NATIONAL GRIEVANCE
NG-3/28/22

7H/00400611

Date: March 28, 2022

To: Denise Biaggi-Ayer
Executive Director
Office of Labor Management Relations
U.S. Department of Veterans Affairs
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 Failing to Engage in the Interactive Process Before Summarily Denying VHA Employees' Requests for Reasonable Accommodation Against the COVID-19 Vaccine**

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 failing to engage in the interactive process before summarily denying VHA employees' requests for reasonable accommodations from the COVID-19 vaccine on either medical or religious grounds. To date, the Department has failed to remedy these violations, and as such, continues to violate the Master Agreement, VA policy, and federal law.

Specifically, the Department violated Articles 2, 3, 17, 18, 30, 47, and 49 of the MCBA; 5 U.S.C. §7116(a) (the "Statute"); 42 U.S.C. §12112 ("Americans with Disabilities Act" or "ADA"); 29 U.S.C. §701 et. seq. (the "Rehabilitation Act"), 29 C.F.R. §1630.2 (Regulations to implement portions of the ADA), 29 C.F.R. §1614.203 (Regulations to implement the Rehabilitation Act), VA Handbook 5975.1 ("Processing Requests for Reasonable Accommodation" or "Handbook"); 42 U.S.C. § 2000e et. seq. ("Title VII" of the Civil Rights Act), 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

On July 26, 2021, Secretary McDonough announced that all Title 38 healthcare personnel were required to be vaccinated against COVID-19. On August 13, 2021, Secretary McDonough expanded the COVID-19 vaccine mandate to include hybrid Title 38 and Title 5 healthcare personnel. Law, regulation, policy, and contract permit employees to seek exemptions from the Covid-19 vaccine requirement based on medical or religious grounds. In both instances, the Department is legally required to make an "individualized assessment" of the circumstances before issuing a decision on the accommodation request.

In late 2021, the Department made the decision to temporarily stop processing requests for reasonable accommodations from the Covid-19 vaccine.

VA Obligations Regarding Request for Reasonable Accommodations

Under Title VII, employees are entitled to religious accommodations in the workplace if they possess a sincerely held religious belief that conflicts with a workplace requirement. See 42 U.S.C. § 2000e-2(a). Similarly, under the ADA and Rehabilitation Act, employees are entitled to reasonable accommodations to allow them to continue to perform the essential functions of their positions. *See* 42 U.S.C. §12102; 29 C.F.R. §1630.2; 29 C.F.R. §1614.203.

In the federal regulations to implement portions of the ADA, agencies "should engage in an informal and flexible interactive process to identify the precise limitations of the individual and what accommodations could overcome those limitations." 29 C.F.R. §1630.2 (o)(3).

VA Handbook 5975.1 defines the "interactive process" as

> The interactive process is the communication between the DMO and the employee, in consultation with the LRAC, to determine how best to respond to the employee's request. During this process, an individualized assessment will be conducted to review essential and marginal job functions, the employee's limitations, and possible accommodations. The interactive process may require more than one discussion. The DMO or LRAC will also explain the reasonable accommodation process to the employee at this time. … Ongoing communication and cooperation are important, especially when a specific limitation, problem, or barrier is unclear or when the disability or an effective accommodation is not obvious. Thus, interactive discussions should be documented, with at least the date, time, participants, and key points noted.

See Exhibit 1, p. 21. The VA Handbook further acknowledges, "Failing to engage in the interactive process is a violation of the Rehabilitation Act of 1973, as amended, and may create liability for VA." See Exhibit 1, p. 21.

While reassignment can be a reasonable accommodation for some employees,

> [Reassignment] is the accommodation of last resort and will be considered only if there is no other accommodation available that will enable the employee to perform the essential functions of his or her current job, and the employee has a permanent or long-term disability. (If the employee has a temporary disability, a detail may be an appropriate accommodation.) Reassignment should be initiated by the LRAC, in collaboration with the HRMO. *The interactive process is especially critical when reassignment is being considered.*

Exhibit 3, pp. 27-28. (emphasis added). Furthermore, employee requests for accommodation can only be denied after the deciding management official consults with the national reasonable accommodation coordinator or regional Office of General Counsel. *See* Exhibit 1, p. 33-35.

VA Guidance on Processing RA Requests (VHA Directive 1193.01)

On February 3, 2022, Denise Biaggi-Ayer sent an email to NVAC informing the Union of the Department's intention to resume processing VHA Healthcare Personnel ("HCP") requests for medical and religious accommodations related to the Covid-19 vaccine requirements pursuant to the VHA Directive 1193.01. *See* Exhibit 2.

According to the email, "The COVID-19 reasonable accommodation process is described in VHA Directive 1193.01. Each employee request for accommodation will be individually considered as required by law and evaluated on VA Form 10230a. *See Attachment, Undue Hardship Review.*" (emphasis in original) But the email later expressly contradicts that statement because it also provides:

> VHA has determined that, for a specific listing of positions, the standard accommodation of masking, maintaining physical distance, testing, and following other required safety protocols is either not possible or does not sufficiently mitigate the safety risk posed. These positions now include (as outlined on VA Form 10230a, Part A):
>
> i. Community Living Center staff
> ii. Intensive Care Unit staff
> iii. Spinal Cord Injury Departments staff
> iv. Emergency Rooms staff
> v. Chemotherapy unit staff (inpatient and outpatient)
> vi. Dialysis staff (inpatient and outpatient)
> vii. Staff who perform aerosol generating procedures
> viii. Healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients (e.g., manipulating cultures from known or suspected COVID-19 patients).
> ix. Staff with substantial face to face contact with individuals coming from congregate settings and bedded residential settings (e.g. blind rehab, residential mental health, homeless shelters)
> x. Acute inpatient medical/surgical unit staff
> xi. Acute inpatient mental health/residential mental health staff

xii. Post-transplant unit staff (inpatient and outpatient)

Exhibit 2 (emphasis added).

This guidance is also present in a February 7, 2022 Memorandum from the Deputy Under Secretary for Health to VHA Officials. *See* Exhibit 3. This Memorandum further states that all recommended accommodation decisions, including both approvals and denials, made for the above 12 positions must undergo review by the Office of General Counsel. However, both the email and guidance on implementing VHA Directive 1193.01 unlawfully deprive employees of their rights under the law and VA policy to an "individualized assessment" of their unique limitations and viability of any number of available accommodations through a documented interactive process.

VA Summary Denials of RA Requests & Forced Reassignments

On March 3, 2022, bargaining unit employees ("BUE") from AFGE Local 1963 (VA Medical Center, Danville, IL) were summarily denied their requests for accommodation from the Covid-19 vaccine without the Department having engaged in the interactive process prior to determining that the employees could only be accommodated through reassignment. These denials are not being approved by OGC before being communicated to BUEs. BUEs are not given an opportunity to discuss their requested accommodations, the availability of alternative accommodations aside from reassignment, or other risk mitigation measures prior to being denied their requests for accommodation. At this time, this practice is being reported by multiple AFGE Locals, including but not limited to Locals 1739 (Salem, VA), 548 (Bay Pines, FL), 910 (Kansas City, MO), 2201 (Fayetteville, AR), and 1061 (Los Angeles, CA). This list only contains a representative sample of the facilities affected by the violations described herein. The Union reserves the right to supplement this list of affected Locals.

While the VA claims it will conduct an "individualized assessment" of an undue hardship for employees of these positions, it also hastily and improperly concludes that the standard accommodations against vaccination do not sufficiently mitigate the safety risk posed by unvaccinated employees. **Therefore, despite its obligations to process requests on a case-by-case basis, the VA is seemingly outright rejecting certain accommodations from individuals who occupy certain positions.** The VA is also denying accommodations for VHA employees in these 12 positions without first obtaining approval from their OGC, in violation of the VA Handbook.

Moreover, on March 15, 2022, a BUE from Local 1061 was provided a document titled "Religious Accommodation Reassignment Option" that provided the employee only three (3) calendar days within which to return the form to indicate their interest in reassignment as an accommodation. *See* Exhibit 4. This form is also in use at the Northern and Southern Colorado VA Healthcare Facilities (AFGE Local 2241), and the Northern Arizona VA Healthcare system (AFGE Local 2401). Employees at all these locations were not provided an opportunity to discuss their requested accommodations or the availability of any other accommodations. They were not offered an opportunity to engage in the interactive process or offer alternative accommodations prior to being forced to consider reassignment. Here, reassignment is not being used as the accommodation of last resort; it is the first and only accommodation the Department

is offering employees. Additionally, the Union was not notified and afforded an opportunity to bargain before the Department began using this form.

Evidence from the field demonstrates that there is no detailed explanation provided as to why these employees may not continue standard accommodations while remaining in their positions or how the employee's requested accommodations create an undue hardship or risk of direct threat to the Department, other employees, or Veteran patients. There is no requirement, in the law, VA Handbook or otherwise, that employees make an election to consider reassignments within a particular timeframe. Again, the Department failed to engage in any bargaining with the Union prior to imposing a three-day timeframe within which employees were required to elect a reassignment. Providing an employee just three days to consider a reassignment, without engaging the employee in a meaningful way to ascertain the availability of other accommodations, deprives the employee any choice or agency in being a part of the search for a reasonable accommodation that requires an "individualized assessment" of their circumstances. By rushing employees through this process and misinforming them of their rights in the accommodation process, the Department is coercing employees into reassignments as the only accommodation as opposed to an accommodation of last resort, without having exhausted all other potential accommodations through direct engagement and interaction with the employee.

This approach to summarily deny requests for reasonable accommodation and instead impose reassignments ignores the actual duties a BUE may be performing in their designated position, the specific accommodations sought by the BUE, and what the latest scientific and medical guidelines are on assessing and mitigating the risk of Covid-19 spread. Therefore, it is evident the Department is not conducting an individualized assessment of BUEs' requests for accommodation and is skirting its obligation to engage in the interactive process as required by federal laws and regulations. The Department cannot demonstrate that it has determined that no other reasonable accommodations will permit employees to perform the essential functions of their position when they have effectively been accommodated during the duration of the Covid-19 pandemic thus far.

The Department has also violated the rights of BUEs who request religious accommodations under Title VII by summarily denying those accommodations without any consideration into specific alternatives or an assessment of the undue hardship present in providing such accommodations.

Additionally, the Department failed to notify and provide an opportunity to bargain to the Union regarding a negotiable issue concerning a change to the terms and conditions of work, and instead, unilaterally implemented a change to the reasonable accommodation process for employees who seek medical and religious accommodations from the Covid-19 vaccine. In refusing to notify, consult, and negotiate in good faith with the Union prior to changing the accommodation process, the Agency committed an unfair labor practice under 5 U.S.C. §§7116(a)(1) and (a)(5). Further, the Agency violated Article 47, Section 2, which sets forth the Parties' responsibilities regarding mid-term bargaining at the national level, and Article 49 which requires the Department to provide reasonable, advance notice to the Union before changing conditions of employment.

Article 2 of the MCBA requires that the Agency comply with applicable federal statutes

and regulations in the administration of matters covered by the MCBA. Therefore, in violating 5 U.S.C. §7116, 42 U.S.C. §12112 ("ADA"), and 29 U.S.C. § 701 et seq (the "Rehabilitation Act"); 42 U.S.C. § 2000e et. seq. ("Title VII") as set forth above, the Agency also failed to comply with Article 2. Further, the Department violated Article 3 which encourages the parties to maintain a cooperative labor-management relationship based on mutual respect, open communication, consideration of each other's views, and minimizing collective bargaining disputes. The Department violated Articles 17 which entitles employees to be treated fairly and equitably and without discrimination in regard to their religious beliefs or disabilities. The Department violated Article 18 by failing to engage in the interactive process and summarily denying accommodation requests from its BUEs. Finally, the Department violated Article 30, Section 7(B) which entitles BUEs to religious and medical exemptions from vaccination requirements during a pandemic. In committing these violations of contract, federal law, and Department-wide policy, the Agency renounced its commitments under Article 3 of the MCBA and necessitated further collective bargaining disputes.

Violations

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

- Article 2 of the MCBA: requiring the Agency to comply with federal law and regulations;
- Article 3 of the MCBA: requiring the Agency to maintain an effective, cooperative labor-management relationship with the Union;
- Article 17 of the MCBA: requiring the Agency refrain from discriminating against employees due to their religious beliefs or disabilities;
- Article 18 of the MCBA: requiring the Agency to provide reasonable accommodations to employees;
- Article 30 of the MBCA: requiring the Department to provide medical or religious exemptions against vaccination requirements during a pandemic;
- 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 provide reasonable, advance notice and bargain with the Union prior to making changes in conditions of employment;
- 5 U.S.C. §§7116(a)(1) and (a)(5): requiring the Agency to consult and negotiate in good faith with the Union;
- The Americans with Disabilities Act and the Rehabilitation Act of 1973 (42 U.S.C. §12112; 29 U.S.C. § 701 et. seq.; 29 C.F.R. §1630.2; 29 C.F.R. §1614.203) requiring the Department to provide reasonable accommodations to employees with disabilities by engaging in the interactive process and offering reassignment only as an accommodation of last resort;
- Title VII of the Civil Rights Act (42 U.S.C. § 2000e et. seq.) requiring the Department to accommodate employees based on their religious beliefs;

- VA Handbook 5975.1 requiring the Department to engage in the interactive process, offer reassignments as a last resort, and consult OGC on denials of reasonable accommodation requests; 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* and immediately cease and desist the summary denial of any requests for accommodation, perform an individualized assessment and/or engage in the interactive process for any employees whose requests for accommodation were summarily denied and/or who were offered reassignment in lieu of any interactive process;
- Fully comply with its contractual obligations under Articles 2, 3, 17, 18,30, 47 and 49 of the MCBA; its statutory and regulatory obligations under 5 U.S.C. §7116(a), 42 U.S.C. §12112; 29 U.S.C. § 701 et. seq.; 29 C.F.R. §1630.2; 29 C.F.R. §1614.203; 42 U.S.C. § 2000e et. seq.; and its obligations to comply with policy under VA Handbook 5975.1;
- To make-whole any bargaining unit employee injured by the Agency's unlawful summary denial of requests for accommodation;
- To pay reasonable attorney's fees and litigation costs under 42 U.S.C. §2000e-16 and 42 U.S.C. §2000e-5;
- Distribute an electronic notice posting, signed by the Secretary, to all bargaining unit employees concerning the Agency's unfair labor practice in summarily denying BUE requests for accommodation against the COVID-19 vaccine and by changing conditions of employment without first notifying and bargaining with the Union;
- Provide mandatory training to responsible management officials concerning the Reasonable Accommodation Process and associated obligations in the MCBA and VA policy;
- 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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