NATIONAL GRIEVANCE
NG-06/20/18

Date: June 20, 2018

To: Kimberly McLeod
Executive Director
Department of Veterans Affairs
Office of Labor-Management Relations
810 Vermont Avenue, NW
Washington, DC 20420
kimberly.mcleod@va.gov
Sent via electronic mail only

From: **Ibidun Roberts**, Supervisory Attorney, National Veterans Affairs Council (#53) ("NVAC"), American Federation of Government Employees, AFL-CIO ("AFGE")

RE: **National Grievance against the Department of Veterans Affairs for illegal repudiation of Article 60.**

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) ("MCBA"), American Federation of Government Employees/National Veterans Affairs Council ("the Union") is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Agency for its unlawful repudiation of Article 60. To date, the VA has failed to remedy this violation, and as such, continues to violate the MCBA, federal law, and Agency policy.

Specifically, the VA violated the Administrative Procedures Act, the Federal Sector Labor Management Relations Statute (FSLMRS), Article 60 of the MCBA, and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

STATEMENT OF THE CASE

Statutory History

In the establishment of the Veterans Health Administration, in 1946, medical personnel did not necessarily enjoy the full panoply of labor rights because Congress declared the Secretary of the VA shall prescribe regulations for working conditions notwithstanding any law, Executive order, or regulation. However, in 1978, Congress enacted the Civil Service Reform Act (CSRA). Although the CSRA applied to the Department, it could be overridden by other provisions of law

for the Department's medical personnel. Notably, the Court of Appeals for the D.C. Circuit, in *CNA v. FLRA*, 851 F.2d 1486 (1988), found that 38 U.S.C. §4101 gave the Secretary the exclusive right to prescribe working conditions. It also found that although the Secretary need not negotiate over those working conditions, it did not preclude the Department from collectively bargaining with the Union. However, the Court openly questioned whether Title 38 employees had any collective bargaining rights under the CSRA.

In response to the Court's question, Congress enacted the Department of Veterans Affairs Health-Care Personnel Act of 1991. The Act made clear that Title 38 employees did have collective bargaining rights, with some exceptions. Specifically:

> (a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations).
>
> (b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.
>
> (c) For purposes of this section, the term "professional conduct or competence" means any of the following:
>
> (1) Direct patient care.
>
> (2) Clinical competence.
>
> (d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency. Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

Prior to 1991, and continuing thereafter, the parties did engage in collective bargaining concerning Title 38 employees. Relevant here, spanning over 20 years, the Department has exercised the authority granted under section 7422(a) to enter into a collective bargaining agreement with the Union and agree to contract provisions concerning the rights of Title 38 employees to Union representation during Boards or hearings. Specifically, the parties have agreed that:

A. The Union will be allowed to represent any unit employee at any hearing before a Title 38 Disciplinary Board or whenever a probationary employee appears before a Professional Standards Board in a termination proceeding. A representative in a Professional Standards Board hearing may do those things an employee is entitled to do under regulations.

B. If the employee does not choose to have Union representation, the Union may be permitted to have an observer present at hearings described in Paragraph A. The Union observer may attend the Professional Standards Board hearing only during the employee's presentation. Consistent with applicable laws and regulations, Union representatives and observers must protect the confidentiality of any information to which they have access in connection with a Board Hearing.

Article 60, Master Agreement.

Additionally, the Department has issued and relied upon the 7422 Secretary's Decision Document ("Decision Document") for limitations on the Secretary's (or designee's) Authority under 7422. The Decision Document has also been considered by reviewing courts as Department policy concerning the Secretary's (or designee's) limitations. Importantly, the Decision Document states that peripheral procedures are not subject to the §7422 exemptions and that the Agency's failure to follow its own regulations and policy is not excluded by §7422.

Further, 38 U.S.C. §7462(b) provides for the right to a representative in a Disciplinary Appeals Board (DAB) (". . .entitled to be represented by an attorney or other representative at all stages of the case."). While permitted to prescribe regulations, the Secretary cannot override statutory rights specifically referencing title 38 employees.

Background

On May 21, 2018, Tamika D. Hinton, HR Specialist, Labor Relations, sent a memorandum, officially notifying the Union of the Agency's intention to repudiate Article 60 of the parties' Master Agreement. The memorandum asserts that Article 60 is "is nonnegotiable under the Statute and hence is null, void and unenforceable." It further states that "contractual requirements in Article 60 interfere with 38 U.S.C. 7422 (b) (c) and (d)" and "Upon receipt of this notice by AFGE, the Department will no longer comply with Article 60 of the Master Agreement." Ms. Hinton lists as references for the notice citations to "VA VAMC Jackson, MS, 49 FLRA No. 23 and 49 FLRA No. 66" and several VA Title 38 decisions.

On the same day, Ms. Hinton issued a "Message to the Field" notifying Labor Relations Specialists, nation-wide, that the Notice of Repudiation was issued to AFGE. This message also specified that the notice was only applicable to AFGE, although other VA Unions have similar contract language, and that they were not to bargain over the matter.

On May 23, 2018, Oscar Williams, Chair of the NVAC Mid-Term Bargaining Committee, issued a demand to bargain the procedures and appropriate arrangements of the Department's

repudiation. On May 24, 2018, Ms. Hinton responded to the Union's demand to bargain asserting that the matter was non-negotiable pursuant to her May 21st letter.

Violation

The provision of this notice is legally objectionable on its face. In as much as it purports to be a declaration of non-negotiability, it is improper. The law requires the Secretary to issue a determination of exemption under 7422 to declare the matter non-negotiable. 38 U.S.C. §7422(d) ("An issue of whether a matter or question concerns or arises out of [the exemptions] under this title shall be decided by the Secretary.") In as much as it purports to be the determination of exemption under 7422, it is improper. The VA's own policy, Decision Document, consistent with the requirement of 38 U.S.C. §7422(d), requires that the Secretary, or his designee (currently the Under Secretary for Health), issue the determination of a 7422 exemption. Also, the Administrative Procedures Act requires that when the VA issues such a determination that it act reasonably. This repudiation notice was sent by Ms. Hinton, an employee in the Office of Labor Management Relations, without signature, and fails to reflect any kind of reasoned decision making. As a result, the notice cannot be a declaration of non-negotiability as concerning §7422, nor can it, itself, constitute the Secretary's determination of exemption.

The notice is also defective in its substance. Because the right to representation in a DAB is prescribed by statute, the designation of a union representative, as opposed to any other representative, does not affect 7422 exempted matters.

Additionally, because nothing in 7422(b) precludes the Department from bargaining peripheral procedures concerning conditions of employment for Title 38 employees, the language of Article 60 does not fall under the 7422 exemptions and is valid and binding.

The Department issued the notice to illegally retaliate against the Union for its position in term bargaining. Further, it is well-settled that an Agency is required to fulfill its bargaining obligations when it has determined, albeit incorrectly, that a provision in a collective bargaining agreement is illegal. As a result, the Department's response to the Union's demand to bargain is a further violation of the FSLMRS.

By issuance of the notice to repudiate Article 60, the Department violated, and continues to violate, the following:

- 38 U.S.C. §7422(a): guaranteeing collective bargaining rights to Title 38 employees;
- 38 U.S.C. §7422(d): requiring 7422 Determinations to be issued by the Secretary or designee;
- 38 U.S.C. §7462(b)(2): entitling employees to a representative at all stages of a DAB proceeding;
- Administrative Procedures Act: prohibiting arbitrary and capricious agency action
- Article 60 of the MCBA: requiring union representation during Title 38 Disciplinary Boards and Professional Standards Boards;
- 5 U.S.C. §§7116(a)(1), (2), (5), and (8): prohibiting the Agency from creating a hostile environment in retaliation for the exercise of protected rights; prohibiting the undue

influencing of a labor organization; prohibiting the Agency from discriminating based on protected activity; prohibiting bad-faith bargaining; prohibiting unlawful repudiation of a collective bargaining agreement; and,

- Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

Remedy Requested

The Union asks that, to remedy the above situation, the VA agree to the following:

- To return to the *status quo ante*;
- To cease and desist further violations of the Agreement and law;
- To post a notice in all VA locations where bargaining unit employees are present that the VA will refrain from further violations of the Master Agreement and law;
- To rerun any Board or Hearing where the Union was not present consistent with Art. 60;
- To make whole any employee affected by the Agency's violation;
- To pay reasonable attorney's fees and litigation costs under 5 U.S.C. §552a(g); and,
- To agree to any and all other remedies appropriate in this matter.

Time Frame and Contact

This is a National Grievance, and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please contact the undersigned at AFGE Office of the General Counsel.

Ibidun Roberts
Supervisory Attorney, National VA Council
AFGE, AFL-CIO
80 F Street, NW
Washington, DC 20001
Tel: 202-639-6424
Fax: 202-379-2928
ibidun.roberts@afge.org

cc: Alma L. Lee, President, AFGE/NVAC
Mary-Jean Burke, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC