7S/402189

NATIONAL GRIEVANCE
NG-9/14/2022

Date: September 14, 2022

To: Kevin Nelson
Labor & Employee Relations Specialist
Office of the Chief Human Capital Officer
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
kevin.nelson2@va.gov
valmrlitigation@va.gov
Sent via electronic mail only

From: Shalonda Miller, 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 violating 2021 MOUs and other contractual obligations concerning performance standards for certain VBA employees, and for failing to provide the Union notice an opportunity to bargain over the implementation of the standards.**

STATEMENT OF CHARGES

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 Veterans Benefits Administration ("Agency" or "VBA") for violating 2021 Memoranda of Understanding ("2021 MOUs") and other contractual obligations concerning performance standards for certain VBA employees, and for failing to provide the Union notice an opportunity to bargain over the implementation of these revised performance standards.

Specifically, the VA violated Article 2, 3 and 27 of the MCBA, the 2021 MOUs, 5 U.S.C. §7116(a), 5 U.S.C. §4302(b)(1), and any and all relevant articles, laws, regulations, and past practices not herein specified.

STATEMENT OF THE CASE

Background

At the VBA, Legal Instrument Examiners ("LIEs"), Field Service Representatives ("FSRs"), and Field Examiners ("FEs") play an integral role in the processing of veterans' benefits and beneficiary claims. The work of AFGE bargaining unit employees ("BUEs") in these positions is measured against national performance standards that numerically rank and identify critical[1] and non-critical elements upon which proficiency, quality, and timely claims processing is determined. Due to the complexity of this work, it is undisputed that the VBA makes frequent and sometimes radical changes to the BUEs' performance standards. Customarily, the Union and the VBA (hereafter together referred to as the "Parties") engage in mid-term bargaining to negotiate a national MOU before changes in the performance standards are imposed on employees. The most recent MOUs for the LIE, FSR and FE positions were executed on September 30, 2021, see attached. The standards were implemented the next day. At the time, the notable change was the conversion in production tracking software from ASPEN to WATRs. Since "Output" is one the critical elements contained in each position's production standard, tracking completed work in WATRs became an integral part of the BUEs' duties.

The nearly identical MOUs state the following at paragraph 14: *Prior to any changes to this national performance standard that affect the type or weight of transactions employees receive credit for, to include retroactive changes which negatively affect employees' production standards, the VBA Mid-Term Bargaining Committee will be notified and all bargaining obligations at the national level will be met.* The NVAC has learned that on a continuing and ongoing basis, the Agency has not provided the Union advance notice and an opportunity to bargain over the latest changes to the performance standards for LIEs, FSRs, and FEs. The Union was also notified that BUEs, through their local union offices, have raised concerns that the performance standards are being implemented in a manner that is contrary to the terms the Parties' negotiated in the MOUs. Examples of changes to the performance standards that were implemented without first satisfying bargaining obligations include but are not limited to:

1. Due to the COVID-19 pandemic, FEs have not been driving to field examinations. However, the "production" element of their performance standard contemplates drive time for these employees. Since drive time has temporarily ceased, management has been assigning other tasks to the FEs. Many of these tasks have not been designated as weighted actions in the production standard, and as a result, has decreased the overall ratings under that standard. The FE MOU requires that management consider such things excluded time; and Article 27 of the MCBA requires standards be based on the requirements of an employee's position.

[1] Note, that for LIEs and FEs, the "critical" elements of their performance standards are: 1) Quality, 2) Timeliness and Workload Management, 3) Output and 4) Customer Service & Organizational Support. FSRs have the same elements except that Customer Service & Organizational Support is a non-critical element.

2. Since its implementation, the WATRs/Employee Performance Report ("EPR") has worked on an intermittent basis. The system was offline completely from June 22, 2022, through mid-July. As a result, the data contained in these systems is skewed and has negatively impacted the production ratings for FSRs, LIEs and FEs. The MOUs requires management to review data for accuracy before using it for performance-based actions, but Local Unions are reporting that BUE are being placed on PIPs based off the erroneous data.

3. LIEs have notified management that workload distribution is not equal. Some are working exclusively on special projects, or on accounting work, or on misuse claims; others are being given fund usage accounting work only. Employees must be provided with enough creditable work to meet their standards. This type of disparate treatment is patently unfair and also impacts morale.

4. On March 23, 2022, the Agency notified the Union that it planned to increase the "Output" element for LIE's, FSR's and FE's production standards, and indicated that the change would be retroactive to the start of the fiscal year. The Union's VBA Mid-term Bargaining Team issued a timely demand to bargain, and the parties exchanged proposals. Despite this, the Agency unilaterally implemented the changes on July 5, 2022.

To date, management officials have failed to address concerns such as these at the Louisville, Indianapolis, Lincoln, Columbia, Milwaukee, and Salt Lake City Fiduciary Hubs. These claims are not exhaustive. In addition, the Local Unions at these stations were denied the opportunity to provide input into the changes in performance standards as required by the MCBA, nor was the national Union given an opportunity to bargain over the implementation of the changes. Resultingly, the Agency has, and continues to violate, the Parties' 2021 MOUs, the MCBA, 5 U.S.C. § 7116(a), 5 U.S.C. §4302(b)(1), and any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

Violations

5 U.S.C. §4302(b)(1) provides that federal agencies are responsible for "establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question . . . .". *See also* 5 C.F.R. part 430. Performance standards must therefore be reasonable, realistic and attainable. Article 27, Section 5 (C) of the MCBA mirrors the statutory requirement. The Agency is legally required to communicate performance standards to an employee that are sufficiently specific to provide the employee with a firm benchmark toward which to aim their performance; instead, on a continuing and ongoing basis, the Agency has employed a "moving target" tactic that has impacted employee morale and jeopardizes the employee's ability to obtain a fully successful rating.

Additionally, the Agency has failed to meet its bargaining obligations pursuant to the Federal Service Labor-Management Relations Statute (the "Statute") and the MCBA. Section 7106(b) of the Statute requires the Agency to bargain over procedures and appropriate arrangements that concern the application of employee performance standards. Furthermore, the Agency's disregard for the bargaining process constitutes an unfair labor practice in violation of Sections 7116(a)(1) and (a)(5) of the Statute. Independently, the 2021 MOUs also require that the Parties resolve subsequent changes to the performance standards by engaging in the negotiating process; thus, the Agency violated the MOUs as well.

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(a), 5 U.S.C. §7106(b) and 5 U.S.C. §4302(b)(1), as set forth above, the Agency also failed to comply with Article 2.

Article 3 of the MCBA encourages the Parties to maintain a cooperative labor-management relationship that is based on mutual respect, open communication, consideration of each other's views, and minimizing collective bargaining disputes. By failing to negotiate with the Union prior to implementing the new standard FSRs, the Agency renounced its commitments under Article 3 of the MCBA and necessitated further collective bargaining disputes. Lastly, Article 27, Section 5 of the MCBA specifically provides for bargaining over national performance standards.

Remedy Requested

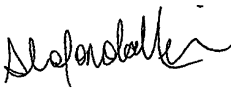
The Union asks that, to remedy the above situation, the Agency agree to the following:

- To return to *status quo ante* until the Agency completes it bargaining obligations, including the suspension of any currently enacted PIPs against affected employees;
- To perform a time-and-motion study to determine appropriate performance standards, and to modify existing standards to ensure they provide a clear means of assessing whether their objectives have been met performance;
- To remove any documentation regarding any adverse action related to this matter from affected employees' employment records;
- To make whole any employee adversely affected by this action to include, but not limited to, back pay, restored leave, award pay outs, missed overtime, missed career-ladder or merit promotions or within grade increases, and attorneys' fees;
- To fully comply with its contractual obligations under Articles 2, 3 and 27 of the MCBA, the 2021 MOUs, and its statutory obligations under Title 5 of the U.S. Code;
- To post, and distribute to affected employees via e-mail, an appropriate notice by the highest appropriate VBA official acknowledging the Agency's illegal conduct and affirming its obligations under the Statute; and
- To agree to any and all other remedies appropriate 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 AFGE Office of the General Counsel. The undersigned representative is designated to represent the Union in all matter related to the subject of this National Grievance.

Submitted by,



Shalonda Miller
Staff Counsel, National VA Council
AFGE, AFL-CIO
80 F Street, NW
Washington, DC 20001
Tel: 202-639-6424
Fax: 202-379-2928
shalonda.miller@afge.org

cc: Alma L. Lee, President, AFGE/NVAC
Bill Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
Thomas Dargon, Jr., Supervisory Attorney, AFGE/NVAC