AFGE REBUTTAL TO VA'S STATEMENT OF POSITION

General

The emperor is unclothed;[1] its pretense of good faith bargaining is exposed. The Department of Veterans Affairs ("Department" or "VA") Statement of Position ("Department's SOP") shows that the Parties are not at impasse. The Department does not even pretend to have read the National Veterans Affairs Council of the American Federation of Government Employees' ("Union") proposals. It has the audacity to require the Federal Service Impasses Panel ("Panel" or "FSIP") either to do the work for the Department and determine the Union's proposals for itself, or worse, ignore the Union's proposals outright. Willfully ignoring proposals made and instead submitting arguments against proposals not made, the VA implicitly concedes that the Parties have not reached impasse. The Panel should withdraw jurisdiction and send the Parties back to the table.

The Union fully incorporates by reference its prior submissions, including its Brief on Jurisdiction (dated Jan. 27, 2020), its Request for Extension (dated May 4, 2020), its Response to VA's Opposition to the Request for Extension (dated May, 5, 2020), and its Written Submission (dated June 3, 2020). The Union also notes that, by the Panel's denial of the Union's request for an extension (due to the VA's illegal failure to provide information requested, pursuant to 5 U.S.C. §7114(b)(4)), the Panel is fully aware that the Union has been denied the ability to present data supporting its positions.

Also, the VA confirms the Union's claims that management cannot be trusted to behave legally or appropriately without the specific procedural and appropriate arrangement safeguards of a complete master collective bargaining agreement ("MCBA"). Relying on information

[1] The Union alludes to Hans Christian Andersen's classic fairy tale "The Emperor's New Clothes" (1837).

requested by the Union that the Department illegally withheld, the Department's has riddled its submission with dishonest accounts, at worst, or clear misinterpretations, at best, of its own citations.

In its Introduction, the VA asserts that AFGE "received 1,048,569 hours of official time," the "equivalent of a $49,142,863.90 taxpayer subsidy."[2] However, the VA's own exhibit[3] proves the falsity of this claim. OPM's report on official time usage concerned ALL the labor unions representing bargaining unit employees at the VA,[4] not just AFGE. The VA has not bothered to supply official time data solely concerning AFGE and instead attributes information for all unions to AFGE. Further, the VA's exhibit shows all its Unions used 3.98 hours of official time per bargaining unit employee ("BUE") for 2016, and that figure declines to 3.53 in 2016. Notably, these rates are far lower than AFGE's 2011 MCBA providing for 4.25 hours per BUE. Contrary to the assertion that the Union abuses and exceeds official time usage, it is clear that the Union is a good steward of the time it receives. Finally, the VA's claim that the Union's proposal provides it with a "blank check" is simply untruthful. The Statute requires that, other than time for negotiations[5] and time for proceedings before the Authority,[6] official time *shall be* granted "in any amount the agency and the exclusive representative involved *agree* to be reasonable, necessary, and in the public interest."[7] Therefore, the Union must bargain for official time and the VA must agree to the use. A "blank check" certainly does not require an endorsement of the amount before cashing. From the outset of its submission, the VA shows that it cannot be trusted to present facts accurately.

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[2] Department's SOP, p. 4.
[3] https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/reports/2016-official-time-usage-in-the-federal-government.pdf, p. 8 and 16.
[4] Department's SOP Exhibit 2.
[5] *See* 5 U.S.C. 7131(a).
[6] *See* 5 U.S.C. 7131(c).
[7] 5 U.S.C. 7131 (d)(2).

Additionally, the Department's late submission (over two hours after the 5pm deadline) further demonstrates the Department's brazenness in flouting the rules. Here, the Department requested the Panel's assistance and then blatantly disregarded its rules. When confronted with the Union's objection to the untimely filing, the Department did not provide a single reason for its lateness and instead resorted to *ad hominem* attacks on the Union representative.[8] Given that the VA is willing to ignore the rules of the very forum in which it appears, there can be no doubt as to how it will conduct itself when it is not subject to negotiated rules (i.e., MCBA) or review (i.e., arbitration).

Next, the VA misinterprets Executive Order 13812 ("EO") and relies on that misinterpretation throughout the Department's SOP. While the EO and implementing OPM guidance required the termination of labor management forums created pursuant to Executive Order 13522, it left agencies with "discretion under the Federal Service Labor-Management Relations Statute (5 U.S.C. Chapter 71) to adopt a labor relations strategy best suited to their own needs."[9] Further, it limited "pre-decisional involvement (PDI) *only to the extent that the cost of doing so brings tangible benefits to the agency*."[10] Therefore, the EO did not terminate all PDI. The VA also impermissibly expands the definition of PDI. PDI is a term of art that means "collaboration and engagement for labor and management to deal with decisions and issues concerning the work place *outside* the traditional collective bargaining process."[11] However, the VA identifies and eliminates items in the Union's proposals that are *within* the traditional collective bargaining process, such as joint training on the MCBA in Article 4, procedures for

[8] Attachment 1, Baxley email.
[9] https://chcoc.gov/content/guidance-implementation-executive-order-13812
[10] *Id.* (emphasis added).
[11] https://www.flra.gov/system/files/webfm/OGC/Training/FLRA%20-%20EO13522%20PUBLIC.pdf, p. 31 (emphasis added).

provision of awards in Article 16, and meeting with the Union at reasonable times and locations in Article 49. The VA also identifies and eliminates partnership and collaboration required by law, such as safety committees in Article 29[12] and collaboration for hybrid employees in Article 56.[13] Those misapplications should be rejected.

Then, the VA claims, for the very first time, that several Union proposals interfere with management's rights. The FSIP can resolve negotiability questions only when the Federal Labor Relations Authority ("Authority") has ruled on substantively identical proposals.[14] Here, the Department has made twenty[15] claims that the Union's proposals interfere with management's rights. The Union has filed negotiability appeals on each of the Department's new claims. The VA has failed to show that any of these proposals are substantively identical to a negotiability question that the Authority has already resolved. As a result, the Department has raised negotiability disputes in which the Panel must rescind jurisdiction. The Panel has done so recently.[16] Consequently, the Panel should withdraw its jurisdiction as to those matters.

Finally, the Panel should stay its issuance of a Decision and Order in this matter until the Union's lawsuit concerning the improper constitution of the Panel concludes.[17]

Article 1 – Recognition and Coverage

The Department claims, for the first time, that the Union's proposals interfere with its rights. As such, the Union has filed a negotiability appeal on its proposals.

[12] 38 U.S.C. 1703C(3)(A)(C).
[13] 38 U.S.C. 7403(h).
[14] *Davis-Monthan Air Force Base*, 05 FSIP 104 (FSIP 2005); *Carswell Air Force Base*, 31 F.L.R.A. 620 (1988).
[15] Article 1, p.6; Article 7, p. 16; Article 9, p. 17; Article 10, p. 18; Article 12, p.19; Article 13, p. 23; Article 14, p. 24 n. 63; Article 22, p. 36 n. 36; Article 23, p. 39; Article 27, p. 44; Article 29, p. 46; Article 33, p. 50; Article 37, p. 52; Article 39, p. 54; Article 40, p. 55; Article 43, p. 57; Article 48, p. 80; Article 49, p. 85; Article 66, p. 89; and, Article XX-Staffing, p.95.
[16] *EPA and NTEU*, 20 FSIP 009 (April 3, 2020).
[17] *NVAC v. FSIP,* Case 1:20-cv-00837-CJN.

Further, there is no bypass-definition dispute in the Parties proposals; the Parties already reached agreement on the issue of bypass. There is no dispute related to "in any matter related to grievances;" the Parties already reached agreement on this language. For "formal discussions," the Union seeks clarity in the MCBA, while the Department appears to object to the "notice requirement." The Department asserts that the Union's proposals are "beyond the Statute" because the VA does not view Authority case law as an authority to be followed. However, the Statute's silence on a requirement does not make the requirement contrary to law. The Authority has plainly held that the opportunity to be represented at a formal discussion contemplates prior notice to the Union.[18] Because this requirement eludes the VA's representatives, as demonstrated by their submission, it is necessary for that clarity to be in the MCBA.

The Department also confuses the requirements for negotiations with those for formal discussions. The Department already agreed that "The Department's consultations and dealings with other employee organizations shall not assume the character of negotiations concerning conditions of employment in the AFGE bargaining unit."[19] So, negotiations as they relate to other employee organizations are not in dispute. There should be no objection to the Union's clarifying language that the presence of an employee organization has no effect on the Union's rights or the VA's obligations when the elements of a "formal discussion" have been met. This is especially so given prior VA confusion concerning employee organizations.[20] A plain reading of the Union's proposal shows that it is not expanding the definition of formal discussion to meetings unrelated to conditions of employment. [21]

[18] *See Norfolk Naval Shipyard, Portsmouth, Virginia*, 6 FLRA 74 (1981).
[19] *See* Department's SOP, Exhibit 1, Article 1.
[20] https://www.va.gov/LMR/docs/Grievances/NOVA_signed_Settlement_Agreement-4-17-08.pdf
[21] *See* Union proposal Article 1 at p. 3 ("Any meeting falling under the definition of formal discussion…").

Next, the VA's asserted reason for designating the Parties' representatives was that VACO was unaware of the filings occurring nationwide. VA wanted a single repository. The Union responded that the VA's issue is internal to the Department. It does not present an issue to be resolved in the Parties MCBA. Other than its unfounded assertion of timely responses, the VA has not presented any reason to designate the Parties' representatives in the MCBA. The Department further fails to demonstrate its authority to designate the Council President as the person to name Union designees.[22]

Further, the VA's proposals do not create a "simple procedure."[23] A process by which an employee gives a grievance to their supervisor, who returns a response to the employee is simple. On the other hand, an employee sending a grievance to the Council President, who will then send it to the VA Director of Labor Management Relations, who will then have to contact the supervisor to respond to the grievance, and then forward the response back to the Council President, who will send it to the employee, creates unnecessary complications. It is not credible that "simplicity" is the reason for the VA's proposal. The true reason is what the VA articulated from the beginning; the Department needs a repository. The VA's incompetence in developing centralized records of grievances does not justify its proposal to outsource that work to AFGE. The fact that the VA is not confident that it can fix its issue without it being required in the Parties' MCBA underscores the significance of the substance of this agreement, and the Panel should keep this in mind every time the VA argues the opposite.

There is no "predecisional involvement" issue in Section 4. Alternate Dispute Resolution ("ADR") prevents costly, unnecessary litigation. Nothing in Section 5 prevents the VA from challenging BUE inclusion, as 5 C.F.R. 2422.2 permits the agency to file a petition with the

[22] *Dep't of the Army, United Power Trades Organization*, 2010 FSIP 102, p. 21-22.
[23] Department's SOP at p. 7.

FLRA. So, VA's claim that "AFGE just doesn't want to have to compete with other Unions in an election every time the VA opens a new facility" is false.

The Department's final paragraph provides the key indication that the VA simply detests bargaining with affiliated Unions. If the Parties were required to just "[l]et the Statute govern," Congress would not have enacted the bargaining obligations in the Statute, which the VA is so desperate to ignore. The VA would prefer an MCBA that has nothing but a recitation of the Statute, which would defeat the purpose of bargaining and the Panel. The Union's proposals are the more reasonable.

Article 2 - Governing Laws and Regulations

The Department fails to provide its final proposals for Article 2.[24] There is no dispute that the MCBA should supersede any local supplemental agreement ("LSA") or other agreements; the Union's proposed language includes the same. Next, the VA claims that each separate agreement would have to be read side-by-side with the MCBA is fiction. That did not occur after the 1997 MCBA, nor after the 2011 MCBA. There is no reason to engage in such a review, and the Union's proposal does not call for such a review.

The Parties do dispute terminating the non-conflicting agreements. The Union believes terminating non-conflicting agreements is unnecessary and the VA explicitly agrees to the survival of non-conflicting agreements in its proposals in Article 21. Here, the VA ignores that the MCBA, especially the pared-down version it is seeking, cannot, and does not attempt to, cover every matter concerning conditions of employment. Where the Parties have already worked out those matters, non-conflicting agreements should continue to govern. Otherwise, the Parties must bargain them anew, wasting taxpayer funds.

[24] Department's SOP, Exhibit 1.

Article 3 – Labor-Management Engagement

The Department has not provided any grievances to substantiate its concern. Further, the VA ignores that the Parties have met the precondition of EO 13812 – tangible benefit to the taxpayer.[25]

Article 4 - Labor-Management Training

Ironically, the Department eschews partnership in the one place it is required. It is axiomatic that a collective bargaining agreement is a partnership agreement. The MCBA is no more one party's than the other. So, the claim that working together on the *Parties'* MCBA constitutes improper partnership strains credulity. Also, flexibility concerning training exists in the current language, and the VA did not demonstrate a need to depart from it.

The remainder of the VA's claims demonstrate ignorance of the Union's proposals, such that one would think the VA has not read the Union's proposals at all. The Union's proposal does not "prohibit unilateral VA training;" it clearly states it " does not preclude additional training by each party." There is no official time cap listed in 5 U.S.C. 7131(d)[26] and it is unclear how else local joint trainings would be scheduled if not bargained locally. There is no requirement of PDI or approval anywhere in the Union's proposals. Even if it were, PDI is fully within the traditional collective bargaining process. Next, the VA disingenuously feigns offense with a proposal to disavow its previous trainings, given it will clearly be a moot document when the successor MBCA is finalized.[27] The remainder of the VA's claims address matters that are

[25] *See* AFGE's Written Submission, p. 10-11.
[26] And the VA did not bargain the Executive Orders with the Union throughout these negotiations. So, to the extent the VA's claims are invoking them, they are not at impasse.
[27] *See* arguments in Department's SOP, Article 1.

not contained in the Union's proposals.[28] Finally, the VA fails to demonstrate the need to limit the grievance procedure.

Article 5 - Labor-Management Committee

The Department admits the Union's prior estimation – it does not understand the purpose of this Committee. These meetings allow the Parties to meet in a non-adversarial setting and provide valuable context for changes in conditions of employment. The VA alleges an inaccurate cost and attendance of the Labor-Management Committee ("LMC"), as shown by citing to an agenda for an entirely different meeting (the National Quality Council). However, whatever the true cost of the LMC, it pales in comparison to the costs the VA is paying for its Bargaining Team to live in Washington, DC, while the Parties have not engaged in bargaining since December 2019. As the VA is incapable of providing accurate accountings, its other claims cannot be trusted.

Article 7 – Quality Programs

The Department claims, for the first time, that the Union's proposals interfere with its rights. As such, the Union has filed a negotiability appeal on its proposals.

Article 9 – Classification

The Department claims, for the first time, that the Union's proposals interfere with its rights. As such, the Union has filed a negotiability appeal on its proposals. Substantively, the Department does not demonstrate any burden imposed by the current MCBA language. Further, classification issues plague the Department, which affects bargaining unit employees. Just because employees cannot grieve the matter under 5 U.S.C. §7121(c)(5) does not mean that they do not have an avenue of review. Importantly, that avenue, a classification appeal, has an impact

[28] Concerning Department's SOP, p. 13, FN 30, the Union is bewildered as to how a point of clarification can position the VA for a ULP.

on similar employees and the entire Department. A classification appeal decision requires the VA to follow the decision triggering an impact on other employees. Both Parties have an interest in resolving classification issues, so employees do not have resort to such appeals.

Article 10 – Competency

The Department claims, for the first time, that the Union's proposals interfere with its rights. As such, the Union has filed a negotiability appeal on its proposals. The Union does not have a "Proposal 2," so that argument is irrelevant.[29] Finally, 5 U.S.C. §7121(c)(4) concerns matters prior to appointment, so appraisals and competence as an employee are categorically not "examinations" under the Statute's grievance exclusion.

Article 11 - Contracting Out

The Department claims, for the first time, that the Union's proposals interfere with its rights. As such, the Union has filed a negotiability appeal on its proposals. Additionally, the Department is under the illusion that it can forgo providing the Union with notice and information when its decision to contract out impacts bargaining unit employees. However, that is a basic requirement under the Statute.[30] The Union's proposals provide a simple procedure and appropriate arrangements when the VA's contracting out impacts the bargaining unit. None of the Union's proposals involve a third-party in the procurement process whatsoever.

Article 12 - Details and Temporary Promotions

The Union's proposals do not create "barriers" to details and temporary promotions. They provide a process to achieve what is already required by regulation. They also require that the VA properly document details and temporary promotions, an issue the VA has had in the

[29] It appears the VA is arguing as though it is a party to the case it cited (*Dover Air Force Base*), because there are no "AQLs" in any of the Union's proposals.
[30] *DHHS, NIH and AFGE Local 2419*, 64 FLRA 266, 269 (2009)

past. The claim that the Union's proposals apply to details "as short as one hour" is pure fiction, showing in stark detail the VA's failure to read the Union's proposal. The Union's proposal clearly states its application to details "of one week or more." Details and temporary promotions also affect employees' existing performance plans. Resultingly, the Union's proposals ensure these types of changes are appropriately considered.

The VA has not shown that the Union has filed any grievances challenging that a detail was "unnecessary." To downgrade the Union's statutory right to bargain, the VA creates an erroneous and unsupported "statutory duty to inform." The VA also creates a standard of "substantive change," triggering the duty to bargain, while the case the VA relies upon has been overturned.[31] If the change is more than *de minimis*, the VA has a duty to notify the Union and provide it with an opportunity to bargain. The Department cannot change that obligation by creating new terms in the MCBA.

The VA has not demonstrated that the current MCBA language has been a deterrent to details. Finally, the Union's proposals recognize management's right to determine the qualifications for details and temporary promotions.

Article 13 - Reassignment, Shift Changes, and Relocations

The Department raises, for the first time, that the Union's proposals interfere with management's rights. As a result, the Union has filed a negotiability appeal to determine this claim.

The VA has failed to demonstrate how documenting a reassignment is burdensome on the Department. Also, the Union's proposals acknowledge management's right to determine qualifications. The procedures specifically operate *after* management has determined the

[31] *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1929 v. Fed. Labor Relations Auth.,* 961 F.3d 452 (D.C. Cir. 2020) (vacating the FLRA's decision in *El Paso I*).

necessary qualifications. It is bizarre for the VA to characterize paying employees for their work as a "financial windfall." Nonetheless, paying employees according to the location of their job is a statutory requirement[32] that the VA cannot excuse itself from in the MCBA. The purpose of the locality payment is to address location-based pay disparities. As a result, a locality payment cannot be considered a "raise." Finally, the Union's proposals do not contain partnership or engagement language at all, only the notification requirements for changes to conditions of employment.

Article 14 – Discipline and Adverse Action

The Department's submission of its final proposal to the Panel is altered from the last best and final offer ("LBFO") presented to the Union, so the Parties have never discussed this proposal. Therefore, it is not at impasse. Notably, the Department proposed eliminating admonishments only from the available forms of discipline, leaving reprimands and higher disciplines.[33] However, in its submission to the Panel, the Department has now regressed in its proposals and eliminated reprimands as well.[34]

Further, progressive discipline is not mandatory in the Union's proposals. Instead it provides a needed guideline which will be considered against the Department's decisions. For the first time, the VA is claiming that the Union's proposals interfere with management's rights. As a result, the Union has filed a negotiability appeal on its proposals.

The VA's high numbers of disciplinary actions demonstrate that its supervisors do not have any fear in using the disciplinary authorities available to it. Contrary to Mr. McDaniels and

[32] 5 U.S.C. §5304.
[33] Attachment 2, VA LBFO Article 14
[34] Department's SOP, Exhibit 1 at p. 4.

Mr. Zinck's Declarations, the Department has lauded its success in disciplining employees.[35] Further, the Department loses, either by mitigation or reversal, a majority of the grievance challenges to its disciplinary actions.[36] Instead of drawing the obvious conclusion that many VA managers take improper and unreasonable actions, the VA instead blames the fact that it is subject to grievance review. Overturned actions, due to improper conduct by management, surely do not make for effective corrective measures.

It is obvious that staying a suspension protects an employee from a harmful loss of pay for an action that is likely to be found improper. The Union's proposal is limited to suspensions of 14 days or less, as Merit Systems Protection Board ("MSPB") procedures may be utilized for stays concerning actions within its authority. The Union's proposal is further limited to actions that are being challenged, because most actions are not challenged. This proposal is narrow and specifically tailored to remedy the harm to employees of management's exercise of its right to discipline. Therefore, it is a reasonable appropriate arrangement that also saves the VA backpay and attorney's fees it would have been subjected to on reversal or mitigation of the action.

Further, it is well-documented that the VA often errs in its decision-making, whereas arbitrators often make appropriate and just decisions. Of the published FLRA cases reviewing arbitrators' decisions on discipline of AFGE bargaining unit employees,[37] other than the Canteen cases of 2012,[38] the Authority has not reversed a single arbitration decision reviewing a

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[35] https://federalnewsnetwork.com/veterans-affairs/2018/03/under-new-accountability-act-va-employees-fear-one-mistake-will-cost-them-their-jobs/

[36] Attachment 3, Wetmore Affidavit. Notably, most employees do not challenge their discipline. The VA has not presented any evidence that every disciplinary action is submitted to the grievance procedure.

[37] The VA illegally failed to provide this information, leaving the Union to conclude that the information does not favor the Department.

[38] AFGE challenged the removal of Veterans Canteen Service employees, who are appointed under 38 U.S.C. § 7802(e). The challenge presented a novel issue of law, resulting in a determination that these employees had no right to challenge their removal in arbitration. *Department of Veterans Affairs, Veterans Canteen Service, Leavenworth, Kansas and AFGE, Local 85*, 66 FLRA 181 (2012); *Department of Veterans Affairs, Veterans Canteen Service, Dayton, Ohio and AFGE, Local 2209*, 66 FLRA 985 (2012).

challenged discipline.[39] Of the discipline taken under the Accountability Act, and reviewed by an arbitrator, none have been overturned. VA has implicitly conceded that arbitrators have decided correctly on these matters because they have not sought review of any Accountability Act arbitration awards with the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").[40] No Federal Circuit opinion exists overturning an arbitrator's award on an Accountability Act action. In fact, it is arbitrators who have been reviewing Accountability Act cases correctly. The VA cannot point to its success at MSPB because the Federal Circuit has ruled that the MSPB has been improperly reviewing these cases.[41]

Next, the VA scores low on accountability because it fails to hold managers accountable.[42] While bargaining unit employees are easily fired, managers receive no discipline for the same, or worse conduct.[43] Notably, then-Secretary Shulkin was accused of wasting taxpayer funds on personal trips to Europe.[44] He disputed it and was not fired for that conduct. Under the Accountability Act, the VA would use the same evidence, or lack thereof, to fire a bargaining unit employee. The hypocrisy and disparity in how the VA treats its bargaining unit employees versus its managers is why VA ranks so low on accountability. The Union cannot be blamed for the VA's disparities, and the MCBA cannot resolve them. Simple fairness in the discipline of bargaining unit employees is all the Union's proposals seek to achieve.

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[39] In *United States Department of Veterans Affairs, James A. Haley Veterans Hospital and AFGE, Local 0547*, 71 FLRA 699 (2020), the Authority only set aside the remedy, not the arbitrator's decision to mitigate the suspension.
[40] Review is in the U.S. Court of Appeals for the Federal Circuit. *See* 38 U.S.C. §714(d)(5)(A).
[41] *Sayers v. Department of Veterans Affairs*, CAFC Case No. 18-2195, March 31, 2020. The Court noted that the VA's argument would lead to absurd and unconstitutional results. The Court's observation can be applied to many of the VA's arguments in the Department's SOP.
[42] https://www.commercialappeal.com/story/news/2017/09/20/leader-memphis-va-brings-checkered-past-him/681122001/; https://www.wgrz.com/article/news/investigations/va-harassment-victims-share-their-stories/71-502202077
[43] https://federalnewsnetwork.com/veterans-affairs/2018/03/under-new-accountability-act-va-employees-fear-one-mistake-will-cost-them-their-jobs/
[44] https://www.govexec.com/management/2017/11/shulkin-stresses-accountability-va-employees-while-defending-his-own/142434/

The remainder of the VA's claims contradicts its public story – the Department is successfully firing more employees.[45] The Department's claims that the procedure in the MCBA prevent it from doing so are false.

Article 16 – Employee Awards and Recognition

The Department does not provide a final offer for Article 16.[46] Despite that, the Union's proposals do not seek "similar payouts" for BUEs and non-BUES. In fact, the Union's proposals do not propose how much to pay any employee at all. Instead, the Union's proposals seek an overall allocation of awards funds in proportion to the numbers in each group. There are more people in the BUE group. According to the VA's information, there are 271,226 employees in the AFGE bargaining unit.[47] With 366,736 overall employees,[48] that leaves 95,510 non-AFGE BUEs. The VA offers no reason why that group of less than 100,000 employees should have the same amount, or higher amounts, allocated overall to awards than the group with 283% more people. For example, if the VA determines it has an overall awards budget of $500,000, the allocation for the BUEs would be $369,783 to be split amongst eligible employees and $130,216 to be split amongst the others. The proposal does not interfere with the VA's ability to determine its award budget. It does not interfere with the VA's ability to measure performance. It is simple, fair, and transparent.

The proposal concerning the Awards Committee originates because VA management routinely abuses the awards program.[49] Nothing demotivates employees more than seeing their supervisor's favorite employees receive all the awards, no matter how hard other employees

[45] Attachment 4, Adverse Action Report.
[46] Department's SOP, Exhibit 1.
[47] Department's SOP at p. 4.
[48] Department's SOP at p. 2.
[49] https://www.va.gov/oig/pubs/admin-reports/VAOIG-12-02359-40.pdf; https://www.va.gov/oig/pubs/VAOIG-09-01123-196.pdf; https://www.va.gov/oig/pubs/VAOIG-10-02887-30.pdf

work. A transparent process also curbs illegal discrimination. The Union has no objection to more frequent Committee meetings if quarterly meetings are not sufficient. Notably, "on the spot awards" are not included in the list of grievance exclusions of EO 13839. So, a sweeping "awards" exclusion would be improperly overbroad.

Most importantly, awards are not an exercise of a management right, so more than Union participation is required; Union negotiation is required. The VA improperly seeks to exclude the Union from that process. The Union's proposals are legal and the more effective and efficient.

Article 18 - Equal Employment Opportunity

The VA wrongly claims that VA Office of Resolution Management and Diversity Inclusion ("ORMDI") staff are available to "advise and assist" employees with processing complaints; thereby alleviating the need for a representative (calling it "redundant representation"). The breadth of this claim is not limited to representatives that happen to be Union officials, but *any* representative at all. Even the VA's ORMDI staff would disagree. First, federal regulation concerning agency Equal Employment Opportunity ("EEO") programs states that an employee filing an EEO complaint is entitled to a representative of their choice.[50] Denying an employee this right would itself create a viable EEO complaint. Second, it is an inherent conflict of interest for ORMDI staff to represent the interests of an employee against their mutual employer while the ORMDI employee is acting in their official capacity as a neutral intended to facilitate and administer the Department's EEO program.[51]

Demonstrably, the VA's cite only states that ORMDI staff provide "complaint processing services." Complaint processing services hardly constitute representation advice and assistance. They "advise and assist" on the *complaint process*, not on the *substance* of an employee's case.

[50] 29 CFR 1614.605.
[51] *See* 29 CFR 1614.105.

There is only one reason the VA would seek to deny employees representation on the substance of their EEO complaint and that reason is to illegally coerce employees into dropping their complaints.

Next, the VA ignores that employees who represent other employees in EEO complaints already do so at taxpayers' expense.[52] Clearly, taxpayers have an interest in eradicating discrimination in the government, and a current employee providing representation is much more cost-effective than an outside attorney. Even the EEOC is not challenging that expense. The Union's proposal simply seeks that employees who represent other employees in EEO complaints, and happen to be union officials, be treated the same as those who are not union officials. It is a simple anti-retaliation proposal. Retaliation is already prohibited by law.[53] The VA's proposal is blatantly illegal.

Article 19 – Fitness for Duty

Other than stating who it applies to, the VA's proposals fail to explain to employees what a fitness for duty examination is and why it would be ordered. "The CBA is meant to act not only [as] a legal instrument explaining employee rights and employer obligations, but act as a source of information for employees."[54] Here, based on the VA's proposals, employees will not know the process or that they have the option of applying for disability retirement or for a reasonable accommodation. The Union's proposals provide a succinct explanation and a recitation of the employee's rights without requiring an employee to consult six (6) different authorities as listed by the VA.[55] The VA does not claim that any of the recitations in the Union's proposals are

[52] 29 CFR 1614.605(b).
[53] *See* 5 U.S.C. §7116(a)(2).
[54] *U.S. Dep't of Agriculture, OGC and AFGE Local 1106*, 20 FSIP 12, p. 21 (May 21, 2020).
[55] The VA lists as authorities combined in the Union's proposals: 5 CFR 339, 5 CFR 831.1205.85 Sections 1 – 3, VA Handbook 5019, the Americans with Disabilities Act, VA Handbook 5975.187, VA Handbook 5021.

incorrect. The VA was clear in its intent with the Article (i.e., to illegally fire employees who present any indication of a fitness for duty examination), ignoring the fact that many employees pass these examinations. Its incendiary reason is before the Authority on negotiability appeal.

Article 20 – Telework

The Department does not provide a final offer for Article 20.[56] Therefore, the parties are not at impasse. Nonetheless, the Department claims "the VA does not want to reduce or eliminate the Department's telework program." But based on its proposals, the VA just wants the ability to do so in the future for vague reasons and without notice to employees. The Union's proposals seek "increasing participation to the extent practicable."[57] The Department's claim that the Union seeks to deny employees telework is disingenuous. Importantly, the Union's limitation on telework (during the first 90 days of any probationary period)[58] is based on the law. The Telework Enhancement Act requires that the VA's telework policy shall "provide that an employee may not be authorized to telework if the performance of that employee does not comply with the terms of the written agreement between the agency manager and that employee." Under the VA's policy, an employee does not have a performance rating, for which the Department can make a telework decision, before they have completed 90 days. The VA has failed to explain how it will comply with this statutory requirement when an employee does not have a performance rating, special or otherwise. Had it explained so, the Union would have easily adjusted its proposal. The VA's disdain for treating employees equally is mystifying.

Nowhere in the Union's proposals does it claim telework to be a "right." The VA's claim of "oversight challenges" evoke a problem with managers, not employees. The VA has not

[56] Department's SOP, Exhibit 1
[57] As stated in the Telework Enhancement Act. 5 U.S.C. § 6506(b)(2)(D).
[58] Clearly the Department sought a longer prohibition of eighteen months.

presented any evidence of its claim that managers "face grievances for denying and rescinding telework based on office coverage." Also, the VA's proposals use a myriad of undefined standards, like "operational need," "reasonable business purposes," "operational demands," "[m]ission related needs," and "valid operational needs" for adjusting an employee's schedule or removing them from telework. Finally, the VA seemingly implies that "notice" is a procedural hurdle for adjusting telework.[59] These are not the proposals of an agency that truly intends to maintain and enhance telework opportunities.

Article 21 – Hours of Work and Overtime

The VA, in its final proposals attached to its SOP, has substantially altered its proposal on this Article.[60] It now accepts some of the Union's proposals previously struck by the Department (like the first sentence in its final proposal and Section 7). The Department also deleted language clearly contained in its final proposals. The Parties are not at impasse. Contrary to its position in Article 2, the Department proposes that local policies and practices remain in effect so long as they do not conflict with the Master Agreement.[61] The Union agrees with this proposal.

Otherwise, the Union's proposals support the VA's right to determine its coverage. The VA used an example of the VA Suicide Hotline not closing on Memorial Day. Nothing in the Union's proposals call for it to close. Instead, the Union's proposals allow qualified employees (as determined by the VA) who *want* to work the holiday the ability to do so over those who do not. It is incomprehensible why this clear win/win arrangement vexes the Department.

[59] The Department's proposals seek the right to adjust an employee's schedule "without the need for notification."
[60] Compare Attachment 5, VA LBFO Art. 21 provided to the Union and Department's SOP, Exhibit 1 at p. 8-16.
[61] Department's SOP, Exhibit 1 at p. 9, Article 21, Section 1(A).

Next, the VA decries seniority in favor of no criteria. The Department fails to provide any alternative criteria. It is axiomatic that the absence of any objective criteria will result in favoritism, so the Union's proposal is more effective and efficient.

The Department claims "[I]t is impossible for the VA to 'post schedules for physicians and RNs in 24/7 patient care areas a minimum of 45 days in advance.'" It cites to a Declaration from Deborah Sanchez, M.D. as support for its claim. However, Dr. Sanchez's Declaration is peculiar because the VA currently requires physicians and RNs to request leave at least 45 days in advance for the purpose of managing clinic scheduling.[62] If scheduling were truly fluid, employee leave requests would not be subject to a 45-day deadline.

The Union's proposals do not define conditions of employment at all. The first sentence of the Union's proposal is the same as the Department's. The Department's proposals also have the same defining of "breaks" as the Union's proposals. Finally, the Union's proposals do not include a Joint Committee or National Work Team.

The Union's proposals in no way interfere with the VA's managerial function of determining staff coverage.

Article 22 – Investigations

The Department eschews that Authority case law, and even Supreme Court case law, interpreting statutory language must be followed. The VA's purposeful defiance of legal authorities demonstrates why clear requirements belong in the MCBA. In *NASA v. FLRA*, 119 S. Ct. 1979 (U.S. 1999), the Supreme Court intended union representatives be allowed to play an active role in *Weingarten* meetings. Further, the opportunity to be present, like formal

[62] Attachment 6, VA Directive 1231.

discussions, is of no consequence if the Union does not have advance notice of the meeting. Therefore, the Union's proposal does not "expand or manipulate the process."

The Union's proposal is unrelated to any Union bulletin board or Union use of government equipment. It appears the Department is unaware that it is required to inform employees of their *Weingarten* rights annually.[63] The Union's proposal simply states where *the Department* should put its notice to meet that statutory requirement to maximize employee knowledge.

The Union's proposal that the VA inform the Union of a pending investigation supplements the employees' right to union representation under 5 U.S.C. §7114(a)(2)(B) and is negotiable.[64] Employees are interviewed during duty time, so there should be no objection to official time for employees to provide a written statement. Similarly, an employee is entitled to a union representative for a written statement just as they would be for an in-person interview.[65]

The Union's proposals do not require VA Police to change their investigatory process. Instead, the Union's proposals recognize that VA Police constitute "representatives of the agency" for purposes of *Weingarten.*[66] Many VA Police are within AFGE's bargaining unit. It is important to have clear language in the MCBA to avoid confusion, because BUEs, such as VA Police, could meet the definition of "representative of the agency" for *Weingarten* purposes.[67] The VA has violated obvious *Weingarten* requirements;[68] accordingly, clarification in potentially ambiguous circumstances is necessary for both employees and supervisors.

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[63] 5 U.S.C. §7114(a)(3).
[64] *Nuclear Regulatory Commission*, 47 FLRA 370 (1993).
[65] *Border Patrol, Del Rio, Texas*, 46 FLRA 363 (1992).
[66] Even the VA's OIG is a representative of the agency for Weingarten purposes, *NASA v. FLRA*, 119 S. Ct. 1979 (U.S. 1999), including when the investigation is criminal, *Office of the OIG, Department of Justice v. FLRA*, 102 FLRR 1-8001, 00-1433 (D.C. Cir. 2001).
[67] *See IRS Los Angeles District Office*, 15 F.L.R.A. 626 (1984)
[68] *AFGE, National Veterans Affairs Council No. 53 and Department of Veterans Affairs, VA Medical Center, Reno,* 67 F.L.R.A. 415 (2014).

The Union's proposal does not require *an employee* to consult with the Union prior to participating in an Administrative Investigative Board ("AIB"). It requires *the Department* consult with the Union prior to putting a bargaining unit employee on an AIB. Therefore, this proposal does not violate privacy rights or 5 U.S.C. §7102.

Finally, for the first time, the Department claims the Union's proposals interfere with its right to determine internal security practices. Because the Union's proposal is for the purpose of ensuring the employee's testimony is accurate, it is not the same as the proposal reviewed in *Customs Service*, 55 F.L.R.A. 1174 (1999). As a result, the Union has filed a negotiability appeal with the Authority.

Article 23 – Merit Promotions

The Union's proposals take up less than seven (7) pages as it agreed that much of what was contained within it were appropriate for other Articles. Otherwise, the Department does not seem to be working from the Union's actual proposals. The Union's proposals do not limit the duration of details to 60 days. That assertion is patently false. Nothing in the Union's proposals create a joint labor-management involvement in career-ladder promotions. Once the Department has made the decision to promote a bargaining unit employee in a career-ladder position, the Union simply provides a procedure for when that promotion takes effect. The Union's proposals do not require posting of announcements other than those that the VA has determined will be competitively filled. Then, it provides a procedure for those announcements. The VA's proposal to not post vacancy announcements will only leave it subject to prohibited personnel practice claims with the Office of Special Counsel ("OSC").

The Department offers no documentary evidence that 15 workdays creates any delay in onboarding employees. The Union's proposal of 15 workdays intends to ensure that employees

on vacation have an opportunity to see the vacancy and apply, establishing a sufficient applicant pool for the Department. The VA's claim of "too many applicants" is a novel one.[69] Had the Union been given this explanation earlier, it could have explored whether this was an actual issue and altered its proposal. Resultingly, the Parties are not at impasse. Nonetheless, the Declarations of Ms. Sadler, Ms. Miller, and Mr. Sitlinger lack credibility and imply a sampling bias. First, they all come from VISN 9; the VA did not provide statements from different parts of the country. This is significant given the VA has publicly claimed that inefficiencies in HR come from different offices handling matters differently.[70] Notably, even the Government Accountability Office ("GAO") has found occupational skills gaps in VA's HR.[71] Without information from other HR offices, there is not enough data from which to extrapolate a legitimate strain on VA's HR infrastructure. It is more likely than not Ms. Sadler, Ms. Miller, and Mr. Sitlinger are simply a part of an inefficient HR office.

The troubling conclusion garnered from the VA's submitted Declarations is the lack of advancement opportunities. The Department has submitted declarations of HR employees complaining of their job duties, but worse, complaining of as many as 600 employees in just two states, Tennessee and Kentucky, seeking career advancement. Instead of questioning why so many employees are lacking in upward mobility access, the VA's response is to *limit the access*. It demonstrates a failure of the Department, and that failure has nothing to do with a posting timeline requirement.

Next, despite submitting Declarations of complaints about their jobs and that they must review too many employees, the Department also proposes eliminating the Competitive Action

[69] Department's SOP, Exhibits 17, 20, and 43. Notably, Ms. Miller (Ex. 20) claims to have attached an Exhibit to her Declaration showing the mean time to process resumes, yet it isn't attached.
[70] https://federalnewsnetwork.com/all-news/2018/03/va-official-says-its-his-mission-to-re-centralize-hr-offices/
[71] https://www.gao.gov/assets/690/681805.pdf

Panels, whose very purpose is to review the applicants. The VA's claim that these panels "do not curtail allegations of violations" should read "do not curtail violations." Somehow, despite the Union's efforts, some managers are so determined to violate merit principles that they do so anyway. Eliminating the guardrails will only result in more EEO and OSC claims.

Finally, for the first time, the VA claims that the Union's proposals interfere with its "fundamental hiring function." As a result, the Union has filed a negotiability appeal on its proposals.

Article 25 – Official Travel

Contrary to the Department's arguments, there is only one issue remaining in dispute in this article: Union representatives' travel between local facilities.[72] The Union's proposals do not expand FTR requirements. The Department fails to address the waste of funds when both management and the Union are traveling to and from the same locations.

Article 26 – Parking and Transportation

The VA laments providing parking to Union officials, yet this Article does not apply to the provision of parking to the Union; it only applies to the provision of parking to the employees performing work for the Department. It would behoove the Department to separate its hostilities against the Union from those towards its employees. It is so blinded by this hostility that it cannot recognize a proposal for the Union, institutionally, from a proposal for bargaining unit employees, specifically. The Department's submitted email from Kendrick Brown demonstrates the point.[73] It is shocking for Mr. Brown to claim that the Department is "diverting funds from medical care" to provide its own employees, who provide the care, with parking. To

[72] The Union's proposals do not include "prepaid calling cards." The remainder of the Union's proposal is the same as the Department's.
[73] Department's SOP, Exhibit 23.

the contrary, providing employees with parking actually supports funds for medical care, since it is those same employees who provide the medical care in the first place. There is no doubt that Mr. Brown, an Associate Director, gets to park at the facility for free. It is troubling that he is claiming bargaining unit employees should not.

In support of its argument, the Department claims that the Union denied "temporary use of their designated parking spaces" for the Wheelchair Games. The VA's own exhibit demonstrates that the facility was choosing to close *an entire lot*, not just the Union's space.[74] And the Union objected because there was already a lack of parking space for bargaining unit employees *who performed medical care*. Clearly, the Union's motivation of prioritizing employees who perform medical care was more in line with the VA's asserted interest.

The VA's assertion that the "perk" of parking should only go to its management officials is absurd. In support of its claim of scarcity, the VA provided pictures of Union parking spaces at one facility. However, it failed to provide pictures of the parking spaces reserved for the facility directors and other management executives, which are not insignificant or scarce.[75] Until the VA has eliminated all employee reserved spaces, its claims concerning patient care is hollow pretext. The VA prefers to attack the Union via proposals concerning BUEs, resulting in the detriment of its own employees and by proxy, Veterans.

The remainder of VA's assertions are clearly not derived from reading the Union's proposals as they address matters not contained in the Union's proposals. The fact that the VA takes the time to call its employees "scofflaws" over parking tickets when its own policy allows for two courtesy warnings[76] is telling.

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[74] Department's SOP, Exhibit 26.
[75] Attachment 7, Williams Declaration.
[76] VA Handbook 0730 at p. 48-49, https://www.va.gov/vapubs/search_action.cfm?formno=730&SortBy=Pub_Type_Desc (last visited 7/2/2020).

Article 27 – Performance Appraisal

The Department begins its arguments with an incorrect statement of the law. The Accountability Act *does not* eliminate the VA's burden of providing employees with an opportunity to improve as required by Chapter 43. It only changes the procedures for taking action against employees when they do not improve. If Congress wanted to eliminate the opportunity to improve, it would have done so.[77] Even President Trump knows the section requiring the opportunity to improve.[78] Instead, the Accountability Act changed Section 4303 (*Actions* Based on Unacceptable Performance), not Section 4302 where the opportunity to improve, which occurs prior to an *action*, is required. So, the Department's proposals eliminating the opportunity to improve are contrary to law.

The Department asserts that 28.8% of employees "agree that steps were taken to deal with poor performers." However, the VA's conclusion that the other 71.2% think that more stringent measures should be taken is unsupported. The majority of employees more than likely believe the VA is too draconian in its performance actions. This conclusion is more reasonable given the Department does not even want to allow employees an opportunity to improve their performance.

The Department's objection to the Union's proposal that it will not penalize union officials "in their performance appraisal" is nonsensical because it would be a prohibited personnel practice to penalize employees in their performance appraisal for matters unrelated to their performance.[79] So, the Department's objection is misplaced. It should join in condemning

[77] Attachment 8, Congressional Letter to Shulkin.
[78] Executive Order 13839 states "Agencies should limit opportunity periods to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, to the amount of time that provides sufficient opportunity to demonstrate acceptable performance."
[79] 5 U.S.C. §2302(b)(10).

an illegal practice and its position should be rejected. The VA also fails to produce examples of the grievances it claims the Union will file, failing to show any have been filed in the intervening years. The Union's proposals are identical to the current language, so if relevant grievances have arisen, the VA should be able to present them.

Finally, for the first time, the Department claims that the Union's proposals interfere with its right to determine and establish qualifications and its right to assign and direct work. As a result, the Union has filed a negotiability appeal with the Authority.

Article 29 - Safety, Health, and Environment

The Department has a "robust and well-run" safety program because of its prior work with its unions. The Department's predecisional involvement of the VA's unions[80] worked so well that the VA has not updated it since. The policy the VA points to establishes the Union as a part of the Steering Committee.[81] The Departments assertions are contradicted by the VA's own policy.

Clearly the Union's proposals are not contained in the VA's policy, and the VA's proposal to refer employees elsewhere for information does not make the case that it cares about the safety of its employees.

Next, the VA has not paid the travel expenses for Union officials to attend VHA safety training since 2013.[82] So, the statement "the average cost to VA for Union employees to attend the two VHA yearly safety conferences (Basic and Intermittent) from 2017-2019 averages

[80] Attachment 9, Reynolds email.
[81] VA Handbook 7700 (Appendix A), https://www.va.gov/vapubs/Search_action.cfm (last visited 7/2/2020).
[82] http://afgenvac.org/wp-content/uploads/2013/08/Safety_and_Health_Training_NG-signed.pdf; http://afgenvac.org/wp-content/uploads/2018/01/NG-121316-Safety-Health-Rep-Training.pdf

$100,000 annually"[83] is false. The Union self-funds the training and the attendance of its members[84] and the VA has expressed its support.[85]

Finally, the VA claims, for the first time, that the Union's proposal interferes with its right to "secure and safeguard personnel." As a result, the Union has filed a negotiability appeal with the Authority.

Article 31 – Silent Monitoring

The Department makes claims attributed to J. Falk[86] and J. Waller.[87] However, neither of their Declarations were provided. Regardless, the VA admits what the Union claimed in its Written Submission, that the VA believes it can monitor veteran healthcare without the veteran's knowledge. It cannot monitor an employee's provision of care without also monitoring the veteran receiving the care. The VA has failed to provide any legal authorization for such violative and invasive conduct.

The VA takes umbrage with the Union's proposal of notice to employees that they will be monitored for performance. This notice is no different than when OSHA[88] or the College of American Pathologists[89] provide the Department with notice of an inspection. The purpose of silent monitoring is to ensure "accurate information… and to determine training requirements." So, the VA's claim that notice will be a warning for employees to be on their "best behavior" makes no sense. If employees do not have accurate information, a notice that the call is being

[83] Department's SOP at p. 47.
[84] Attachment 10, AFGE 2020 Safety Conference Flyer and AFGE 2019 Safety Conference Flyer.
[85] Attachment 11, VA Support Letter 2018.
[86] Department's SOP, Exhibit 28 was not provided.
[87] Department's SOP, Exhibit 29 was actually a declaration from Joseph Dassaro, not J. Waller. Mr. Dassaro's declaration did not at all mention Silent Monitoring.
[88] https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf
[89] https://www.cap.org/laboratory-improvement/accreditation

monitored would not provide them with the information. If employees need training, one-weeks' notice does not allow them sufficient time to register and attend a training.

There are 52 weeks in a fiscal year; the Union's proposals do not in any way restrict the sample size or frequency of the monitoring. Notifying employees is no less efficient than taxpayers funding the pay for someone to listen to another employee's phone calls repeatedly. Finally, the Union does not have a proposal requiring partnership or a Task Force.

Article 33 - Temporary, Part-Time, and Probationary Employees

For the first time, the VA claims that the Union's proposals restrict its right to hire, assign, direct, and retain employees. The VA does not identify the particular proposal it claims restrict its rights. As a result, the Union has filed a negotiability appeal on its proposals.

Article 35 – Time and Leave

The Department has operated under the Union's proposals for the past nine (9) years, and it has not had any effect on its "clinical coverage." The VA's issues with coverage come from its failure to prioritize staffing the Department[90], not the leave use of its employees. The Union's proposals explicitly acknowledge the discretionary nature of LWOP requests. But they also acknowledge when LWOP is mandatory, like for disabled veterans seeking medical or mental treatments under Executive Order 5396. The Department's objection to allowing its disabled veteran employees from seeking treatment on *unpaid time*, consistent with EO 5396, is not only indefensible but unlawful. The VA's opening statement of its argument, "The Department will always consider the health and well-being of its employees," is laughable and disingenuous.

But the VA does not stop there; it goes on to disparage its employees who are disabled veterans by insinuating that they will abuse the system and "undertake widely accepted (and

[90] https://www.washingtonpost.com/politics/va-struggles-to-fill-hospital-jobs-it-has-49000-openings-across-the-country/2019/11/05/91fbd4fe-ff4f-11e9-9777-5cd51c6fec6f_story.html

prescribed) therapies such as medicinal marijuana and goat yoga." For the many veterans who are simply seeking medical treatment, the insinuation is disrespectful. For the VA to cast aspersions on medical treatment it acknowledges is widely prescribed is contemptable.

As it pertains to Union officials use of LWOP, the Union's proposals explicitly state that it may be granted. Nothing in it requires blanket approvals.

The VA is either ignorant of the leave categories or misunderstands them. Employees can use up to 13 days of sick leave for bereavement, but they can also use annual leave or LWOP, in addition to sick leave. The VA wants to charge employees sick leave regardless of the employee's choice, or whether they have sick leave available.

The Department includes a Declaration from Joseph Dassaro.[91] In the middle of a pandemic, Mr. Dassaro takes exception to granting employees LWOP *for being sick* because it removes his discretion. To be clear, the VA submitted a Declaration from one of its managers that he wants discretion to *deny* employees the ability to stay home *unpaid* while they are sick during a pandemic. He wants "qualifiers" as though the existence of a *pandemic*, declared by the President of the United States, is disputed. If there were any doubt as to what VA managers will do with "flexibility," Mr. Dassaro's declaration, insensitive and contrary to public health and safety, is telling.

Mr. Dassaro similarly opposes the granting of LWOP for employees receiving treatment or rehabilitation through the Employee Assistance Program ("EAP"). As a reminder, the VA has already agreed: "For clearly compassionate and appropriate reasons, the Department may increase the stated limits applicable to all forms of leave in accordance with applicable government-wide regulation and law." Obviously being sick during a pandemic and receiving

[91] Department SOP, Exhibit 29.

treatment through EAP are clearly compassionate and appropriate reasons to warrant the granting in the MCBA.

Article 37 – Training and Career Development

For the first time, the VA claims that the Union's proposal "infringes on the Department's authority to determine its administrative and functional structure including employee relationships through organizational lines of authority and the distribution of responsibilities for delegated and assigned duties." The Department does not provide any case to show that the Union's proposals are similar to those found to be outside the duty to bargain. As a result, the Union has filed a negotiability appeal.

Article 39 – Upward Mobility

The Union is not opposed to renaming the article. However, the 2002 Version of VA Directive 5015 is not rescinded and appears on the VA website today.[92]

For the first time, the VA claims that the Union's proposals interfere with a multitude of management's rights. The VA does not provide any cases showing how similar proposals have been found to be nonnegotiable. As a result, the Union has filed a negotiability appeal with the Authority.

Article 40 - Within-Grade Increases and Periodic Step Increases

For the first time, the Department declares that the Union's proposals infringe on its right to discipline, among other management rights. The VA does not identify which proposals it claims violates its rights. As a result, the Union has filed a negotiability appeal with the Authority.

[92] https://www.va.gov/vapubs/Search_action.cfm (last visited 7/2/2020).

Nonetheless, the Union's proposals do not in any way restrict the VA from providing pay increases. In fact, the Union's proposals prevent their undue withholding. When discipline is appropriate, Management should not resort to denying a WIGI. The Union's proposal keeps the VA competitive.

Article 43 – Grievances

The Union has yet to locate a single manager that is so afraid of grievances that they refuse to assign work, direct employees, or discipline employees. Also, the VA has failed to show any abuse of the grievance procedure. The VA claims "employee[s] may exercise his or her right to pursue relief by initiating an action under the statutory procedure or timely filing a negotiated grievance," while simultaneously excluding all matters from the grievance procedure. The Union asked the Department what would be left to grieve, given the VA's exclusions, and the VA representatives could not answer. The VA provides a grievance procedure in name only. Its proposals to substantively eradicate the statutorily required grievance procedure are illegal.

Next, the VA misstates and clearly misunderstands the case it cites. The VA cites to *Department of the Treasury, IRS v. FLRA,* 494 U.S. 922 (1990) to claim that any exercise of management rights under Section 7106(a) is legal and therefore excluded from the grievance procedure. VA's argument is tantamount to "because management does it, it is legal." This conclusion has no support from the cited case.

First, 5 U.S.C. §7121(c) contains specific grievance exclusions and the Union does not dispute them. In fact, the same exclusions are in the Union's proposals. Instead, the Department somehow broadens these statutorily enumerated exclusions to include an exclusion of all exercise of management rights under §7106(a). *IRS v FLRA* concerned FLRA's finding that IRS was required to bargain with NTEU concerning its contracting out determination. The Court

found that the decision to contract out is not subject to the Statute at all. It did not add to the matters excluded from the grievance procedure under §7121(c). It stated that *if exercised legally*, matters under other laws were not subject to bargaining, grievances, or any other entitlement under the FSLMRS. So, the case actually stands for the proposition that if management does not act in accordance with law, it *IS* subject to not only the grievance procedure, but bargaining, and other related processes. Additionally, and fatal to the Department's argument is the fact that every exercise of management rights under §7106(c) is *not* governed by an area of law outside the Statute. The Department's legal citation for the blanket exclusion of grievances fails.

Next, the VA inaccurately describes the law uniquely pertaining to it. 38 U.S.C. §7422 *does not* remove matters from the grievance procedure. It allows the *Secretary* of the VA to remove specific matters from collective bargaining.[93] The Parties cannot agree to what is in the Secretary's discretion, nor can the Panel choose what is in the Secretary's statutory discretion.

Additionally, the VA does not have sole and exclusive discretion over "leave, awards, training, official time and any discretionary exclusions." It is clear the VA does not know what "sole and exclusive" discretion means, even after it has recently received a decision from the Authority on the subject.[94]

Then, the Department clearly misunderstands 5 U.S.C. §7121(c)(4), which concerns matters prior to, and including, the appointment of an employee. Appointment "refers to the action which takes place at the time an individual is *initially hired* into the Federal service."[95] So, "appraisals, proficiencies, awards, incentives, quality step increases, retention, recruitment, non-selection for promotion, training, and advancements including career ladder promotions" occur

[93] *See* 38 U.S.C. §7422(d).
[94] *AFGE National VA Council #53 and U.S. Dep't of Veterans Affairs*, 71 F.L.R.A. 741 (2020).
[95] *National Council of Field Labor Locals of the American Federation of Government Employees, AFL-CIO and United States Department of Labor*, 4 FLRA 376 (1980).

after appointment and are categorically not "certifying," or "examining" under the Statute's grievance exclusion.

As the Department can rely upon "[w]arning letters, performance expectation reminders, and counseling" for its chosen disciplinary penalty, there are significant grievance remedies. Where supervisors use warning letters, performance expectation reminders, and counseling to harass employees, the need is pertinent.[96]

The following assertion by the Department is perplexing: "5 USC 7121(2)(C)(3) excludes suspensions and removals for reasons of National Security from the grievance process, regardless of employee status (probationary, term, temporary, or permanent)."[97] First, that citation does not exist. Second, 5 U.S.C. §7121 does not mention national security at all. Finally, the VA has not explained any national security interest that would be relevant to the Parties' MCBA and it has not made any such proposals to justify this statement in its SOP.

Not only does the VA argue for an exclusion it does not list in its proposals (changes to working conditions), but the case it relies upon has been overturned.[98]

The Department's arguments concerning Section 714 of the Accountability Act continue to be wrong. First, arbitrators do not have "unlimited authority" and are not "permitted to expand the law beyond that to which the MSPB is held." Arbitrators are explicitly required to apply the same standards and burdens of proof as the MSPB.[99] The VA has not presented a single case where an arbitrator failed in this regard. As stated earlier, the VA has declined to file any appeals from arbitrator's decisions in such matters, thereby conceding that arbitrators have acted correctly. Further, it is confounding that the VA is claiming appeals to the FLRA present a

[96] Attachment 12, Pershing Arbitration Decision.
[97] Department's SOP at p. 58.
[98] *See* note 29, *supra.*
[99] *See Cornelius v. Nutt*, 472 U.S. 648 (1985).

hurdle for them because actions taken under Section 714 of the Accountability Act are *not* appealed to FLRA, which is exactly in line with Congress' intent in the Accountability Act. It appears the VA does not know the appeal avenues of the statute exclusively designed for it. To that end, and contrary to the Department's claim that Congress intended to remove appeal "hurdles," Congress explicitly includes an appeal of Accountability Act actions to the Federal Circuit[100] of which the VA has not availed itself. Clearly Congress did not include the Department as a party who can review a determination as to whether an Accountability Act decision was correctly made. So, the VA is without authority to claim any arbitrator's decision was wrong.

The remainder of the VA's arguments concerning the MSPB are inapposite. As noted earlier, it is the MSPB that was reviewing Accountability Act cases incorrectly.[101] A proper authority, the U.S. Court of Appeals for the Federal Circuit, not the VA, has made that finding. Without seeking the same review of arbitral decisions, the VA cannot claim that arbitrators' decisions are incorrect.

The VA points to its agreement with the National Association of Government Employees ("NAGE") for support of its proposals; however, it is clear a management party that was familiar with VA's operations wrote it.[102] It is also strange for the VA to point to the NAGE agreement here and claim "divisive" differences, when the Department is seeking many more grievance exclusions with AFGE than it has with NAGE. Obviously, the VA's proposals would create the divide it decries.

[100] 38 U.S.C. §714(d)(5)(A).
[101] *Sayers v. Department of Veterans Affairs*, CAFC Case No. 18-2195, March 31, 2020.
[102] Department's SOP, Exhibit 32. It includes a proper acknowledgement that the Secretary of the VA must act to exclude a matter from the grievance procedure. P. 2(C).

To be clear, the VA's assertion of a "divisive culture of disparate treatment" is also disingenuous. The VA fails to mention its other unions, like the National Federation of Federal Employees ("NFFE"), which does not have the exclusions that NAGE has, nor that are proposed with AFGE.[103] Two of the Department's Unions already have different exclusions, so a difference in AFGE's is of no consequence.

Separate from the differences between the Department's Unions, the VA always had at least four different systems for employees: bargaining unit employees have access to the negotiated grievance procedure; non-bargaining unit employees have access to the administrative grievance procedure; SES employees are specifically governed by 38 U.S.C. §713, not the negotiated or administrative grievance procedure; and, Title 38 employees have the Disciplinary Appeals Board process governed by 38 U.S.C. §7462. The existence of these various systems has not created any "divisive culture of disparate treatment."

The Department even misapplies the Bible in its confusion. The Bible verse refers to deference in matters of morality.[104] Yet, the VA asks the Panel to call on one statutory procedure over another. The requirement of the grievance process is clearly steeped in statute.[105] It has timelines and accountability through the FLRA, the EEOC, OSC, and the Courts. And as earlier discussed, arbitrators have not been overturned on Accountability Act matters at all, unlike the MSPB. Clearly, DOL, EEOC, MSPB, and the FLRA are fallible, as they also have appeal processes. Therefore, it is easy to conclude that the grievance procedure is at least equal to the others.

[103] *U.S. Department of Veterans Affairs and NFFE*, 19 FSIP 024 (2019), 7-8.
[104] The full verse is "Render to Caesar the things that are Caesar's, and to God the things that are God's." Mark 12:17.
[105] 5 U.S.C. §7121.

The Department then turns to outright fabrications.[106] The VA first claims that the Union filed 4,618 grievances in 2018.[107] It should be noted that 4,618 grievances for a bargaining unit of over 270,000 employees indicates that the process is not being abused. Next, when the Department claims that the grievances were "determined" to be justified or not, it is referring to determinations made by the VA itself, not a third party. In other words, the VA granted the grievances 17.28% of the time and denied them 83% of the time. Obviously, when the VA polices itself, it rarely finds anything wrong. Here is where the VA's believability stops. The VA then claims that its grievance decisions were only overturned 48 times at arbitration, but only in Article 44 does it reveal that 400 grievances advanced to arbitration. This number, 400 out of 4618 demonstrates that the Union only advances less than 10% of its grievances to arbitration. Evidently, the informal resolution process set forth in the MCBA is effective.

The VA then offers a fallacious argument that the existence of an expenditure on the grievance process is an indictment on the grievance process itself. There is no support for the position that the VA will be immune from expenditures for third-party resolution of claims. Some cost is expected to be borne by the Department. Without sufficient context, it is impossible to judge whether this expense is too high, low, or reasonable. Additionally, the VA has to spend money on grievances and arbitrations when there is a dispute between the union/employee and the agency, so to assume that complaints are frivolously filed unfairly presumes the guilt of the employee and the innocence of the manager, when it could just as easily be the case that the manager is at fault and the employee is an unwitting victim. Further, management officials also file grievances. Any discussion of financial expenses without a look at the motivating

[106] Department's SOP, Exhibit 36 shows that VA doesn't understand its own data.
[107] The VA claims its reference is attached, but there is no email from Huerta in the Department's SOP, Exhibit 2.

circumstances or larger budgetary context renders FSIP without sufficient data to determine the reasonableness of the Parties' respective proposals.

The Department then espouses a series of figures in which no factual conclusion can be drawn. First, the VA asserts that "at an average cost of $1,568.07 per grievance, the VHA spent $5,990,027 on meritless grievances."[108] It is unclear if the Department is claiming that it incurs costs for grievances separate from arbitration costs resulting in this figure or if the Department is claiming that every grievance is advanced to arbitration resulting in this figure. However, neither of these conclusions are true. The MCBA does not attribute any cost to grievances short of arbitration and just 5 pages later, the VA reveals that only that 400 grievances are advanced to arbitration.[109] The only conclusion that can be reached is that the VA has not demonstrated where the $5,990,027 figure comes from. Then, the VA asserts that "[a]t an average cost of $4,981.95 just for the arbitrator, the VHA spent $1,708,808.85 on arbitrator fees" for "meritless" arbitrations.[110] Regardless of the outcome, these costs are borne equally by the Parties. Further, the VA does not provide the number of cases won by the Department (which can be presumed is not favorable to the VA) or settled between the Parties. The conclusion here is not that the Union bring meritless grievances, but instead: 1) that the Union does not take every grievance to arbitration and, 2) that the Parties' grievance procedure works. The fact that the VA would conceal the exact outcomes of the Union's grievances, by illegally withholding information and supplying obfuscating figures, reeks of desperation, but not an iota of factual evidence.

The remainder of the VA's arguments amount to nothing more than an unsubstantiated rant meandering into unrelated topics. The current grievance process works by having parties

[108] Department's SOP at p. 63.
[109] Department's SOP at p. 68.
[110] *See* Department's SOP at p. 68.

resolve their issues before arbitration is used as a last resort. The VA provides no evidence for its grievance exclusions or changes to the grievance process.

Article 44 – Arbitration

The Department uses one arbitration decision to advance the unjustified claim that the Union routinely files frivolous grievances. When the Department to provide the number of cases it won, it is not the Union behaving frivolously. Nonetheless, the Parties' current procedure and the Authority's caselaw[111] already allow procedural arbitrability issues to be bifurcated. It should be noted that while the Department decries the cost of arbitration, bifurcation *doubles the cost*. Both matters can be heard in one hearing to be the most economically efficient. Additionally, arbitrators have more integrity than the VA gives them credit for. They have not had any issues with finding a matter to not be arbitrable.[112] Bifurcation should not be the rule for every case as the Department's proposal requires. The Union's proposals, more appropriately, allow the option for bifurcation. The Department's proposals then require a change in the arbitrator, which is hardly efficient, prolonging the very arbitration process to which VA objects. This is the very example of inefficiency.

If the VA truly wanted to expedite arbitrations,[113] it has the power to do so. The Union has no interest in delaying arbitrations whatsoever. It is the VA that has a real interest in delay. For example, in arbitration of a ground rules dispute, the Parties had a hearing date of March 26,

[111] In 2018, the Authority announced that it would now hear direct challenges to an arbitrator's procedural-arbitrability determination through nonfact exceptions, in *Department of Housing and Urban Development* , 70 FLRA 432 (FLRA 2018), and essence-of-agreement exceptions, in *Small Business Administration* , 70 FLRA 525 (FLRA 2018). This changed prior precedence that did not allow direct challenges to arbitrator's procedural arbitrability determinations.
[112] *AFGE Local 933 and U.S. Dep't of Veterans Affairs JD Dingell VAMC Detroit, MI*, 71 FLRA 521 (2020) (dismissing the Union's exceptions to an arbitrator's decision that the grievance was untimely.)
[113] It must be noted that for fiscal year 2020, EEO complaints pending a requested hearing are averaging 1100.9 days. Attachment 13, VA EEO Information, p.14.

2019 before Arbitrator Kirk Underwood.[114] However, on March 24, 2019, Arbitrator Underwood unexpectedly terminated his practice. The parties then selected Arbitrator Mark G. Pearce, however, the VA suddenly lacked availability until September 24, 2019. Before the hearing, the Department abruptly needed to add another day of hearing.[115] Then for a fourth hearing day, the VA was unavailable until January 31, 2020.[116] The VA unilaterally extended the conclusion of the hearing almost a full year beyond when it was originally scheduled. This type of delay is typical for the VA. The VA is the cause of the issue it complains of; it is not a failure of the Union's proposals.

In direct contradiction to its assertions in Article 43 where the VA appeared to claim that the Union advanced 3,820 grievances to arbitration, the VA reveals that the Union does a good job of not advancing frivolous cases to arbitration. Out of 4,618 grievances for a bargaining unit of over 270,000 employees, the Union invoked arbitration on only 400 grievances, and continued to resolve matters leaving only a portion of the 400 to proceed to arbitration. Despite the VA's best efforts at demonizing the Union, the process, agreed to by the Parties for decades, works.

Finally, the VA confuses the level of bargaining obligation with the level for filing grievances. The National Union is the party to this bargaining, so the bargaining obligation is properly at the national level. The bargaining obligation level, *who* is bargaining (which is not disputed), is irrelevant to the mandatory, substantive bargaining obligation of *what* the grievance procedure entails. The Parties have agreed, and it has been borne out, that grievances are best resolved at the lowest possible level. The Department has not provided a scintilla of evidence that arbitration at the national level, with convoluted procedures, makes more sense for the

[114] The date was scheduled over the Department's objection seeking to delay the hearing as part of its strategy. *See* Attachment 14, Underwood emails.
[115] Attachment 15, Pearce emails.
[116] Attachment 16, Pearce emails2.

Parties. There is no evidence that one party making all the arbitration decisions while the other pays for it makes sense. In an utter failure of self-awareness, the VA ends its arguments crying foul at the unfairness of arbitration with an arbitrator who did his job. It should also be noted that the current MCBA arbitration article is less than two (2) pages. The Department's proposals complicate the procedure so thoroughly that it has ballooned to five (5) pages. Clearly, the current simple process works and the VA is grasping at straws to eliminate the statutorily-required process.

Article 45 – Dues Withholding

The VA claims employees should opt-in to paying dues annually. However, this violates employees' designation to pay dues. No other voluntary allotment has such a requirement at the VA. Employee associations (like NOVA) do not require annual renewal for deduction of membership dues. Similarly, these other items do not have annual renewal requirements: TSP contribution - automatically resume in the next year; Thrift Loan Repayment continues for the life of the loan; FEGLI Optional Insurance; Savings allotments; Post 56 Military Service Deposit; Quarters; Subsistence; Garage; Parking; Payment of commercial insurance premiums on the life of the allotter; Voluntary liquidation of indebtedness to the U.S. Government, including voluntary payment of back taxes; Payment of certain state, District of Columbia and local taxes under 5 C.F.R. 550.351 when an employee has a legal obligation to pay, but the payroll provider has no capacity to withhold; Voluntary Allotment for Alimony and/or Child Support under 5 C.F.R. 550.361; and, an allotment to a political action committee.

The FLRA did not "change the law."[117] Obviously, the FLRA does not have authority to change the law and neither does the VA. The VA's annual opt-in proposals attempt to determine

[117] Department's SOP at p. 70.

the procedures for dues withholding, which it is not empowered to do. In other words, the Department proposes to drop employee memberships each year, negating their election, and in contravention of the exclusive list of factors for an agency-initiated termination of dues withholding in the Statute. The proposal is illegal and cannot be selected.

For a member-initiated revocation, the Union's proposals offer a more simplified process: any day during a 30-day period.

Article 46 - Local Supplement

The VA's claims contradict its own final proposal in Article 21, Section 1 (A)[118] allowing practices and local agreements. It contradicts the Parties' agreement in Article XX permitting bargaining at the local level. It also contradicts the Parties' agreement in Article 35, Section 2 (D) allowing practices and local agreements for resolution of annual leave disputes.[119] Then, the Department makes an unsubstantiated claim that VBA alone has approximately 1000 MOUs.[120] However, in its illegal refusal to provide the Union with requested information, the VA claims that it does not have MOUs other than what is posted on the Union's website.[121] The Union's website has only *79* VBA MOUs.[122] Further, even under the current MCBA, MOUs, past practices, and local supplemental agreements are only in effect to the extent they do not conflict with the current agreement. One document cannot account for all the conditions of employment and the MCBA does not claim to do so. Therefore, matters will have to be addressed at the local level as the Parties have already agreed.

[118] Department's SOP, Exhibit 1 at p. 9.
[119] Attachment 17, VA Article 35.
[120] Department's SOP at p. 71, FN 223.
[121] Attachment 18, VA Response to Info Request, p. 2.
[122] http://afgenvac.org/?page_id=594

Finally, the Department misstates the law and again relies on a case that was overturned.[123]

Article 47 - Mid-Term Bargaining

The Department has significantly changed its proposals from the last document provided to the Union.[124] So, the Parties have never discussed these proposals. The Panel should rescind jurisdiction.

Nonetheless, the VA's proposals continue to relegate the Union's statutory mid-term bargaining rights to consultation rights. Therefore, the VA's proposals are an illegal waiver and cannot be selected.

Article 48 – Official Time

The Department espouses untruths. The statement "Their current proposal does away with all limits on official time, essentially demanding a blank check from American taxpayers" is patently false. The Union's proposal clearly puts a limit on official time. Despite an increase of the need for official time due to the unique to VA Accountability Act, VA's limitation on settlements, and the increased number of whistleblower and EEO complaints, the Union proposes the same official time rate as the last MCBA. The Union then drops the bank of official time the President can assign, previously 25,000 hours.

The VA's claim that ". . . under the current CBA, AFGE received 1,048,569 hours of official time in fiscal year (FY) 2016. The equivalent of a $49,142,863.9011 taxpayer subsidy . . ." is also <u>false</u>. OPM's report was for ALL the VA-affiliated unions, not just AFGE. The VA cannot even tell FSIP how much time AFGE has used. It instead attributes the entirety of its

[123] *See* note 29*, supra.*
[124] Attachment 19, VA Article 47.

official time to AFGE, with numbers, that it has been shown the VA does not accurately track.[125] What is clear from the report the VA cites is that official time use from 2014 to 2016 dropped by 11.49%. The obvious conclusion is that the unions, including AFGE, responsibly use their official time and do not use more than is necessary.

The Department asks the Panel to "limit to a finite number the total amount of official time each year which can be authorized for §7131(d) activities." However, to do so would be contrary to the explicit terms of §7131(d). At any time, the Parties can agree on official time that is reasonable, necessary, and in the public interest. The Panel cannot do away with what the Statute explicitly provides. The MCBA simply sets forth the Parties' initial agreements and cannot prohibit future discussions.

Putting the Department's anti-union animus aside, it has failed to offer any evidence of official time use being a burden on the Department. Clearly, the Department's refusal to "prioritize" staffing demonstrates that it does not believe it has a staffing problem.[126]

The Union's dues revenue pale in comparison to the VA's $220.7 billion budget for FY 2020, which included AFGE's use of official time. While the VA attempts to decipher AFGE's finances, it fails to account for the important fact that **the $58,554,416[127] in dues came from 125,995[128] employees, less than half of the total bargaining unit, of which the Union must still represent all 271,226.** The VA's violative conduct is not limited to the dues paying members; its failures impact every bargaining unit employee. The Union represented the *entire* bargaining unit when the VA was leaving employees exposed to COVID-19.[129] The Union

[125] United States Government Accountability Office, VA COULD BETTER TRACK THE AMOUNT OF OFFICIAL TIME USED BY EMPLOYEES, GAO-17-105 at. p.i, 18 (January 2017).
[126] https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5104
[127] This is the correct amount of dues remitted to AFGE from the VA.
[128] Union's LM2 Report.
[129] https://www.afge.org/globalassets/documents/generalreports/coronavirus/4/osha-form-7-national-complaint.pdf

represents the *entire* bargaining unit when the VA fails to pay employees correctly or on time.[130] The Union represented the *entire* bargaining unit when the VA was willfully violating employee's privacy rights.[131] The Union did this with less than half of its bargaining unit paying dues. The Union's doing so benefited veterans *and* taxpayers; this is why Congress found Unions and collective bargaining to be in the public interest.[132] Official time is not a "windfall;" it is a necessary component to evening the scales between the Union and management. When the VA stops violating the law, only then will it have the credibility to comment on the Union's official time use.

Also, the VA's reliance on the dues amount is bewildering when the VA, in Article 45, is seeking to purge dues withholding against employees' will. The VA's claim is no different from reassuring the Union it has plenty of gas in the tank while planning to siphon the gas in two minutes. While the VA's arguments change for expedience, they were never valid in the first place.

The VA's limitation on §7131(d) time is hardly a compromise. The VA moved from insanity (10,000 hours = .04 hours per BUE) to extremely unreasonable (176,296 hours = .65 hours per BUE) all while the unique circumstances at the VA (Accountability Act, health and safety concerns during a pandemic, limitations on settlements and increased whistleblower and EEO cases) warrant more than EO 13837's guidance of 1 hour per BUE.

The Department's LWOP proposal is directly counter to Congress's intent with the provision of official time, to provide the same *paid time* Management uses. Managers do not use

[130] http://afgenvac.org/wp-content/uploads/2013/08/Emergency_Payments_NG-signed.pdf
[131] http://afgenvac.org/wp-content/uploads/2017/07/2017-07-11-NG-7-11-17-VA-Adverse-Actions-Report.pdf
[132] 5 U.S.C. 7101(a).

LWOP or annual leave to conduct activities under the Statute. The VA even indicates that it will not approve LWOP in the same submission it claims LWOP is available.[133]

While the Department claims, for the first time that official time interferes with its right to assign work, that claim has already been addressed by the Authority. Official time is a carve out exception to management's rights.[134]

Article 49 – Rights and Responsibilities

The Department's position on the Union's "primary concern" concerning its bargaining obligation (which is not contained in the Union's proposals) is inconsistent with law. Similar to every other time the VA cites to the case, it has been overturned.[135] The remainder of the VA's assertions are irrelevant, because its own proposals do not mention how employees should comport themselves and the Union's proposals do not mention partnership.

Article 50 – Surveillance

The Parties never discussed this article and the VA fails to offer any argument in support of its proposals for Article 50. Similar to silent monitoring, the Department cannot surveil an employee's provision of care without also surveilling the veteran receiving the care. The VA has provided no legal support for its broad proposals. The Union's proposal provides simple procedures for when the Department does surveil employees.

Article 51 – Use of Official Facilities

The VA provides space and equipment to several groups but wants the Panel to sanction a violation of 5 U.S.C. §7116(a)(2) by not allowing the Union to do so. The VA is allowing Blacks in Government and Federally Employed Women, federal government employee

[133] Department's SOP at p. 80, FN 262.
[134] *Military Entrance Processing Station*, 25 F.L.R.A. 685 (1987); *Council of Locals 214, AFGE v. FLRA*, 798 F.2d 1525 (D.C. Cir. 1986) (noting that Congress was aware of official time's limitation on management rights.)
[135] *See* note 29*, supra*.

organizations, to use government equipment to host a talk series.[136] The only reason the Department is making these proposals is to illegally discriminate against the Union.

Additionally, the Department's opposition to printing the agreement shows it is out of touch. Not all bargaining unit employees have computers. Even the VA claims to have someone on their team that worked their way up from a GS-2.[137] An employee making $21,000 a year should not have to prioritize buying a computer *and* paying for internet access to have a copy of their negotiated conditions of employment.

Article 56 – Title 38 Hybrids

The Department currently has 108,007 Title 38 Hybrid employees in AFGE's bargaining unit.[138] That is 40% of the bargaining unit. The entirety of the VA's proposal to strike the article is that it is consolidated and addressed in another article. In other words, the Department has reduced eight (8) pages of crucial information concerning this unique type of employee to: "The competitive procedures set forth in this Article will not apply to the following:[] Appointments, advancements, and promotions of Excepted service employees."[139] The Union's proposals address more than the "hiring and promotion" of Title 38 Hybrid employees. Section 7 contains procedures and appropriate arrangements concerning the effective date after management has decided to promote an employee. Section 15 encompasses the VA's statutory requirement to collaborate with the Union.[140] These items are not resolved by the VA's limited and factually incorrect proposal in Article 23.

[136] Attachment 20, VA Intranet.
[137] Department's SOP at p. 4.
[138] Attachment 18, p. 7.
[139] Department's SOP, Exhibit 1 at p. 17-18.
[140] 38 U.S.C. 7403(h).

Article 63 – Research Grants

The Department does not provide its final proposals concerning Article 63.[141] The entirety of the VA's argument, including the Declaration from Frank Kozel, M.D.,[142] relate to Article 64. Notably, the Union's proposals in Article 63 do not include any bargaining obligations or "monitoring" by the Union. Those are contained in Article 64, which the Department signed agreement on December 10, 2019. The Union's proposals concerning Article 63 provide simple appropriate arrangements of notifying the relevant employee of approval and changes to research grants.

Article 66 – Technology for Administering, Tracking, and Measuring VBA Work

The Department does not provide its final proposals for Article 66. Also, for the first time, the VA asserts that the Union's proposal restricts several management rights. As the Department does not identify which proposals restrict its rights or provide any cases where the Authority found a similar proposal outside the duty to bargain, the Union has filed a negotiability appeal on the VA's claim.

Article 67 – Skills Certification

While the Department does not provide its final proposals for Article 67, it submits arguments in favor of striking. First, the Department fails to address how this Article is properly at FSIP when the VA failed to submit Article 67 for bargaining. Because the Parties have explicitly agreed that additional articles may not be submitted after May 2, 2019, the Panel must rescind jurisdiction on this article.

[141] The Department includes a strike of Article 64 (Department's SOP, Exhibit 1 at p. 66), but the Parties agreed to Article 64 on December 10, 2019.
[142] Department's SOP, Exhibit 45.

Nonetheless, the VA's argument in its submission and the Declaration from Mark Bilosz[143] are bizarre. The Veterans' Benefits Improvement Act of 2008, PL 110-389, *requires* that VBA administer a skills certification program. So, the claim that VBA has a "permanent hold" on a statutorily required test demonstrates the willfulness of the VA's violations of law. Further, the law specifically provides for the Union's involvement in the development of the examination.[144] The Union's procedure and appropriate arrangement proposals would apply to any version of the examination administered by the VBA, whenever it decides to come into compliance with the law.

Duration of Agreement

The Department failed to provide its final proposals on the Duration of the Agreement.[145] The Department is embarrassed by the $2 million it alleges it spent on negotiations in 2011.[146] It should be, because the Department was the cause of it. The Department had nine (9) different Chief Negotiators during the 60 weeks of bargaining the 2011 MCBA.[147] The VA team changed multiple times, as acknowledged in VA's Exhibit.[148] Those changes prolonged negotiations because the Parties would have to start at the beginning and bring the new members up to speed. The Department cannot assign its own failures to the Union. Further, neither party reopens the Agreement so frequently as to be concerned with a three-year duration. A three-year duration better serves the Parties because neither can anticipate what changes may occur necessitating an update to the MCBA.

[143] Department's SOP, Exhibit 47.
[144] 38 U.S.C. §7732A(a)(2)(A).
[145] Department's SOP, Exhibit 1.
[146] This number should be viewed with skepticism; the Department provides no accounting of what expenses are included in this figure.
[147] Attachment 3, Wetmore Declaration.
[148] Department's SOP, Exhibit 3.

Further, the Department assails the requirement of providing employees with a copy of the MCBA.[149] However, the MCBA is the most economical way to provide employees with sufficient information related to their conditions of employment. Being provided with information is different than making information available for review. It is why the Accountability Act requires that the evidence file be provided to the employee and not just made available for review.[150] Something this important should not be relegated to only a website.

Article XX Staffing

The VA claims to have rescinded its new proposals to "simplify the agreement." However, the Union's new articles are immediately relevant to issues at the VA today.

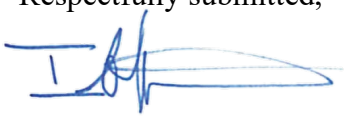
Substantively, the Department claims for the first time, that the Union's proposals restrict management's rights. The VA does not identify which proposals restrict its rights. The VA also does not include any cases to determine whether the Authority has found similar proposals outside the duty to bargain. As a result, the Union has filed a negotiability appeal on its proposals.

Article XX Phased Retirement

The Union's proposals do not make phased retirement an entitlement. Further, much of the VA's concerns were never discussed with the Union. The Union is open to the seeming corrections as articulated by the Department. However, the Union objects to subordinating the MCBA to Department policy. The Union's procedures and appropriate arrangements are fully negotiable and complete, which weighs in favor of being covered in the MCBA. Finally, this Article is not at impasse because the Union is willing to further negotiate, especially since the VA's concerns were not raised earlier and are easily addressed.

[149] Department's SOP at p. 5.
[150] *See* 38 U.S.C. §714(c)(1)(D)(2).

Respectfully submitted,



Ibidun Roberts

Counsel for AFGE