authority, how many times must you tell them? And he says he didn't know.

BY MR. JOHNSON:

Q Am I correct?

MR. WAY: Well, let the record speak for itself.

MR. JOHNSON: No. I'm asking him.

THE ARBITRATOR: No. The record speaks for itself.

MR. JOHNSON: Okay.

THE ARBITRATOR: He went in, and evidently the record says the first person he talked to was Ms. House, and he told Ms. House it was for a private function.

And she said, oh, private function, go see Ms. Hollaway. He went to see Ms. Hollaway, and Ms. Hollaway said, do you want to have a function there, private or otherwise, and fill out these forms.

MR. JOHNSON: Correct.

THE ARBITRATOR: And there we are. The question is, does the Commissioner have any idea how many times he has to say to Department of Commerce employees, to everyone he runs into or just once, that it's a private function? And so that's the question. And, you know, I don't know. But he doesn't know.

MR. WAY: Right.

THE ARBITRATOR: So, okay, the answer is you don't know --

THE WITNESS: Right.

THE ARBITRATOR: -- how many times he would have to?

MR. ROBERTSON: Well, the question that actually stirred this up was we were asking to reconcile the indication on the first page with the statement on the third page.

THE ARBITRATOR: Oh, yes. But you've done a good job of that, so let's quit. Let's go on.

MR. JOHNSON: Okay.

THE ARBITRATOR: You know, I see the point.

THE WITNESS: I'd like to -- Could I respond to that?

THE ARBITRATOR: Sure.

THE WITNESS: Thank you. I mean, I've read this now, and I think it refreshed my memory.

And I think when I read this, the understanding that I had is he made a contact to the first person, which was Ms. House. He may have said this is for a private function. She actually said, we

don't normally do private functions.

When he went back the second time, he never said private function because he felt maybe they weren't going to give it to me as a private, and therefore the indication that it's PTO.

THE ARBITRATOR: Okay.

THE WITNESS: That's what's in the proposed -
- That's the way I read the paragraph in the proposed removal, and that's the way I understood Ms. Focarino's letter.

THE ARBITRATOR: And your actual decision letter, do you know whether or not that gets clarified?

THE WITNESS: I don't think it really mentioned that particular issue.

BY MR. JOHNSON:

Q In response to that, any evidence for that interpretation?

A Any evidence? No. That was my interpretation of her letter.

Q Any evidence for that?

A Only that in the Hollaway receipt slip, she entered "PTO" as the contact, or, you know, that little form that she filled out. She didn't put "private

function." She put "PTO."

THE ARBITRATOR: When you talk about "her letter," you're talking about Ms. -- the woman who testified --

MR. WAY: No. I think he's referring to the reservation slips by Ms. Hollaway attached to her e-mail, and that is at -- I mean, I'll show it to the Commissioner to make sure that that's what it is.

Referring to -- Is that Tab 20? It's an e-mail from Telita Hollaway to Catherine Teti, and there's an RSVP reservation slip?

THE WITNESS: Right. It says, "charged to PTO." It doesn't say --

THE ARBITRATOR: Okay. And that's the only thing versus a recitation in writing by anyone, Ms. Hollaway and Ms. House or Ms. Teti, about what occurred?

THE WITNESS: Well, there is an e-mail from Catherine Teti to Hollaway, and it said that Mr. Valone stated that he worked for the PTO and would like to have a special event there. I mean, this is in her e-mail.

THE ARBITRATOR: Well, now, Ms. Teti never --

THE WITNESS: It's to -- Excuse me. I got it reversed. It was from Hollaway to Teti. I misspoke.

THE ARBITRATOR: Oh, okay. Because I don't think Teti ever spoke to him.

THE WITNESS: Right. And Hollaway was the person that he went to --

THE ARBITRATOR: The second.

THE WITNESS: -- second.

THE ARBITRATOR: Well, sent by Ms. House to Ms. Hollaway?

THE WITNESS: Right. Apparently, in her mind, he came as a -- You know, it says he worked for the PTO. Mr. Valone stated he worked for the PTO, it says right here.

THE ARBITRATOR: Let's go off the record.

(Whereupon, a brief discussion was held off the record.)

BY MR. JOHNSON:

Q What level of authority is required for a PTO employee to reserve the Herbert Hoover facilities on behalf of the PTO?

A Well, that would come through our administrative services area if, in fact, we ever did

it. What level of authority?

Q Yes.

A I would say from the office of the director of general services in the PTO.

Q So, a patent examiner can't just walk over there and say, I work with the Patent Office, I want this facility, and get it?

A On behalf of the PTO?

Q Yes.

A Is that what you meant?

Q Right.

A On behalf of the PTO?

Q Yes.

A Well, I mean, I was thinking we would contact someone at the PTO first rather than just go over on your own. There would be no reason to reserve it on behalf of the PTO unless there was some PTO function that was going to occur there.

Q Well, suppose they just walk over as an examiner and say, I want to reserve this for a private function, I work for the PTO?

A Well, that's not what you asked me.

Q Well, I retract the question and ask you

that.

MR. WAY: Can you restate the question?

BY MR. JOHNSON:

Q As a patent examiner, can I walk over to the Department of Commerce and say I'm a PTO patent examiner, I want to reserve the auditorium or a building or other facilities?

MR. WAY: That speaks for itself. Anyone can walk over and do anything they want.

THE WITNESS: I guess you could walk in and make that statement.

BY MR. JOHNSON:

Q Do you think they would grant it to him?

A I think that there would be some investigation to figure out what the purpose of the thing was and whether the PTO was actually requesting it or this person as a private citizen.

Q We're ready to move on. Next question.

What weight or influence, if any, would the grievant's position as a patent examiner carry in obtaining the use of facilities at the Hoover Building?

A What -- Could you restate it? I didn't quite hear it.

Q What weight or influence, if any, would the grievant's position as a patent examiner carry in obtaining the use of the facilities at the Hoover Building?

A The only weight would be that the employee would identify themselves as an employee of the Department of Commerce as opposed to someone who was completely outside the Department of Commerce.

Q Well, the question was a patent examiner.

THE ARBITRATOR: Are you talking about seeking use for a private function or seeking use --

THE WITNESS: Well, he didn't say private. I don't think he said private.

THE ARBITRATOR: No, he didn't. So, I'm --

THE WITNESS: I mean, what weight would --

MR. JOHNSON: A patent examiner.

THE WITNESS: A patent examiner. I would just say the only weight would be at least it's an employee of the Department of Commerce as opposed to someone who's walking in off the street who has no affiliation whatsoever. That's the extent of the weight that it would --

BY MR. JOHNSON:

Q But if he's a patent examiner, an employee of Commerce rather than just as an Agency employee?

A Well, we're all a part of the Department of Commerce.

Q I understand that. But my question was to a patent examiner.

A And my answer was, the only weight would be, you have an employee who's part of the umbrella of the Department of Commerce as opposed to a private citizen that has no affiliation with the Department of Commerce. That's the difference.

THE ARBITRATOR: I mean, it gets you in the door?

THE WITNESS: It gets you in the door; yes.

THE ARBITRATOR: Whereas, I wouldn't get in the door.

THE WITNESS: Maybe you would.

MR. WAY: Nothing personal.

BY MR. JOHNSON:

Q Do you have any first-hand knowledge that the grievant informed the DOC official that he represented PTOS?

A No.

Q Do you have any first-hand knowledge that the grievant informed the DOC that he represented the Patent and Trademark Office?

A Well, I did refer to this e-mail that I saw in the bundle where actually Ms. House told Ms. Teti he identified himself as a PTO employee.

Q You're not answering my question, I don't believe. I said he represented the PTO. The word "represented."

I can say I work -- I can go into the State Department and say I work at the Patent and Trademark Office. Did he represent -- Did he officially say that he represented the PTO?

MR. WAY: This is argumentative, sir.

MR. JOHNSON: Well, if you'd stop interrupting me, we could move on.

THE ARBITRATOR: It is argumentative, but this is your last chance on this one, so give it your last shot, and then let's move on.

MR. JOHNSON: Okay. I'm through.

THE ARBITRATOR: You're through?

THE WITNESS: Well, I referred to that e-mail, and my recollection of the e-mail is that he

identified himself as a PTO employee.

THE ARBITRATOR: Right; yes.

MR. WAY: Tab 20.

BY MR. JOHNSON:

Q Based on your understanding, with a private organization such as IRI, would they be eligible to obtain the facility at the Herbert Hoover Building?

A I don't know whether they would or not, to be honest with you.

Q Would the procedures for obtaining the Herbert Hoover facility for the PTOS be the same as they are for a private entity, a non-Commerce entity, a private corporation?

A I don't know.

Q Can the PTOS obtain the Hoover Building facility to hold an affair without the sponsor or approval of the PTO?

A I would believe that the PTOS would come to the PTO and inform us and then move forward with a request.

Q My question, and I'll repeat it very briefly, is, can the PTOS obtain the Herbert Hoover Building facility to hold an affair without the approval of the

PTO?

A I don't know because I don't know what information the Department of Commerce would ask for.

Q Do any of the Internet postings on Tab 12 or Tab 13 mention the PTO?

A I do not -- I don't believe they do.

Q The same question relative to the PTOS.

A Same answer.

Q What regulation requires the identification of the, quote, "nature of the conference to the Agency employees"?

A The nature of the conference to the Agency employees?

Q Yes.

A Are you saying there's a regulation that --

Q I'm asking you what regulation or statute or authority requires the identification.

THE ARBITRATOR: Of what?

MR. JOHNSON: Of the conference.

THE WITNESS: The nature?

MR. JOHNSON: The nature of the conference to the employee. Would you like for me to repeat it again?

THE WITNESS: Absolutely.

BY MR. JOHNSON:

Q What regulation requires the identification, quote, "of the nature of the conference to Agency employees," end quote?

A Could you tell me where you quoted from?

Q Yes. It's 21.

A Where is it?

Q Look down, and I guess it would be the one, two, three -- third complete paragraph.

A Well, again, you're --

Q Is everybody with us? Are we on the same page? Tab 21, third paragraph?

THE ARBITRATOR: Oh. I was looking at something else. What is it again?

BY MR. JOHNSON:

Q What regulation required the identification of, quote, "the nature of the conference to Agency employees"?

A Well, this is contained in the proposal letter and refers to 5 CFR 2635.702.

Q Well, you had a copy of that. Can you pinpoint that to us? Do you think that you've answered

that question before?

A Answered it before?

Q Yes.

MR. WAY: Well, he answered it now, didn't he?

THE WITNESS: I just answered it.

MR. JOHNSON: No, he hasn't answered it now. But I'm just asking him if he thinks he's answered it. If he says he has, then we'll --

MR. WAY: Well, let's not have any guessing games.

MR. JOHNSON: Okay. Then we'll ask him to answer the question.

MR. WAY: Can you restate it so we can all remember what your question was?

THE ARBITRATOR: Well, you're asking how did this violate the ethics rule on a conflict of --

MR. JOHNSON: Correct.

MR. WAY: If that's the question, the witness answered it. He says it's 2635.702. He just answered you right here.

THE ARBITRATOR: (a) or (b)?

MR. WAY: Well, he said 702.

MR. JOHNSON: Which regulation requires identification -- requires it -- You say that requires it? I'm not --

THE ARBITRATOR: Okay. All right. This is something -- The regulation says thou shalt not do anything that would lead to the appearance of, and so, you know, you can argue about whether he did or did not.

But to argue with Mr. Godici -- He did answer the basis for his sustaining the proposal to remove, so --

MR. JOHNSON: Okay. Let's proceed.

THE ARBITRATOR: Are you finished?

MR. JOHNSON: Well, if you say so.

THE ARBITRATOR: What?

MR. JOHNSON: I'm ready to go if you are.

THE ARBITRATOR: I mean, are you finished with your questions?

MR. JOHNSON: Well, I'm -- I ended my questions; yes.

THE ARBITRATOR: So, you have no more questions?

MR. JOHNSON: Oh, yes. I have more

questions. Yes.

THE ARBITRATOR: Oh, my goodness. Well, let's go because, see, it's now a quarter after five, so let's go. And pick it up.

BY MR. JOHNSON:

Q Is it the Agency's position that the Department of Commerce grant the grievant the requested Hoover Building facility based solely on the grievant's representation?

A I'm not --

Q Of his employee --

A Could you read the question one more time?

Q Okay. Let me just add something to it.

Is it the Agency's position that the Department of Commerce granted the grievant full use of the requested Hoover facility based solely on the grievant's representation that he was employed at the Patent and Trademark Office?

MR. WAY: Well, I'm objecting to that. It's assuming facts. You said "full use"? I mean, he was stopped before he was using it.

MR. JOHNSON: Okay. Let me back up and ask it again.

BY MR. JOHNSON:

Q Granted him the facilities, the requested facilities. How about that?

A Well, I'm not sure that it ever got that far to be perfectly honest with you. I think they showed him the facility. They tabbed him in. There was probably paperwork to be done, but I don't know whether all of that was completed or not.

Q Is it your position that he attempted to make the reservation or he was granted the reservation?

A Well, there was a reservation slip in the documentation, so at least it was entered into the log for a certain date. I don't what further procedures needed to be done in order to finalize, but the process was begun.

Q Is the PTOS associated in any manner with Mutual of Omaha Insurance Company?

A The PTOS?

Q Yes.

A I don't know.

Q Are you a member of the PTOS?

A Yes, I am.

Q What is the association between the PTOS and

Mutual of Omaha?

MR. WAY: He said he doesn't know.

MR. JOHNSON: Oh, you don't know. Sorry. Go ahead -- Oops, sorry.

BY MR. JOHNSON:

Q Does the PTOS have an association with the Mutual of Omaha? You know it does.

MR. WAY: What? No.

MR. JOHNSON: I mean, we know that they're -- from evidence --

THE WITNESS: Pardon me?

MR. JOHNSON: -- that has been provided to us.

BY MR. JOHNSON:

Q We want to know, do you feel that whatever that association is, it gives the impression that the government agency is endorsing that insurance company?

A I know of no association, so -- No, I don't.

THE ARBITRATOR: Okay. Hold on a minute. So the witness is not left totally baffled, I assume what you're talking about is that, by being a member of the organization, the PTOS, that Mutual of Omaha offers some kind of group insurance policy that you can, you

know, purchase for you, yourself, and your family, or so and so like travel insurance, some cut-rate thing based on the group affiliation.

And the question is, assuming that there is such a thing, that there is such an opportunity that as a PTOS member you can buy into some sort of group policy sold by Mutual of Omaha --

THE WITNESS: Right.

THE ARBITRATOR: -- do you believe that having that opportunity constitutes some sort of endorsement by PTO of Mutual of Omaha and their products?

THE WITNESS: Well, obviously, there's some kind of contract between the PTOS and -- if this exists. I guess -- I don't know if it exists or not.

But if you're saying, hypothetical, if it does exist, there would be some contract that would be involved between the PTOS and some group rate they would get or whatever, so I would assume that they would approve of Mutual of Omaha. I don't know.

THE ARBITRATOR: PTOS or PTO?

THE WITNESS: PTOS. Society. The Patent and Trademark Office Society. Not the Patent and Trademark

Office. I don't think we would be involved in that.

BY MR. JOHNSON:

Q You don't feel that the Patent and Trademark Office would be possibly or reasonably perceived as endorsing Mutual of Omaha; correct?

A The society would, but I don't think the office would.

Q Does the PTOS charge fees for events held on U.S. government property?

A The society? You said PTOS?

Q PTOS.

A Not that I know of; no. I know the only thing they charge for is a picnic, and they hold it down at Fort Hunt Park. That's the only one I've ever gone to.

THE ARBITRATOR: But you don't know whether the Department of Interior manages Fort Hunt Park down there on the banks of the Potomac?

THE WITNESS: I don't know whether they do or not to be honest with you. Are you asking me whether they have to pay for that or --

THE ARBITRATOR: No. No. In the question --
What was the question?

MR. JOHNSON: My first question was, does the PTOS charge fees for events held on U.S. government property, and --

THE WITNESS: No. You said use PTO property. You didn't say U.S. government property.

THE ARBITRATOR: No. He said U.S. government property.

THE WITNESS: I'm sorry. I misunderstood.

THE ARBITRATOR: That's why, when you said Fort Hunt --

THE WITNESS: I thought he said USPTO property.

THE ARBITRATOR: -- I immediately jumped.

THE WITNESS: I misunderstood the question. I'm sorry. I thought you meant USPTO property. I thought that's what you said.

BY MR. JOHNSON:

Q What is your answer?

A Well, if it's government property, like I said, the one and only event that I know that they actually charge tickets for that I've gone to is a picnic, and it's at Fort Hunt. And if Fort Hunt is government property, then with all those

assumptions in place, I guess the answer would be yes.

Q Has the PTO operated a merchandise shop on the PTO controlled property? PTOS.

A The PTOS has some function. I think they volunteer to man the store where Mr. Moore just actually bought his shirt.

THE ARBITRATOR: Used to, but don't anymore.

But I'll take judicial notice that PTOS ran a gift shop and probably did so rent-free and within space controlled otherwise by PTO. Is that what you want?

BY MR. JOHNSON:

Q Was it rent-free?

MR. ROBERTSON: We don't know. It doesn't matter. Move on.

MR. JOHNSON: Well, we paid.

MR. ROBERTSON: It doesn't matter.

THE ARBITRATOR: Either with or without paying rent, but with the approval of the PTO which leased the property and sub-leased it or allowed its use by the PTOS.

MR. JOHNSON: Right.

THE ARBITRATOR: Notice is taken.

BY MR. JOHNSON:

Q Do you know who negotiated that with the PTO?

A No.

THE ARBITRATOR: And I will disclaim any responsibility for having negotiated it.

BY MR. JOHNSON:

Q Does your job give you the authority to decide what is or what is not appropriate for the Department of Commerce to be associated with?

A I don't believe so. I think officials at the Department of Commerce would have a say of what they're associated with.

Q Do you know what the box with the number therein as shown in Tab 13, Paper Number 3 means?

A Tab 13 --

A Yes.

Q -- Paper Number 3 -- Page 3? Is this what you're referring to?

THE ARBITRATOR: What is it?

THE WITNESS: It's the third page of my Tab 3, and it's a block --

THE ARBITRATOR: Tab 3?

THE WITNESS: Excuse me. Tab 13, Page 3.

THE ARBITRATOR: Page 3. What's --

THE WITNESS: If you're asking me what this block is or what it means --

BY MR. JOHNSON:

Q Do you know what that block means?

THE ARBITRATOR: Oh, my goodness. We're back.

THE WITNESS: My understanding is that this would be the number of times this page was viewed on the Internet.

BY MR. JOHNSON:

Q Do you know what -- Would you look at Tab 3, Exhibit 4?

A Okay.

MR. WAY: I think the Arbitrator wanted these to be called exhibits, not tabs. So, that would be Exhibit 3; right?

THE ARBITRATOR: Exhibit 3, Tab 4. Is that what --

MR. WAY: Exhibit 3 only has one document of two pages.

THE ARBITRATOR: Oh, okay.

MR. WAY: It says, "Notice of Job Opportunity."

MR. JOHNSON: Are we all on the same page now?

THE ARBITRATOR: Yes.

BY MR. JOHNSON:

Q Would you read through that?

A Do you want me to read the whole thing?

Q Oh. Are you familiar with it?

A Yes.

Q Okay. Then I'll just ask you the question; okay?

What incidents in there represent a conflict of interest relative to the regulations that have been cited in this --

MR. WAY: Objection. This is not cited as a conflict of interest. That's --

MR. JOHNSON: Well, I'm asking what it is.

MR. WAY: Well, why would you be asking that because that's not part of the charges?

MR. JOHNSON: Well, Mr. Way, let me explain something to you, if I may.

MR. WAY: No. I don't need your explanation. You can address it to the Arbitrator.

MR. JOHNSON: Well --

THE ARBITRATOR: Yes. But just a minute. He has not been disciplined for this.

MR. JOHNSON: Right; correct.

THE ARBITRATOR: And your question -- He had been disciplined for violation of ethic rules in two specific respects. But he hasn't been charged with violating them with regards -- in either respect with regards to this.

MR. JOHNSON: What I'm going to with regard to that and also Ms. O'Shea's statement is his counseling, and we want to know what in those two documents -- not only this one, but one more -- that would merit counseling of any kind relative to this charge that he's been charged with.

THE ARBITRATOR: All right. Because her testimony was that this was one of the things that she counseled him about?

MR. JOHNSON: Yes.

THE ARBITRATOR: Oh, okay.

MR. WAY: Well, this Commissioner wasn't involved in that counseling, so it's inappropriate --

THE ARBITRATOR: Well, no.

MR. WAY: If you're asking --

THE ARBITRATOR: Wait just a second. In his decision, he takes note that you've been counseled.

MR. WAY: Right.

THE ARBITRATOR: Okay. Here's what he was counseled about. You can ask him, well, what do you see in this that's deserving of some sort of counseling, although --

MR. JOHNSON: Relative to the charges.

THE ARBITRATOR: Well, it's -- Relative to the charge about misrepresentation?

MR. JOHNSON: And conflict of interest. We have two.

MR. WAY: It's irrelevant. This is a prior instance.

THE ARBITRATOR: Just a second. Just a second. Let me -- You're objecting?

MR. WAY: Yes. I am objecting because he's misleading the witness --

THE ARBITRATOR: Just a second. You're objecting. Okay. Now -- I'm going tell you, I -- Well, you want to ask him questions about how in any way this represents a misrepresentation? You want to ask him how in any way this represents a conflict of

interest?

MR. JOHNSON: Yes.

MR. WAY: We never alleged it was a conflict of interest.

MR. JOHNSON: Well, my goodness.

THE ARBITRATOR: Well, okay. I --

MR. JOHNSON: May I just point out what they said? And we are addressing their argument.

THE ARBITRATOR: Okay. What is it that they say that you want to --

MR. JOHNSON: "There have been incidents in the past for which you were counseled about using your official position in an Internet posting in an effort to recruit infinite energy technologists in order to infiltrate the PTO."

THE ARBITRATOR: Okay. That was said there in the --

MR. JOHNSON: In the --

MR. WAY: What does that say about conflict of interest? It doesn't say anything about conflict of interest. It says you were previously counseled.

MR. JOHNSON: Well, we're trying to figure out --

MR. WAY: And he was counseled.

MR. JOHNSON: -- what the counseling was.

THE ARBITRATOR: What?

MR. JOHNSON: Relative to conflict of interest or what?

MR. WAY: It doesn't say relative to conflict of interest.

MR. JOHNSON: Well, Mr. Arbitrator, we recognize that people are counseled every day about many things. This charge is specific to what he did in a conflict of interest and misrepresentation --

MR. WAY: No, it's not. It's talking about a prior work history and prior discipline.

MR. JOHNSON: You are trying to mislead.

MR. WAY: You're trying to mislead. That was the basis of my objection.

MR. JOHNSON: No. I am addressing what is in the proposed removal.

THE ARBITRATOR: One at a time. Okay. Evidently, it was said in the proposed removal that made specific reference to this --

MR. JOHNSON: Yes. Absolutely.

MR. WAY: Right. As a prior counseling.

THE ARBITRATOR: -- as a matter of prior counseling --

MR. JOHNSON: To what?

THE ARBITRATOR: Just a second. I'm speaking, and don't you all forget the rules. When I'm talking, nobody else talks. That only applies to me.

Now, quote, "Being at the Patent Office as an insider for almost two years, I, Tom Valone, invite those who believe in the philosophy expounded by" so on and so forth, et cetera, "to join me. Together we can make policy change happen slowly within the system."

This purports to be a recruitment notice saying "Job Opportunities, U.S. Patent and Trademark Office. All able-bodied infinite energy technologists are invited to infiltrate the USPTO immediately due to the expansion into industrial section," so on and so forth.

Now, if this is not a misrepresentation, if this is not a conflict of interest, you know, I'm a little hard-pressed to see how it couldn't be.

I mean, Mr. Valone has some strongly-held private views about cold fusion and other forms of non-conventional sources, I suppose, of energy.

The Patent Office has been a little cold towards those types of proposals. He is seeking to change policy, not so much on the merit, but by recruiting people to come in and assume positions where they might be the ones to pass on future patents in these areas.

Now, you can argue about whether this does or does not rise to a legal standard, you know, and I will welcome those arguments from both sides.

But to ask the witness this question, I just don't -- I don't see how he can say -- whether he says yes or no, it's supposed to influence me. You know, whether he says, well, yes, I think it does, or no, I don't think it does, or whatever.

But do you understand that this is really -- I'm questioning the value of your -- I really question whether you want to go into this one.

But at any rate, having said that, I will overrule the objection provided you keep it short, Mr. Johnson. Now, keep it short. Now, go ahead.

The question is, how do you see this as a conflict of interest? Is that what your question is? Or a, what did you say, misrepresentation?

MR. JOHNSON: Well, we can put it into one question, a conflict of interest and a misrepresentation as parallel to the charges in which he was removed. He was removed for a conflict of interest --

THE ARBITRATOR: Well, you're talking in relationship parallel or a relationship to?

MR. JOHNSON: Right.

THE ARBITRATOR: Relationship to?

MR. JOHNSON: Right.

THE ARBITRATOR: Okay. You say a relationship between this matter about which he was counseled and the later, at least, allegations, assuming that it will be correct, about the COFE conference and the Department of Commerce facilities, do you see a relationship?

THE WITNESS: Well, I do see a relationship.

And I would agree with you, I read this as a conflict in terms of he's got a personal agenda that he has gone out on the Internet and made these statements with respect to trying to bring people on board at the PTO to further his personal beliefs.

And the impression you get is, you know, by

having these people come in and issue patents that would not be issued by the people that are currently here, I mean, that's pretty clear. You stated it better than I.

THE ARBITRATOR: All right now. You have --

MR. JOHNSON: I'm ready to move on here.

Like I said, we'll address it in the brief.

THE ARBITRATOR: Okay. Well, how many more questions have you got?

MR. JOHNSON: Not that many questions, but it seems as if we get bogged down on each one of them.

THE ARBITRATOR: It's all Mr. Way's fault.

MR. JOHNSON: And some of these we will drop.

I have very little.

THE ARBITRATOR: All right. While you're searching through, we'll go off the record.

(Whereupon, a brief recess was taken.)

BY MR. JOHNSON:

Q Do either you or the society, the PTOS Society, have any control over the conference arrangements at the Hoover building?

THE ARBITRATOR: Control over what?

MR. JOHNSON: Conferences, space at the

Hoover Building.

THE ARBITRATOR: Oh, the facilities over there?

MR. JOHNSON: Right.

THE WITNESS: No.

BY MR. JOHNSON:

Q Did you instruct anyone to pull the reservations for the conference?

MR. WAY: That's been asked and answered.

MR. JOHNSON: I'll let it go if he says so.

THE ARBITRATOR: But he shook his head no. Go ahead.

BY MR. JOHNSON:

Q How did you know that the reservations were cancelled? I believe you answered that. You said Ms. Focarino told you?

THE ARBITRATOR: He's nodding yes. You need to speak up so the reporter -- I can tell --

THE WITNESS: Well, he said I believe you answered that, so I just assumed that he was comfortable with that.

THE ARBITRATOR: As long as you're answering, just go ahead and say it out loud.

THE WITNESS: All right. Sorry.

BY MR. JOHNSON:

Q Is there any written authority that grants a person that occupies your position of authority to cancel a private corporation reservation at the Hoover Building?

A Is there any written authority that allows me to reserve --

Q To cancel a reservation or --

A To cancel the reservation?

Q Yes.

A I don't know.

Q What is the criteria for granting a non-Commerce entity use of the facility at the Herbert Hoover building?

MR. WAY: Didn't we --

THE ARBITRATOR: Yes. That's been asked and answered.

BY MR. JOHNSON:

Q What was your answer? You don't know?

MR. WAY: Oh, read the transcript.

THE ARBITRATOR: Well, that's right. That --

MR. JOHNSON: Okay, okay. Let's go.

THE ARBITRATOR: He doesn't know what the criteria are for reserving --

MR. JOHNSON: Okay.

THE ARBITRATOR: -- the conference space in the building is.

MR. JOHNSON: Now, let's see. This has been asked and answered. This has been answered. Been answered. Been answered.

MR. WAY: Can we take a five-minute recess while he goes through his checklist?

MR. JOHNSON: Well, sometimes he has answered questions --

THE ARBITRATOR: That's all right. We're just talking about we're all sitting here, and maybe the court reporter wants to take a quick break. Off the record.

(Whereupon, a brief recess was taken.)

BY MR. JOHNSON:

Q Are you familiar with the operating procedures of the IRI, the Integrity Research Institute?

A No, I'm not.

Q Are you familiar with the particular subject matter that was mentioned in the brochure for the conference, Tab 19, Page 4 and 5?

A Page 4 and 5?

Q Yes.

THE ARBITRATOR: Where are you talking --
Where are we?

MR. JOHNSON: At Tab 12, I believe.

MR. WAY: Which tab? You've said 12 and 19
now.

MR. JOHNSON: Well, it's 12 and 19.

THE ARBITRATOR: Nineteen? Nineteen is
Telita Hollaway -- all those memos.

MR. JOHNSON: No, no. See, we've got so many
numbers here. Which one is this?

MR. WAY: So, your question was with respect
to Tab 19 or Tab 12 so that we can get the witness --

MR. JOHNSON: They're both the same subject
matter.

MR. WAY: So, pick one then.

THE WITNESS: I've got 19 open.

MR. JOHNSON: Fine. Nineteen. Let's go.
Let's go. Everybody's rushing. Let's go, let's go.

THE ARBITRATOR: Yes. Please go. What is it that you're asking him?

MR. JOHNSON: I'm asking him if he's familiar with the subject matter of those conferences. Here's what I'm asking. The subject matter on this particular page --

THE ARBITRATOR: Wait a minute. What page is that? Nineteen is --

MR. JOHNSON: I don't know. They don't number the pages. They just put them together.

THE ARBITRATOR: Who?

MR. WAY: It's the fourth item on Tab 19.

THE ARBITRATOR: Oh, okay.

MR. JOHNSON: Are we all together?

THE ARBITRATOR: Yes.

BY MR. JOHNSON:

Q Are you familiar with any of those subjects?

A I'm not intimately familiar. I'm not an expert in any of these subjects.

Q Would you say you're relatively well-versed in any of them?

A Well-versed?

Q Yes.

A I would not say I'm well-versed.

Q Based upon your knowledge of these brochures, does the IRI sanction or endorse any single particular energy-producing technology over any other that is shown?

A Well, there are numerous technologies that are mentioned. I would assume that they're somehow -- Well, I don't know what the organization endorses or doesn't endorse to be perfectly honest with you.

Q But there are several different technologies listed; is that correct?

A As part of the program, there are.

Q To your knowledge, does the U.S. government have any program or sanction any effort to obtain alternate forms of energy?

A I don't have any knowledge of programs the government sponsors.

Q Does the government sanction any?

A I don't have any knowledge of programs the government sanctions.

Q If given a tax break to use a particular form of energy, would that be a sanction?

THE ARBITRATOR: Or an endorsement.

THE WITNESS: It would be a tax break. An acknowledgement --

THE ARBITRATOR: An incentive.

THE WITNESS: An incentive. There's a good word. Thank you.

THE ARBITRATOR: And you are aware that there are tax breaks for using other than fossil fuels --

THE WITNESS: I'm aware of that on the 1040 Form. I've never had the opportunity to check that block or use that block.

THE ARBITRATOR: Yes. Whether you use wind power, solar cells, whether you use --

THE WITNESS: Right.

THE ARBITRATOR: There are some if you own farm property, there are certain ones there. But you're aware of them, even though you've never been able to be a beneficiary of those tax breaks?

THE WITNESS: Yes.

BY MR. JOHNSON:

Q Does the PTO grant patents to inventors for all types or forms of energy-producing devices?

A Well, that's a pretty broad definition. You'd have to be more specific than that. I know we

grant patents on a solar panel.

Q Okay. That's good enough.

THE ARBITRATOR: I grew up as a kid with something called a Delco house and a Delco windmill, and it generated and charged up Delco batteries. That's why it was called a Delco house.

And then you lived off those batteries every evening until they ran down and the lights went out. And so they've made great improvements since then, so I'm sure they've patented it.

So, I'll take judicial notice that patents have been granted for such technology.

BY MR. JOHNSON:

Q Do you consider it to be a noble and patriotic act to make the United States less dependent upon conventional energy by seeking alternative forms of energy?

A I think it would be a benefit to seek alternative forms of energy such as the ones you get credit for on the government tax form.

Q Was the subject matter of any U.S. patent represented in the conference?

A I don't know if the conference ever took

place to be perfectly honest with you.

Q Well, the conference took place in Bethesda -

-

MR. WAY: Objection.

THE ARBITRATOR: Yes. But in the materials that were published about it. Of course, you didn't attend the conference, which took place at another location. I'm just speeding this up a little bit.

But on the basis of the materials advertising the conference, do you have any reason to believe that anything about a U.S. patent, one that had been granted -- what was the question? -- was it exploited or what?

MR. JOHNSON: Actually, it's on Tab 16 where they have several of the patents that were to be discussed at the conference.

THE ARBITRATOR: Oh, okay.

MR. JOHNSON: Did you want to take a look at the tab -- What page is -- Oh, no page again. Tab 16, Page 2.

THE ARBITRATOR: This is also applications for patents or patents granted?

MR. JOHNSON: These are actually patents granted.

THE WITNESS: Now, what's the question?

BY MR. JOHNSON:

Q Was the subject matter of any U.S. patents represented at the conference -- or the proposed conference, or whatever you want to call it?

MR. WAY: Well, it appears that the witness doesn't have it in his personal knowledge. If you're referring to documents --

THE ARBITRATOR: If it's a document, the document says whatever it says. So, you know --

MR. JOHNSON: Okay.

BY MR. JOHNSON:

Q Are you personally opposed to the inventors discussing their patents on U.S. government property?

A Inventors discussing their inventions?

Q No. Patents.

THE ARBITRATOR: Patents.

THE WITNESS: On government property. Well, I think that's probably occurred, at least in that situation where we had that exhibit or something along those lines. No, I'm not -- I mean, under certain circumstances, it would be fine.

BY MR. JOHNSON:

Q Does the PTO have a policy that prohibits inventors with U.S. patents from discussing the subject matter of their patents on U.S. government property?

THE ARBITRATOR: You're talking about blanket prohibition?

THE WITNESS: I know of no blanket prohibition. Thank you.

BY MR. JOHNSON:

Q Restrictive prohibition?

A I know of no restrictive prohibition.

Q Does the PTOS have a journal?

A The journal of the Patent and Trademark Office Society, yes, they do.

Q Do they have advertisements in that?

A Pardon me?

Q Do they have advertisements in their journal?

A They may have.

Q In regards to the Patent Office changing positions as to what is patentable and what is not patentable, has the Patent Office changed their position in recent years as to what was once considered unpatentable suddenly became patentable?

A Not that I'm aware of. We follow case law.

You know, if a certain -- If the courts decide certain cases in one way or another, we may look at those cases. But every case stands or falls on its own merits.

Q Well, how about patenting living organisms?

A What about it?

Q Have they always been patentable?

A Have they always been patentable?

Q Right.

A Well, the Chocobardi case in the eighties established that micro-organisms that eat oil spills -- the courts established and the Supreme Court established that that was patentable subject matter.

Q But the Patent Office has held before that they were not patentable; right?

A I'm not so sure. I --

Q Why would it get to Supreme Court?

A -- don't know. Pardon me?

Q Why would it get to the Supreme Court if we had patented them?

A You're asking me why it went to the Supreme Court?

Q Yes.

A Well, because it was appealed to the Supreme Court, I assume.

Q Well, why was it appealed to the Supreme Court? It was rejected by the Patent Office, was it not?

A I don't know the entire history of that application to be perfectly honest with you.

THE ARBITRATOR: Can an interested party challenge the granting of a patent and say, hey, wait a minute?

THE WITNESS: Yes.

THE ARBITRATOR: So, it can get into court by a third party, neither the PTO nor the person granting the patent being the instigator of a challenge?

THE WITNESS: A third party can challenge the issuance of a patent within the USPTO. They ask for re-examination of the patent within the USPTO.

THE ARBITRATOR: And if it's denied, they have no recourse to the courts, or do they?

THE WITNESS: Under the current re-examination statutes, appeal of a re-examination does not go through and can't go through the court system.

Now, there have been some changes in the re-

examination practice lately, but that has been one of the criticisms of re-examination.

THE ARBITRATOR: Okay. So, a third -- Okay. That's all right. So, the only way a case could get then into the court system would be in denial of the patent?

THE WITNESS: Correct.

THE ARBITRATOR: The granting of a patent couldn't be the basis for a case concerning that patent getting into --

THE WITNESS: No. That's not true. There's two ways. Denial by the U.S. Patent Office, denial by our board of appeals can then go to the Court of Appeals for the Federal Circuit.

Another thing that can happen is that a patent owner can actually attempt to enforce their patent against a third party, and then that can go into a district court and then up through the court system.

THE ARBITRATOR: But where the third party counters back by --

THE WITNESS: Alleging --

THE ARBITRATOR: -- the patent should never have been granted because --

THE WITNESS: That is a defense.

THE ARBITRATOR: -- prior art and so on and so forth.

THE WITNESS: That may be the defense of a third party; yes.

BY MR. JOHNSON:

Q So, there was a change, and that was not because anybody was infringing, was it not? In the living organism.

A In the Chocobardi case?

Q Yes.

A The Supreme Court ruled that the subject matter was eligible for patenting.

Q But the Patent Office had rejected that Patent Application; isn't that true?

A I don't know the full -- You can read the history.

MR. WAY: That's been asked and answered.

THE WITNESS: You can read the history. I just don't -- I don't have that on the tip of my tongue. I don't know for sure.

THE ARBITRATOR: Well, that's all right. I mean --

BY MR. JOHNSON:

Q How about computer programs?

MR. WAY: This is getting a little far
afield, isn't it?

MR. JOHNSON: No, I'm not.

THE ARBITRATOR: No, no.

BY MR. JOHNSON:

Q Computer programs?

MR. WAY: That's the question?

MR. JOHNSON: Yes.

THE WITNESS: What's the question?

THE ARBITRATOR: Have they always been
patentable?

THE WITNESS: Well, I can go back to Herman
Hollorith who patented devices that were the precursor
to the IBM Corporation back in the early 1900's. I
mean, it's an evolution that occurs.

THE ARBITRATOR: I guess not so much the
devices but the program --

MR. JOHNSON: Right.

THE ARBITRATOR: -- the computer program,
which is software --

MR. JOHNSON: That's what I asked.

THE ARBITRATOR: -- versus hardware.

THE WITNESS: If software has a concrete, useful, tangible result, it's eligible for patenting; yes.

THE ARBITRATOR: And has it always been, or was there a time when, because it's paper, you know --

THE WITNESS: No. Actually, in this case, the U.S. Patent and Trademark Office has been very consistent with recognizing that if manipulation results in a concrete, useful, tangible result, then it's eligible for patenting.

THE ARBITRATOR: Oh, okay.

THE WITNESS: That's the history of software.

THE ARBITRATOR: Including you can patent the instructions that cause the manipulation. The instructions themselves can be patented versus trademarked, I assume?

THE WITNESS: Absolutely.

THE ARBITRATOR: Okay.

BY MR. JOHNSON:

Q How about Parker versus Fluke? Was that -- Are you familiar with Parker versus Fluke?

A I've heard of the case. I couldn't recite it

to you. So, I'll tell you, no, I'm not familiar with it.

Q Business methods.

A And the question is?

Q Have they always been patented?

A I think that the State Street Bank decision in 1998, which upheld the patentability of a scheme for determining the value of a mutual fund account, which is kind of the seminal case with respect to business methods, actually upheld the previous policies of the USPTO, which was that they were eligible for patenting.

Q So, we have three areas of technology -- living organisms, computer programs, business methods -- which have changed, somewhat evolved, or what have you --

MR. WAY: Objection. It misstates the witness' testimony. He said --

THE ARBITRATOR: It misrepresents the witness' testimony, but at any rate, I understand your argument --

MR. JOHNSON: Okay.

THE ARBITRATOR: -- and you can support it by, you know, the case law, and I'll be fascinated to

read it.

MR. JOHNSON: Okay.

BY MR. JOHNSON:

Q Now, is it illegal to propose changes within the Patent and Trademark Office by a patent employee?

A Illegal?

Q Yes.

A By statute?

Q Yes.

A To propose?

Q Regulation.

A Pardon me?

Q Regulation.

A To propose a change?

Q Yes.

A No.

Q Is there a prohibition against a Patent Office employee giving money to a fellow employee to attend a conference?

A Is it proper? Is it okay?

Q I asked if there is a prohibition against it.

A Oh. Well, I don't think so. I guess you'd

have to look at the situation.

Q You stated on direct that you -- that any patent examiner -- that trusts any patent examiner --

MR. JOHNSON: To make time short and get to it, would we permit Mr. Robertson to read it and get it --

MR. WAY: No.

MR. JOHNSON: You object to it?

THE ARBITRATOR: If it shortens this stuff up, you'd better believe it, so the answer is yes.

MR. JOHNSON: Because this is the end of it.

THE ARBITRATOR: If it's necessary to call in somebody who can read Chinese to speed this up, we'll do it.

CROSS EXAMINATION

BY MR. ROBERTSON:

Q You stated on direct that your trust in a patent examiner amounts to complete reliance on that examiner's judgment. Does that include the judgment of a GS-11 examiner?

A Well, I mean, I don't know if I actually used those exact words when I --

MR. WAY: Right. You had a caveat.

THE WITNESS: -- testified before to be perfectly honest with you.

MR. WAY: I'm sorry. I --

THE ARBITRATOR: Let him testify.

THE WITNESS: But to try to finish this up, I also think I stated that examiners, as they work through the grades, have different levels of responsibility as they move up the grades. Is that what you're asking?

MR. ROBERTSON: Okay.

BY MR. ROBERTSON:

Q On what matters specifically does the office place reliance on an examiner's judgment?

A Well, I mean, first and foremost, the ultimate decision on whether or not to grant an application.

Q To grant or not grant an application. If that's true, why does even a primary examiner need to have an appeal conference before writing -- Why does an examiner need to have an appeal conference before writing an examiner's answer?

A Well, I mean, the examiner could allow an application, so that discards that premise.

Q They can grant it; yes.

A They can grant a premise. They can write rejections and the applicant acquiesces, and the case goes abandoned, so there's not allowing an application.

There's a very small percentage of applications -- and it's way less than one percent -- that actually the applicant will appeal the final decision that the examiner makes.

And before we use the resources of moving that case into the appeal process before an administrative law judge, we have that examiner explain his position to two other examiners in an appeal conference.

And the bottom line is, you know, if there's an agreement that it should go forward, it goes forward. If the other people feel that it's a fairly weak case, then they try to get the examiner to allow the case or make some other rejection.

THE ARBITRATOR: Peer review sort of thing?

THE WITNESS: Normally, it's the supervisor that's with them and another --

THE ARBITRATOR: Oh, not so peer.

THE WITNESS: Well, I'd say normally it's a

supervisor and one other person who's an expert in that technology area which could be another primary examiner.

BY MR. ROBERTSON:

Q So, why does the office also have the Second Pair of Eyes Program?

A Why does the office have the Second Pair of Eyes? We have, in some areas of technology, a review of applications where we've seen there's been some problems with respect to quality.

But it's been in selected areas from time to time, and the purpose of it is to draw the attention of an examiner who might have made an error and have a training loop so that the errors don't occur again.

Q But that's not then complete reliance on the examiner's judgment; right?

MR. WAY: Objection. As the witness stated -

-

THE ARBITRATOR: Objection overruled.

THE WITNESS: There are many instances -- And we issue 180,000 applications a year. We acted on this year almost 300,000 applications.

The vast majority of them go through neither

Second Pair of Eyes nor the appeals process. The vast majority of them.

BY MR. ROBERTSON:

Q Some of them do?

A Like I said, a certain small percentage do.

Q Do you remember -- No.

MR. ROBERTSON: That's it.

MR. WAY: All done?

MR. JOHNSON: We're done.

REDIRECT EXAMINATION

BY MR. WAY:

Q Now, Commissioner Godici, there was a question asked earlier, and I'd like to follow up on it, about anything in the record showing this grievant's involvement in the Internet posting.

I'd like for you to take a look at Tab 19. And it states there, "Hosted by Integrity Research Institute" right on the cover page; right?

A Yes.

THE ARBITRATOR: Where is that?

MR. WAY: Right there. "Hosted by Integrity Research Institute."

BY MR. WAY:

Q And also, at the top right corner, you see a Web address; is that right?

A Yes.

Q Erols.com\iri\brochure1?

A Right.

Q Do you know what IRI stands for?

A Integrity Research Institute.

Q Okay.

THE ARBITRATOR: Where do you see that?

MR. WAY: Right here.

Erols.com\iri\brochure1.

THE ARBITRATOR: Oh, I see. I see it now.

BY MR. WAY:

Q And if you can go to -- it looks like an order form later in that same tab. Do you see that?

A Yes.

Q In the bottom right, it also shows iri@erols.com; is that right?

A Yes.

Q Then now I'd like you to keep your thumb on that and flip to Tab 12.

A Okay.

Q All right. Go a few pages back to a

familiar-looking page. It looks like one, two, three, four, five pages back.

MR. JOHNSON: What does it say, 1 of 3 or 1 of 5 or 2 of 5 or what?

MR. WAY: One of two.

BY MR. WAY:

Q And it also says, "Hosted by Integrity Research Institute"; right?

A Yes, it does.

Q I would like for you to compare those two items, the item at Tab 12 and the item at Tab 19. It has got the same title, right, "First International Conference on Future Energy"?

A Yes.

Q And it has got the same date, April 29 to 30, '99?

A Yes.

Q It has got the same host, "Hosted by Integrity Research Institute"; right?

A Yes.

Q The same workshops, it appears to be?

A Yes.

THE ARBITRATOR: Yes. It's identical except

for change of location.

MR. WAY: Right.

THE ARBITRATOR: What's the question?

BY MR. WAY:

Q Now, let's go back to Tab 19 on the fourth page, the program. Who does it say the president of IRI is?

A Thomas Valone, President, Integrity Research Institute.

Q This grievant here; right?

A Yes.

Q So, would you agree with me that IRI produced both of these brochures and the president is this grievant?

MR. ROBERTSON: Objection.

MR. JOHNSON: Objection.

THE ARBITRATOR: Well, I mean --

MR. WAY: It says "IRI." It's identical.

MR. JOHNSON: You said they produced

--

THE ARBITRATOR: No. Wait just a second. He can answer any way he wants to.

MR. WAY: Sure.

THE ARBITRATOR: But it remains a fact in my mind, at least, is that someone else, probably involved in IRI, could also have been in charge as in Joe, you go over and you do the notices we're going to send out, as well as Mr. Valone himself.

MR. WAY: Sure. I mean, we have a preponderance of the evidence standard, and --

THE ARBITRATOR: Well, that's right.

MR. WAY: -- I'm talking about circumstantial evidence.

THE ARBITRATOR: And the circumstantial evidence, for benefit of the Union, is that Mr. Valone knew doggone well that this stuff was going out, whether he sent it out himself or whether somebody else within IRI did.

This is not something that he was unaware of. So, I mean, you'd have a real -- I mean, he can testify that there was a renegade member who sent this stuff out. But, you know, right now --

MR. JOHNSON: We're on the same page.

THE ARBITRATOR: What?

MR. JOHNSON: We're on the same page.

THE ARBITRATOR: What, you've got a renegade

member? Don't let me be the seed.

MR. JOHNSON: No, you're not.

MR. WAY: As you were saying, so we can just

--

THE ARBITRATOR: Okay. Go ahead.

MR. WAY: No, no. You were finishing up, so I just wanted to --

THE ARBITRATOR: No. I want you to finish up on that line of questioning because, as I say, what he thinks is -- You better be happy with what I think.

MR. WAY: Oh, I understand. But --

THE ARBITRATOR: Okay. Well, then, ask your

--

MR. WAY: -- the question from the Union was to the witness, is there anything in the record to show that this grievant was involved in the Internet posting, so I'm putting that same question.

BY MR. WAY:

Q Is there anything in the evidence that leads you to believe that this grievant put this on the posting?

MR. ROBERTSON: Asked and answered.

THE ARBITRATOR: Do you want to change your

answer from no to yes?

MR. WAY: Or let me rephrase it.

BY MR. WAY:

Q What does this evidence tell you about who posted it on the Internet?

A Well, what it -- Obviously, the organization -- what is it? -- IRI was involved in producing materials and getting them out to folks, and Mr. Valone is the president of that organization as far as I know.

So, I'm sure he's aware of and involved, at some level, in producing and distributing his materials.

Q And how well do you believe this evidence supports Charge 2, which was that he misrepresented the information promoting COFE being sponsored by DOC?

A Well, you know, I think in the same manner. The brochures that went out that advertised the conference clearly stated the involvement or the co-sponsorship or under the auspices or whatever the exact language was of the Department of Commerce, and that was the misrepresentation that we're all talking about.

Q And what role do you think this grievant had

in that misrepresentation in the brochures?

A Basically, the same role in terms of the institute, this Integrity Research Institute, which was responsible for pulling together this conference and advertising it and actually collecting money for it and so on and so forth that produced all of this information, and, as president, would be aware of it.

Q Let me ask you about -- If you could go to Tab 10, an article in Nature magazine. By the way, are you familiar with Nature magazine?

A Yes, I am.

Q How authoritative is Nature? Is this a reputable magazine?

A I believe it is a reputable magazine.

Q If you can flip to the second page -- I'm sorry, the third page. Look at the article that states "U.S. State Department Gets Cold Feet About Cold Fusion."

A Right.

Q Do you see that?

A Yes.

Q If you can take a minute to -- Have you had a chance to read this tab of the ER file before?

A Yes.

Q Do you need a chance to read it again?

Because my question is going to be, do you have any idea from this article who was the conference organizer with respect to organizing it at the Department of State prior to the Department of Commerce?

A Well, it would be --

THE ARBITRATOR: Okay. Again, they haven't raised the objection, but I'm just going to raise the objection. I mean, at most, this is the grossest of hearsay.

He reads it in a magazine, he sees it now in a magazine, may have seen it at the time. But, at any rate, he sees it now at this time that somebody has printed an article that says this stuff.

That doesn't establish it as such, you know, and that's one of my big problems with the case altogether --

MR. WAY: Not only if it quotes Mr. Valone's statements where Valone says he was chastised by the Patent Office and admits he made a mistake sending out the notice?

MR. ROBERTSON: Which notice?

MR. WAY: The notice that they're addressing, the notice about job recruitment.

MR. JOHNSON: I don't see anything.

MR. ROBERTSON: Oh, that's a different notice, isn't it?

MR. WAY: Oh, I'm not -- I'm talking about even if it admits -- It lends authority. It's quoting him. It's his own statements.

THE ARBITRATOR: Well, look, look, look, look, look. I'm going to assume that Mr. Valone is going to be called as a witness. This is great material to cross examine him from when it comes your time.

But to ask this witness, as if his testimony about what's here makes it a fact, it just doesn't do it for me if you understand what I'm saying.

MR. WAY: Well, you certainly allowed the Union to go through all this, and all I'm trying to do is have a fair chance to go through the same testimony with the witness.

MR. JOHNSON: You'll have the same chance against our witness.

THE ARBITRATOR: Just a second. Just a

second. When I hold up my hand, again, that means everybody stop talking.

I let the Union do what?

MR. WAY: Go through the same exact questions, was there anything in the record that showed that this grievant was involved with the Internet postings. This is circumstantial evidence, and I'm following up on the same line of questioning.

THE ARBITRATOR: Well, okay. Number one, he's your witness, and they get to cross examine him. And the -- I made it pretty clear -- Well, first of all, let me say, since they get to cross examine, they've got a little bit more leeway than you do in coming back on redirect with leading questions of your own witness --

MR. WAY: Oh, they weren't leading. I asked him open-ended questions.

THE ARBITRATOR: Well, it's all right for them to be leading because it speeds it all up. But my point is that the information that they elicited out of him, I think I've made it quite clear that I'm not very impressed with. You know, as I said, unless they can somehow demonstrate that Mr. Valone, you know,

lost control of the organization of which he was president and a bunch of people ran amuck and started cranking this stuff out, as far as I'm concerned, he's responsible for this.

He, at least, was the guy who came back to somebody, even if somebody else did it, and said, I'm getting the Department of Commerce auditorium.

He's the only person that could have conveyed that information at all. So, I have

--

MR. WAY: Okay. Well, if you feel that way, it gives me a comfort factor that it's getting --

THE ARBITRATOR: Yes. Feel comfortable. And I don't see how, even if they do come back with evidence about no, no, he didn't do it, it was the run-amuck secretary/treasurer who did this, he still can't -- none of his testimony can counter any of that. So, I just say let's move on with it. Do you have any more on redirect?

MR. WAY: I do have a couple, but, you know, I'm glad that you said that because then we know that we're on the right track with respect to --

THE ARBITRATOR: I wouldn't count on that,

but at least --

MR. WAY: Well, I'm trying to get circumstantial evidence to meet my burden of proof.

THE ARBITRATOR: Okay. You will -- Yes. You will in no way be harmed if you don't ask him another question about -- trying to establish as a fact that Mr. Valone did this. It's clear there was information before him that would give him reason to suspect it was Mr. Valone. And by "him" -- But that's all right.

MR. WAY: Well, I knew the deciding official not only suspected it, but he made the decision that this grievant committed the charged offenses. So, it's more than just --

THE ARBITRATOR: Well, okay. All right. But the -- And I think that's fine. But you're trying to establish -- He said he didn't know for a fact that he did it.

There is no evidence that it was actually Mr. Valone who did it, and that's true. There is none. There is all this other stuff, but there's still no direct --

MR. WAY: Like I said, we were eliciting

circumstantial evidence.

THE ARBITRATOR: Well, let me just -- Enough is enough on that subject because --

MR. WAY: I didn't say I was going --

THE ARBITRATOR: -- you really don't need to do this, and I am -- As I say, it is now approximately twenty minutes to 7:00 p.m., and I want to move on, and I'm sure Mr. Godici wants to.

MR. WAY: I understand. And I didn't say I had any more questions on that topic.

THE ARBITRATOR: Okay. Move on to your next question.

BY MR. WAY:

Q I'd like to go to Exhibit 30, and I expect this is going to be my last question.

THE ARBITRATOR: Quickly, what page?

MR. WAY: I'm trying to find it. And following up, just to give you a marker, following up on whether PTOS was --

THE ARBITRATOR: What exhibit?

MR. WAY: Appendix XIV of Exhibit 30.

BY MR. WAY:

Q Commissioner Godici, what is that document at

Appendix XIV?

A It appears to be a memo from Mr. Valone to Q. Todd Dickinson.

Q Is there any reference to the PTOS Society referenced in that document?

A Yes.

Q Can you read the reference into the record?

A It says, "To keep you informed, the Patent and Trademark Office Society has been working with me as part of the education committee to present an unofficial open-to-the-public educational event called the First Conference on Future Energy."

Q Who signed that document?

A Tom Valone.

Q And if you can flip to the next page

--

A Yes.

Q -- and if you --

THE ARBITRATOR: Just a second. When was the -- I want to get the dates correct -- or in my mind.

MR. WAY: The date of going to the Department of Commerce?

THE ARBITRATOR: Yes. Going to the

Department of Commerce.

MR. WAY: It looks like March 9.

THE ARBITRATOR: March 9?

MR. WAY: Right.

THE ARBITRATOR: Okay.

MR. WAY: Should I proceed? This could be my last question.

THE ARBITRATOR: Yes, you sure can.

BY MR. WAY:

Q If you could look right under the monuments there, who does it say this conference was sponsored by?

A By the Patent and Trademark Office Society.

MR. WAY: Thank you. That's all I have.

THE ARBITRATOR: Well, we're back to 19 --

MR. WAY: No. This is Tab 30, Appendix XIV.

THE ARBITRATOR: But this is the misrepresentation that had the U.S. Department of Commerce -- Am I looking at -- Okay. I'm a little bit confused. How is this different from what we've been looking at?

MR. WAY: It talks about the Patent and Trademark Office Society.

THE ARBITRATOR: But this is the Holiday Inn relocation.

MR. WAY: No, no. It still says U.S. Department of Commerce.

THE ARBITRATOR: I'm sorry. I'm just a little bit -- What exhibit number are the original Internet --

MR. WAY: Tab 12 had --

THE ARBITRATOR: Okay. And then we moved from 12 earlier to what? From 12 to --

MR. WAY: And then 19 had --

THE ARBITRATOR: Okay, 19. And then what is this one?

MR. WAY: This is Tab 30, Appendix XIV.

THE ARBITRATOR: Okay. How is that different than 19?

MR. WAY: These are all on the same dates. So, it appears that first it was sponsored by DOC, in cooperation with DOC, under the auspices of DOC, and then it goes to PTOS, and then ultimately it appears that the location was changed to Holiday Inn.

THE ARBITRATOR: Okay. So, we jumped -- Number-wise, we jumped a bit back and forth?

MR. WAY: Right. Because sponsors changed, locations changed.

THE ARBITRATOR: From 13 to -- what was it?

MR. WAY: Twelve, 19, and 30.

THE ARBITRATOR: But chronologically, it's 12, 30, 19?

MR. WAY: It looks like -- Yes, that sounds about right. Yes, sir.

THE ARBITRATOR: Okay. Therein lies -- There's nothing -- You guys are really something if you --

MR. WAY: You know what, though? It appears that Tab 30 was submitted the last just by the --

THE ARBITRATOR: I don't -- Okay. It's Exhibit 12. Then chronologically, it's --

MR. WAY: But 30 has a lot of documents. Exhibit 30, Appendix XIV seems to be the next item. And then it goes to Exhibit 19.

THE ARBITRATOR: In the chronological order?

MR. WAY: Yes. It looks like it off the top of my head at this hour. And that's all I have of the Commissioner.

THE ARBITRATOR: Okay.

THE WITNESS: Am I done?

THE ARBITRATOR: No. You've got me.

THE WITNESS: All right.

THE ARBITRATOR: But I'm going to be really quick.

I just want you to know the problem facing me in this case, and actually get your opinion about what I should do about it, and that is this.

Kind of key to what went on with regards to at least what I'm going to call the misrepresentation, if not conflict of interest, in the dealing of Mr. Valone with the Department of Commerce, the Agency's case is all based on hearsay evidence.

I mean, you never talked to any of these people. And more troubling is that, because these people have disappeared, the Union has never had an opportunity to talk with them, to ask them, you know, exactly what did Ms. House -- Ms. House, what did Mr. Valone say to you? Did he tell you that? Did he explain this?

Likewise, we can't even produce the PTOS president at the time. He won't have anything to do with this. He absolutely refuses, and nobody has come

to me to seek a subpoena so, you know, we could send them off to District Court and see if they can get a subpoena to compel his testimony.

So, nobody from the Union has been able to say to this guy, okay, do you remember such and such a conversation that you had with Mr. Valone? What did Mr. Valone say to that? The education committee, he was on some education committee of the PTOS, Mr. Valone was, and we don't know what happened there.

But my trouble is that the people who had information upon which the Agency relied can't be -- nobody can ask them a question. And we've just got these e-mails back and forth about this, that, and the other, but it's not any e-mails the Union participated in, posing questions or anything like that.

So, my job is to provide all parties with a full and fair hearing. And generally speaking, that means an opportunity to develop their case and to cross examine the witnesses and the information the other side relies on, or at least question the information.

I don't know what to do. What do you think I ought to do?

THE WITNESS: Well, I appreciate your -- You've got a difficult job in terms of trying to -- I mean, we're all trying to resurrect facts and events that occurred five years ago or whatever it is now, and that's difficult. It's difficult for me. I know it's difficult for you.

But I think that we have to rely on the evidence in front of us to make a decision, and that sometimes can be difficult.

THE ARBITRATOR: Well, you probably don't know, but I'll tell you, in a disciplinary case, with regards to the evidence, the burden of producing persuasive evidence is on the Agency. In non-disciplinary cases, it's on the Union.

But here it's on the Agency, so that -- And I might say, I mean, I think that some of the things that I've mentioned about what Mr. Valone has done here I think are -- well, let me put it this way, I'm troubled by them. I'm troubled by the representations made here or that got made here. We'll put it that way. Whoever made them, it got made.

THE WITNESS: Right.

THE ARBITRATOR: But I don't know --

THE WITNESS: Can I just make a very

--

THE ARBITRATOR: Sure.

THE WITNESS: -- short comment?

THE ARBITRATOR: That's exactly what I'm
inviting.

THE ARBITRATOR: Okay. Well, the way I
looked at this case, and hopefully the way that you may
have looked at this case, is that this is more than
just an argument over trying to reserve some space and
whether or not the proper procedures were followed or
who said what and so on and so forth.

I mean, it's pretty clear that something
happened down at the Department of Commerce and Mr.
Valone attempted to set up a conference down there.

The thing that I think is most troubling with
respect to this is that there was a series of things,
some of which Mr. Valone was counseled for, leading up
to this event where actually Mr. Valone was trying to
manipulate, so to speak, the system for his personal
interests.

And when, you know, I'm responsible for an
agency that is supposed to be completely impartial and

administer the laws, when there are actions by persons within the Agency that cast doubt on our ability to be impartial, that's the troubling part of this.

And those are the actions that --

THE ARBITRATOR: So, this is like the job announcement?

THE WITNESS: Exactly. I mean, there are pieces of this that just kept piling up and piling up and piling up, and my ability to rely on Mr. Valone to do the job impartially is destroyed, and I think those actions clearly cast some dispersion on the impartiality of the Agency.

So, that was the basis of my decision. And you can get down into the nuts and bolts of what happened when he walked over to the Commerce Department and who said what, but I looked at it as a bigger picture.

THE ARBITRATOR: Oh, yes, yes, yes. And I can appreciate what you're saying, and I will certainly -- Because I have respected you from the first time I met you, and I respect particularly your concerns about running your agency.

I can even appreciate your concern extending

-- well, being as broad as it is with regards to Mr. Valone.

I guess the problem I have is, if you've got all of these patent examiners and they're so very specialized -- And at least in this instance, his area of specialization, as I understand it, has absolutely nothing to do with any of these other advocations, and it's these other advocations that have gotten him into trouble because he has crossed the line in their pursuit.

But they really don't have anything to do, though, with his ability to judge patents that come in in his whatever you call it, his specialty within his art unit.

So, I'm saying, well, my goodness me, you know, while I agree that all officers of the United States government should be above reproach and I should have total confidence in their exercise of their judgment, I know, as a manager myself in the federal government, that certainly I never had total confidence in all the judgment of the employees who worked under me.

Some of them, with regards to some subject

matters, I wouldn't have any confidence in their judgment. But those subject matters were not ones that were at all within their job description as a necessary ingredient.

Although, you know, I would still be disturbed by conduct comparable to Mr. Valone's of someone misrepresenting the Department of Justice.

But I would still -- If they misrepresented their -- In what capacity from the Department of Justice they were showing up and doing something, before I canned them, I'd certainly have to be absolutely certain what they said to who, and I would know that I would have to produce, either before the Merit System Protection Board or somebody, the witness I was relying on so there would be an opportunity before the administrative law judge or whatever to cross examine.

THE WITNESS: Well, unfortunately, five years have gone by in this case --

THE ARBITRATOR: Yes, I know it.

THE WITNESS: -- and neither of us had any control over that.

THE ARBITRATOR: And I don't know who's to

blame for that. I really don't. I don't know.

But, anyway, I wanted you to know what my concerns are. I wanted to get your reaction, and we'll just have to see.

But anything you want to tell me further, have at it.

THE WITNESS: Well, I think you've done a great job, and I'm not trying to be pejorative, but this is a tough decision, and I think I've stated my rationale and my reasons why I don't feel that Mr. Valone can be trusted to do the job.

THE ARBITRATOR: Well, next I get to hear their case, and I'll be telling them some things. So, anyway, with that, I pronounce this adjourned unless somebody has something else to say. And we meet back, what, on Monday?

MR. WAY: Monday at ten here.

THE ARBITRATOR: Ten o'clock. All right. Ten o'clock here in this room.

* * *

(Whereupon, at approximately 6:56 o'clock p.m., the hearing in the above-entitled matter was adjourned for the day.)

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CERTIFICATE OF COURT REPORTER

I, PATRICIA D. STAFFA, the Verbatim Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of November, 2004.

PATRICIA D. STAFFA
Court Reporter