

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,

FMCS CASE
201024-00737

Union,

And

U.S. Department of Veterans Affairs,

Agency.

NG 7-11-19

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BEFORE: MARY P. BASS, Arbitrator

Hearing: via WebEx, November 18, 2020
Briefs received January 31, 2021

APPEARANCES:

For the Union:

Thomas Dargon, Jr, Esq.
Staff Counsel, National VA Council
Office of the General Counsel
AFGE, AFL-CIO
Washington, DC

For the Agency:

Robert Vega, Trial Attorney
Office of the General Counsel
Dept. of Veterans Affairs
Hines VA Hospital
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OPINION AND AWARD

Introduction

On July 3, 2019, the Under Secretary for Benefits of the Agency issued a letter to Veterans Benefits Administration (“VBA”) field employees entitled “Labor Day &

Columbus Day Veterans Challenges.” Jt. Ex. 3. The letter notified the employees of two “Challenges” for certain VBA employees to complete a certain number of claims during a seven week period for the “Labor Day Challenge” and a 12 week period for the “Columbus Day Challenge” (the “Challenges”). Both challenge periods were to begin on July 8. According to the Agency’s letter, each participating employee achieving “successful completion of the rating challenge” was to be granted a 1-day time off award to be used on Friday, August 30, 2019 in the case of the Labor Day Challenge and on Friday, October 11, 2019 in the case of the Columbus Day Challenge. The Agency did not advise the Union of the challenges prior to the July 3 letter being released to the field. On July 11, 2019 the Union submitted a Demand to Bargain (“DTB”) on the subject of the Challenges, and simultaneously filed the instant Grievance. A. Ex. 4, Jt. Ex. 3. On July 29, 2019, the Agency offered a briefing for August 13, 2019. The briefing did not take place. 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 Labor Day and Columbus Day Challenges. If so, what shall be the remedy?”

In its brief, the Agency stated the issue as: “1. Was the VBA Labor Day and Columbus Day Time-Off Award Challenge ‘covered by’ the MCBA?

2. Was the VBA Labor Day & Columbus Day time off Award Challenge a material, substantial or significant change?”

I find the issue to be: Did the Agency violate law or contract by implementing the VBA Labor Day and Columbus Day Time-Off Challenges, and 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 47, Mid-Term Bargaining,

Article 49, Rights and Responsibilities

Joint Exhibit 3

Transmission from the Dept. of Veterans Affairs, Veterans Benefits Administration dated July 3, 2019, addressed to all VBA Services, Staff Office, Regional Offices and Centers, Subject: Labor Day & Columbus Day Veterans Challenges.

“VBA Employees,

The beginning of this summer has been awesome for VBA, as you have met and exceeded our Independence Day Challenge. Your efforts have energized me to issue our next effort, the Labor Day Veterans Challenge (LDVC). As stated in the video, I am expanding the participants to include employees who work in Compensation, Pension, Fiduciary, Vocational Rehabilitation & Employment, and Education Services. For the 7 weeks between July 8th and August 24th I am challenging each service to complete the

following number of claims:

- Compensation & Pension:
 - o Not-Rating and NWQ managed message work items completions (275K)
- Fiduciary:
 - o Field Exams (16,582)
- VR&E
 - o Individualized Written Rehabilitation Plans (6,945)
- Education Service:
 - o Average Days Complete: 25.3 days for original claims
 - o Average Days Complete: 11.4 days for supplemental claims
 - o Average Days Pending: 30 days for total approval document processing
 - o Average Days Pending: 75 days for compliance survey reports
- Regional Office and Records Management Center:
 - o Completed Freedom of Information Act (FOIA) Requests (3,122)

If these monumental milestones are reached, I will grant each Not-Rating, Fiduciary, VR&E, Education, and FOIA-processing employee a 1-day time off award to be used for Friday, August 30th in recognition of their achievement, and for successful completion of the challenge.

In addition to the Labor Day Veterans Challenge, employees who work rating claims (Compensation and Pension employees) will be engaged in an end of fiscal year Columbus Day Challenge, which will run for 12 weeks between July 8th and September 30th. These employees are asked to complete **400,000** claims during this time, I will grant each Compensation and Pension rating employee a 1-day time off award to be used on Friday, October 11th. I believe that providing Veterans with the benefits they have earned in a manner that honors their service is the foundation on which VBA stands. The Labor Day and Columbus Day Veterans Challenges will not only increase the high quality of services we provide to Veterans but will also help to increase and cultivate a culture of collaboration.

This Labor Day time off award is limited to the following parameters:

- a) The award must be applied and used for Friday, August 30, 2019. This award is not subject to any deviation of date or substitution.
- b) Regional Office Leadership will inform all eligible participants with approved annual or sick leave scheduled for August 30, 2019, that the leave will be returned to the employee.
- c) Employees' compressed (or AWS/CWS) day that falls on Friday August 30, 2019, will be granted permission to move their compressed day off to Thursday, August 29, and apply the time off award to Friday, August 30, 2019.

This Columbus Day time off award is limited to the following parameters:

- a) The award must be applied and used for Friday, October 11, 2019. This award is not subject to any deviation of date or substitution.
- b) Regional Office Leadership will inform all eligible participants with approved annual or sick leave scheduled for October 11, 2019, that the leave will be returned to the employee.
- c) Employees' compressed (or AWS/CWS) day that falls on October 11, 2019, will be granted permission to move their compressed day off to Thursday, October 10, 2019, and apply the time off award to Friday, October 11, 2019.

To be eligible to receive this award, all qualifying employees must be meeting their performance standards based on their most recent monthly performance review provided for EOM June and continue meeting their individual standards (both production and quality) throughout the challenge.

The Office of Field Operations will provide further information about specific positions included in these challenges in a separate memo.

(signed) Paul R. Lawrence, Ph.D
Under Secretary for Benefits”

Positions of the Parties

The Union argues that by implementing the Challenges without providing the Union with notice and a 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 changes in the conditions of employment effectuated by the Challenges were subject to prior bargaining under Articles 16, 47 and 49 of the Master Agreement.

The Agency 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

The July 3, 2019 notice to VBA employees from the Under Secretary for Benefits, entitled Labor Day & Columbus Day Veterans Challenges set out the terms of these award programs. Jt. Ex. 3. It states the categories of employees covered by the program, the dates of the two programs, and the types and numbers of claims to be completed for eligibility for the one day off award. The award for the Labor Day Challenge was to be used on Friday August 30, and the award for the Columbus Day Challenge was to be used on Friday, October 11, 2019. Employees who had already scheduled a leave day on one of the time-off days were to have the leave day returned. Another modification permitted movement of a “compressed day” from the time-off day.

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 FLRA’s “covered by” doctrine is to balance management’s need for finality in bargaining over a given topic and a union’s need for 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. 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 increase the number of claims completed by the participating employees, is related to Departmental performance and quality public service. It is an incentive program, to motivate employees and improve service to veterans. It recognizes the accomplishments of employees as individuals.

The relative significance and impact of contributions criteria are considered in the program: Specific increases in production are rewarded by a day off. The Time-Off Award is specifically covered in Section 6A as that section includes the completion of an assignment of importance to the mission of the Department, and in Section 6B, which 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. Employees were not required to use their time-off award if they did not wish to do so. Jt. Ex. 5.

The Challenges were, in sum, programs in which the employees already assigned to the tasks in question were promised rewards if they increased their output. Participation was voluntary. There is no evidence that their performance would be judged otherwise than by whatever performance criteria were normally applied. 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's Demand to Bargain specifically asks for "a briefing on this matter in order to determine if we need to bargain over the Procedures and Appropriate

Arrangements for the represented employees.” A. Ex. 4. Mr. David Bump, Vice President for the Union Local 2157 in Portland, Oregon Regional Office of the VBA, the National Representative for the AFGE National VA Council, and the Labor Co-chair of the VBA Mid-Term Bargaining Committee, testified that the Agency should have bargained on eligibility for participation, when the award could be used, the performance criteria for “fully successful” and the impact of the program on overtime.

Ms. Sona Anderson, a former employee at the San Diego VBA Regional Office and President of AFGE Local 1201, 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, more than a year 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 in 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 rose to the level of “substantial impact” on conditions of employment.

The Union further argues that the Challenges were independently subject to bargaining 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.” Implied in this section is the condition that a change in the conditions of employment is contemplated, not the case here.

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.

Similarly, 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

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.

Mary P. Bass

Mary P. Bass

Arbitrator

Dated: March 8, 2021

New York, N.Y.