



NATIONAL VETERANS AFFAIRS COUNCIL

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

NATIONAL GRIEVANCE

NG-12/09/2020

Date: December 9, 2020

To: Michael Picerno
Acting Executive Director
Office of Labor-Management Relations
U.S. Department of Veterans Affairs
VALMRLitigation@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 misclassifying Clinical Perfusionists as exempt employees under the FLSA

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”), the 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 of Veterans Affairs (“Agency”) for misclassifying Clinical Perfusionists as exempt employees under the Fair Labor Standards Act (“FLSA”). The Agency also failed to bargain this change with the Union. To date, the Agency has failed to remedy this violation and as such continues to violate the MCBA, government-wide regulations, and federal law.

Specifically, the Agency violated Articles 2, 3, 47, and 49 of the MCBA; 5 U.S.C. §7116(a), Department of Labor (“DOL”) regulations, the FLSA, 5 U.S.C. §5584, and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified. The Union specifically reserves the right to supplement this grievance based upon the discovery of new evidence or information of which it is not presently aware, or otherwise, as necessary.

STATEMENT OF THE CASE

Background

A. Violation of FLSA and Government-Wide Regulations

On July 2, 2020, the Agency implemented a revision to VA Handbook 5005 that included a new qualification standard for Clinical Perfusionists,¹ who were previously classified as Medical Instrument Technicians (Perfusion). Attachment A. Prior to this change, the bargaining unit employees who are now Clinical Perfusionists were classified as non-exempt employees under the FLSA. Following the change, the Agency misclassified these bargaining unit employees as exempt. The Agency has the burden to demonstrate an employee's exemption status under the FLSA. An employee is presumed to be nonexempt unless an agency correctly determines that the employee clearly meets the requirements of one or more FLSA exemptions. 5 C.F.R. §551.202 (a). Here, Clinical Perfusionists perform substantially similar job duties that they performed as Medical Instrument Technicians (Perfusion). As such, the Agency's misclassification of Clinical Perfusionists as exempt violates the statutory and regulatory requirements governing employee classification under the FLSA, including 29 U.S.C. §213 and related regulations.

The Agency's misclassification of Clinical Perfusionists as exempt employees has resulted in the loss of overtime pay in violation of 29 U.S.C. §207 and related regulations. As non-exempt employees, Clinical Perfusionists are entitled to overtime pay at one and one-half times their regular rate of pay.

Further, notwithstanding the FLSA classification issue discussed above, the new qualification standard was not implemented immediately at every facility where Clinical Perfusionists are employed, but once implemented, is being retroactively applied to July 2, 2020. Various facilities have yet to implement the change. At various facilities, the Agency is seeking reimbursement of a portion of the overtime pay that the employees earned following the Agency's change on July 2, 2020. The perceived overpayment was the result of administrative error, not fraud or misrepresentation on the part of the employee. As such, even if the employees were "overpaid" for overtime pay, all affected employees are entitled to a debt waiver pursuant to 5 U.S.C. §5584 and related VA policy.

B. Failure to Bargain

Articles 47 and 49 of the MCBA require the Department to bargain with the Union over changes to conditions of employment. Additionally, under section 7116(a)(1) and (5) of the Statute, the Union must be given adequate notice and a pre-implementation opportunity to bargain before the Department may lawfully implement changes in working conditions affecting unit employees.

Here, assuming, *arguendo*, that the revision to the qualification standard changed conditions of employment for Clinical Perfusionists, the Department failed to provide the Union with notice and the opportunity to bargain prior to implementing this change. In addition to the violations listed above, the Department's failure to bargain over these changes amounted to an unfair labor practice. *See* 5 U.S.C. §7116(a)(1) and (5).

¹ Clinical Perfusionists are employed at various facilities, including but not limited to, the VA St. Louis Health Care System, Durham VA Healthcare System, James A. Haley Veterans' Hospital, and the Hunter Holmes McGuire VA Medical Center.

By failing to bargain with the Union, the Department committed an unfair labor practice under section 7116(a)(1) and (5), violated its contractual duty to bargain under Articles 47 and 49 of the MCBA. In doing so, the Department also violated Article 2 of the MCBA, which requires the Department to comply with applicable federal statutes and regulations in the administration of matters covered by the MCBA. Finally, by failing to consult and negotiate in good faith with the Union, the Department is in violation of Article 3 of the MCBA, which encourages the Parties to maintain a cooperative labor-management relationship that is based on mutual respect, open communication, consideration of each other's views, and minimizing collective bargaining disputes.

Violation

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

- Article 2 of the MCBA: requiring the Department to comply with all federal law and regulations;
- Article 3 of the MCBA: requiring the Department to maintain an effective, cooperative labor-management relationship with the Union;
- Article 47 and 49 of the MCBA: requiring the Department to bargain with the Union over changes to conditions of employment;
- 29 U.S.C. §213 and related regulations: prescribing the requirements for an exempt employee;
- 29 U.S.C. §207 and related regulations: prescribing overtime requirements;
- 5 U.S.C. §5584 and VA policy: prescribing the requirements for debt waivers;
- Any and all other relevant articles, laws, rules, regulations, customs, and past practices not herein specified.

Remedies Requested

To remedy the above violations, the Union asks that the Department agree to the following:

1. To return to the *status quo ante*;
2. To immediately reclassify Clinical Perfusionists as non-exempt employees;
3. To immediately debt grant waivers for any perceived overpayment of wages to all affected Clinical Perfusionists, pursuant to 5 U.S.C. §5584 and VA policy;
4. To cease and desist further violations of the MCBA and federal law;
5. To fully comply with its contractual obligations under Articles 2, 3, 47, and 49 of the MCBA and its statutory obligations under Federal Service Labor-Management Relations Statute and the FLSA
6. To post an electronic notice, signed by the VA Secretary, to all AFGE bargaining unit employees that the Department violated the law and that the Department will refrain from further violations of the law;
7. To make whole the Union and any employee adversely affected by the Department's violations, including but not limited to, backpay and liquidated damages;

8. To pay reasonable attorney's fees under 29 U.S.C. §216(b); 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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