

FEDERAL MEDIATION AND CONCILIATION SERVICE

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In the Matter of the Arbitration between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
NATIONAL VETERANS AFFAIRS COUNCIL,

NG 3-2-20

Union,

and

U.S. Department of Veterans Affairs,

Agency.

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BEFORE: MARY P. BASS, Arbitrator

Hearing: via WebEx, November 18, 2020

Briefs received January 31, 2021

APPEARANCES:

For the Union:

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OPINION AND AWARD

Introduction

On January 24, 2020, The Appeals Management Office of the Veterans Benefits Administration (“VBA”), a component of the Department of Veteran’s Affairs (“Agency”) distributed an email notification to the Regional Office Directors entitled, “Legacy Appeals Team Production Challenges.” These Challenges comprised the Regional Office Legacy Appeals Team NOD Production Challenge (the “RO Challenge”) and the Legacy Decision Review Officers Production Challenge (the “DRO Challenge”). Jt. Ex. 2. Both challenge periods were to begin February 1, 2020. The RO Challenge offered a “special contribution” 8 hour time-off award for all members of legacy appeals teams that completed at least 15% more Notices of Disagreement cumulatively over the Challenge period, ending April 30, 2020. The Time-Off awards were to be used on May 22, 2020.

The DRO Challenge offered a “special contribution cash award” of \$1,000 to the 10 DROs with the highest production during the challenge period, February 1, 2020 through February 29, 2020 while maintaining 75% availability and not exceeding a 25% deferral rate.

The Challenges were stated to be in support of the goal of eliminating the pre-Board legacy appeals inventory by July 4, 2020.

The Agency did not give prior notice to the Union of the proposed Challenges. The Union did not submit a demand to bargain in relation to them. It filed a Grievance on March 2, 2020, stating that the Challenges constituted a change in conditions of employment, and that the Agency failed to satisfy its bargaining obligation by failing to give advanced notice to the Union. The Union requested as a remedy: that the Agency cease and desist implementation of the Challenges; a return to the *status quo ante*; Agency compliance with its contractual and statutory obligations; Agency distribution of electronic notices; a make-whole remedy; and other appropriate remedies.

The foregoing facts are not in dispute.

Issue

The parties did not agree on the issues. In its brief, the Union stated the issue as: “Whether the Agency violated law or contract by implementing the VBA Legacy Appeals Team Production Challenges. If so, what shall be the remedy?”

The Agency proposed the issues as:

- “1. Did the VBA Legacy Appeals Team Production Challenges constitute a change in conditions of employments requiring bargaining?
2. Did the Union fail to timely file its National Grievance per Article 43, Section 7 of the MCBA?
3. Were the VBA Legacy Appeals Challenge Time Off and monetary awards “covered by” the MCBA?
4. Did the FBA Legacy Appeals Challenge Time Off and monetary awards constitute a material, substantial or significant change? “

I find the issues to be:

1. Did the Union fail to timely file its National Grievance per Article 43, Section 7 of the Master Agreement?
- and
2. Did the Agency violate law or contract by implementing the VBA Legacy Appeals Team Production Challenges? If so, what shall be the remedy?”

Relevant Documents

Relevant Provisions of the Master Agreement 2011 (Jt. Ex. 1)

Article 16, Employee Awards and Recognition

Section 1 - Background and Purpose

Recognition of employees through monetary and non-monetary awards reflects the parties' efforts to promote continuous improvement in Department performance. The employee recognition program provides a positive indication of the parties' commitment to providing quality public service. The employee recognition program, as described in this article, has the following characteristics:

- A. It is an incentive program; that is, employee recognition is based on achievement and improvement.

Achievements are linked to the Department's mission of providing high quality care and service to veterans and the public. The program is intended to motivate employees to strive for excellence. Strong emphasis is placed on recognition of efforts to improve service to veterans and the public.

B. It recognizes the accomplishments of employees both as individuals and as members of groups or teams. Because of the interrelationship of work performed by employees, enhanced Department performance is sought through teamwork, not through competition among individuals. This program is based on the concept that individual employees who, through personal efforts and accomplishments support the goals of their teams, work units and, thus, deserve recognition. It is also based on the concept that groups or teams which improve Department performance deserve recognition. It recognizes that the Department, the Union, and employees have important roles in identifying and recognizing employees deserving of awards and praise. The intent of this program is to promote a positive work environment and to link awards to employee contributions that enhance Department performance.

C. Further, it is the intent of this program to ensure that employees will be appropriately rewarded regardless of changes in the Department's organizational structure, work processes, or work initiatives.

Section 2 - Policy

A. There is no limit on the number of awards that employees may receive or the frequency with which they may receive awards unless otherwise stated in this article.

B. When employees are considered for awards, the relative significance and impact of their contributions will be considered in determining which type of award would constitute appropriate recognition and, for monetary awards, in determining the amount of money to be granted. Funding availability must also be considered in the granting of monetary awards.

C. Awards will be processed in a timely and expeditious manner.

D. The Department will provide an award recipient with written documentation that clearly articulates the specific reason(s) that the employee received the award. Employees are encouraged to relate this information to specific evaluation criteria when completing applications for merit promotion.

Section 3 - Types of Awards

Awards which employees may be eligible to receive include but are not limited to:

A. Special Contribution Award

B. Instant Award

C. Suggestion Award

D. Time-off Award

Section 4 - Award Panels

Each facility will establish award panels consisting of management and bargaining unit employees. The composition and membership of each panel will be decided jointly by the local union and the Department. The local union will designate the bargaining unit panel members. Panel decisions will be made by consensus and will then be forwarded to the Director of the facility. Award panels will be formed at the beginning of assessment period. Panels will perform the following functions, maintaining the strictest

confidentiality and avoiding even the appearance of conflicts of interest:

A. Establish fair and equitable mission-related criteria for awards.

B. Operate within parameters as negotiated locally.

Section 5 - Monetary Awards

A. Special Contribution Awards

The special contribution award is a special act or service award which recognizes individuals or groups for major accomplishments or contributions which have promoted the mission of the organization. Award amounts should be linked to the significance and impact of the accomplishment or contribution. A special contribution award may be made to an individual employee or to a group. A group may consist of individuals from a single organization or multiple components/offices/units.

B. Instant Awards

This is a special act or service award given to an employee for noteworthy contributions or accomplishments in the public interest which are connected with or related to the recipient's official employment. The distinction between a special contribution award and an instant award rests in the relative significance of the contribution or accomplishment.

C. Suggestion Awards

The Department will encourage employees to file suggestions under the Department's Suggestion Program. Suggestions will be considered in a fair and equitable manner. Suggestion awards will be appropriate for tangible suggestions, intangible suggestions, and problem identification, as defined in the Department's Suggestion Program.

1. In the event no decision is made regarding adoption or non-adoption of a suggestion within 90 days of submission, the employee, upon request, will be given a written or oral status report.

2. Non-adoption of employee suggestions is to be written and contain specific reasons for non-adoption.

3. If the idea set forth in a rejected suggestion is later adopted, the appropriate suggestion coordinator will reopen the case for award consideration if the matter is brought to their attention within two years after the date of rejection notice.

Section 6 - Time-Off Awards

Time-off awards may be granted to an individual or group of employees for contributions that benefit the Department. These awards may be granted for contributions such as, but not limited to, the following:

A. A significant contribution involving completion of a difficult project or assignment of importance to the mission of the Department;

B. The completion of a specific assignment or project in advance of an established deadline and with favorable results;

C. Displaying unusual initiative, innovation, or creativity in completing a project or improving the operation of a program or service;

D. Displaying unusual courtesy or responsiveness to the public which clearly demonstrates performance beyond the call of duty and which produces positive results for the Department; and,

E. Exemplary work by an employee as a canvasser for special campaigns or programs such as the Combined Federal Campaign, US Savings Bonds, or blood donor program. (An award for such an effort may not exceed one work day per activity.)

Section 7. Award Nomination Procedures.

A. Employees and management officials are encouraged to identify individual employees who they believe should be recognized for high quality accomplishments or contributions.

B. Nominations of individual employees should be submitted in writing to the appropriate manager or award panel. The nominations should include a description of the accomplishments or contributions of the nominee(s) and an explanation of their significance, as well as the name and telephone number of the employee submitting the nomination. Nominations should not include suggestions for the type of award or the amount of money to be granted. Information provided in the nominations will be considered in determining appropriate recognition.

Article 43, Grievance Procedure, Section 11 – National Level Grievances

Article 47, Mid-Term Bargaining,

Article 49, Rights and Responsibilities

Joint Exhibit 2:

Subject: Legacy Appeals Team Production Challenges

Directors,

AMO proposes two production challenges, one Notice of Disagreement (NOD) challenge for Regional Office (RO) legacy appeals teams and another production challenge for individual Decision Review Officers (ORO) assigned to legacy appeals teams. With these challenges, AMO anticipates increased NOD production to support the USB's goal to eliminate the pre-Board legacy appeals inventory by July 4, 2020. The RO challenge will run from February 1, 2020, through April 30, 2020. The DRO challenge will run from February 1, 2020, through February 29, 2020.

RO Legacy Appeals Team NOD Production Challenge

RO legacy appeals teams must complete at least 15 percent more NODs than require by their NOD stage production from February 1, 2020, through April 30, 2020. Production will be evaluated weekly to monitor progress, but to achieve success, ROs must complete at least 15 percent more NODs cumulatively over the entire challenge period. Any RO who achieves the NOD production challenge target will receive a special contribution 8-hour time-off award for all members of the legacy appeals team, to be used on Friday, May 22, 2020.

Legacy DRO Production Challenge

Legacy appeals team DROs must increase production while following AMO's workload prioritization guidance and maintaining at least 75% availability and a deferral rate of no more than 25%. AMO

Operations will identify the ten highest- producing DROs with fully successful or better regular and overtime production and at least 75% availability and a deferral rate of no more than 25% from February 1, 2020, through February 29, 2020. Due to differences in locally negotiated ORO production standards, highest production will be determined based on the percent above the local standard during regular time; deferral rate will be determined by comparing in ASPEN the number of deferral actions with non-deferral actions. In the event of a tie, AMO Operations will first consider overtime production during the same period, then fiscal year-to-date production, and, if necessary, quality. **The ten DROs with the highest production during the challenge period, while maintaining 75% availability and not exceeding a 25% deferral rate, will receive a \$1,000 special contribution cash award.** Please note, AMO will closely monitor station performance to ensure each station, and their DROs, continue following AMO's workload prioritization guidance. As a reminder, at this time, all excess production above the monthly stage-specific targets must be directed towards NODs. DROS that fail to comply with AMO's workload prioritization guidance may be disqualified from the DRO Production challenge....”

Positions of the Parties

The Union argues that the Grievance is timely. The Union further argues that by implementing the Challenges without providing the Union with notice and pre-implementation opportunity to bargain, the Agency violated the mid-term bargaining procedures outlined in Articles 47 and 49 of the 2011 Master Agreement, and 5 U.S.C. § 7116(a). It argues that the Challenges were not “covered by” subjects of the Master Agreement in that they are not “expressly contained in” and are not “inseparably bound up” with the provisions of Article 16 of the Master Agreement and that any change in the conditions of employment effectuated by the Challenges were subject to prior bargaining under Article 16 and Article 47 of the Master Agreement.

The Agency argues that the Grievance is untimely. It also argues that the Challenges were “covered by” Article 16, Section 6 of the Master Agreement and accordingly did not require bargaining. It further argues that even if the Challenges were not “covered by” Article 16, their subject matter was “inseparably bound up with the agreement or plainly an aspect of it,” dispensing with the requirement of bargaining. The Agency further argues that implementation of the Challenges did not introduce a “material or substantial change in conditions of employment that required bargaining.”

Discussion

Timeliness.

The Grievance is timely. Article 43, Section 11A of the Master Agreement provides in pertinent part that “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 ...the aggrieved party (the Department or the Union) may file a written grievance with the other.”

It is undisputed that the Agency did not directly advise the Union of the Challenges. Mr. David Bump, a Union member of the VBA Mid -Term Bargaining Committee testified that he first became aware of the Challenges on February 3, 2020. Ms. Sona Anderson, President of AFGE Local 1201 testified that she first became aware of the Challenges in the third week of February, 2020. This testimony was unrebutted. The Grievance was filed within 30 days of February 3, 2020 and is accordingly timely.

The Merits

With respect to the substantive issues, I find that the Challenges, a matter on which the Union wished to bargain, is one that is already expressly “covered by” or contained in Article 16 of the Master Agreement, and, in addition, it is inseparably bound up with and plainly an aspect of a subject expressly covered by Article 16 of the Master Agreement. The Challenges are accordingly not subject to further bargaining. This case is similar to the seminal case of *U.S. Dept. of Health and Human Services, Social Security Administration, Baltimore*, 47 FLRA 1004 (1993) in which the principles applicable herein were set out.

The purpose of FLA’s “covered by” doctrine is to balance management’s need for finality in bargaining over a given topic and a union’s security against unilateral changes by management in terms and conditions of employment that have not been the subject of bargaining on the topic in question. *U.S. Dep’t of Health & Human Services, supra*.

The parties extensively considered the subject of performance awards in their

current Master Agreement Of 2011. Article 16, the result of their bargaining, is set out in its entirety above. The Challenges on their face fit easily into the category of awards included in that article. The purpose of the Challenges, to eliminate a backlog in a type of notice to veterans, is related to Departmental performance and quality public service. The Challenges program is an incentive program, to motivate employees and improve service to veterans. It recognizes the accomplishments of employees both as individuals and as members of teams:

The criteria of relative significance and impact of contributions are considered in the program: 15% increase in production is rewarded, and the most productive employees receive a monetary reward; The Legacy DRO Production, a monetary award program, is a special contribution award that fits within Section 5A of Article 16, and the Time-Off Award is covered in Section 6A specifically as that section includes the completion of an assignment of importance to the mission of the Department and Section 6B, which specifically sets out as a criterion the completion of a specific assignment or project in advance of an established deadline and with favorable results. While the word "Challenges" is not included in Article 16, "exact congruence of language is not required. *Dept. of Health & Human Services, supra.*

Mr. Kenneth Smith, Assistant Deputy Under Secretary, Veterans Benefits Administration testified, and it was undisputed, that in the implementation of the Challenges, performance criteria were not changed, work hours were not changed, no employees pay was changed, no employee suffered discipline, and work locations were not changed.

The two Challenges were, in sum, programs in which the cohort of employees already assigned to the tasks in question was promised rewards if they increased their output. Participation was voluntary. The program was covered by, inseparably bound up with, and plainly an aspect of a subject expressly covered by Article 16 of the Master Agreement

The Union filed no demand to bargain, and the Grievance does not mention specific topics on which it wished to bargain. Mr. Bump testified that the Agency should have bargained on eligibility for participation, when the award could be used, and the impact of the program on overtime. Ms. Sona Anderson, President of AFGE Local 1201 and now retired, was an employee at the San Diego VBA Regional Office. She testified with respect to the program that several bargaining unit employees at the San Diego Regional Office approached her with complaints about overtime, that they couldn't change the day the time off award could be used, and that trainees were not eligible because their performance standards had not yet been determined.

To the extent such assertions would be relevant as not being within the contemplation of the parties at the time Article 16 was negotiated, which I do not find, the Union did not present any corroborating details to indicate, many months after the Challenges were completed, how many employees, if any, were in fact impacted in their working conditions by the programs, whether, for example, overtime was increased during the period, or whether any person was seriously inconvenienced by the limitation of a time-off award to use on a single day.

In the recent case of *U.S. Dept. of Education and U.S. Dept. of Agriculture*, 71 FLRA 968, (2020) FLRA issued a general statement of policy or guidance to the effect that an agency will not be required to bargain over a change to a condition of employment otherwise bargainable unless the change is determined to have a substantial impact on a condition of employment. *U.S. Dept. of Education, supra*, at p. 971. Here, in addition to the conclusion that the Challenges program was covered by and inseparably bound up with Article 16, the Union did not prove that any alleged change in conditions of employment rose to the level of "substantial impact" on them.

The Union further argues that the Challenges were independently subject to bargaining requirements under Article 47, § 2, and Article 49, § 4 of the Master Agreement. Article 47 §2 A of the Master Agreement relating to mid-term bargaining requires the Agency to "forward all proposed changes for which there is a bargaining

obligation to the President of the NVAC...” Here, as set out above, there was no bargaining obligation relating to the Challenges. Section 2B of that section states, “If either party initiates a demand to bargain, briefings will occur...” and Section 2C states, in pertinent part, “The Department’s bargaining obligation is triggered when the Union submits a bargaining demand.” The Union did not submit a bargaining demand in this case.

Article 49, Rights and Responsibilities, covers “Notification of Changes in Conditions of Employment” in Section 4A. It requires reasonable advance notice “prior to changing conditions of employment.” Here, conditions of employment were not shown to have appreciably changed by reason of the Challenges.

It is to be noted that there was no testimony introduced relating to the bargaining history of Article 16 or to the practice of the parties in its implementation since its inclusion in the Master Agreement in 2011.

AWARD

The Grievance is denied.

Mary P. Bass
Arbitrator

Dated: March 8, 2021, New York, NY..

AFFIRMATION

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

I, Mary P. Bass, do hereby affirm upon my oath as an arbitrator that I am the individual described in and who executed this instrument, which is my award.

Dated: March 8, 2021
New York, N.Y.

Mary P. Bass
Arbitrator