NATIONAL GRIEVANCE
NG-1/6/2022

7H/00398943

Date: January 6, 2022

To: Denise Biaggi-Ayer
Executive Director
Office of Labor Management Relations
Denise.Biaggi-Ayer@va.gov
Sent via electronic mail only

From: Sarah Hasan, Staff Counsel, National Veterans Affairs Council (#53) ("NVAC"), American Federation of Government Employees, AFL-CIO ("AFGE")

RE: **National Grievance against the Department of Veterans Affairs for Improperly Charging Employees AWOL Who Have Requested FMLA**

STATEMENT OF THE CHARGE

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) ("MCBA"), American Federation of Government Employees/National Veterans Affairs Council ("NVAC" or "the Union") is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Department of Veterans Affairs ("Department") for improperly charging bargaining unit employees ("BUE") absence without leave ("AWOL") while their FMLA approvals were pending. To date, the Department has failed to remedy this violation, and as such, continues to violate the Master Agreement and federal law.

Specifically, the Department violated Articles 2, 35, 47 and 49 of the MCBA; 5 U.S.C. Section 7116 (the "Statute"); 29 C.F.R. 825.220(a)(1); VA Financial Policy Volume XV, Chapter 3; and any and all other relevant articles, laws regulations, and past practices not herein specified. The Union specifically reserves the right to supplement this grievance based upon the discovery of new evidence or information of which it is not presently aware, or otherwise, as necessary.

STATEMENT OF THE CASE

Background

Under MCBA Article 35, Section 16, bargaining unit employees can take up to 16 weeks of leave under the Family Medical Leave Act ("FMLA") during any 12-month time period for

certain qualifying conditions, or up to 12 weeks of FMLA leave for other criteria. Once employees are approved FMLA leave, they are entitled to use it on a rolling-basis until the anniversary of their approval date, at which point the employee's entitlement to a new bank of FMLA would be triggered, assuming the employee was eligible for FMLA leave and was using that leave for a qualifying condition.

During the June 2021 Monthly Human Resources ("HR") Professionals Call, the Department announced certain changes to FMLA and VATAS whereby timekeeping was aligned with FMLA regulations and VA policy to include, "a 2 pay period grace period [of approved FMLA in VATAS after an employee requests FMLA and before final approval]; after that an employee will receive an error if they continue to submit FMLA requests without an approved FMLA case[.]" *See* Exhibit 1, p. 11. As a result, HR offices are responsible for providing the payroll office with FMLA approval memoranda so that the payroll office can create the FMLA case in VATAS. *Id*. The downstream effects of these changes are now resulting in violations of employees' FMLA rights.

For example, AFGE Locals in VISN 10 report that once an employee's "conditional" or "provisional" FMLA exceeds thirty (30) days without a final approval of FMLA, employees are charged AWOL. These AWOL charges are automatic and employees are not told of whether their FMLA requests have been approved or not from HR or their own supervisors. In some cases, employees come to discover that the VISN HR office does not even have copies of the employees' FMLA request.

Employees are improperly charged AWOL or incur a debt over their "conditional" approved leave status when the Department fails to timely process an employee's FMLA request and employees' conditional approval exceeds two-pay periods. Therefore, to employees, it appears that they have been approved FMLA, only to find out that the request is still pending, either because of a potential backlog of claims, or the request has been lost in transmission to the centralized HR office. In the interim, employees are not being advised of the progress or status of their FMLA request.

According to VA Financial Policy XV, Chapter 3, Section 304, supervisors are responsible for "certifying" the accuracy of timecards. By allowing employees to be charged AWOL while their FMLA requests are pending, supervisors are reneging on this duty. It is at the supervisory level that a timecard audit, review, or other triggering event occurs to determine the status of an employee's FMLA approval. Timecards with inaccurate or incomplete time entries for employees whose FMLA leave is approved or pending should not have been certified and signed by any supervisor or designee.

To the extent employees' FMLA requests are transmitted to a centralized HR work group, it is unclear whether HR is in receipt of those requests and the chain of custody of those requests. Employees are being told their medical records are being stored on a virtual cloud-based platform, without acknowledgement of receipt of the information once it is transmitted (whether faxed, scanned, or otherwise) from either the provider or the employee. Consequently, employees are unclear who to contact concerning their FMLA requests. They are only advised of the status of their FMLA request once they begin to see AWOL charges on their timecards thirty days after they submitted their FMLA paperwork.

Multiple AFGE Locals, including 1739 (Salem, VA), 1224 (Las Vegas, NV), 1633 (Houston, TX), 2028 (Pittsburgh, PA), 609 (Indianapolis, IN), and others have reported these problems on a continuing and ongoing basis. This list is not exhaustive and the Union reserves to supplement this list.

Under 29 C.F.R. 825.220(a)(1), employers are prohibited from interfering with an employee's exercise of FMLA rights. Employees' exercise of their FMLA rights is impeded when the Department charges employees AWOL who have properly requested FMLA, all the while it is the Department that has delayed the approval of these requests or fails to communicate an FMLA approval memo to timekeepers.

Furthermore, the Department violated the Statute when it changed conditions of employment, specifically, how (1) FMLA was conditionally approved in VATAS for two pay periods; (2) requests were to be sent to consolidated HR offices without clearly communicating an HR representative to whom employees could communicate their concerns; and (3) FMLA records were being solicited, stored, and used by the Department based on these changes, without first notifying and bargaining with the Union.

The Department also violated numerous Articles of the MCBA. Article 2 of the MCBA sets forth the requirement that the Agency comply with federal law. Article 35 of the MCBA establishes that employees will accrue and use leave in accordance with applicable statutes, OPM regulations and the MCBA. Section 16 specifically provides that BUE are entitled to 16 weeks (*viz*., 640 hours) of LWOP during any 12-month period for certain reasons covered by the FMLA. Under the FMLA, only the amount of leave *actually* taken may be counted against an employee's FMLA entitlement.

Violations

By failing to fulfill its obligations, the Department violated and continues to violate, the following:

- Article 2 of the MCBA: requiring the Department to comply with federal law and regulations;
- Article 3 of the MCBA: requiring the Department to maintain an effective and cooperative labor-management relationship with the Union;
- Article 35 of the MCBA: entitling employees up to 16 weeks of FMLA leave to be used in a 12-month period depending on the circumstances;
- Article 47 of the MCBA: requiring the Department to notify and bargain with the NVAC over proposed changes in personnel policies, practices, or working conditions affecting two or more local unions;
- Article 49 of the MCBA: requiring the Department to bargain with the Union prior to making changes in conditions of employment;
- 5 U.S.C. § 7116(a)(5) and (a)(8): requiring the Department to consult and negotiate in good faith with the Union;

- 29 C.F.R. 825.220(a)(1) which requires FMLA calculations to be consistently and uniformly applied all employees, 60 days' notice to employees before changing the FMLA "year," and allowing employees to retain the full benefit of 12 weeks of leave under whichever method affords greatest benefit to the employee during the intervening transition;
- VA Financial Policy XV, Chapter 3 which requires that supervisors certify the accuracy of time cards; and
- Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

Remedies Requested

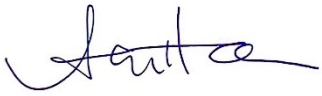
The Union asks that, to remedy the above situation, the Department agree to the following:

- Return to the *status quo ante* concerning the calculation of FMLA leave in VATAS;
- Rescind the June 2021 HR guidance;
- Make whole all affected BUEs who have either been denied FMLA that was previously approved or charged AWOL;
- Pay reasonable attorney's fees under the Back Pay Act;
- Fully comply with its obligations under Articles 2, 3, 35, 47 and 49 of the MCBA; VA Financial Policy XV, Chapter 3; its statutory obligations under 5 U.S.C. Section 7116(a); and its regulatory obligations under 29 C.F.R. 825.220;
- Distribute an electronic notice posting to all bargaining unit employees concerning the Agency's unfair labor practice in changing the calculation of FMLA without first informing or bargaining with the Union;
- Agree to comply with any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.
- Agree to any and all other appropriate remedies in this matter.

Time Frame and Contact

This is a National Grievance, and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions, please contact the undersigned at the AFGE Office of the General Counsel. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance.

Submitted by,



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