



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

# NATIONAL VETERANS AFFAIRS COUNCIL

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

7S/00390721

## NATIONAL GRIEVANCE NG-10/15/19

**Date:** October 15, 2019

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

**From:** Shalonda Miller, 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 bargain in good faith during negotiations for a successor term agreement.

### 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 bargain in good faith during negotiations for a successor term agreement. To date, the VA has failed to remedy this violation, and as such, continues to violate the MCBA and federal law.

Specifically, the VA violated Articles 2 and 49 of the MCBA, 5 U.S.C. §§7116(a) and 7114(b)(4), and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

### STATEMENT OF THE CASE

#### **Background**

#### **Department’s Proposals**

The Parties have been traveling to the DC metropolitan area in accordance with its ground rules for term negotiations over a successor agreement. However, during these meetings, the Department fails to reasonably meet with the Union and has demonstrated its intent to rush through the process toward impasse. Notably, the Department has begun to spend almost 7 hours of the 8-



hour bargaining day in caucus, which does not appear to be fruitful. Demonstrably, on October 4, 2019, after three days of not presenting any articles, the Department should have presented what would have been their counters to Article 14-Discipline and Adverse Action. Instead, the Department presented their initial proposal. The Union had to inform the Department that it presented its initial proposal on September 12, 2019 and the Union presented its initial proposal on September 16, 2019. With no work required to present an initial proposal, this conduct begs the question of what the Department is working on during its long caucuses.

Next, the Department continues to propose matters that are not conditions of employment. Resultingly, the Union has no duty to bargain over the items. For example:

1. On October 9, 2019, in Article 45-Dues Withholding, the Department presented proposals on decertifying the Union.
2. On October 9, 2019, in Article 45, the Department presented proposals of a process for employees to challenge their dues withholding. The process, as proposed, was unrelated to the Department and the Department would not be a participant.
3. On September 16, 2019, in Article 49, the Department presented proposals concerning “Standards for Serving as a Union Official,” which involves the Department in how Union Officials are selected.
4. On September 16, 2019, in Article 49, the Department presented proposals concerning the Union’s storage of electronic records which is a matter governed by federal litigation laws and discovery rules.

Also, the Department has demonstrated that bargaining is futile as there are no procedures or appropriate arrangements that the Department will consider. Mr. Picerno explicitly stated, “The Department is not interested in any procedures outside what is required by law, rule, and regulation.” This conduct constitutes an insistence on waiver of the Union’s statutory right to bargain. For example:

1. On October 7, 2019, the Department insisted on striking any and all procedures and appropriate arrangements in Articles 16. Mr. Picerno stated, “Codifying specific procedures ties management’s hands in awards.”
2. On September 18, 2019, the Department presented its counter, a complete strike, to Article 56-Title 38 Hybrids. The Department supported its strike by stating that the subject matter would be appropriately addressed in Article 23. The Union pointed out that the Department’s outstanding proposal on Article 23 was also a complete strike. On October 4, 2019, when it finally presented its counter on Article 23, the Department presented its LBFO and the entirety of Article 56 was relegated to a sentence that Article 23 would not apply to Hybrids.

Lastly, the Department has again provided regressive proposals. For example, on October 8, 2019, the Department provided its Last Best and Final Offer on Article 49, rescinding a concession it made concerning the provision of 10 minutes of duty time to Union representatives to make a presentation during New Employee Orientation. The Department orally explained the LBFO required the presentation to be made on official time.

### **Information Requests**

The Department has failed to provide requested information and responded in a manner that demonstrates bad faith bargaining. For example:

1. In response to the Department’s proposal to strike a majority of the Article 23-Merit Promotions, on August 21, 2019, the Union requested information that

supported the Department's position that the current article was burdensome and complex. On October 10, 2019, Chief Negotiator, Michael Picerno, cheekily responded to the Union's request for information with a copy of the current language of Article 23.

2. On July 11, 2019, during discussion of Article 31-Silent Monitoring, Department team member, Dr. Angela Denietolis, after Storm Morgan presented the Department's strike to the entire article, stated that silent monitoring is currently taking place nationwide and that the Department does it "all the time" and "does not provide notice." When the Union requested the specific facilities where this was occurring, she responded that she was "not prepared" to give the facilities now. In response, the Union requested information concerning the extent and nature of the Department's silent monitoring. On October 9, 2019, Mr. Picerno responded by stating that the Department made no such claim that it conducted secret nationwide recording of Veterans being provided healthcare and did not provide the information requested.

The Department's responses to these information requests demonstrate that it is either refusing to provide information necessary for the Union to respond to the Department's proposals or the Department is making deliberate misrepresentations at the table as pretextual justifications of its proposals.

### **Table Negotiations**

Throughout the bargaining sessions in September and October 2019, the Department engaged in a pattern of conduct demonstrating bad faith bargaining, typified by the following:

1. On October 7, 2019, during discussion on Article 14-Discipline and Adverse Action, Department team member, Stephen Baxley, physically advanced towards the Union's Chief Negotiator, Alma L. Lee, yelling and pointing a finger towards her. Department team member, Charles Arrington, stood in the doorway laughing. Mr. Baxley had to be coaxed out of the room by the mediator.
2. The Department has now presented eight articles in which their first counter was their Last Best and Final Offer.
  - a. On October 8, 2019, the Department's first counter to Article 49-Rights and Responsibilities was its LBFO.
  - b. On October 4, 2019, the Department's first counter to Article 7-Quality Programs was its LBFO.
  - c. On October 3, 2019, the Department's first counter to Article 23-Merit Promotion was its LBFO.
  - d. On September 13, 2019, the Department's first counter to Article 29-Safety, Health, and Environment was its LBFO.
  - e. On September 12, 2019, the Department's first counter to Article 32-Staff Lounges was its LBFO.
  - f. On August 1, 2019, the Department's first counter to Article 21-Hours of Work and Overtime was its LBFO.
  - g. On July 30, 2019, the Department's first counter to Article 8-Child Care and Article 24-Official Records were its LBFOs.

3. On October 9, 2019, the Department insisted on proposals that discriminate against employees for participating in the Union. In discussion of Article 45-Dues Withholding, the Department insisted that only union dues withholding would be subject to affirmative annual renewal, where other voluntary, personal allotments, like mortgage payments and gym memberships, are not.
4. In an apparent effort to obfuscate the bargaining process and frustrate the Union, the Department has repeatedly denied stating what it has stated.
  - a. In discussion of Article 14, on October 7, 2019, when questioned about why the Department's proposals eliminate reprimands and admonishments from its definition of disciplinary actions for Title 38 employees, Department team member, Charles Arrington, stated that the Department would not reprimand or admonish Title 38 employees. The response caused surprise on the Union's side. When questioned why Title 38 employees would be treated differently, Mr. Arrington replied that they would not be treated differently. When specifically questioned if the Department's proposals meant that no employee would be reprimanded or admonished, Mr. Arrington responded, "That is the Department's position." When the Union continued to probe that position, Department team member, Stephen Baxley, began a rant stating that Mr. Arrington did not say that and that the Union constantly says the Department makes statements that it didn't make. When asked what we were supposed to get from Mr. Arrington's statement, Mr. Baxley stated, "Exactly what it says up there." The Department's proposals, projected on the screen, eliminated reprimands and admonishments from disciplinary actions.
  - b. In discussion of Article 19-Fitness for Duty, on October 10, 2019, the Department explained its full strike of the article by asserting that "714 makes the article obsolete." 714 is a reference to the section of the VA Accountability and Whistleblower Protection Act of 2017 that allows the Department to take adverse actions against employees in an expedited manner. When questioned about why the Department would propose firing employees when they have a health problem causing performance or conduct issues, Mr. Baxley responded that they didn't say that. When questioned about why 714 was raised for an article dealing with employee's experiencing health issues, Mr. Baxley stated that "714 was not discipline."

## **Violations**

The Department has, and continues to, engage in bad faith bargaining. Under the Statute, the obligation to bargain in good faith includes the obligation to approach negotiations with a "sincere resolve" to reach a bargaining agreement. AFGE Council of Prisons #33, et al and Bureau of Prisons, FCC Oakdale, La., 64 FLRA 288 (2009). "When an agency gives the impression that it is futile for the union to attempt negotiations over its proposals, the agency has failed to engage in good faith bargaining in violation of the Statute." Fed. Bureau of Prisons, FCI Bastrop and AFGE Local 3828, 55 FLRA 848, 855 (1999).

Here, the substance of the Department's proposals, its rush to submit LBFOs, its refusal to provide information, and its pattern of obstructive behavior during bargaining demonstrate that it

has no intent to approach negotiations with a sincere resolve to reach agreement. Instead, the proposals, considered as a whole, were designed to derogate the Union in the eyes of VA employees and the public at large, while preventing it from fulfilling its representational duties. The proposals demonstrate, and the Department's bargaining team reiterated, that it was not willing to consider any procedures or appropriate arrangements outside of what is required by statute or regulations. The Department's one-sided proposals and refusal to approach negotiations with a sincere resolve to reach agreement run afoul of its statutory bargaining obligations with the Union.

Based on the foregoing, the Department has repeatedly and consistently failed to bargain in good faith. Notably, the Union has no duty to bargain over proposals that are submitted in bad faith or that do not concern conditions of employment. Consequently, the VA has violated, and continues to violate law and contract, as explained below.

1. By violating the federal statutes outlined below, the VA violates Article 2 of the MCBA, which requires that the Department be governed by applicable federal statutes;
2. By violating the federal statutes outlined below, the VA violates Article 49 of the MCBA, which requires that the parties have due regard for the obligations imposed by 5 U.S.C. Chapter 71;
3. By failing to bargain in good faith, the VA violates 5 U.S.C. §§7116(a)(1) and (a)(5), which requires the Department to consult and negotiate in good faith with the Union;
4. By failing to provide data that is normally maintained in the regular course of business and reasonably available and necessary for full and proper discussion, understanding, and negotiation of collective bargaining subjects, the VA violates 5 U.S.C. §§7116(a)(1) and (a)(5);
5. By withdrawing a previous concession without good cause, the Department has engaged in regressive bargaining in violation of 5 U.S.C. §§7116(a)(1) and (a)(5);
6. By reinserting proposals that constitute a waiver of the Union's statutory rights, the Department has insisted to impose on permissive subjects in violation of 5 U.S.C. §§7116(a)(1) and (a)(5); and,
7. Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

## Remedy Requested

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

1. Whereas, the Authority has specific authority under §7118(a)(7)(B) to remedy unfair labor practices by fashioning and ordering the terms of collective bargaining agreements, AFGE Nat'l Border Patrol Council and INS, 51 FLRA 1308 , 1337 n.17 (1996) (citing NTEU v. FLRA, 910 F.2d 964, 968 (D.C. Cir. 1990));  
Whereas, the Arbitrator stands in the place of the FLRA with the authority to order the same remedies, NTEU and FDIC, 48 FLRA 566 (1993); and,  
Whereas, the Statute requires a mutual obligation to bargain in good faith;  
Therefore, that the Parties return to the *status quo ante* and bargain anew in good faith.
2. Where tentative agreement has been reached on particular articles, that the Parties mutually agree to eliminate those articles as an exception to the *status quo ante* remedy;

3. To cease and desist further violations of the Agreement and law;
4. To post a notice in all VA locations where bargaining unit employees are present that the VA will refrain from further violations of the Master Agreement and law;
5. To make whole the Union and any employee affected by the Department's violations;
6. To pay reasonable attorney's fees and litigation costs under 5 U.S.C. §5596; and,
7. 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. **Shalonda Miller is the designated representative for this National Grievance.** If you have any questions regarding this National Grievance, please contact her at 202-639-6424 or [shalonda.miller@afge.org](mailto:shalonda.miller@afge.org).



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