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| **American Federation of Government Employees, National Veterans Affairs Council**<br><br>**Union**<br><br>**v.**<br><br>**U. S. Department of Veterans Affairs, Veterans Benefits Administration**<br><br>**Agency** | **FMCS CASE NO. 17-0926-55166** |

**Thomas Dargon, Jr., Esquire**

**Union Representative**

**Christina J. Knott, Esquire**

**Darryl A. Joe, Esquire**

**Agency Representatives**

**BEFORE; GARVIN LEE OLIVER**

**Arbitrator**

# Opinion and Award

This arbitration proceeds from a grievance filed by the American Federation of Government Employees, National Veterans Affairs Council (Union) against the U. S. Department of Veterans Affairs, Veterans Benefits Administration (Agency). The grievance alleges that the Agency violated paragraphs 3 and 4 of an October 2016 Memorandum of Understanding, Article 2, 3, and 47 of the Master Agreement, 5 U.

S. C. Sections 7116 (a)(1) and (5), and other relevant law. The alleged violations relate to the Agency's expanded use of National Transaction Reports to monitor employees and support disciplinary actions. The Agency denied the alleged violations.

A hearing was held in Washington, D. C. on May 30, 2018. The parties were represented by counsel, afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and present documentary and oral argument. The parties submitted briefs on July 20, 2018.

Based on the entire record, including my observation of the witnesses and their demeanor and consideration of the oral and documentary arguments presented, I make the following findings, conclusions, and award.

## Issues Presented[1]

Did the Agency modify or change its application of the National Transaction Report in a manner that triggered a duty to bargain pursuant to its contractual and statutory obligations?

Did the Agency comply with federal law and contract by using the National Transaction Report to monitor employee activity and support disciplinary action against employees? If not, what shall the remedy be?

## Applicable Provisions

**1. The Federal Service Labor-Management Relations Statute ("Statute"), 5 U.S.C. 7101 *et seq*, particularly Sections 7106(b)(2)&(3), 7114(b)(1), 7116(a)(5)&(8) (the Statute).**

**2. 2011 Master Agreement: ARTICLE 66 - TECHNOLOGY FOR ADMINISTERING, TRACKING, AND MEASURING VBA WORK**

[1] The parties' stipulated issue is "Did the Agency comply with federal law and contract by using the National Transaction Report to monitor employee activity? If not, what shall the remedy be?" (Arb. Ex.1). Both parties addressed the question of whether the Agency violated law or contract by using the National Transaction Report to monitor employee activity and support disciplinary action . Another issue addressed by the parties involved whether there was any change in the application of the National Transaction Report hat triggered a duty to bargain.. I have enlarged the issues presented accordingly . 201`1 Master Agreement, Article 44, Section 2F.

Section 1 – Scope

A. The provisions of this article shall apply to the application of the technology that may be used to administer, track, and/or measure the work of VBA bargaining unit employees.

B. The application of such technology is governed by established policy of the Department as contained in the Department's notification to the affected employees and the Union. It is also governed by this Agreement and by applicable requirements under law and government-wide regulations.

C. If the Department decides to modify or change its application of technology in a manner that triggers a duty to bargain, it will meet its contractual and statutory obligations.

D. Pursuant to 5 USC 7106(b)(1), technology is not a mandatory subject of bargaining. Under Executive Order 13522, employees and their Union representatives shall have predecisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 USC 7106(b)(1).

Section 2 - Application of the Technology

To the extent consistent with Section 1, such technology shall be applied in a manner that ensures validity, reliability, and attainability by most similarly situated employees.

A. General - The application of the technology will be fair, equitable, consistent, and take into account matters beyond the control of the employee.

B. Where the selection of certain work of an employee is to be random, the Department will provide the employee and the Union with the methodology that was used to assure randomness.

Section 3 - Contesting Results

At any time an employee disagrees with a record of his/her work that was obtained through or by technology, the employee may seek corrective action in accordance with Article 43 - Grievance Procedure.

Section 4 - Annual System Review

A. The application of the technology will be evaluated annually by the parties to identify systemic problems and positive outcomes associated with it (in relation to its stated purpose, unintended effects on work product, and impact on employees' conditions of employment).

B. Recommendations for improvement of the technology and/or its application may be made by the Union at any time. The recommendations should address employees' positive and/or negative experiences, and will be addressed by the Department whether they are adopted or not.

C. The application of technology is an appropriate subject for bargaining at the local union level, on aspects not in conflict with this article.

## 3. Master Agreement: Article 47 – Mid-Term Bargaining

## 4. October 24, 2016 Memorandum of Understanding National Transaction Reports .

1. This agreement encompasses the National Transaction Reports, which are composed of the Throughput Transparency Cost (TTC), Employee Throughput Report (ETR), and Transaction Summary Report found on the Tableau Server along with any other report on that server.

2. As of the signing date of this MOU, the Agency agrees the National Transaction Reports are currently used as analytical tools and are not currently used to evaluate employee performance. Employee performance is currently evaluated using data from the ASPEN system.

3. If, in the future, the Agency intends to use the National Transaction Reports in a manner that triggers a duty to notify and bargain with the Union or develops a replacement for the ASPEN system, the Agency agrees to fulfill its bargaining obligations to the Union.

4. If the Union is made aware of issues with the National Transaction Reports that may adversely affect employees, both parties agree to informally discuss the issues and work to mutually resolve the issues. Should informal discussions not resolve the issues, the parties will proceed with the bargaining process, if necessary.

5. In accordance with Article 47 of the Master Agreement, local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated national policy and agreements, including this MOU.

6. Management shall provide a copy of this MOU to the President of each AFGE Local within 10 days of the signing date of this MOU.

## FINDINGS OF FACT

The Parties Agreed to the Following six Stipulated Facts:

1. The "National Transaction Report" refers to the Throughput Transparency Cost Report, Employee Throughput Report, Transaction Summary Report, and any other report found on the Tableau Server maintained by the Veterans Benefits Administration (VBA).

2. The National Transaction Report is used by the Veterans Benefits Administration for several purposes. One purpose is to review an employee's daily transactional activity. In some instances, this may lead managers to identify instances of alleged conduct issues, including, but not limited to, time and attendance issues.

3. In the National Transaction Report, an employee's daily transactional activity is based only on transactions performed by that employee in the Veterans Benefits Management System (VBMS).

4. The National Transaction Report has been relied upon by the Veterans Benefits Administration to support disciplinary action against employees.

5. From December 2015 through April 2016, the Parties attempted to negotiate a Memorandum of Understanding concerning the Agency's use of the National Transaction Report. Those negotiations were not successful. The Union filed a National Grievance on May 13, 2016.

6. To resolve a prior National Grievance concerning the May 2016 implementation of the National Transaction Report, the Parties' entered into an Memorandum Of Understanding (MOU) on October 24, 2016.

On December 10, 2015, the Agency briefed the Union about the National Transaction Report (NTR), including a slide presentation on how this data could be used. The slide presentations stated that the new metrics "provides a new and more detailed approach to viewing and measuring the claims process." A slide also stated that "the ATP allows for comparisons at work and stations" and another that "The TTC/ETR Report is intended to be used as an analytic tool and is not authorized for use in employee performance monitoring. [It] focuses on activities from the Employee Perspective and demonstrates how many transactions occurred for Employees." and states, "[The] Employee Throughput Report (ETR) lets Managers look at daily throughput by employee" and "Managers can drill into positions to see employees and the transactions and throughput they performed on a given day." Joint Exhibit 10, pages 7-12.

David Bump, a national representative for the National VA Council, testified that he understood the NTR was looking at blocks of time and whether employees were having transactions during the blocks of time. He stated that the Union's concern was how NTR would affect the jobs of employees who were monitored. The Union was told that it was going to be used to look at station performance and that while NTR had the ability to "drill down [to employees] " the Agency was not going to be using it for that …at that time." (Tr. 63-68,91). Michael Stephens, Director, VA Regional Office, Indianapolis, testified that management did not inform the Union during the briefings, or in the later MOU discussions, that management would not use the NTR to support conduct actions. (Tr. 166,172). He

testified that "[W]e did indicate in this MOU that if we were to move forward and start using National Transaction Report or Employee Transaction Report , as a subset for that, for employee monitoring purposes, we would meet our bargaining obligation. In fact, we did start using it for that as some point …and we have an MOU on that that was bargained." Tr.175.

Subsequent to the October 24, 2016 MOU, the Union received reports from field employees that the Agency was using the NTR to monitor employee activity, to initiate investigations, and to justify disciplinary action. The Union did not receive formal notice from management of this action. Tr.39-40, 72, 214, 218-219. No such notice was provided in response to the Union's request for information. Joint Exh. 7.

John Mickelson, Union second vice president for VBA operations, in an information meeting with the Pension Center manager, Andrew Lindstrom, was told that management had discovered misconduct in using the analytical data from the National Transaction Report and was going to initiate investigations. Mickelson replied that the Union would submit a demand to bargain. Lindstrom said that management was proceeding and did not have to bargain conduct or discipline.

In accordance with Item 4 of the NTR MOU, the Union sought to resolve the issue informally, and the subject was placed on the Mid-Term Bargaining Committee Meeting Agenda for July 27, 2017 in Providence, RI. Union Exh. 4. The Union expressed concerns about not being informed that management would use the NTR in this way, asked what kind of procedures and appropriate arrangements that use would be subject to, and the opportunity to put forth proposals. According to David Bump, a national representative for the National VA Council, there was a short, heated discussion about the use of the report. The Agency did not have a "willingness to discuss" the procedures and appropriate arrangements related to the expanded use of the NTR. Tr. 76:13-21. Management would not bargain on the use of the NTR for conduct purposes, for conduct monitoring, and would not discuss any bargaining issues related to the report being used to discipline. Tr. 77. It was management's position that "we're not going to discuss the conduct piece of it because that isn't negotiable." Tr. 174.

David Bump testified that, because of management's refusal to bargain, the Union missed out on presenting proposals on such things as training on the new technology, a computer alert for an employee's lapse in transactions, management consideration of lapses for the time it takes to review extensive medical evidence, and rearranging work to help employees avoid lapses in transactions. Tr. 78-88).

Kevin Nelson, co-chair of the management mid-term bargaining committee, testified that "This is the Agency's position that conduct is not an issue that we have to discuss anyway and negotiate." Tr. 211. He testified that management would have been "willing to have any appropriate arrangement discussions …such as providing training [or] …an assessment acclimation period….Tr. 200-201.

The Union filed the instant grievance on August 7, 2017. (Joint Exh. 3). The Agency denied the grievance on September 21, 2017. (Joint Exh. 4). The Union invoked arbitration on November 22, 2017. (Joint Exh. 5).

In response to the Union's request for information, Joint Ex. 7, the Agency produced a spreadsheet of all AFGE bargaining unit employees against whom disciplinary action has been initiated or imposed based on data gathered from the NTR. Joint Ex. 9. The Union points out that the Agency reported on Joint Ex. 9 that the St. Paul RO (station 335) had 6 instances of proposed disciplinary action while John Mickelson requested the same information from his facility and reported 9 instances of proposed disciplinary action. Union Ex. 2.

It is undisputed that disciplinary action has been proposed against bargaining unit employees in at least 13 Regional Offices across the country as of May 2018. There have been at least 23 proposed actions containing an admonishment, reprimand, or suspension of 14 days or less. There have been at least 24 proposed actions containing a suspension of more than 14 days, and of those 24 reported proposals, 22 were proposed removals. The underlying charges vary, but include the following: lack of candor, willful idleness, loafing, inaccurate reporting, inaccurate data manipulation, taking inappropriate work credit, conduct unbecoming a federal employee.

On February 14, 2018 the parties agreed to hold local grievances relating to the instant grievance in abeyance. (Joint Ex. 6).

## DISCUSSION AND CONCLUSIONS

Positions of the Parties

The Union maintains that while it could not prohibit the Agency from disciplining employees or using certain data to support discipline, it had a statutory right to bargain the procedures and appropriate arrangements that would be followed in the exercise of the right to discipline. The Union claims that the Agency violated Section 7106(a) and (b) of the Statute when the Agency expanded its use of the National Transaction Reports (NTR) to monitor employee activity and initiate disciplinary action, a more than a *de minimus* change in conditions of employment, without affording the Union notice and an opportunity to negotiate. The Union asserts that the Agency did not have a "willingness to discuss" the procedures and arrangements related to the expanded use at the mid-term bargaining sessions. The Union claims that by its actions the Agency also violated Article 47, Section 2 of the Master Agreement and the NTR Memorandum of Understanding which was specifically tailored to the NTR and required the Agency to bargain when making the change. .

The Agency defends on the basis that it did not violate federal law, the Master Agreement, or sections 3 and 4 of the October 2016 MOU by monitoring employees and using data derived from the NTR to support disciplining employees. The Agency claims that the use of such technology was covered by Article 66 of the Master Agreement which expressly addresses "the application of technology that may be used to administer, track, and/or measure the work of VBA bargaining unit employees." The Agency also urges, inter alia, that there was no change in conditions of employment as NTR is just an analytical tool and did not change how work is performed. Further, that technology is a permissive subject of bargaining and as such the Agency did not need to negotiate its use of NTR.

### Discussion and Conclusions

**Whether additional bargaining was a permissive subject of bargaining**

Technology, methods, and means of performing work is a permissive subject for bargaining. 5 U.S.C. § 7106(b)(1). Parties may not insist to impasse on a permissive topic of bargaining. *AFGE, Local 3937*, 64 FLRA 17 (2009). The

Agency claims that while the parties did negotiate over the topic of technology in the collective bargaining agreement, additional bargaining over the same topic was not required.

The Authority has held that that where parties have elected to bargain over "permissive" subjects of bargaining and have reached agreement thereon, stability in Federal labor-management relations can be achieved by requiring both parties to adhere to those terms during the life of the parties' agreement while preserving each party's right to terminate practices embodied in the agreement upon its termination." FAA and PASS, 14 FLRA 644 (1984). In this case, Article 66, Section 1B of the 2011 Master Agreement provided that "If the Department decides to modify or change its application of technology in a manner that triggers a duty to bargain, it will meet its contractual and statutory obligations." Paragraph 3 of the 2018 MOU says practically the same thing. Therefore, the Agency was required to adhere to these agreements and, as concluded below, engage in bargaining over the change.

**Whether the use of such technology was covered by Article 66 of the Master Agreement**

Under the "covered by" doctrine, once the parties have agreed on a bargained issue, management is no longer obligated to negotiate regarding that topic. *United States Department of HHS, Social Security Administration, Baltimore, MD*, 47 FLRA 1004, 1018-19 (1993). The Federal Labor Relations Authority ("the Authority') uses a two-prong test to determine whether the "covered by" theory defends management against allegations concerning failure to comply with bargaining obligations. Id. Under the first prong, the Authority determines whether the collective bargaining agreement expressly sets forth the subject matter. *Id*. Consideration of the second prong requires a determination whether the subject matter (if not expressly found in the collective bargaining agreement) is inseparably bound up with, and plainly an aspect of, a subject covered by the collective bargaining agreement. *Id*.

Article 66 addresses the application of the technology that may be used to administer, track, and/or measure the work of VBA bargaining unit employees. The NTR is a technology tool used to monitor (track) the number of transactions an employee makes in blocks of time during the work day. Article 66, Section 1.C. provides, "If the Department decides to modify or change its application of

technology in a manner that riggers a duty to bargain, it will meet its contractual and statutory obligations." An issue in this case involves whether the Agency "modified or changed" its application of NTR, a determination of which is not covered by Article 66, and Article 66, Section 1.C provides for bargaining in case of a modification or change. Nor is the issue of the use of NTR to support discipline expressly found in Article 66 or inseparably bound up with and plainly an aspect of the use of Article 66 technology by VBA managers. It is noted that Article 66, Section 3 does not address discipline but does provide that "At any time an employee disagrees with a record of his/her work that was obtained by technology, the employee may seek corrective action in accordance with Article 43, Grievance Procedure" and Article 66, Section B. provides that "Recommendations for improvement of the technology and/or its application may be made by the Union at any time."

Accordingly, it is concluded that the issues of whether the Agency modified or changed its use of ATR and whether the Agency complied with federal law, contract, and the MOU by using the National Transaction Report to monitor employee activity and support the disciplining of employees are not covered by the Master Agreement.

Based on the testimony of David Bump, a national representative for the National VA Council and Michael Stephens, Director, VA Regional Office, Indianapolis, I conclude that the Agency's decision to use the NTR to monitor employees --"drill into positions to see employees and the transactions they performed on a given day" and initiate investigations for questionable lapses in transactions and use it to support disciplinary action constituted a change in its application of the National Transaction Report in a manner that triggered a duty to notify the union and bargain pursuant to Article 66, Section 1.C. and its other contractual and statutory obligations.

**Whether the change from using the NTR to look at station performance to using it to monitor employees and initiate employee investigations and support disciplinary actions constituted a change in conditions of employment**

*C*ondition of employment under section 7103(a)(14) is defined in part as *"*personnel policies, practices, and matters whether established by rule, regulation, or otherwise affecting working conditions…." See *United States Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas (Agency)*

*and American Federation of Government Employees, National Border Patrol Council, Local 1929 (Union),70 FLRA No. 102 (2018)).* The change instituted a surveillance system whereby management could "drill into positions" to see employees and the transactions they performed on a given day and during time periods of the day. Even if employees are fully successful in their performance standard, they are subject to investigation if NTR showed they were not logging transactions as expected during the workday. Unless other systems explained the lapses (such as the employee being on leave), employees were required to appear at fact finding meetings to explain lapses and other concerns with their transaction reports, and how they managed their work day (Union Exh. 1). If management determined there is no satisfactory explanation for the lapses, NTR is used to support disciplinary actions (Union Exh. 2).

It is concluded that t he change from using the NTR to look at station performance to using it to monitor employees and initiate employee investigations and support disciplinary actions constituted a change in conditions of employment

The change in application of the technology was a more than de minimus change and triggered an obligation to notify the Union of the change and bargain on procedures which management would use and appropriate arrangements for employees adversely affected. Section 7106(b)(1) and (2) of the Statute. By failing to do so the Agency violated Section 7116(a)(1) and (5) of the Statute.

**Alleged Failure to Comply with the October 2016 MOU**

Paragraph 2 of the MOU states that the Department used NTRs as analytical tools and the NTRs were not currently used to evaluate employee performance. Paragraph 3 of the MOU provides that the Department will fulfill its bargaining obligations if it intends to use the NTRs in a manner that triggers a duty to bargain. . Paragraph 4 requires the parties to informally discuss issues involving NTRs "that may adversely affect employees," and if informal discussions fail to resolve the issues, to "proceed with the bargaining process, if necessary."

I conclude that the change from using the NTR to look at station performance to monitoring employees constituted a change in conditions of employment and also triggered a duty to bargain under Paragraph 3 and 4 of the MOU. The testimony of Michael Stephens, Director, VA Regional Office, Indianapolis, indicated that a possible change to monitoring was contemplated and discussed. He stated, "[W]e did indicate in this MOU that if we were to move forward and start using National

Transaction Report or Employee Transaction Report, as a subset for that, for employee monitoring purposes, we would meet our bargaining obligation. In fact, we did start using it for that as some point …and we have an MOU on that that was bargained." Tr.175.

By failing to notify the Union of the change and bargain the Agency violated paragraphs (3) and (4) of the MOU and Article 66, Section 1.C. of the 2001 Master Agreement.

**Good Faith Bargaining**

Section 7114 of the Statute requires that an agency and an exclusive representative have a duty to negotiate in good faith, including the obligation to "approach the negotiations with a sincere resolve to reach a collective bargaining agreement."

At the last bargaining session at the Mid-Term Bargaining Committee Meeting Agenda on July 27, 2017 the Union expressed concerns about not being informed that management would use the NTR in the expanded way, asked what kind of procedures and appropriate arrangements that use would be subject to, and about the opportunity to put forth proposals. According to David Bump, a national representative for the National VA Council, there was a short, heated discussion about the use of the NTR. The Agency did not have a "willingness to discuss" the procedures and appropriate arrangements related to the expanded use of the NTR. Tr. 76:13-21. Management would not bargain on the use of the NTR for conduct purposes, for conduct monitoring, and would not discuss any bargaining issues related to the NTR being used to discipline. Tr. 77. It was management's position that "we're not going to discuss the conduct piece of it because that isn't negotiable." Tr. 174. Management was concerned that, as in the earlier discussions for the MOU, the Union intended to prohibit the use of NTR reports for discipline purposes, which they considered a non-negotiable proposal.

Kevin Nelson, co-chair of the management mid-term bargaining committee, testified that "This is the Agency's position that conduct is not an issue that we have to discuss anyway and negotiate." Tr. 211. He testified that management would have been "willing to have any appropriate arrangement discussions …such as providing training [or] …an assessment acclimation period….Tr. 200-201.

The record reflects that management clearly indicated to the Union throughout the meeting that "conduct is not an issue that we have to discuss and negotiate" and although Mr. Nelson testified that management "would have" been willing to have appropriate arrangement discussions, he did not indicate to the Union any willingness to receive such proposals or willingness to discuss any bargaining issues related to the expanded use of the NTR. By refusing to discuss any bargaining issues related to the expanded use of the NTR, and not looking beyond earlier negotiations for the MOU when the Union had offered a proposal which management considered non-negotiable, the Agency did not engage in good faith bargaining.

Although management has the right to take disciplinary action against employees, section 7106(a) of the Statute, the right is subject to negotiations on procedures which management officials will observe in exercising its authority and appropriate arrangements for employees adversely affected by the exercise of the right. Section 7106(b)(1)and(2) of the Statute.

I conclude that the Agency did not "approach the negotiations with a sincere resolve to reach a collective bargaining agreement" as required by section 7114 of the Statute and thereby violated section 7116(a)((1), (5), and (9) of the Statute.

The Union also urges that the Agency violated Article 2, 3, and 47 of the 2011 Master Agreement by failing to fulfill certain other obligations. Article 2 states that in the administration of the Agreement officials and employees shall be governed by applicable federal statutes and regulations. The Union has not described how the Agency specifically violated the provision in this respect, and the applicable governing statutes and their alleged violations have been addressed elsewhere in this decision. Article 3, concerning labor-management cooperation, is to be "interpreted as suggestions, not pr[o]scriptions," so there can be no violation of this article. The Union has not demonstrated how Article 47, dealing with the procedures for mid-term bargaining, was violated, and the alleged violation of section 7116(a)(5) requiring negotiations in good faith as required by section 7114(b)(1) was addressed above.

The Remedy

The Union seeks *status quo ante* relief, which includes a cease and desist order until bargaining obligations are met, issuance of an electronic notice posting to all

AFGE bargaining unit employees in VBA announcing the finding of an unfair labor practice, and a make-whole order for any bargaining unit employees adversely affected by the unilateral implementation of the NTR, including back pay, interest, and attorney's fees.

In cases where an agency has an obligation to bargain over only the impact and implementation of a matter, and it is found that it failed to meet that obligation, such as this one, the Authority applies the factors set forth in *Federal Prison System, Correctional Institution, Petersburg, VA and American Federation of Government Employees, Local 2052,* 8 FLRA 604 (1982) ("FCI") to determine whether a *status quo ante* remedy is appropriate. The five FCI factors include:

> (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

Id. at 606.

As the Union points out, in this case, all five of the FCI factors weigh in favor of the Union . Factor #1 favors the Union because the Agency failed to provide notice. Factor #2 favors the Union because the Union did request bargaining prior to the July 27, 2017 Mid- Term Bargaining Committee meeting in Providence, RI shortly after becoming aware that the use of the NTR had been expanded in the field. Factor #3 favors the Union because the Agency has refused to comply with its statutory and contractual obligations to bargain the procedures and appropriate arrangements to be followed in the exercise of its right.. Factor #4 favors the Union because of the nature and extent of the adverse impact on bargaining unit employees. There have been 23 proposed actions containing an admonishment, reprimand, or suspension of 14 days or less, 24 proposed actions containing a suspension of more than 14 days, and of those 24 proposals, 22 were proposed removals. Joint Ex.9.

Factor #5 also weighs in favor of the Union as the Agency failed to present any evidence concerning potential disruption to Agency operations in the event of a *status quo ante* remedy.

Because of the pending 47 disciplinary actions, I believe a limited *status quo ante* remedy would best serve the parties. Based on the above findings and conclusions, I render the following

**AWARD**

1. The Grievance is SUSTAINED, in part, as to alleged violations of Article 66, Section 1C of the 2011Master Agreement, Sections 3 and 4 of the October 24, 2016 Memorandum of Understanding, and Sections 7116(a)(1) and (5) of the Statute. In all other respects, the Grievance is DENIED.
2. The Agency shall cease and desist from:
   (a) Enforcing or otherwise implementing the National Transaction Reports to monitor employees, initiate employee investigations, and support disciplinary action against employees, including all pending disciplinary actions, until such time as the parties complete bargaining in accordance with the Statute and the parties' agreements concerning procedures which management will observe and appropriate arrangements for employees adversely affected.
   (b) Failing and refusing to bargain in good faith with the American Federation of Government Employees, National Veterans Affairs Council of Locals, the exclusive representative of its employees, concerning its contractual and statutory obligations.
   (c) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.
3. The Agency shall:
   (a) Bargain in good faith with the American Federation of Government Employees, National Veterans Affairs Council of Locals, the exclusive representative of its employees, concerning its contractual and statutory obligations with respect to the change in the National Transaction Reports to monitor employees, initiate employee investigations, and support disciplinary action against employees. If agreement is reached, make any

such agreement retroactive to October 24, 2016 to include its effect on all pending disciplinary actions. The loss of back pay, benefits, and attorney fees payable, if any, shall be paid in accordance with the Back Pay Act, 5 U.S.C. Section 5596, as amended, and will include the payment of interest.

(b) Post at its facilities copies it shall duplicate of the attached Notice to be signed by Mr. Willie Clark, Deputy Under Secretary for Field Operations. The Notice shall be posted for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) In addition to the physical posting of the notice, distribute the notice electronically, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

4. Unless the parties resolve the issue of attorney fees and expenses, the record will remain open for 30 calendar days from the date this Award becomes final for the Union to file a motion for attorney fees. The Agency may reply within 30 days of its receipt of the Union's motion.

5. Pursuant to Article 44, Section 2D and H of the 2011 Master Agreement, the arbitrator's fees and expenses shall be borne equally by the parties and any dispute over the interpretation of the award shall be returned to the arbitrator for settlement, including remanded awards.

_____/s/_____

GARVIN LEE OLIVER

Arbitrator

Dated: ….2018

Fort Belvoir, Virginia

# NOTICE TO ALL EMPLOYEES

**POSTED BY ORDER OF AN ARBITRATOR OF THE FEDERAL MEDIATION AND CONCILIATION SERVICE**

**An Arbitrator of the Federal Mediation and Conciliation Service has found that the Department of Veterans Affairs, Veterans Benefit Administration violated the Federal Service Labor-Management Relations Statute and an October 24, 2016 Memorandum of Understanding and has ordered us to post and abide by this Notice.**

**We hereby notify our employees that:**

**WE WILL NOT** enforce or otherwise implement the National Transaction Reports to monitor employees, initiate employee investigations, and support disciplinary action against employees, including all pending disciplinary actions, until such time as the parties have completed bargaining in accordance with the Federal Service Labor-Management Relations Statute and the parties' agreements concerning procedures which management will observe and appropriate arrangements for employees adversely affected.

**WE WILL NOT** fail or refuse to bargain in good faith with the American Federation of Government Employees, National Veterans Affairs Council of Locals, the exclusive representative of its employees, concerning our contractual and statutory obligations.

**WE WILL NOT** In any like or related manner interfere with, restrain, or coerce bargaining unit employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

**WE WILL** bargain in good faith with the American Federation of Government Employees, National Veterans Affairs Council of Locals, the exclusive representative of our employees with respect to the change in the National Transaction Reports to monitor employees, initiate employee investigations, and support disciplinary action against employees. If agreement is reached, we will make any such agreement retroactive to October 24, 2016 to include its effect on all pending disciplinary actions. The loss of back pay, benefits, and attorney fees

payable, if any, shall be paid in accordance with the Back Pay Act, 5 U.S.C. Section 5596, as amended, and will include the payment of interest.

**Date:_____ By:_____**

**(Signature & Title)**

**This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.**

# IN THE MATTER OF ARBITRATION

## CERTIFICATE OF SERVICE

I certify that a copy of the Decision and Award of Garvin Lee Oliver in **FMCS Case No. 17-0826-55166** was served by email on the following representatives of the Parties on the date set forth below:

**Thomas Dargon, Jr., Esquire** **Thomas.Dargon@afge.org**

**Union Representative**

**Christina Knott, Esquire** **Christina.Knott@va.gov**

**Darryl Joe, Esquire** **Darryl.Joe3@va.gov**

**Agency Representatives**

_____/s/_____

GARVIN LEE OLIVER

Arbitrator

Fort Belvoir, Virginia

Dated: