In the Matter of the Arbitration between:

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American Federation of Government Employees,
National Veterans Affairs Council,
Grievant

And

U.S. Department of Veterans Affairs,
Respondent

FMCS Case No. 1900822-10266
VBA Incentivized Telework
National Grievance 4/2/19

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Before: Marilyn H. Zuckerman, Esq., Arbitrator

Appearances:

For the Union: Shalonda Miller, Esq.

For the Agency: Amber Grogan, Esq.

Dates of Hearing: January 15, 2020; December 1, 2020

Briefs Filed: March 26, 2021

## BACKGROUND

At the hearing, the parties entered into the following stipulations:

1. Nationwide, AFGE represents approximately 270,000 bargaining unit employees at the VA.
2. On March 15, 2011, the parties executed the 2011 Master Agreement.
3. On February 21, 2017, the parties executed a Memorandum of Understanding (”February 2017 MOU”) known as the VBA Telework Directive.
4. The Department of Veterans Affairs is an “executive agency” pursuant to the Telework Enhancement Act, 5 U.S.C. Sections 6501 et. seq..
5. The Union did not submit a demand to bargain over a national incentivized telework policy.

6. The parties did not negotiate a national incentivized telework policy.
7. The Roanoke Regional Office incentivized telework policy was grieved at the local level.
8. A finding was issued by an Arbitrator as to the Roanoke incentivized telework policy.
9. There was no local grievance filed at the St. Paul Regional Office regarding an incentivized telework policy.

Additional Facts

The Telework Enhancement Act, Public Law 111-292, 5 U.S.C. Chapter 65, was signed into law by President Barack Obama in 2010. The Act encourages federal agencies to permit employees to telework to the maximum extent possible. The Act requires that teleworkers and non-teleworkers be treated in the same manner when it comes to rewarding performance and setting work requirements. 5 U.S.C. Section 6503 (a)(3).

The parties' 2011 Master Agreement (Jt. Ex.1) remains valid and in effect until a new agreement is negotiated. Article 20 provides for a nationwide telework program. This nationally negotiated provision states that if an employee meets certain eligibility criteria for telework, such as having at least a "fully successful" annual performance rating, then the employee may volunteer to telework with management approval. The contract provision also permits eligible employees to work "as many as five days per week for full time telework."

Article 47 of the MCBA sets the process for mid-term bargaining over changes in conditions of employment. Article 47, Section 4 provides that: "On all policies and directives or other changes for which the Department meets its bargaining obligations at the national level, appropriate local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated national policy and agreements."

The national parties negotiated a February 2017 MOU which is incorporated into the MCBA by the exercise of Article 47. This MOU provides that no employee will be required to work above the "fully successful" level to remain on, or be considered for, telework. (Jt. Ex. 2, Ex. A) The MOU also permits local bargaining over telework to the extent that the local agreements do not conflict with national MOUs and agreements. The MOU further states that if, after implementation, a party to the agreement is made aware of issues that may adversely affect bargaining unit employees, the parties will informally try to resolve the issues. If those discussions fail, the parties are to begin the negotiating process.

Performance-based telework has been in place at the St. Paul Regional Office since September 2017. The parties bargained locally over this policy, but after the Union did not respond to Management's "last best offer," the policy was implemented. The 2017 telework policy included telework opportunities for Veterans Service Center (VSC) and Pension Management Center (PMC) employees based on performance criteria in addition to those employees already eligible to telework based on seniority. The additional telework eligibility was added as a result of feedback from less senior employees who were concerned that they might never be eligible to telework. The parties executed an

MOU locally on October 16, 2018. In November of that year, Local Management advised the Local Union that it intended to add more telework opportunities under an awards program. On March 6, 2019, the Local Union Chief Steward acknowledged that he had discussed the issue with Local Management. On March 8, Local Management implemented the planned increase in the number of telework opportunities under the awards program. The St. Paul RO awards program allows additional Veteran Service Representatives (VSRs), Rating Veteran Service Representatives (RVSRs) and Claims Assistants (CAs) who would not otherwise be telework-eligible to telework if they exceed production criteria by 10 percent or more. See Joint Ex. 3, Attachment 2.

Performance-based telework has been in place at the Roanoke RO since December 2017. Joint Exhibit 3, Attachment 4. While a draft telework policy was proposed to the Local Union on November 1, 2017, this policy was later let go upon the retirement of the Roanoke Director. Joint Ex.3, Attachment 3. A second policy was implemented on December 20, 2017 after notice was given to the Local Union but they did not choose to bargain, opting instead to file an amended grievance. Joint Ex. 3, Attachment 4. The policy established a tiered telework program to incentivize employees to produce at higher rates, but the basic eligibility of fully satisfactory performance did not change. DROs, RVSRs, VSRs and CAs who produced at higher levels were rewarded with increased telework days of two to four days per week. The Union grieved this policy at the local level. In June 2019, Arbitrator Eileen Cenci found that Management at the Roanoke RO did not commit an unfair labor practice, did not violate the national MOU or Master Agreement, and met its obligations to bargain with the Local Union. See Joint Ex. 5.

At the present arbitration hearing, the National Union also presented copies of incentivized telework policies from the Little Rock Regional Office and the Huntington Regional Office. However, these policies postdated the present grievance which was filed on April 2, 2019. Upon Management's objection, the Arbitrator excluded these two documents from evidence. Therefore, the present grievance includes only the incentivized telework policies from the Roanoke RO and the St. Paul RO.

## STIPULATED ISSUES

1. Is the grievance filed on April 2, 2019 arbitrable?;
2. If the grievance is arbitrable, did the Agency commit an unfair labor practice or violate law, contract, or policy when two or more VBA regional offices implemented incentivized telework policies? If so, what shall the remedy be?

## POSITIONS OF THE PARTIES

The Union.

The Union argues that the present national grievance was timely filed under Article 43, Section 11 because it was filed within 30 days of when the Union became aware of the act or occurrence giving rise to the grievance. Paul Fleming, the Union's Co-Chair of the VBA Mid-Term Bargaining Committee, testified that he learned on March 5, 2019 that two Regional Offices had implemented incentivized telework policies. The national grievance was filed on April 2, 2019, within 30 days of that notification. Management witness Kevin Nelson testified that prior to March 5, Fleming knew that an incentivized telework policy had been implemented at the Roanoke Regional Office because Fleming had testified during a local arbitration regarding this matter on February 28, 2019. But Fleming explained during the present case that when he testified in February 2019, he was

unaware that any other Regional Office had implemented an incentivized telework policy. He was later notified that the St. Paul Regional Office had implemented a similar policy and he then contacted the NVAC to request the filing of a national grievance.

The Union maintains that there is no limitation on the scope or subject of national grievances under Article 43. The decision to file a national grievance instead of a local grievance is left to the discretion of the Union or the Department. Union witnesses testified that the NVAC considers whether a violation impacts two or more local unions as a basis for electing to file a national grievance.

The Agency contends that the Union failed to comply with Article 43, Section 10 of the MCBA by filing "multiple grievances over the same issue." If the Arbitrator should interpret this argument as a threshold arbitrability claim, it must be denied because the Department did not raise this arbitrability defense in its written grievance decision as is required by Article 43, Section 11(b) of the MBCA. Should the Arbitrator decide to consider this argument, it should nonetheless be denied. The Department claimed that since the local union in Roanoke had previously filed a grievance over that office's incentivized telework policy, the NVAC was precluded from filing a national grievance by Article 43, Section 10. However, the Union did not file its national grievance pursuant to Section 10. The national grievance was filed under Section 11, "National Level Grievances." Therefore, the Union did not violate the MCBA in the filing of the present grievance.

The Department may argue that the local Roanoke grievance and the national grievance are a way for the Union to get "two bites at the apple." The Union maintains that this too is an arbitrability argument that was not properly raised in the written

grievance decision. The parties stipulated to the issues in this case and the only arbitrability defense concerned the timeliness of the grievance. Therefore, the "two bites at the apple" defense is untimely. Should the Arbitrator elect to consider it, this defense is not persuasive. The concept of "two bites at the apple" applies to a grievance that is barred by an earlier ULP pursuant to 5 U.S.C. Section 7116(d) of the Statute or vice versa. There was no such ULP in this case. The d-bar does not apply where local and national grievances contain similar subject matter. And there are no contractual limits on the subject of a national grievance filed by either party.

On the merits, the Union argues that the Arbitrator should sustain the grievance because the Department violated the parties' MCBA and MOU. By relating the number of days that employees can telework to a predetermined percentage by which they meet or exceed the fully satisfactory performance rating, the Department unilaterally augmented the eligibility standard for telework. The Roanoke and St. Paul policies do not permit maximum telework for fully successful performance. Therefore, the Arbitrator must find that these incentivized telework policies violated the February 2017 MOU.

The Union next argues that the Arbitrator should sustain the grievance because the Department violated the FSLMRS. The Union maintains that the Department did not fulfill its bargaining obligations on the local level in either Roanoke or St. Paul. Attempts by the local unions to complete bargaining after the telework policies were implemented would have been futile. By implementing changes to conditions of employment without fulfilling the obligation to bargain, the Department committed an unfair labor practice in violation of 5 U.S.C. 7116 (a) (1) and (5). Thus, the Arbitrator should find that the Department violated the FSLMRS.

The Union maintains that the Arbitrator should sustain the grievance because the Department violated VA Handbook 5011 (Un. Ex. 4). Chapter 4 is entitled "Alternative Workplace Arrangements (Telework)." This Chapter encourages the approval of telework to the maximum extent possible. It also requires the Department to meet its bargaining obligations prior to modifying a telework agreement. VBA Letter 20-17-06 (Union Ex. 1) contains identical language. By unilaterally implementing changes to the St. Paul and Roanoke telework policies, the Department violated its own policy requiring it to first bargain with the Union. Since the Department violated VA Handbook 5011, Chapter 4, the grievance should be sustained.

The Union asks the Arbitrator to conclude that the Union's national grievance was timely. On the merits, the Union requests that the Arbitrator find that the Department failed to comply with its statutory and contractual obligations to the Union. The Department committed a ULP when it unilaterally implemented a new policy without first bargaining at the national level. The new policy required higher work performance in order for an employee to be eligible for more days of telework. The Union asserts that it has proven that the Department violated the MBCA when it unilaterally changed the telework policy contained in the MCBA and the February 2017 MOU. The Department also failed to follow its own policies, VA Handbook 5011, Chapter 4 which requires the Agency to negotiate before modifying telework agreements.

The Union respectfully requests that the grievance be sustained and that appropriate relief be granted. The Union asks that the Arbitrator order the Department to return to the status quo ante unless and until the Department satisfies its statutory and contractual bargaining obligations with the Union over the changes in telework eligibility.

The Union requests that the Arbitrator direct the Department to cease and desist the local rollout of incentivized telework policies and order the Department to return to the status quo until it satisfies its bargaining obligations. Should the grievance be sustained in whole or in part, the Union respectfully requests that the Arbitrator retain jurisdiction to resolve any outstanding question or remedy.

The Agency.

The Agency argues that the present grievance is not arbitrable because there is no national policy relating to incentivized telework. The Union presented two different local incentivized telework policies from the Roanoke and St. Paul Regional Offices, but presented no evidence that a national incentivized telework policy existed or that such a policy was implemented from the national level. Since there is no national incentivized telework policy, the changes are appropriately bargained at the local level.

Because there is no national incentivized telework policy, the parties must rely on the Master Agreement and the 2017 MOU which put the place of bargaining local policies at the individual facility level. Article 20, Section 18 states that local parties may negotiate "methods for rewarding increased productivity of telecommuters" upon the effective date of the Master Agreement. The 2017 MOU at paragraph 18 states that: "Local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with the negotiated national policy and agreements."

The Master Agreement does not state that the two local policies were to be handled in a national grievance. Article 47, Section 4(B) of the Master Agreement provides that: "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 the affected local union." The St. Paul and Roanoke Regional Offices are two separate VBA facilities and are not "within a facility." As such, Article 47 does not require notice to the NVAC President and does not establish that two or more local policies affecting different facilities can be properly combined into a national grievance.

The Agency next argues that this grievance is not arbitrable as a national grievance because the issues have been decided in a prior grievance at the local level. The present grievance is therefore an improper collateral attack on the local award pertaining to the Roanoke policy. Article 43, Section 10 of the Master Agreement, "Grievance Procedure, Multiple Grievances," provides that the parties may initiate grievances over the same issue in multiple localities as either a group grievance at the national level or as individual grievances at the local level. The contract does not permit the Union to grieve in both a national grievance and individual local grievances over the same issue at the same time. The Union grieved both the Roanoke policy locally and that same policy in this national grievance. And the Agency never mutually consented to combine the local Roanoke grievance with a group national grievance.

Next, the Agency argues that the present grievance is not arbitrable because the national grievance was not timely. The grievance should have been filed within 30 days of the act or occurrence on which it was based or within 30 days of when the Union became aware or should have become aware of the act or occurrence. See Article 43, Section 11 (A). The St. Paul RO put an incentivized telework policy in place in September 2017 and notified the Union of the current policy in October 2018 before implementing the policy on March 8, 2019. See Joint Ex. 3. The Roanoke RO's current

incentivized telework policy was implemented on December 20, 2017. *Id.*, Attachment 4. The Agency maintains that the implementation of incentivized telework at the Roanoke and St. Paul facilities in September and December 2017 started the clock for the 30-day time period in which a grievance must be filed under Article 43. And yet the Union did not file a national grievance until April 2, 2019. Jt. Ex. 2. During the Roanoke local arbitration on February 28, 2019, Paul Fleming testified for the Union. This was 33 days before the April 2, 2019 national grievance. Therefore, the National Union "became aware" of the Roanoke policy more than 30 days before the filing of the national grievance. The Union was also aware or should have been aware that the St. Paul policy took effect in September 2017 after appropriate notice to the local union.

While the Union may argue that the national grievance was timely because the "act or occurrence is continuing," (Article 43, Section 11 (A)), the Agency maintains that this position should be rejected because the initial implementation of the incentivized telework programs were exact events occurring on exact dates. It was not unreasonable for the Union to grieve the telework policies when they were first implemented. And in fact, that's what the local union did with the Roanoke policy in 2017. See Joint Ex. 5. The Union failed to bring a national grievance regarding the multiple local policies for well over a year resulting in the present untimely and duplicative grievance.

The Agency next argues that if the Arbitrator finds that the present grievance is arbitrable, it should be denied on the merits. The St. Paul and Roanoke incentivized telework policies do not violate any law, contract, or policy. While the Union may argue that the Agency refused to bargain in good faith in violation of 5 U.S.C. Section 7116 (a) (1) and (5), the parties successfully bargained telework at the national level in Article 20

of the Master Agreement and the 2017 MOU. The Union does not recognize that the language in the Master Agreement and the 2017 MOU allows for distinct telework policies at the local level. The Union does not allege that Management failed to bargain with local union officials on these policies and therefore fails to show the existence of an unfair labor practice.

The Union has also failed to show any violation of the Telework Enhancement Act. The Roanoke and St. Paul policies are consistent with the Act. Basic eligibility for telework is governed by the Master Agreement and the 2017 MOU. The St. Paul policy makes some additional positions eligible for telework based on high performance. Both policies treat teleworkers and non-teleworkers equally in terms of performance appraisals and rewards. The local policies added to the opportunities established nationally and did not conflict with the Master Agreement, the 2017 MOU or the Telework Enhancement Act.

The incentivized telework policies do not violate any contract between the parties. Both the Master Agreement and the 2017 MOU allow for local negotiation of telework policies so long as these policies do not conflict with the national agreements. A "fully successful" performance rating still makes an employee eligible for telework. An employee who increases his/her output to a higher level within the "fully successful" range or into a higher performance output range is simply rewarded with more frequent telework opportunities.

The Union maintains that the incentivized telework policies are inconsistent with VBA Letter 20-17-06 (Union Ex. 1) and VA Handbook 5011 (Union Ex. 4). However, the Agency argues that a review of these policies reveals that they are entirely consistent

with the local policies to incentivize performance with increased telework. The incentivized telework policies are entirely consistent with the VBA Letter's stated policy to improve productivity and adjust telework based on employee performance. The incentivized telework policies are consistent with the VA Handbook 5011 because the policies maximize telework while also increasing employee performance and agency operations.

The Agency maintains that there was no requirement to bargain incentivized telework at the national level. The Agency met its obligation to bargain at the national level by negotiating and agreeing to Article 20 of the Master Agreement. The national parties also agreed to the 2017 MOU. The remaining bargaining obligations rest at the local level.

Finally, the Agency argues that the Union's requested remedy is improper. The Union asked for the Agency to issue a notice posting and to provide an opportunity to bargain incentivized telework at the national level. The Agency maintains that this requested remedy conflicts with the 2017 MOU. This agreement allows for variable local telework policies.

The Agency therefore concludes that the grievance is not arbitrable, or, in the alternative, that the Agency did not commit any unfair labor practice.

## DISCUSSION AND DECISION

Only the St. Paul and Roanoke incentivized telework policies are before this Arbitrator pursuant to the present national grievance. Any local incentivized policies that were implemented after the grievance was filed on April 2, 2019 were excluded from evidence at the present arbitration hearing.

In the Agency's brief, the Department has raised both the issues of procedural and substantive arbitrability. Only the procedural claim of untimeliness was raised in the Department's third step grievance response.

The Arbitrator finds that the present national grievance was timely. It is true that the Co-Chair of the Union's Mid-Term Bargaining Committee, Paul Fleming, testified at the Roanoke arbitration on February 28, 2019. But he was persuasive in the present case that he did not know until March 5, 2019 that the St. Paul Office had also implemented an incentivized telework policy. The national grievance was filed on April 2, 2019 which was within the 30 day time limit in Article 43, Section 11.

The Union argues persuasively that there is no limitation on the scope or subject of a national grievance under Article 43, Section 11. The decision to file a national grievance instead of a local grievance is left to the discretion of the Union or the Department. The Union interpreted Article 47, Section 4(B) to mean that when a violation impacts two or more local unions, a national grievance is appropriate.

The Agency contends that the Union failed to comply with Article 43, Section 10 by filing "multiple grievances over the same issue." But the Department did not raise this arbitrability defense in its written grievance decision as is required by Article 43, Section 11(b). This claim is therefore waived.

To dispel any concerns over the issue, the Arbitrator will say that the local union's grievance in Roanoke was not a bar to the present national grievance under Article 43, Section 11. Also, the present national grievance did not give the Union "two bites at the apple" because this concept applies to a grievance that is barred by an earlier ULP pursuant to 5 U.S.C. Section 7116(d) of the Statute or a ULP that is barred by an earlier

grievance. No evidence was presented in the instant case of an earlier ULP on the same subject.

As to the merits, the Union sought mid-term bargaining over an alleged change in the national telework policy covered by Article 20 of the MCBA. The Union sought to bargain at the national level over the changes to the St. Paul and Roanoke telework policies because two or more local unions were involved. However, under Article 47, Mid-Term Bargaining, Section 4(B), it is only when proposed changes in personnel policies, practices, or working conditions affect the interests of "two or more local unions within a facility" that notice is required to a party designated by the NVAC President with a copy to the affected local unions. Otherwise, notice is required only to the local union or unions.

Therefore, the present case involving alleged changes in two facilities handled by two different local unions did not require the Agency to give notice to the Union at the national level. The St. Paul and Roanoke incentivized telework policies were properly handled locally as was demonstrated by the local grievance in Roanoke that went to arbitration. The parties also attempted to bargain over the St. Paul incentivized telework policy and Management's "last best offer" was implemented. As a result, the Agency did not violate Section 7116 (a) (1) or (5) by failing to bargain at the national level over the changes in Roanoke and St. Paul. Similarly, the Agency did not violate the VA Handbook 5011 or VBA Letter 20-17-06 because the Department gave notice and an opportunity for bargaining in the Roanoke and St. Paul Regional Offices.

Article 47, Section 4 of the MCBA squarely states that on all policies where the Department met its bargaining obligation at the national level, local bargaining shall take

place at individual facilities and may include substantive bargaining that does not conflict with negotiated national agreements. The national parties negotiated the national telework policy contained in Article 20 and the 2017 MOU. The MOU also states at paragraph 18 that: "In accordance with Article 47 of the Master Agreement, Local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated national policy and agreements."

The local parties in Roanoke and St. Paul negotiated the incentivized telework policies at each location. These policies did not conflict with the national policy. They added to the national policy. A rating of "fully successful" was still required for each employee to telework. The national telework policy in Article 20, Section 18 did not guarantee that a fully successful employee would receive 5 days of telework per week. Rather, Article 20, Section 18 (C) specifically states that the local parties may bargain over "methods for rewarding increased productivity of telecommuters." Pursuant to local bargaining, an employee who received a rating that was at a higher level within the "fully successful" rating, or at a level higher than "fully successful" could receive further opportunities for telework. The MCBA and the 2017 MOU provided the basis for the implementation of telework. The Roanoke and St. Paul local policies added to the opportunities for telework in those locations.

It has been some time since the Roanoke and St. Paul policies were implemented. The Agency's response to the COVID crisis may have impacted the incentivized telework policies in some way. The national parties may wish to sit down and take a look as to whether other local incentivized policies were implemented and whether they were

negotiated locally. By agreement, the national parties can discuss how they wish to proceed on incentivized telework.

Since only two offices were involved in the present grievance and the incentivized policies implemented locally did not conflict with the Statute, VA Policy, the MCBA or the 2017 MOU, the present grievance is denied.

March 26, 2021

Marilyn Zuckerman