FEDERAL MEDIATION AND CONCILIATION SERVICE
WASHINGTON, D.C.

In the Matter of the Arbitration between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE)
NATIONAL VA COUNCIL NO. 53 (NVAC), Union

and

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, Agency

FMCS Case No. 190805-09758 (Term bargaining)

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

I. The Union's grievance allegations prior to May 18, 2019 in the National Grievance, dated June 18, 2019, are procedurally arbitrable. Because the parties met on May 28, 2019 to discuss their May 2nd proposals, the applicable date to begin the 30-day period to file the grievance was no sooner than May 28, 2019.

II. Based on the evidentiary record and the totality of circumstances in the instant case, the Union has met its burden of proof demonstrating by a

preponderance of the evidence that the Agency violated the Master Agreement and the applicable statutes by committing an unfair labor practice in failing to bargain in good faith during the period covered by the National Grievance dated June18, 2019.

Therefore, the Agency engaged in bad faith bargaining during negotiations for a successor agreement, as alleged in the National Grievance dated June 18, 2019.

III. Remedy

The Arbitrator directs the Department of Veterans Affairs:

A. **To cease and desist** from violating the Federal Service Labor-Management Relations Statute, including 5 U.S.C. 7102, 5 U.S.C. 7114, 5 U.S.C. 7116 and 5 U.S.C. 7121, as well as 38 U.S.C. 7422 and in so doing violating Articles 2, 43, 44 and 49 of the 2011 Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees by bargaining in bad faith.

B. If the parties have not reached an agreement, to renegotiate in good faith and **cease and desist** from interfering with, restraining or coercing employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute and other applicable statutes.

C. To post the following electronic Notice signed by the Secretary and in the same locations and manner as would be required after an order of the Federal Labor Relations Authority. The electronic Notice shall be posted and maintained for 60 consecutive days. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

NOTICE TO ALL EMPLOYEES
POSTED PERSUANT TO
AN ARBITRATION DECISION AND AWARD
UNDER ARTICLE 44 OF THE MASTER AGREEMENT
BETWEEN THE DEPARTMENT OF VETERANS AFFAIRS AND
THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

An Arbitrator having authority comparable to that of an administrative law judge of the Federal Labor Relations Authority has found that the United States Department of Veterans Affairs violated Articles 2, 43, 44 and 49 of the Master Agreement and the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT bargain in bad faith during collective bargaining negotiations with the American Federation of Government Employees by engaging in a course and conduct of bad faith conduct by striking Articles 2, 43, 44, and 49 and proposing in their stead Articles that violate the Federal Service Labor-Management Relations Statute and other applicable statutes.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute and other statutes.

WE WILL hereafter bargain in good faith and with a sincere resolve to reach a collective bargaining agreement.

_____
Department of Veterans Affairs

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

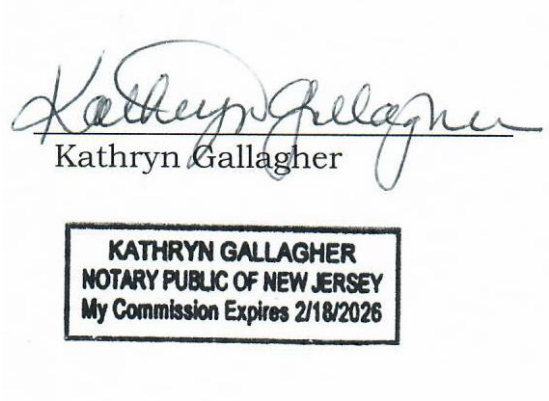
The Arbitrator hereby retains jurisdiction for the limited purpose of resolving any dispute that may arise regarding the remedy ordered pursuant to this Award.

May 14, 2021

Sally Steinberg-Brent, Arbitrator

State of New Jersey
County of Mercer

On this 14th day of May, 2021 before me personally came and appeared Sally Steinberg-Brent, to me known and known to me to be the individual described in the foregoing instrument, and she acknowledged to me that she executed the same.



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Hearings in the above-entitled matter were held on January 8 and January 9, 2020 at the Department of Veterans Affairs, 811 Vermont Avenue, Washington, D.C. and on January 14, 2021 by video conference before Sally Steinberg-Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. The parties submitted briefs, and the record was declared closed on March 19, 2021.

APPEARANCES

For the Agency:

Robert Vega, Staff Attorney

Aaron Robison, Staff Attorney

Janell Bell, Labor Relations Specialist

Ryan Fuller, Labor Relations Specialist

William Hervey, Attending Physician

Cortney McCormick, Administration Section Chief

Brian Barcikowski, Paralegal Specialist

Kurt Martin, Technical Advisor

Bruce Oliver, Technical Advisor

Roy Ferguson, Director of Staff Operations and Labor Management Relations

Heather Flick, Consultant

For the Union:

Thomas Dargon, Jr., Council

Christopher Zatratz, Council

Ibidun Roberts, Witness

David Cann, Witness

ISSUES SUBMITTED

1. Whether or not the Union's grievance allegations prior to May 18, 2019 in the National Grievance, dated June 18, 2019, are procedurally arbitrable.

2. Subject to the Arbitration ruling on Issue 1, whether or not the Agency engaged in bad faith bargaining during negotiations for a successor agreement as alleged in the National Grievance dated June 18, 2019. If so, what shall the remedy be?

STIPULATED FACTS

1. On December 15, 2017, the Agency notified the Union of its intention to renegotiate the 2011 Master Agreement.
2. On April 2, 2019, the Parties executed a Memorandum of Understanding covering the ground rules for term negotiations ("Ground Rules MOU").
3. On May 2, 2019, the Parties exchanged a complete set of initial proposals.
4. From May 28, 2019 to June 6, 2019, the Parties met for the first negotiation session in Long Beach, California

RELEVANT STATUTES

The Federal Service Labor-Management Relations Statute

TITLE 5 OF THE UNITED STATES CODE
GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III--EMPLOYEES
SUBPART F--LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

Chapter 71 - LABOR-MANAGEMENT RELATIONS

5 U.S.C. 7102 – Employee Rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

2. to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. 7106 – Management Rights

(a)Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
(1)to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
(2) in accordance with applicable laws—

(A)to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
(B)to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
(C)with respect to filling positions, to make selections for appointments from—
(i)among properly ranked and certified candidates for promotion; or
(ii)any other appropriate source; and
(D)to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7114– Representation Rights and Duties

a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

…

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining…

5 U.S.C. 7116 (a)(7)– Unfair Labor Practices

Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-- (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or (8) to otherwise fail or refuse to comply with any provision of this chapter.

…

(c)(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

5 U.S.C. 7121 – Grievance Procedures

a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1)Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(C)include procedures that—

(i)assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
(ii)assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
(iii)provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.
(2)(A)The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—
(i)a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board…
(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both.
An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board…
(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.
An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable

appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.
(2)In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.
(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

5 U.S.C. 7122 - Exceptions to Arbitral Awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient-
(1) because it is contrary to any law, rule, or regulation; or
(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations; the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

Title 31 MONEY AND FINANCE

31 U.S. C. § 9701 - Fees and charges for Government services and things value

(a)It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.
(b)The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

(1) fair; and
(2) based on—
(A)the costs to the Government;
(B)the value of the service or thing to the recipient;
(C)public policy or interest served; and
(D)other relevant facts.
(c)This section does not affect a law of the United States—
(1) prohibiting the determination and collection of charges and the disposition of those charges; and
(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

Title 38 VETERANS BENEFITS, Chapter 74 Veterans Health Administration

38 U.S.C. 7422 – Collective Bargaining

(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations).
(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.
(c) For purposes of this section, the term “professional conduct or competence” means any of the following:
(1) Direct patient care.
(2) Clinical competence.
(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.
…

RELEVANT REGULATIONS

5 C.F.R. 2424.2(c) Negotiability dispute means a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. A negotiability dispute exists when an exclusive representative disagrees with an agency contention that (without regard to any bargaining obligation dispute) a proposal is outside the duty to bargain, including disagreement with an agency contention that a proposal is bargainable only at its election. A negotiability dispute also exists when an exclusive representative disagrees with an agency head's disapproval of a provision as contrary to law. A negotiability dispute may exist where there is no bargaining obligation dispute. Examples of negotiability disputes include disagreements between an exclusive representative and an agency concerning whether a proposal or provision:

(1) Affects a management right under 5 U.S.C. 7106(a);

(2) Constitutes a procedure or appropriate arrangement, within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively; and

(3) Is consistent with a Government-wide regulation.

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION AND COVERAGE

Section 1 - Exclusive Representative
AFGE is recognized as the sole and exclusive representative for all of those previously certified nonprofessional and professional employees, full-time, part-time, and temporary, in units consolidated and certified by the Federal Labor Relations Authority (FLRA) in Certificate No. 22-08518 (UC), dated February 28, 1980, and any subsequent amendments or certifications.
The parties agree that should AFGE request the FLRA to include subsequently organized employees in the consolidated unit, such FLRA certification will not be opposed by the Department if the unit would otherwise be considered an appropriate unit under the law. Upon certification of FLRA, such groupings automatically come under this Agreement.
Section 2 - AFGE Role
As the sole and exclusive representative, the Union is entitled to act for and to negotiate agreements covering all employees in the bargaining unit. The Union is responsible for representing the interests of all employees in the bargaining unit.

ARTICLE 2 - GOVERNING LAWS AND REGULATIONS

Section 1 - Relationship to Laws and Regulations
In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.
Section 2 - Department Regulations
Where any Department regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern.

ARTICLE 43 GRIEVANCE PROCEDURE

Section 1 – Purpose
The purpose of this article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for Title 5, Title 38 Hybrids and Title 38 bargaining unit employees in resolving grievances that are within its scope, except as provided in Sections 2 and 3.
Section 2 - Definitions
A. A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the Department concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees.
B. This article shall not govern a grievance concerning:
1.Any claimed violation relating to prohibited political activities…
2.Retirement, life insurance, or health insurance;
3.A suspension or removal in the interest of national security…
4.Any examination, certification or appointment;
5.The classification of any position which does not result in the reduction in grade or pay of an employee.
C. Under 38 USC 7422, the following exclusions also apply only to pure Title 38 bargaining unit employees:
Discussions between an employee and an EEO (ORM) counselor would not preclude an employee from opting to select the negotiated grievance procedure if the grievance is otherwise timely. …

Section 4 - Jurisdiction 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.

Section 5 – Representation
The only representation an employee may have under this procedure is representative(s) approved in writing by the Union… An employee may pursue a grievance without union representation, but the Union may elect to attend each grievance step. The Union will be provided notice immediately when any grievance is filed as well as given advance notice of each meeting.

Section 9 - Failure to Respond in Timely Manner
Should the Department fail to comply with the time limits at any step in Section 7 [Procedure]above, the grievance may be advanced to the next step.
Section 10 - Multiple Grievances
Multiple grievances over the same issue may be initiated as either a group grievance or as single grievances at any time during the time limits of Step 1. Grievances may be combined and decided as a single grievance at the later steps of the grievance procedure by mutual consent.
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 the 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 not 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 44 - ARBITRATION

Section 1 - Notice to Invoke Arbitration
…A notice to invoke arbitration shall be made in writing to the opposite party within 30 calendar days after receipt of the written decision rendered in the final step of the grievance procedure.
Section 2 - Arbitration Procedure
A. On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service (FMCS) to provide a list of seven impartial persons to act as an arbitrator. The parties shall meet within 10 calendar days after receipt of such list to select an arbitrator (this may be done by telephone for national level grievances). If the parties cannot mutually agree on one of the listed arbitrators, then the Department and the Union will alternatively strike one potential arbitrator's name from the list of seven and

will then repeat this procedure until one name remains. The remaining person shall be the duly selected arbitrator. The parties will choose lots to determine who strikes the first name. Following the selection, the moving party will, within 14 calendar days, notify the FMCS of the name of the arbitrator selected. A copy of the notification will be served on the other party. The time limits may be extended by mutual consent.
C. The procedures used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. All witnesses necessary for the arbitration will be on duty time if otherwise in a duty status. On sufficient advance notice from the Union, the Department will rearrange necessary witnesses' schedules and place them on duty during the arbitration hearing whenever practical. Such schedule changes may be made without regard to contract provisions on Article 21 - Hours of Duty. …
D. The arbitrator's fees and expenses shall be borne equally by the parties. If either party requests a transcript, that party will bear the entire cost of such transcript.

F. The parties will attempt to submit a joint statement of the issue or issues to the arbitrator. If the parties fail to agree on a joint submission, each shall make a separate submission. The arbitrator shall determine the issue or issues to be heard.
G. The arbitrator's decision shall be final and binding. However, either party may file an exception to the arbitrator's award in accordance with applicable law and regulations. The arbitrator will be requested to render a decision within 60 days. Any dispute over the interpretation of an arbitrator's award shall be returned to the arbitrator for settlement, including remanded awards. An arbitrator's award shall have only local application unless it was a national level grievance, or the matter was elevated to the national level. Where it is mutually agreed between the NVAC President and the Department within 30 days after a local union has filed a notice for arbitration, an arbitration dispute will be elevated to the national level. The arbitrator has full authority to award appropriate remedies including reasonable legal fees pursuant to the provisions of Section 702 of the Civil Service Reform Act, in any case in which it is warranted.

ARTICLE 49 - RIGHTS AND RESPONSIBILITIES
Section 1- Introduction
The Parties recognize that a new relationship between the Union and the Department as full partners is essential for reforming the Department into an organization that works more efficiently and effectively and better serves customer needs, employees, Union representatives, and the Department.
Section 2 - Rights and Responsibilities of the Parties

A. In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the

obligations imposed by 5 USC Chapter 71 and this Agreement, and the maintenance of a cooperative labor-management working relationship.

B. Each party shall recognize and meet with the designated representative(s) of the other party at mutually agreeable times, dates, and places that are reasonable and convenient.

C. The Department supports and will follow statutory and contractual prohibitions against restraint, coercion, discrimination, or interference with any Union representative or employee in the exercise of their rights.

Section 3 - Union Representation

The Union will be provided reasonable advance notice of, be given the opportunity to be present at, and to participate in any formal discussion between one or more representatives of the Department and one or more employees in the unit or their representatives concerning any grievance, personnel policy or practice, or other general condition of employment. The Union will also be allowed to be present and represent a unit employee at any examination by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary/adverse action/ major adverse action against the employee and the employee requests representation.

Section 4 - Notification of Changes in Conditions of Employment

A. The Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain. The Department will work with the Union to identify and provide specific training and equipment to address concerns related to the use of technology, to include the sending and receiving of electronic communications

…

Section 5 – Information

If the Union makes a request under 5 USC 7114(b)(4), the Department agrees to provide the Union, upon request, with information that is normally maintained, reasonably available, and necessary for the Union to effectively fulfill its representational functions and responsibilities. This information will be provided to the Union within a reasonable time and at no cost to the Union.

…

Section 7 - Union-Employee Communication

The Department will not alter or censor the content of any direct communications between the Union and employees. However, Department facilities may not be used for posting or distribution of libelous or defamatory material directed at Department or Union officials or programs.

…

ARTICLE 57 - PHYSICAL STANDARDS BOARD
Section 1 – General
This Article applies only to Title 38 employees and is provided for informational purposes only. The Physical Standards Board (PSB) process, and/or the examination and evaluation process for Title 38 employees, is governed by 38 USC and VA Handbook 5019. In the event that the Department believes that a Title 38 employee is physically or mentally incapable of performing their duties, the Department will give a specific reason to the employee in writing. The employee shall be entitled to meet with the recommending medical official and to provide any oral and written evidence from his/her own physician/counselor before a recommendation is made. In any such meeting, the employee is entitled to Union representation and shall be provided notification of such entitlement.
…
E. When the Department orders a medical examination or questions an employee or a potential employee's abilities to meet a specific job qualification, the Department will provide the essential functions of the employee's position to the examining physician (the Department's or a private physician). The Union shall receive answers on how the Department came to the conclusions of the "essential functions", both physical and mental, of a specific PD or functional statement, upon request.
…
Section 7 – Confidentiality
Confidentiality must be maintained throughout the review process. …

ARTICLE 61 - TITLE 38 VACANCY ANNOUNCEMENTS
Section 1 – General
All Title 38 bargaining unit positions will be announced facility wide with posting and/or distribution a proper subject for local bargaining. If facilities are consolidated, positions will be posted at each geographic location. These announcements must be readily available for review by employees. The posting/application period will run for a minimum of 14 calendar days.
Section 2 - Contents of Vacancy Announcement
The qualifications for the position and educational/certification level will be kept current and clearly defined on the vacancy announcement. If the requirements of the job/position change, the vacancy announcement will be reposted reflecting the changes.
Section 3 – Vacancy
A. All employees will have a fair and equitable opportunity to compete for selection for a posted vacancy. All applicants will be asked the same questions during an interview.
B. At the request of the employee, the Department will supply the employee with an explanation of why they were not selected for the position.

Section 4 - Title 38 Position Qualifications

A. The Union will be pre-decisionally involved and may submit recommendations for criteria to be used in the development of all bargaining unit position qualifications.
B. The Union will be provided copies of all position qualifications for vacant positions.
C. Current employees will receive first consideration when filling position vacancies.

NATURE OF THE CASE

On December 15, 2017 the U.S. Department of Veterans Affairs (hereafter the "V.A.", the "Agency" or the "Department"), notified the American Federation of Government Employees (AFGE), National VA Council No. 53 (NVAC) (hereafter the "Union" or the "AFGE") of its intention to renegotiate the 2011 Master Agreement. On March 28, 2019, the Secretary of the Department of Veterans Affairs designated Dr. William Hervey as Chief Negotiator. On April 2, 2019, the parties executed The MEMORANDUM OF UNDERSTANDING-GROUND RULES, FSIP INORMAL CONFERENCE (Joint Exhibit 4) (hereafter the "Ground Rules") for the negotiation. The parties agreed to begin meeting on May 28, 2019 in Long Beach, California for the first two weeks of negotiation.

The parties exchanged proposals on May 2, 2019 (Union Exhibit 1; Joint Exhibit 1). For the first round each of the parties was to choose three Articles to present. The Union chose the Preamble, Article 1- Recognition and Coverage, and Article 20 – Telework, and the Agency chose Article 57 – Physical

Standards Board, Article 61- Title 38 Vacancy Announcements, and Article 65- Wage Surveys.

The Ground Rules provided that the Department would pay for travel. Travel authorization by the V.A. was required. The authorization was complicated, requiring at least four levels of Department approval. Although both V.A. employees and non-V.A. employees required travel authorization for their travel to be reimbursed, the process of payment for travel for non-VA employees differed from that of V.A. employees.

Although one of the Union negotiators received an email receipt stating that his flight was reserved, because there were additional steps, and he had not filled out the requisition properly, his flight was not authorized. Instead, it was cancelled, unbeknownst to the Union representative, who did not observe the notification at the bottom of the email the received, informing him that the ticket had not yet been issued. The Union asked the Agency to provide authorization; the Director of Labor Management Relations for the Agency asked the Director of Staff Operations to "take care of" the authorization. However, the flight was not timely authorized, and the Union employee had to pay for the flight himself.

A second Union employee also learned that his flight was not paid for when he arrived at the airport. He was unable to purchase the ticket himself.

The VA rescheduled his flight for later that evening; his late arrival prevented the Union from preparing on May 27, 2019 prior to the first bargaining session. The Union paid for that employee's flight and according to the testimony, the Union had not been reimbursed as of the date of the hearing.

The Union was not authorized to have additional days for preparation, but two of the V.A. negotiators requested and received authorization for two days of preparation and arrived two days prior to the scheduled start of negotiations.

There were difficulties with the location and setup on the first day of negotiation. These problems stemmed from a lack of communication, the Union's not being provided with laptops and difficulties with the Union representatives' accessing the projector. Due to the problems in linking the projector to the Union's computers and the fact that the V.A. negotiators did not notify the Union negotiators of the location of the room, the negotiations began late, although not significantly late.

The V.A. official handling the travel arrangement informed the parties that the first session of bargaining would occur at the Tibor Rubin V.A. Medical Center in Long Beach, California. He stated that the specific building and room number for the first bargaining session would be provided in a separate

message, but that message was not sent. The Union officials were not apprised of the room and even the Agency officials had some difficulty locating the room.

According to the testimony (Tr. 53, 185, Union Exhibit 1), the Agency's proposals struck about 28 of the 66 Master Agreement articles, removing 14 of them completely and effectively striking another 12. The Agency apparently considered the strikes legitimate proposals while the Union deemed them evidence of the Agency's bad faith bargaining, especially as there were proposals that the Union found illegal (Tr. 185-186). In addition, according to the testimony (Tr. 167-168), a member of the V.A. negotiating team recorded the negotiations, in violation of XI.A) PRIOR IMPASSE ARTICLE #22 the Ground Rules, which stated, in pertinent part, "No electronic recording or transcripts will be made during negotiations."

The Agency proposed in Article 1, Section 3D that virtually all communications between the parties occur between the National Affairs Counsel and the Department's Director of Labor-Management Relations (DOLMR). The Union struck this language of Article 1, opposing the Department's proposal as delegating the Union's representative, limiting the Union's right to choose its representatives. The Department put the language back in its counter proposal (Union Exhibit 7).

The Agency's proposals for Article 43 – Grievance Procedure, eliminated more than 15 categories of grievances from grievance procedure, including discipline, performance, incentive pay, non-selection for promotion, working conditions, leave, overtime, holiday work, compensatory time and training opportunities (Union Exhibit 1).

The Department's proposal for Article 44- Arbitration, required the Union to reimburse the Agency for the time supervisors and management officials spent preparing for, and participating in, "Union-demanded" grievances or arbitration (Union Exhibit 1). The Department's Chief Negotiator based the proposal for reimbursement of the Agency on 31 U.S.C. Section 9701, which authorizes the government to charge parties when something of value has been provided (Tr. 315-316). The Union negotiators considered that proposal illegal (Tr. 186). The Agency's proposals for Article 44 also changed "The arbitrator's fees and expenses shall be borne equally by the parties" to "The party invoking arbitration (moving party) will bear all fees and costs of the arbitration…" (Union Exhibit 1, page 244).

The Agency's proposed in Article 45 that to have Union dues deducted, "The employee must personally submit a written VA Dues Allotment Form…" and that an employee's dues allotment "shall immediately terminate [a[fter the twelve (12) month assignment period, unless affirmatively renewed by submission of a VA Dues Allotment Form. …To renew the allotment, an

employee must submit an appropriate written VA Dues Allotment Form… within the seven (7) calendar-period ending upon the anniversary of the first deduction." (Union Exhibit 1, page 251) The Union considered the proposals in Article 45 *ultra vires* (Tr. 187).

There was lengthy discussion. On the second day, the V.A. added language stating that the Department could change its policy at any time. Union negotiators objected that the proposal would entail a waiver of the Union's bargaining rights (Tr. 75, Union Exhibit 2, Agency Exhibit 18). The Department's Chief Negotiator testified that he did not realize that the Union would read the Agency's proposal that way and agreed to language in the Preamble stating that nothing in the Agreement shall constitute a waiver of either party's rights unless explicitly waived (Tr. 241, Agency Exhibit 2). The Union eliminated the sentences regarding the "Department Policy", and the V.A. made another counter-proposal (Union Exhibit 3), but then the Agency struck the entire Article once again (Union Exhibit 4). The Union negotiators thought this might be a mistake because it appeared to be regressive, but the response was that the Agency did not think the Article had any place in the Agreement (Tr. 82).

The Agency's Chief Negotiator stated that he did not intend to supersede the Agency's obligations to bargain changes in conditions of employment. As a

result, in the Preamble, signed by both parties, it was affirmed that neither party was waiving its rights, unless such was stated explicitly (Tr. page 241).

At one point, the Chief Negotiator for the Agency stated that he needed to run language by the Office of General Counsel because the Department did not have labor lawyers on their team, while the Union did.

The Union also alleged that the Department engaged in excessive caucuses. Because the caucuses did not result in changes, according to the Union, the caucuses appeared to be used merely for dilatory purposes. The parties only signed one Article during the initial two-week session whereas their schedule required at least four Articles per week.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was brought to arbitration.

The Arbitrator has thoroughly studied the evidentiary record and read all the cases submitted by the parties. The Arbitrator has also considered all of facts, allegations and legal arguments and evidence submitted by the parties in the present proceeding, she only refers to the submissions and evidence she considered necessary to explain her reasoning.

DISCUSSION AND ANALYSIS

I. Arbitrability

Article 43, Section 11 (A) of the parties' Master Agreement provides, in pertinent part:

> 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.

The Agency asserted that the grievance allegations regarding its May 2, 2019 proposals are procedurally non-arbitrable because the Union was aware of the grievance on or about May 2, 2019 when it received the Agency's proposals, but did not file a grievance until June 18, 2019, which was more than 30 days later. The Union countered that the Agency could have changed its proposals when the parties met to negotiate for two weeks beginning May 28, 2019, although the Union negotiators found that the Agency "never retracted anything" (Tr. 55).

Because the parties met for two weeks beginning May 28, 2019, as agreed, to discuss their May 2nd proposals, the applicable date to begin the 30-day period to file the grievance was no sooner than May 28, 2019. Thus, there is not valid basis to declare the Agency's May 2, 2019 proposals procedurally non-arbitrable.

American Federation of Government Employees Council of Prisons 33, Locals 1007 and 3957 and U.S. Department of Justice, Bureau of Prisons, Oakdale, Louisiana, 64 FLRA 288, 290 (2009), found "When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that an administrative law judge would apply in a ULP proceeding under § 7118. U.S. Dep't of Def., Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa., 58 FLRA 750, 756 (2003). … As in other arbitration cases, the Authority defers to the arbitral findings of fact. Id."

II. Merits

The Ground Rules (Joint Exhibit 4) provide at VI. Bargaining Locations and Schedules A.) PRIOR IMPASSE ARTICLE #9 provided, "The Department will be responsible for paying travel and per diem expenses for ten (10) Union Master Bargaining Team Members or their alternates during the bargaining sessions addressed by this MOU." The Union team waited for initial authorization instructions for the trip to Long Beach, California, the first location for the negotiations. After a few prompts the Director of Labor Management Relations for the VA responded by copying someone from her office to say, "Could you get on this?" According to the testimony the Union team did more prompting thereafter and "finally the travel authorizations went out" (Tr. 43). The V.A. Lead Negotiator testified that he recalled receiving

emails from the Union Lead Negotiator citing problems that "they were having with travel authorization or something, as did our team," and he referred them to the Director of Labor Management Relations, copying the Union Lead Negotiator "and everyone else on the memo, saying, 'Please expedite this.'"

Securing authorization for travel arrangements was complicated for both negotiating teams, but even more convoluted for the Union team. Apparently designed to ensure that expenses over $20,000 charged to the V.A. are authorized, the procedure involved four steps and included both a certification and an authorization before payment is issued. The V.A. Director of Staff Operations and Labor Management, who issued the 30-page document giving ITT travel instructions to the Union negotiating team, was not in the chain of command for certifying or approving the travel authorization requests (Tr. 508). He described the challenging procedure to obtain authorization, as follows:

> When a person's ready to submit it, they actually hit the 'Submit' button. And unfortunately, it's a little more cumbersome than what you would think it would be because once you hit 'Submit', that's not the end of it. You hit 'Submit,' then you hit 'Continue stamping,' and then after that…as long as it's complete, there is a 'Continue dynamic stamping' and then there is a 'Close' button that you have to hit at the very end of it. So at that point, the traveler should receive a message that it has been submitted. From that point most travelers have anywhere from 4 to 10 individuals who are authorized to certify that the individual is authorized to travel. Once they have done that portion of it, the next stage is for the approval and that again there are anywhere from about 4 to maybe 10 people that are authorized to actually approve the document, to approve the travel itself. …one of the individuals has to certify that's in the list and then once they have done that portion, it's to approve it. …so Concur [the travel company] typically puts out a message

> at each level saying…either you've submitted something, it has been certified, it has been approved, so they do receive messages letting them know. And they also receive a message letting them know that if it has not been approved, how many days or how many hours they have until the document is no longer available and the trip is cancelled.

(Tr. 430-432)

The Director of Staff Operations and Labor Management continued that non-contract VA employees "have to complete a form, I believe it is the 10091, and they are required to complete that document so that an electronic transfer of funds can be made to their accounts. So that has to be done initially before they can even get into Concur. It sets them up with an account. …Using this form is the vendorization process…" (Tr. 432-433)

The Director of Staff Operations and Labor Management did not verify that each traveler who received the ITT instructions had a reserved and confirmed flight (Tr. 510). Given how complicated the travel authorization system was, it would have been helpful if V.A. management had assisted the Union negotiating team with making travel arrangements. However, there is no indication in the record that the Agency's failure to help secure the Union's travel authorization was in bad faith; rather, there appeared to be a *laissez-faire* attitude on the part of Department officials, who passed responsibility to one another without checking to see that the task was accomplished.

The Department failed to notify the Union of the meeting room location before the start of the negotiations. The email sent to the Union negotiating

team stated that the location and building information would be sent in a separate message, but that message was never sent. The Director of Staff Operations and Labor Management testified that he did not have the facility [building or room] location information and that it was his understanding that the lead V.A. negotiator would provide the specific building and room numbers (Tr. 437-438). Dr. William Hervey, the V.A.'s Lead Negotiator, testified that he did not see the email from the Union asking for the room's location until the evening of the first meeting because he did not check his email until that evening (Tr. 234). He also stated that the memo giving the Long Beach Medical Center as the location without the building or room information had the name and number of the Labor and Management Relations person to contact for further information (Tr. 230), However, while the "Attachment Instructions to Travelers" that was part of the Travel Authorization Memorandum (Agency Exhibit 1) lists the name, telephone number and email address of the Program Manager, but it does not state that he is the person to contact for further information. Furthermore, Dr. Hervey testified that he arrived early on the first day of negotiations and took "a couple" members of the V.A. negotiating team, found someone to unlock all the rooms "and then went downstairs to try to catch people as they came in to make sure everybody got where they were supposed to go," but he "personally did not run into any AFGE members and send them in that direction" (Tr. 234-235). When asked how he expected the Union team to know where to go, he answered, "The thought didn't cross my mind. I figured…we would catch them as we caught our own team members."

(Tr. 284) The failure of the Agency to advise the Union negotiating team of the building location and room number bespeaks more of a lack of professionalism than of bad faith.

The Ground Rules provide at VI. Bargaining Locations and Schedules C. PRIOR IMPASSE ARTICLE #11: "If bargaining occurs at a VA facility, the Department will also supply a laptop, projector, screen, table, chairs, conference-ready telephone and access to printer/photocopier, if not already available." (Joint Exhibit 4)

Although a projector was placed in the conference room, the Department did not provide laptops, and the Union negotiating team had problems connecting to the projector. The V.A. Administrative Section Chief contacted someone at the facility (Agency Exhibit 23) who sent an I.T. person, who resolved the problem in less than an hour (Tr. 400-401) during which the parties introduced themselves.

Despite the fact that the V.A. Lead Negotiator and the Administrative Section Chief arrived two days in advance "to help get things set up," (Tr. 403), the conference room was not set up in accordance with the Ground Rules. This was undoubtedly frustrating for the Union negotiating team, which had already experienced travel authorization problems and the V.A.'s failure to provide the room location, as well as confronting what one Union team member

described as "the most aggressive attacks on both institutional and employee rights" that he had ever seen in collective bargaining (Tr. 185). The Union cited the fact that the room failed to meet the specifications set forth in the Ground Rules as another example of the Agency's bad faith bargaining. Had the negotiations begun in a more conciliatory and courteous manner, the inadequacy of the set-up might not have seemed so serious.

The fact that the V.A. negotiating team did not include more representatives with collective bargaining experience is more significant (Tr. 563, 533). The Department's Lead Negotiator, Dr. William Hervey, is a psychiatrist, not a lawyer, yet, except Article 20, which was written by a team member, who is a lawyer but not a labor lawyer, and Article 48, which he co-wrote, Dr. Hervey wrote the 350 pages of the V.A.'s proposed contract changes, admittedly a legal document (Tr. 265-266). He asked the lawyer team member to run proposed language by the Office of General Counsel (OGC), and he had several meetings with the OGC and Labor and Management Relations personnel "to make sure I wasn't doing anything legally goofy." (Tr. 226, 265) Moreover, Dr. Hervey lacked experience in negotiating collective bargaining contracts (Tr. 226). Although Dr. Hervey admitted that "Department policy can't supercede contract language," (Tr. 240), the language in the Agency's proposals superceded the contract language and in some cases would have violated the Federal service Labor-Management Statute.

Tracy Schulberg, the Executive Director of Labor-Management Relations had been a member of the V.A. bargaining team, but she was removed after the first session because Dr. Hervey felt "she was no longer an asset to the team." (Tr. 307, 313, 550) According to the testimony of Roy Ferguson, the Director of Staff Operations and Labor Management, Michael Doucette, a Labor-Management specialist, expressed personal concerns and frustrations about being on the V.A.'s negotiating team to Mr. Ferguson about the way the negotiations were being managed. Mr. Doucette had been hired by Ms. Schulberg to lead the negotiations, but the Acting Deputy Secretary of the Veterans Administration appointed Dr. Hervey. Mr. Doucette stated that he would have run the negotiations differently and that they were being run differently from the way he thought they should be run. He also sent an email to Mr. Ferguson complaining that Dr. Hervey made a very disrespectful, negative innuendo about the Union's Lead Negotiator (Tr. 498, 550-556). Mr. Doucette left the V.A. (Tr. 225, 561).

Dr. Hervey admitted that he was "a little VHA-centric." He testified that he wanted to negotiate an agreement that allowed the Department to provide a high quality of patient care and still respect the rights of the Union to exercise the rights that Congress had granted them to represent employees." (Tr. 227) These are admirable goals and yet, as a psychiatrist, Dr. Hervey must have known that the Union negotiators would view his striking approximately 42% of the articles of the Master Agreement as an attack on the Union.

Dr. Hervey preferred to avoid "unnecessary" restatements of the law in order to bring "clarity and concision to the document." (Tr. 249) While eliminating references to the law would make the collective bargaining agreement more concise, omitting legal references would not add clarity.

The Union objected to the Agency's caucusing for over 26 hours or 40% of the time during the first two weeks of bargaining without significant progress in the negotiations (Joint Exhibit 5, Tr. 304). Although the V.A. Lead Negotiator was disappointed in the lack of progress, he did not attribute it to the time the Agency spent in caucus (Tr. 305).

The Agency's proposal for Article 1 included the plan that there be a single point of contact for Union grievances (Union Exhibit 6):

> Management has determined that All communications from the Union to the Department will be delivered to the department the national level [stet]. Such communication includes but is not limited to …grievances; unfair labor practice (ULP) charges; demands to bargain… Management has determined that communications will go to the Department's Director of Labor-Management Relations (LMR) or their written designee."

Despite the fact that the AFGE files tens of thousands of grievances for its members, Dr. Hervey maintained that a single point of contact would make it less likely that a grievance would be dropped (Tr. 299). The Union struck this language because both parties have a statutory right to choose their representatives (Tr. 93). *Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina (Respondent) and National Association of Government Employees, Local R5-150, SEIU, AFL-CIO (Charging*

Parties/Unions), 57 FLRA 495 (1980) held, "A union's right to designate its own representatives is a statutory right under § 7114 of the Statute." *Federal Deposit Insurance Corporation Headquarters, Respondent and National Treasury Employees Union, Charging Party*, 18 FLRA 768 (1985) found:

> It is well-established that a party is not required to bargain over a permissive subject of bargaining. This applies equally to proposals advanced by agency management as it does to proposals made by a union. In American Federation of Government Employees, AFL-CIO, 4 FLRA 272 (1980), for example, the Authority determined that an agency's proposals which would have infringed on a union's right to designate its own representatives when dealing with agency management were outside the required scope of bargaining. Therefore, the union's refusal to bargain over the proposals was found not to have violated the Statute.

5 U.S.C. 7116(a)(7) provides, in pertinent part, as follows:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-- to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.

Thus, the Agency cannot insist on proposals that conflict with the Master Agreement, which is in effect.

The Department's initial proposal (Union Exhibit 1) struck and replaced Article 43-Grievance Procedure and Article 44-Arbitration in their entirety in contravention of 5 U.S.C. 7121 – Grievance Procedures, which provides, in pertinent part:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. …

> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.
> (b)(1)Any negotiated grievance procedure referred to in subsection (a) of this section shall—
>
> (C)include procedures that—
> (i)assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
> (ii)assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
> (iii)provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

In the Department's initial proposals (Union Exhibit 1, pages 230-231), the following were among the 15 categories of Union grievances excluded from grievance procedures: warnings; discipline; major adverse actions; decisions to reprimand, demote, suspend (with or without pay), remove or terminate an employee for misconduct or unacceptable performance; disputes regarding incentive pay, cash awards, quality step increases, recruitment, retention or relocation payments; non-selection for promotion; filling supervisory or other positions outside the Union bargaining unit; disputes concerning working conditions; disputes regarding leave, including but not limited to annual leave, sick leave and leave without pay; disputes regarding overtime work, holiday work and compensatory time; disputes concerning within grade increases or career ladder promotions; and disputes regarding training opportunities.

Dr. Hervey admitted that employees are entitled to overtime, holiday and compensatory time, but did not know where an employee would appeal, for example, not getting holiday pay for Christmas Eve if the denial of holiday pay were excluded from the grievance procedure, although he understood that the denial of holiday pay would be illegal (Tr. 329-331).

Regarding the Department's unprecedented proposal for Article 44-Arbitration, requiring the Union to reimburse the Agency for the time supervisors and management officials spent preparing for, and participating in, "Union-demanded" grievances or arbitration (Union Exhibit 1), the V.A.'s Chief negotiator admitted that a third party (here the Union) would not be permitted to reimburse salaries of government employees because it could lead to corruption (Tr. 317).

The Department proposed the following language in Article XX CONDITIONS OF EMPLOYMENT (Union Exhibit 1, page 331):

> Section 1 – Conditions of Employment
>
> A. The Parties mutually agree that "conditions of employment" are defined by Department policy and this Agreement.
> …
>
> C. The Union will be informed of any substantive change in conditions of employment proposed by the Department and shall be permitted reasonable time to present its views or recommendations regarding the changes… the Department shall consider those views or recommendations before taking final action…The Department shall then provide the Union a written statement of the reasons for the final action.

D. Matters covered under U.S. Code 7422(b) [arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation] are not considered conditions of employment for the purposes of this Article.

E. The parties agree that any decision, proposal or action taken by a Department supervisor or management official that is consistent with federal law, government rule, regulation, Department policy, and this Agreement does not represent a change in "conditions of employment" and therefore shall not, by definition, trigger a duty to consult with the Union.

F. The Parties agree the only way to change "conditions of employment" is by changing Department policy…the change to "conditions of employment" must be a "substantive change"…to rise to the level of triggering a duty to inform the Union and allowing the Union reasonable time to present its view and recommendations regarding the change. All such notification and bargaining will be done at the national level.

G. The Department shall have discretion in exercising its right to change conditions of employment to the maximum extent allowed by law that does not require a waiver of any Party's statutory rights.

The proposed Article XX would contravene 5 U.S.C. 7102 – Employee Rights, which provides, in pertinent part:

> Each employee shall have the right… to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

The Agency's initial proposal (Union Exhibit1) eliminated Article 47-Midterm Bargaining, instead adding the language in Article XX, *supra* at page 35, reducing the Union's bargaining rights to consultation rights. The Department's proposal also overhauled Article 49 – Rights and Responsibilities,

eliminating "the parties will have due regard for the obligations imposed by 5 USC Chapter 71 and this Agreement, and the maintenance of a cooperative labor-management working relationship," and eliminating the provision for advance reasonable notice to the Union of changes in conditions of employment (Union Exhibit 1, pages 279-286).

In the negotiations the Department presented a complete strike of Article 57. The Agency informed the Union that it struck the entire Article because the article was redundant in that its terms were provided for in law and did not have a place in the bargaining agreement. The Arbitrator takes administrative notice that the Secretary of the Department of Veterans issued a 7422 Decision removing Article 57 from the Agency's bargaining obligations. *American Federation of Government Employees, AFL-CIO v. Robert Wilkie* (Court Filing), D.D.C. No. 1:20-cv-02084, July 30, 2020.

Based on the evidentiary record and the totality of circumstances in the instant case, the Union has met its burden of proof demonstrating by a preponderance of the evidence that the Agency violated the Master Agreement and the applicable statutes by committing an unfair labor practice in failing to bargain in good faith during the period covered by the National Grievance dated June 18, 2019.

Therefore, the Agency engaged in bad faith bargaining during negotiations for a successor agreement as alleged in the National Grievance dated June 18, 2019.

II. Remedy

The Arbitrator directs the Department of Veterans Affairs:

D. **Cease and desist** from violating the Federal Service Labor-Management Relations Statute, including 5 U.S.C. 7102, 5 U.S.C. 7114, 5 U.S.C. 7116 and 5 U.S.C. 7121, as well as 38 U.S.C. 7422 and in so doing violating Articles 2, 43, 44 and 49 of the 2011 Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees by bargaining in bad faith.

E. If the parties have not reached an agreement, to renegotiate in good faith and **cease and desist** from interfering with, restraining or coercing employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute and other statutes.

F. Post the following electronic Notice signed by the Secretary and in the same locations and manner as would be required after an order of the Federal Labor Relations Authority. The electronic Notice shall be posted and maintained for 60 consecutive days. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

NOTICE TO ALL EMPLOYEES
POSTED PERSUANT TO
AN ARBITRATION DECISION AND AWARD
UNDER ARTICLE 44 OF THE MASTER AGREEMENT
BETWEEN THE DEPARTMENT OF VETERANS AFFAIRS AND
THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

An Arbitrator having authority comparable to that of an administrative law judge of the Federal Labor Relations Authority has found that the United States Department of Veterans Affairs violated Articles 2, 43, 44 and 49 of the Master Agreement and the Federal Service Labor-

Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT bargain in bad faith during collective bargaining negotiations with the American Federation of Government Employees by engaging in a course and conduct of bad faith conduct by striking Articles 2, 43, 44, and 49 and proposing in their stead Articles that violate the Federal Service Labor-Management Relations Statute and other statutes.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute and other statutes.

WE WILL hereafter bargain in good faith and with a sincere resolve to reach a collective bargaining agreement.

_____

Department of Veterans Affairs

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

The Arbitrator hereby retains jurisdiction for the purpose of resolving any dispute that may arise regarding the remedy ordered pursuant to this Award.

May 14, 2021 Sally Steinberg-Brent, Arbitrator