



Out of Many/**One Union**
AFGE NVAC/AFL-CIO

NATIONAL VETERANS AFFAIRS COUNCIL

American Federation of Government Employees, Affiliated with the AFL-CIO

NATIONAL GRIEVANCE

NG-02/3/2020

Date: February 3, 2020

To: Tracy Schulberg
Executive Director
U.S. Department of Veterans Affairs
Office of Labor-Management Relations
810 Vermont Avenue, NW
Washington, DC 20420
tracy.schulberg@va.gov
Sent via electronic mail only

From: Christopher Zatrutz, Staff Counsel, National Veterans Affairs Council (#53) (“NVAC”), American Federation of Government Employees, AFL-CIO (“AFGE”)

RE: National Grievance against the Department of Veterans Affairs for failing to comply with performance appraisal procedures in VHA HRC

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) (“MCBA”), American Federation of Government Employees/National Veterans Affairs Council (“the Union”) is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Department for failing to comply with performance appraisal procedures for bargaining unit employees in the Veterans Health Administration (“VHA”) Health Resource Center (“HRC”). To date, the Department has failed to remedy this violation, and as such, continues to violate the MCBA and federal law.

Specifically, the Department violated Articles 2, 27, 43, 47 of the MCBA; 5 U.S.C. §7117; VA Handbook 5013; and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

STATEMENT OF THE CASE

Background

The Union represents all bargaining unit employees in the VHA Office of Member Services (“VHA Member Services”). This includes virtual employees and those stationed at VA facilities with VHA Member Services offices. In June 2016, the Union and the Department



agreed to a Memorandum of Understanding on the realignment of various VHA Departments to VHA Member Services. (Attachment A). Accordingly, since June 2016 the VHA's Health Resource Center ("HRC") located at Canandaigua, NY; Topeka, KS; and Waco, TX has been a part of VHA Member Services. (Attachment A).

Contact Representatives ("CRs"), GS-0962, employed at the HRC are responsible for initiating, receiving, and responding to inquiries with Veterans, family members, and legal representatives concerning insurance and billing procedures, eligibility and benefits counseling, pharmacy administrative support, and other customer support issues. To perform their duties, CRs rely on various software and telephone processing systems, including Avaya. Due to chronic technical issues, CRs experience frequent delays when completing their work. These technical issues often result in increased Talk Time and overall Average Handle Time. (Attachment B, p. 1).¹

Pursuant to Article 27 of the MCBA, the Department conducts annual performance appraisals for all bargaining unit employees. The performance appraisal process, including the criteria for receiving specific ratings and the standards for conducting evaluations are clearly defined in the MCBA. (Article 27). Employees receive an overall rating and work assignments are also given ratings. (Article 27, Section 2). Employees can receive one of five different overall ratings based on their performance: outstanding, excellent, fully successful, minimally successful, and unacceptable. (Attachment B, p. 5) (Article 27, Section 2(N)).

Leading up to the Department's performance appraisals for Fiscal Year ("FY") 2019, the Union sought clarification from the Department about the standards it was using to evaluate employee performance. (Attachment C, p. 1, 4, and 6). The Union was doing so because it was worried that – for timed elements of the performance appraisal – employees would receive low ratings due to the Department's chronic technical issues which made it difficult for employees to hit their timed targets. (Attachment C, p. 1) (Attachment B, p. 1²).

The Department informed the Union that it was not changing performance standards. (Attachment C, p. 5). However, the Department also said it was rating employees who performed "less than fully successful at the time data was available ... as full successful." (Attachment C, p. 5). The Department appears to have enhanced the ratings of lower performing employees due to "data unavailability following implementation of the Avaya telephony system." (Attachment D, p. 5).³ In other words it seems that, in order to compensate for the technical issues that employees faced during the implementation of the Avaya telephony system, the Department enhanced the ratings for certain employees' non-critical timed elements.

¹ This is a sample Contact Representative performance appraisal. It indicates that Average Handle Time includes Talk Time.

² This is a sample Contact Representative performance appraisal. It indicates the various ratings for Average Handle Time based on the timeliness of performance.

³ The Department rated Talk Time, which is a non-critical timed element, as Fully Successful even for employees whose talk time performance was less than Fully Successful. The appraisals read "Due to data unavailability following implementation of the Avaya telephony system this element will be marked as Fully Successful. Data availability is from 10/01/18-07/31/19."

Violations

Unfair and inequitable application of performance appraisal process

The Union agrees with the Department's decision to compensate employees for the Department's technical issues. However, the Union opposes the Department's inequitable application of the benefit to only certain employees. Article 27 of the MCBA requires the Department's application of the performance appraisal process to be "fair" and "equitable." (Article 27, Section 3(A), (B)). But, the Department did not enhance the ratings of employees who performed Fully Successful or better. (Attachment C, p. 9) (Attachment B). The Department decided against doing so, despite the fact that *all* employees at HRC experienced and were burdened by the same technical issues during the implementation of the Avaya telephony system. The Department chose only to enhance the ratings of employees who performed less than Fully Successful. (Attachment C, p. 5). Because all employees were burdened, but only one category of employees had their ratings adjusted to account for this burden, the Department's application of the performance appraisal process was unfair and inequitable.

Preventing employees from contesting ratings

Following FY2019 performance appraisals, a number of bargaining unit employees took issue with their ratings and sought to contest them. In particular, employees who performed Fully Successful, but were only nominally below an Exceptional rating, also sought to have their ratings enhanced due to the same technical issues that they faced during the implementation of the Avaya telephony system. (Attachment C, p. 6, and 7). In response to these concerns, the Department informed the Union "[a] decision was made in regards to ratings across all HRC business lines and there will not be any exceptions to fully successful ratings to make someone outstanding." (Attachment C, p. 9).

Performance appraisals are important for many reasons, not the least of which is their impact on an employee's eligibility for awards, promotions, and other personnel actions. (Article 27, Section 7(C)). Therefore, if an employee is given a rating that differs from what they deserve, the employee suffers a material loss. For this reason, VA Handbook 5013 permits bargaining unit employees who are dissatisfied with their performance appraisal or overall rating to contest it. (Attachment E, p. I-6). Further, the MCBA broadly permits a grievance over any complaint by an employee relating to employment or to the MCBA. (Article 43, Section 2). Therefore, to comply with the VA Handbook and the MCBA, the Department must allow *all* employees at HRC to contest their performance appraisals if they so choose, including those rated as fully successful.

Failure to bargain

Prior to the Department's completion of FY2019 performance appraisals, the Union repeatedly gave input and sought clarification about how the Department planned to evaluate employee performance. (Attachment C, p. 1 and 4). Rather than consult with the Union about its thoughts and concerns, the Department disregarded the Union's attempts to negotiate a change to the performance appraisal process and unilaterally implemented its own change. (Attachment C,

p. 2, 3, 5, 8, and 9). Had the Department consulted with the Union, the adverse consequences of its change to the performance appraisal process likely could have been avoided. Article 27 requires the Department to involve and bargain with the Union over the performance appraisal process. (Article 27, Section 1(F)(2),⁴ Section 5(B),⁵ (E),⁶ and (I)⁷).

The Department contends that it did not change performance standards. (Attachment C, p. 5). However, the Department admits that it evaluated employees who performed less than Fully Successful differently than those who performed Fully Successful or better. (Attachment C, p. 5 and 9). Since employees who performed less than Fully Successful were rated as performing Fully Successful, the standard for being rated Fully Successful *must* have changed. Accordingly, prior to implementing changes to the performance appraisal process and to performance standards, the Department was required under the MCBA to bargain with the Union. (Article 47; Article 27, Section 5(E) and (I)). The Department failed to do so. What's more, the Department's failure to consult and bargain with the Union prior to implementing the changes violated 5 U.S.C. §7117(d)(1) and (2).

By failing to fulfill its obligations, the VA violated, and continues to violate, the following:

- Article 2 of the MCBA: requiring the Department to comply with all federal law and regulations;
- Article 27 of the MCBA: requiring the Department to fairly and equitably apply the performance appraisal process and to bargain with the Union over changes thereto;
- Article 47 of the MCBA: requiring the Department to bargain with the Union over changes to conditions of employment;
- Article 43 of the MCBA: permitting a grievance over any complaint by an employee relating to employment or to the MCBA;
- 5 U.S.C. §7117(d)(1) and (2): requiring the Department to bargain with the Union over changes to conditions of employment;
- VA Handbook 5013, Performance Management Systems: permitting bargaining unit employees to contest their performance appraisal or overall rating; and
- Any other law, rule, regulation, or Master Agreement provision not herein specified.

Remedies Requested

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

⁴ "The performance appraisal process will emphasize . . . employee and employee representative participation in the development of the program."

⁵ "The local union may provide input into any changes to performance standards and/or establishment of new performance standards."

⁶ "The local union shall be given reasonable written advance notice (no less than 15 calendar days) when the Department changes, adds to, or establishes new elements and performance standards. Prior to implementation of the above changes to performance standards, the Department shall meet all bargaining obligations."

⁷ "When the Department mandates national performance standards, all bargaining obligations with the Union shall be met at the national level."

1. To fairly and equitably apply the performance appraisal process by revising the performance appraisals of employees that performed Fully Successful or better, by enhancing their rating, to account for the technical issues they faced during the implementation of the Avaya telephony system;
2. To allow all employees to contest their performance appraisals if they so choose;
3. To consult and bargain with the Union prior to implementing changes to the performance appraisal process and to performance standards;
4. To cease and desist further violations of the MCBA and law;
5. To fully comply with its contractual obligations under Articles 2, 27, 43, 47 and statutory obligations under 5 U.S.C. §7117;
6. To post an electronic notice, signed by the VA Secretary, to all VA bargaining unit employees that the department violated the MCBA and law and that the Department will refrain from further violations of the MCBA and law;
7. To make whole the Union and any employee affected by the Department's violations, including awards, promotions, and other personnel actions due to the revised performance appraisals;
8. To pay reasonable attorney's fees and litigation costs under 5 U.S.C. §5596; and
9. To agree to any and all other remedies appropriate in this matter.

Time Frame and Contact

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



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