UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE ARBITRATION

OPINION AND AWARD
FMCS Case No. 17-51588-A
Contract Violation
BFFS 3.0

Between

AFGE / C-53 AFL-CIO **Union**
National VA Council (NVAC)
American Federation of Government Employees (AFL-CIO)

And -

ARBITRATOR:
N. J. STOCKER

DEPARTMENT OF VETERANS AFFAIRS **Employer**
Veterans Health Administration

APPEARANCES:

UNION:

Shalonda Miller, Esq., Staff Counsel
National VA Council

Geneva V. Moore, NVAC, AFGE 1738

Elizabeth LaDow, Field Examiner

William Stephen, Field Examiner

EMPLOYER (AGENCY):

Amy K. Siak, Esq., Agency Counsel

Daniel Borichevsky, Labor Relations Specialist

Bevan Liewelyn, Program Analyst

Kevin D. Nelson, Labor Relations Specialist

This arbitration arises pursuant to a notice from Federal Mediation and Conciliation Service dated March 9, 2017, that the arbitrator was selected by the above parties, as set forth in their Collective Bargaining Agreement effective March 15, 2011. The decision of the arbitrator shall be final and binding. However, either party may file an exception to the arbitrator's award in accordance with applicable laws and regulations. The arbitrator's fees and expenses shall be borne equally by the parties.

The arbitration hearing in this matter was held at 9:00 a.m. on October 24, 2017, at the Veterans Administration Center, 1800 G Street N.W., Room 861A, Washington, DC 20420. The parties agreed they were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits and for argument. Neither party objected to the publication of the Award and the Arbitrator's Oath of Office was waived by the parties. The Union stated this is a National Grievance pursuant to the Collective Bargaining Agreement.

It was agreed by the parties post-hearing briefs would be mailed on January 5, 2018.

ISSUE:

1. Was the grievance timely filed?
2. If so, did the Agency fail to provide the Union reasonable advance notice of and opportunity to bargain over changes in conditions of employment when it unilaterally implemented the case processing program known as BFFS 3.0. If not, what shall the remedy be?

RELEVANT COLLECTIVE BARGAINING CONTRACT PROVISION (Jt. 1)

ARTICLE 43 - Section 11 – National Level Grievances

A national level grievance is one that is filed by the Union or by the Department. Grievances between the Department and the Union at the national level shall be filed by the aggrieved party as follows:

A. Within 30 calendar days of the act or occurrence or within 30 days of the date the party became aware or should have become aware of the act or occurrence or at any time if the act or occurrence is continuing, the aggrieved party (the Department or the Union) may file a written grievance with the other.
B. Upon receipt of a grievance, the parties will communicate with each other in an attempt to resolve thee grievance. A final written decision, including any position on grievability or

arbitrability, must be rendered by the respondent within 45 days of receipt of the grievance. If a decision is in issued in 45 days, or if the grieving party is dissatisfied with the decision, the grieving party may proceed to arbitration in accordance with Article 44 – Arbitration. The time limits may be extended by mutual agreement.

Article 27 – Performance Appraisal

Section 3 – Policy

A. In its entirety and application, the performance appraisal process will to the maximum extent feasible, be fair, equitable, and strictly related to job performance as described by the employee's job description.

B. Conduct unrelated to job performance shall not be considered in measuring an employee's performance.

C. Performance appraisals shall be fair and objective. They shall measure actual work performance over the entire rating period in relation to the performance requirements of the positions to which employees are assigned. Regardless of the source(s) of information used for performance appraisal, such information will be collected, used, and maintained in accordance with the Privacy Act.

Section 5 – Performance Standards

A. Objective criteria will be used to the maximum extent feasible in establishing and applying performance standards and elements. The rating official will establish and communicate in writing to employee(s) critical and non-critical elements and performance standards, at the beginning of the appraisal period (normally within 30 days). After initial issuance of critical and non-critical elements and performance standards, the elements and standards will be provided annually thereafter. All aspects of the performance plan, including numerical standards, measurement indicators, priorities, and weightings, if applicable, will be communicated in writing to the affected employees at the time the employees receive his/her performance elements and standards. The local union may provide input into any changes to performance standards and/or establishment of new performance standards.

E. 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.

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

<u>Article 43 – Grievance Procedure</u>

<u>Section 4 – Jurisdiction</u>

If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision.

<u>Article 47 – Mid-Term Bargaining</u>

<u>Section 4</u>

B. Proposed changes in personnel policies, practices, or working conditions affecting the interests of one local union shall require notice to the President of that local. Proposed changes in personnel policies, practices, or working conditions affecting the interests of two or more local unions within a facility shall require notice to a party designated by the NVAC President with a copy to thee affected local unions.

C. Upon request, the parties will negotiate as appropriate. The Union representative shall receive official time for all time spent in negotiations as provided under 5 USC 7131(a).

D. Ground Rules for local bargaining shall be established by the parties at the local level.

<u>Article 66 – Technology for Administering Tracking, and Measuring VBA Work</u>

<u>Section 1 – Scope</u>

A. The provisions of this article shall apply to the application of the technology that may be used to administer, tract, and/or measure the work of VBA bargaining unit employees.

B. The application of such technology is governed by established policy of the Department as contained in the Department's notification to the affected employees and the Union. It is also governed by this Agreement and by applicable requirements under law and government-wide regulations.

C. If the Department decides to modify or change it application of technology in a manner that triggers a duty to bargain, it will meet its contractual and statutory obligations.

D. Pursuant to 5 USC 7106(b)(1), technology is not a mandatory subject of bargaining. Under Executive Order 13522, employees and their Union representatives shall have pre-decisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5USC 7106(b)(1).

Section 2 – Application of the Technology

To the extent consistent with Section 1, such technology shall be applied in a manner that ensures validity, reliability, and attainability by most similarly situated employees.

A. General – The application of the technology will be fair, equitable, consistent, and take into account matters beyond the control of the employee.

BACKGROUND

On or about April 23, 2016, the Veterans Benefits Administration released an update to the VA Beneficiary Fiduciary Field System (BFFS), a Microsoft based software, that allows VA Field Examiners to process benefits on behalf of veterans and other beneficiaries who are unable to manage their VA benefits due to mental defect. Field Examiners are also responsible for conducting examinations to determine benefit eligibility.

In order to assist the field examiners, a software program was developed by Microsoft in 2012 and 2013, with its first Iteration 2.0 implemented in early 2014. There were subsequent updates to 2.0 and in April 2016 update 3.0 was implemented. In September 2016, the National VA Council (Union) found out the Agency (VA) had unilaterally implemented BFFS 3.0 without providing notice and opportunity to bargain changes in conditions of employment pursuant to 5 USC S 7116 (a)(1) and (5) of the Federal Service Labor Management Relations Statute and the parties Master Collective Bargaining Agreement. A grievance was filed (U-1) alleging the Veterans Benefits Administration failed to notify and bargain changes in conditions of employment resulting in the instant arbitration proceedings.

POSITION OF THE UNION

The Agency raised a timeliness defense at the beginning of the arbitration hearing. The Master Agreement requires that questions or arbitrability must be submitted as a threshold matter to be resolved at the earliest stages of the dispute being grieved, no later than Step 3 of the grievance procedure.

If the Agency fails to do so, any purported procedural deficiencies in the grievance are thereafter deemed waived.

The email the Agency presented at the hearing purportedly indicates that the Union had notice of the implementation of BFFS as early as April 2016. The Agency failed to provide evidence that it actually notified the Union of the Change prior to implementation. The Union contends it was notified of the updated version on or about September 23, 2016. The Union contacted the Agency about its bargaining obligations. The Agency never asserted that notice was previously issued. The Agency could have provided the email to the Union when the Agency responded to the grievance on or about November 28, 2016.

Alternatively, the purported email could have been disclosed during the parties' settlement discussions. Based on these acts, the timeliness issue must be denied and allow the dispute to proceed on its merits.

The Federal Labor-Management Relations Statute imposes upon the Agency a duty to bargain in good faith with the Union over changes to conditions of employment prior to the implementation. This duty requires change to conditions of employment not covered by a collective bargaining agreement and is more than *de minimus* change. Arbitrators have the authority to resolve statutory unfair labor practices claims which are raised in the grievance process. An unfair labor practice decision made by an arbitrator has the same force of law as a determination made in an unfair labor proceeding by a FLRA ALJ. Under Section 7116 of FLRA Act an arbitrator functions as a substitute for an ALJ. A change in bargaining unit employees' working conditions when it involves a change in conditions of employment that has an adverse effect on Unit employees (U.S. Department of Air Force, 335th MSG/CC Davis-Monthan AFB, Ariz, 64 FLRA 85, 89 (2009). Example; being assigned additional tasks which they did not previously perform. If the Agency's exercise of a management right detracts from a unit employee's ability to satisfactorily perform his or her duties, the adverse impact on the employee is reasonably foreseeable.

The Agency witness admitted that the implementation of BFFS 3.0 resulted in the development of approximately 70 individual fiduciary program guide articles. The purpose of these articles, according to the Agency was to help employees know exactly how to execute their jobs in the new system. He further stated when we moved from BFFS 2.0, in the corrective iterations of BFFS 2.0, we moved BFFS 3.0, we had this visual shift. None of the old training materials would work. In order to make the BFFS system work for our handicapped employees, we had to make a change for all of our employees. I saw an opportunity...so I said lets refrain and provide training as though no one's ever seen this system before and provide new training.

Field Examiners for the Veterans Benefits Administration conduct investigations into the ability of adult beneficiaries to manage their finances, or into the suitability of elected or appointed fiduciaries to manage those benefits. In 2014, the parties negotiated over the implementation of new software to help facilitate those examinations. BFFS 2.0 was implemented in May 2014. The Agency and the Union have negotiated over the use of other VBA technologies such as WATRS, ASPN, and VBMS and any updates thereto. In April 2016, the Agency released BFFS 3.0 without notifying or receiving any input from the Union. BFFS 3.0 had numerous problems. During the first week there were five updates to correct defects.

Field examiners are evaluated on the performance elements of quality, timeliness and production. Due to difficulties with 3.0 some Agency managers would mitigate the performance elements or limit the type of exams their employees could conduct. Other managers would threaten or impose discipline on field examiners who were having difficulty performing at the required level, or management provided no training on the new version. The Agency acknowledges BFFS 3.0 was a major change.

The Union and the Agency are in the process of negotiating the release of BFFS 4.0.

The duty to bargain is triggered by any change to conditions of employment that is not covered by the collective bargaining agreement and is more than *de minimus*.

The Union witnesses testified to the addition of new duties field examiners became responsible for with the implementation of 3.0.

1) Completing a new field called: social interactions
2) Using a FELUX spreadsheet to complete streamline exams

3) Gathering and classifying a reference's contact information

4) Using the auto-save feature in BFFS

5) Rebutting quality errors with references to the program manual

6) Reducing diary date entries from 1-2 years to six months

Ms. LaDow testified that in her Louisville fid hub, field examiners were not given training on 3.0 but rather simply had to acknowledge that they received an email identifying the changes to the system.

Due to the change itself, inconsistencies of operational standard and lack of training, field examiners could be detrimentally affected by the unilateral implementation of 3.0, including discipline, up to and including removal are matters the Union would want to bargain.

The Agency implementation of BFFS 3.0 constitutes a change in conditions of employment that was more than *de minimus* and therefore required bargaining.

The arbitrator should sustain the grievance and make whole any employee adversely impacted by the Agency.

POSITION OF THE AGENCY

The Beneficiary Fiduciary Field System (BFFS) was created to enhance service to the beneficiaries and improve workload management for field examiners. This software was created and developed in 2012 and 2013 with its first iteration 2.0 being implemented in 2014. In April 2016, update 3.0 was implemented, which was a required updated from 2.0 because Microsoft, the developer of the platform BFFS is based on, had a mandatory update due to Federal Law 508 with update 3.6 being implemented, and in November 2016, with update 3.7 being implemented. Currently another update entitled 4.0 is set to be implemented.

Prior to implementing BFFS 2.0 the Agency gave the Union timely notice and opportunity to bargain over the new software.

The update to issue 3.0 was required by federal law to a government-wide regulation. The software update was not a change to terms or conditions of employment, it was a *de minimus* change. All of the subsequent updates to BFFS, including 3.0, flow from the original implementation of 2.0

software. In April 2016, 3.0 was implemented to bring the previous software into compliance with Section 508 of the Rehabilitation Act.

In relation to the timeliness issue, according to the Master Agreement, grievances are required to be filed within 30 days of the act or occurrence. The Agency detailed, at the hearing, how even though it was an update required by law, it provided to the Union an explanation of what update 3.0 entailed on April 26, 2016 as a courtesy. The Union acknowledge receipt and indicted that they may submit a demand to bargain, but they never did. There was no demand to bargain or a grievance filed until more than 5 months later. The subject grievance was filed in October 2016, almost 6 months after version 3.0 was implemented. The Union made reference to September 23, 2016 and states they were notified at that time about BFFS, yet they presented no evidence to support that claim. The Union offered no witness or documents that correlated in any way to the date of September 23, 2016, as such the grievance in untimely.

The Agency is not required to negotiate over technology, methods and means of performing work. The use of BFFS is the technology, method and means of performing work. The Agency is not required to bargain over the substance of BFFS. Rather, the Agency is only required to bargain over procedures and appropriate arrangements if the foreseeable impact is more than *de minimus*. The change was not even a change in terms and conditions of employment, the changes largely entailed moving a button from one place on the screen to another and incorporating mandatory ADA compliant features. Section 5.08 requires that all federal information that is accessible electronically be accessible for those with disabilities. Examples of disabilities in the mandatory update are geared toward audio visual, or other disabilities that can be accommodated.

The Federal Labor Relations Authority has stated that the totality of this circumstances must be examined and that it will "place principal emphasis on such general areas of consideration as to the nature and extent of the effect or reasonably foreseeable effect of the change on condition of employment of bargaining unit employees." The authority cited such factors as the extent of the change in work duties, location, office space, hours, wages and benefits; the temporary or permanent nature of the change; the number of employees to be affected by the change and the parties bargaining history; as well as equitable considerations in balancing the various interests. 5 USC§7106 states rather explicitly, at the election of the agency, it can negotiate on "numbers, types and grades of employees or positions assigned...or on the technology, methods and means of performing work."

The field examiners pay, job classification, and normal work hours all remained the same. The work they performed was performed in same locations and same general manor as before. The update had no effect on prospect for promotions. It has no, or only minor, adjustments to workday routines. The duties of field examiners are exactly the same and are not more time consuming. There were no changes in working conditions, the job is performed the same way – the grievance should be denied.

OPINION

The Arbitrator has carefully reviewed the testimony of the parties' and witnesses called to testify in this proceeding. I have carefully considered documentary evidence, as well as the parties' well-stated contentions in support of, and in opposition to their actions. Having completed my deliberations, I state the following:

The Agency entered an additional issue at the start of the hearing which had not been discussed with the Union beforehand:

1. WAS THE GRIEVANCE TIMELY FILED?

The Agency sets forth in the Master Collective Bargaining Agreement, grievances are required to be filed within 30 days of the act or occurrence, Article 43, Section 11. The Agency provided to the Union an explanation of what update 3.0 entailed on April 26, 2016 as a courtesy. The Union acknowledges receipt and indicated that they may submit a demand to bargain, but never did. This grievance was filed in October 2016, almost 6 months after Version 3.0 was implemented. The Union made reference to September 23, 2016 that they were notified about BFFS 3.0 update but presented no evidence to support that claim.

The Union alleges in the Master Agreement it requires that questions arbitrability must be submitted as a threshold matter to be resolved at the earliest stages of the dispute, "the Department must assert any claims of non-grievability or non-arbitrabiity no later than the Step 3 decision not at the arbitration hearing. In so doing, procedural deficiencies in the grievance are thereafter deemed waived. The Agency did not submit a grievance decision and did not raise the matter at any instance prior to the arbitration hearing. The Union contends it was notified of the updated version on or about September 23, 2016. When the

Union contacted the Agency about its bargaining obligations, The Agency never asserted that notice was previously issued.

The Arbitrator agrees with the Union. If the Agency felt there was a timely issue it should have presented their facts during the grievance steps or informal discussions with the Union. If the facts clearly raised a timeliness issue, this could have influenced the Union's position Article 43, Section 4 – Jurisdiction states, "If either party considers a grievance non-grievable, or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must asset any claim of non-grieavability or non-arbitrabiiity no later than the Step 3 decision." The Agency did not answer the grievance. Therefore in the first issue, "Was the grievance timely filed?", the Arbitrator has denied the Agency request and determined the grievance was timely filed and will allow the dispute to proceed on the merits.

2. DID THE AGENCY FAIL TO PROVIDE THE UNION REASONABLE ADVANCE NOTICE OF AND OPPORTUNITY TO BARGAIN OVER CHANGES IN CONDITIONS OF EMPLOYMENT WHEN IT UNILATERALLY IMPLEMENTED THE CASE PROCESSING PROGRAM KNOWN AS BFFS 3.0?

BFFS 2.0 was developed in 2012 and 2013 and became effective in 2014. The Agency gave the Union timely notice and opportunity to bargain over the implementation. BFFS 2.0 was created by Microsoft for the Agency Field Examiners at the Department of Veterans Affairs to enhance service to beneficiaries and improve work load management. In 2014, the parties negotiated over the implementation of the new software 2.0. In April 2016, the Agency released BFFS 3.0, and the Union claims without notification or receiving any input from the Union. There were numerous bugs and problems within the first week of implementation. On April 26, 2016, Dennis Freeman, VBASEAT, emailed Kevin Nelson, VBAHOUS, "On the surface this looks like we were left out again for bargaining on this. I will be submitting a DTB and a cease and desist until bargaining has completed on this today. Please provide your thoughts. You may want to ask Dean what is occurring. He thought we were already notified."

James R. Swartz, President AFGE, Local 2823 on the same dated, April 26, 2016 also notified Robert Slicer, VBAINDY, of a demand to negotiated and cease and desist further implementation.

Kevin Nelson, Labor & Employee Relations Specialist for the Agency responded on April 26, 2016:

"Hi Dennis,

I have been informed that work in BFFS 3.0 is processed largely the same way as BFFS 2.0. The custom workflows process the exact same way in BFFS 3.0, same buttons and fields in the same locations. The main impact is learning how to navigate the systems (no left navigation but in the ribbon, additional features inherent in the system like popping out a window, etc.).

Pension & Fiduciary (P&F) Service provided three hours of Lync training to every end-user that focused on what changed.

P&F Service did experience some technical issues, which is not uncommon on the first day of a release. They are currently in three fiduciary hubs (Columbia, Indianapolis, Louisville) and will visiting the remaining three fiduciary hubs over the next two weeks. They have also established an online Lync chat for all out-based end users and hubs they are not physically visiting.

It must be noted the P&F Service is not able to rollback BFFS 2.0 so a cease and desist would result in complete stoppage of processing fiduciary work.

Please let me know if you have any questions. Thanks."

Due to problems with 3.0 the Agency is discussing with the Union BFFS 4.0.

In the Union Ex.6, there was a demand to negotiate 4.0, however, in the same letter from Paul Fleming, VBAMTBC, "the VBA Mid-term Bargaining Committee received notice on October 12, 2017 of the BFFS 4.0 upcoming release. AFGE requests a briefing on this matter in order to determine if we need to bargain over the Procedures and Appropriate Arrangements of the employees we represent."

The Agency has demonstrated that 3.0 was required by federal law Section 508, which required that all federal information that is accessible electronically be accessible for those

with disabilities. Some disabilities that are supported by this mandatory update were geared toward audio, visual or other disabilities that can be accommodated. Update 3.0, of the already utilized BFFS Version 2.0, was required in order for the software to be ADA compliant.

The Arbitrator is under the impression the Union feels there should be a negotiation demand with any update in software. I disagree, the duty to bargain is triggered by any changes to conditions of employment that is not covered by a collective bargaining agreement and is more than *de minimus*. The Arbitrator felt the Union did not submit evidence that the changes in 3.0 were more than *de minimus* or not to comply with 508. Yes, there were issues when 3.0 was implemented, however, the Union did not file a grievance until October 2016. The changes in 3.0 from 2.0 were required by law to bring 2.0 into compliance with Section 508 of the Rehabilitation Act. Ms. LaDow, a witness for the Union, admitted at the hearing "the main reason why they changed the system to 3.0, is to incorporate some of the ADA compliance stuff." 5 USC §7106 states that management is not required to bargain over every instance or change in the workplace. The field examiners pay, job classification, and normal work hours all remained the same with 3.0.

The Arbitrator does believe the Agency now provides notification to the Union even if the changes are *de minimus* to keep them informed and listen to their suggestions and concerns with future updates as they are doing with 4.0. See Article 66, Section 1D of the Collective Bargaining Agreement.

AWARD

I, THE UNDERSIGNED ARBITRATOR, having been selected in accordance with the parties Collective Bargaining Agreement, and duly heard the proofs and allegations of the parties', Award as follows:

ISSUE 1 – WAS THE GRIEVANCE TIMELY FILED?

As explained in my opinion, the grievance was timely filed and I shall allow the issue in dispute to proceed on the merits.

ISSUE 2 – DID THE AGENCY FAIL TO PROVIDE THE UNION REASONABLE ADVANCE NOTICE OF AND OPPORTUNITY TO BARGAIN OVER CHANGES IN CONDITIONS OF EMPLOYMENT WHE IT UNILATERALLY IMPLEMENTED THE CAE PROCESSING PROGRAMS KNOWN AS BFFS 3.0?

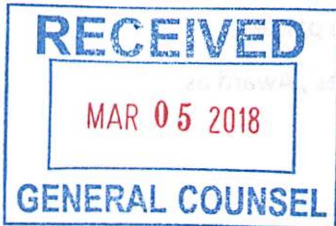
I have determined the Agency did inform the Union of the introduction of 3.0 through Kevin Nelson on April 26, 2016 in an email to Dennis Freeman and James Swartz. Furthermore, the Union did not provide enough evidence that the changes in 3.0 were more than *de minimus* and not required by Section 508 of the Rehabilitation Act. The grievance dated October 14, 2016 is denied. (Union Ex.1).

Should there be any disagreement in interpreting this Award, the Arbitrator retains jurisdiction on these issues.

I, Norman J. Stocker, do hereby affirm upon my Oath as Arbitrator, that I am the individual described herein and who executed this instrument which is my Award in the above entitled matter.

2/27/18
DATE

N. J. Stocker
N. J. Stocker, Arbitrator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