

NATIONAL GRIEVANCE
NG-10/3/18

Date: October 3, 2018

To: Kimberly McLeod
Executive Director
Department of Veterans Affairs
Office of Labor-Management Relations
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Sent via electronic mail only

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

RE: **National Grievance against the Department of Veterans Affairs for failing to bargain in good faith during ground rules negotiations for 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 Agency for failing to bargain in good faith during ground rules negotiations. 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 any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

STATEMENT OF THE CASE

Background

On December 15, 2017, the then-Deputy Secretary for the Department of Veterans Affairs, Thomas G. Bowman, issued a letter to NVAC President, Alma Lee, officially notifying the Union of the Agency’s intention to renegotiate the Master Agreement. In this letter, Mr. Bowman named Mark Frassinelli as the Agency’s Chief Negotiator.

After a series of improper and unilateral bargaining demands by Mr. Frassinelli, the Union filed a grievance alleging bad faith bargaining and violations of the parties Agreement (NG-2/21/18). In retaliation for the Union's filing of the grievance, on March 9, 2018, the Agency filed a grievance against the Union, alleging bad faith bargaining, and sought illegal remedies, such as third-party payment for the Agency negotiating team's official travel. The Union filed an additional bad faith bargaining grievance (NG-3/30/18) when the Agency unilaterally cancelled a mutually agreed upon meeting. Prior to hearing on the Union's grievance, on June 8, 2018, the parties settled the three grievances. In addition to settling the dispute concerning the number of bargaining team members for ground rules, the relevant terms of the settlement required that the parties meet during the weeks of June 25, 2018 and July 8, 2018: each with travel on Monday, meeting on Tuesday, Wednesday, and Thursday, 8AM to 5PM, and travel on Friday.

Table Negotiations

The VA issued the requisite travel orders for both weeks and the parties met June 26-28 and on July 10. While the Union's proposals closely mirrored the agreed-upon Ground Rules from the prior term bargaining, the Agency's initial proposals were contemptable:

- The VA proposed that the teams would meet for two consecutive weeks per month at the facility closest to Mr. Frassinelli's home, so everyone, but Mr. Frassinelli, would be away from their families for two straight weeks;
- The VA proposed that the Agency would not pay for any of the Union's travel, even though they recently paid for the bargaining teams of two other unions (NNU and NFFE);
- The VA proposed that the Union could only have five (5) members to negotiate for a 250,000-employee bargaining unit, while NNU was provided ten members for a 9,500-employee bargaining unit and NFFE was provided seven for a 7,000-employee bargaining unit.
- The VA proposed that the Union team would only receive official time for time at the table, which is already required under the FSLMRS. The Union would not receive any preparation time. However, NNU was given 20 hours of prep time before their first table session and 16 hours a week in between sessions thereafter.
- The VA proposed that the parties be limited to 90-minute caucuses each day. Where the VA proposed that the Union will not receive preparation time, practically, preparation can only be done during caucus time. Additionally, NNU recently received no such limitation. The VA proposed that bargaining over the entirety of the contract's existing 66 articles would terminate after 120 days. However, during bargaining for prior term negotiations, the parties spent 60 week-long sessions for the entire agreement. Additionally, the VA recently agreed with NFFE that neither side would open more than four articles. The VA seeks to establish a timeline that limits the parties ability to bargain a contract and uses it as a tool to evade its obligation to bargain an agreement in good faith.

The VA barely moved toward reasonableness in their subsequent counters. Instead, they indicated a rush to impasse and regressively bargained:

- On June 26, 2018, Mr. Frassinelli refused to allow the Union to ask questions during his presentation of the VA's initial proposals, stating, "I just want to get through my proposals."

- On June 27, 2018, the VA added the VATAS proposal, which was not mentioned in their initial proposals and moved the parties away from agreement.
- On June 27, 2018, the VA added a proposal for the Union to waive ratification, which moved the parties further away from agreement.
- On June 27, 2018, Mr. Frassinelli indicated that the VA intended to choose the Union's bargaining team in not providing any preparation time by stating, "All your national officers are on 100% official time, so they can use their existing time to prep."
- On June 27, 2018, Mr. Frassinelli improperly demanded that the Union provide written counters. When the Union insisted on providing counters orally and asked Mr. Frassinelli for authority that counters must be in writing, he declared, "Either give me your counters in writing or we are at impasse." The Union refused. Mr. Frassinelli then walked out of the room.
- On June 27 and 28, 2018, the VA unrelentingly objected to including the requirement for "thorough discussion" in the ground rules as a prerequisite to impasse.
- On June 28, 2018, in response to the Union's proposal of a limited number of articles to shorten the duration of bargaining, Mr. Frassinelli asked, "So, how long before impasse?"

With each counter, the Union responded with reasonable proposals that incorporated the Agency's stated interests, for example:

- In response to the VA's interest of quick term negotiations and lower cost, the Union proposed a limited number of reopened articles to reduce the amount of time spent bargaining.
- In response to the VA's interest on the adequacy of meeting locations, the Union proposed criteria for the Chief Negotiators to mutually select different locations, which also aids the ratification process.

In all, during the four days of meeting, each side presented their initial set of ground rules proposals and two counters. The Agency refused to discuss the proposals to reach agreement, and instead, insisted on only presenting the proposals and answering questions on what the language meant.

On the fourth day, July 10, 2018, the Union presented the Agency with a request for information concerning the VA's continued insistence on a "gag order" and the Union's waiver of ratification. To date, the VA has not provided the information.

On the same day after the Union presented its second counters, Mr. Frassinelli abruptly ended negotiations, stating, "The VA will not continue to meet without a mediator."

Mediation

The Agency requested assistance from the FMCS and the parties worked to schedule the mediation sessions with the assigned FMCS mediator. The parties agreed to meet during the week of September 10, 2018, with Monday as the travel day; meeting on Tuesday, Wednesday, and Thursday; and, travel on Friday.

The VA arrived under the apparent supervision of David Mansdoerfer and Catherine Bird, top officials from the Department of Health and Human Services (HHS), who serve as chief negotiators for HHS and liaison to the White House. The VA sought to hide the fact that the

“attendees for the VA” were, in fact, not VA employees or representatives, but employees of HHS. When pressed, the VA refused to give the Union a copy of any release, detail, or authorization. After debate and caucus, the VA left their minders from HHS to confer from the VA caucus room.

On September 11, 2018, Mr. Frassinelli opened mediation stating that, that the parties had “made incremental movement; neither side” has “made a leap of faith.” Mr. Frassinelli said the VA “discussed” issues but the “movement of both parties had been minor.” The Union objected to the characterization of its movement as “minor” and reiterated that the request for a mediator was premature given the significant movement made by the Union to meet the Agency’s stated interests. On Tuesday, the VA presented an additional counter. On Wednesday, the Union presented its counters and specifically outlined the proposals that were only negotiable at the Union’s election:

- “Gag order” is not negotiable because it interfered with the Union representatives’ Constitutional right to freedom of speech and statutory right to present its views under the Federal Service Labor Management Relations Statute;
- Waiver of Ratification is not negotiable because it interferes with the Union’s statutory right to ratify labor agreements under 5 U.S.C. 7102;
- Travel and meeting after duty hours, uncompensated, is not negotiable because it conflicts with the Fair Labor Standards Act and Title 5 overtime;
- 120-day duration with no limitation on the number of articles in the 66-article agreement is not negotiable because it is offered by the VA in an attempt to avoid bargaining;
- Use of VATAS is not negotiable because it is covered by an existing agreement and does not constitute any guide to the conduct of negotiations; and,
- Transfer of official time for negotiating team members is not negotiable because it is covered by an existing agreement and does not constitute any guide to the conduct of negotiations.

The Union also outlined the subjects the VA refused to negotiate that are mandatory subjects of bargaining:

- VA insisted on a regressive proposal that it unilaterally determine the location, facilities, and equipment available to the parties during term bargaining; and,
- VA insisted that it unilaterally determine the use and selection of a neutral to draft official bargaining history and act as custodian of all proposals.

Early on Thursday, September 13, 2018, Mr. Frassinelli terminated mediation and declared the parties were at impasse. Mr. Frassinelli expressed that he was without authority to move on the Agency’s proposals.

Impasse

On September 27, 2018, Mr. Frassinelli submitted a request to FSIP that it consider a negotiation impasse. In it, Mr. Frassinelli suddenly claims that the parties engaged in “thorough discussions,” which he previously did not believe was necessary for impasse. Further, he asserts that “based upon analysis of seven total proposals,” the VA requested assistance from an FMCS mediator. Yet, after mediation, the issues identified by the VA in its request to FSIP totaled ten. The obvious conclusion from Mr. Frassinelli’s filing is that the parties have more issues at impasse

than they did going into mediation. Missing from Mr. Frassinelli's incomplete filing is the VA's summary position on the issues it lists are at impasse.

Importantly, the VA has now explicitly insisted to impasse on the following permissive matters:

- Transfer of official time for negotiating team members
- "Gag order"

Violations

The Department's extreme initial proposals, lack of movement, and insistence on a sterile discussion of the parties' differences demonstrates surface or sham bargaining. The Union is without any notice of what proposals are at impasse or why and the VA's FSIP request does little to shed any light on the matter. The VA did not come to the table or mediation with any willingness to enter the discussions with an open mind or a purpose of reaching agreement. Instead, the VA was merely going through the motions of negotiations with a clear strategy to evade bargaining. The Department's refusal to provide information to aid in the discussion of its position demonstrates it had no intent of bargaining in good faith. Its continued objection to including the requirement for "thorough discussion" in ground rules further demonstrates this position. As a result, the VA violated, and continues to violate, the following:

- By violating the federal statutes outlined below, the VA violates Article 2 of the MCBA, which requires that the Agency be governed by applicable federal statutes;
- 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;
- By failing to send duly authorized representatives to the bargaining table who are fully authorized to negotiate on any condition of employment and to reach agreement thereon, the VA violates 5 U.S.C. §7114(b)(2);
- By engaging in surface and regressive bargaining, submitting proposals designed to evade bargaining, failing to provide requested information, and insisting to impasse on permissive subjects, the VA violates 5 U.S.C. §§7116(a)(1) and (a)(5), which requires the Agency to consult and negotiate in good faith with the Union; and,
- Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

Remedy Requested

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

- To return to the table and engage in good faith negotiations over ground rules;
- To rescind its proposals on the permissive subjects, negotiable at the Union's election;
- To cease and desist further violations of the Agreement and law;
- To post a notice for 90 days in all VA locations where bargaining unit employees are present that the VA will refrain from further violations of the Master Agreement and law;
- To make whole, the Union or any employee affected by the Agency's violation;

- To pay reasonable attorney's fees and litigation costs under 5 U.S.C. §552a(g); and,
- To agree to any and all other remedies appropriate in this matter.

Time Frame and Contact

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



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Mark Frassinelli, Chief Negotiator, VA