



# NATIONAL VETERANS AFFAIRS COUNCIL

American Federation of Government Employees, Affiliated with the AFL-CIO

## NATIONAL GRIEVANCE

NG-10/17/2022

**Date:** October 17, 2022

**To:** Denis Biaggi-Ayer  
Executive Director  
Office of Labor Management Relations  
U.S. Department of Veterans Affairs  
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*Sent via electronic mail only*

**From:** Ibidun Roberts of Roberts Labor Law and Consulting, L.L.C., on behalf of National Veterans Affairs Council (#53) (“NVAC”), American Federation of Government Employees, AFL-CIO (“AFGE”)

**RE:** National Grievance against the Department of Veterans Affairs for violation of the Settlement Agreement, reached on July 5, 2022, resolving certain disputes arising out of NG 9-29-2017 which concerned VA’s failure to provide performance improvement plans prior to taking actions based on unacceptable performance under 38 U.S.C. §714.

## 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” or “Master Agreement”), American Federation of Government Employees/National Veterans Affairs Council (“the Union”) is filing this National Grievance against you and all other associated officials and/or individuals acting as agent on behalf of the U.S. Department of Veterans Affairs (“VA,” “the Agency,” or “the Department”) for its violation of the Settlement Agreement, executed on July 5, 2022, resolving certain disputes arising out of NG 9-29-2017, which concerned VA’s failure to provide performance improvement plans prior to taking actions based on unacceptable performance under 38 U.S.C. 714.

Specifically, the VA violated Articles 2 and 49 of the MCBA, the Settlement Agreement, 5 U.S.C. §7116(a)(1) and (5), and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

## STATEMENT OF THE CASE

### **Background**

On September 27, 2017, the Union filed a grievance against the Department relating to its elimination of performance improvement plans (“PIPs”) as required by Article 27 of the MCBA. Notably, instead of the 90-day PIP required by Article 27, Section 10 of the Master Agreement, the Agency provided employees with a “two pay period” opportunity to improve. The Department had not asserted that the 38 U.S.C. §714 removed its obligation to provide employees with an opportunity to improve.<sup>1</sup> Instead, the Department asserted that it was no longer obligated to provide the 90-day duration of the performance improvement plan in the Master Agreement. The Union timely invoked arbitration on the grievance and the parties selected Arbitrator Jerome Ross to resolve the dispute presented by the grievance. Arbitrator Ross conducted a hearing on April 26, 2018, and, on August 23, 2018, he issued his decision sustaining the Union’s grievance.

Specifically, he found that:

[T]he [Accountability Act] did not remove VA employees’ opportunity to demonstrate acceptable performance, as required by federal law. Consequently, the [Accountability Act] also did not act to supersede any negotiated contractual provisions that provide bargaining unit employees the opportunity to demonstrate acceptable performance. Article 27, Section 10 of the Master Agreement falls under that category. Accordingly, the [Accountability Act] also did not authorize the Agency to disregard its obligations under that negotiated provision.

As a result, he ordered the Agency to “(1) resume compliance with the requirements set forth in Article 27, Section 10 of the Master Agreement; (2) rescind any adverse action taken against bargaining unit employees for unacceptable performance who did not first receive a PIP complying with the provisions of Article 27, Section 10; (3) as a result, reinstate and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits.”

However, on September 24, 2018, the Agency filed exceptions to Arbitrator Ross’s Award asserting that it was contrary to law, that the Arbitrator exceeded his authority, and that the award failed to draw its essence from the parties’ CBA. Because the VA filed exceptions, the arbitrator’s award could not become final. On November 16, 2020, the Federal Labor Relations Authority (the “Authority” or “FLRA”) denied VA’s exceptions. *U.S. Dep’t of Veterans Affairs, Veterans Benefits Admin. and AFGE, Nat’l Veterans Affairs Council #53*, 71 F.L.R.A. 1113 (2020) (“*Decision*”). Notably, the Authority found that the Award is consistent with law because “[ ] Section 10, which requires the Agency to give an employee a PIP and ninety days to improve *prior* to initiating a performance-based action, is not contrary to the Accountability Act.” *Decision* at 1116 (emphasis in original). The issuance of this decision made the arbitrator’s award final.

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<sup>1</sup> The Agency’s position subsequently evolved to assert that performance improvement plans, as a whole, are contrary to 38 U.S.C. §714.

However, VA still did not comply with the Ross Award and instead, on November 27, 2020, filed a request for the FLRA to reconsider its decision. On December 8, 2020, VA also filed a request for the FLRA to stay the implementation of the *Decision*.

On February 22, 2021, VA's Office of the Chief Human Capital Officer issued a bulletin instructing that the Department should resume the issuance of PIPs as required by the Ross Award. However, the Department had not taken any action to rescind adverse actions taken against bargaining unit employees for unacceptable performance without first receiving a PIP or make the affected bargaining unit employees whole.

Because the FLRA's decision was final on November 16, 2020, and the Authority had not stayed the decision, on May 17, 2021, the Union filed an unfair labor practice charge (ULP) alleging that the Department had failed to comply with the Ross Award.

While the ULP charge was pending, on June 25, 2021, the FLRA denied the Department's requests for reconsideration and for a stay.

On or around September 2021, VA began notifying affected employees of their entitlement to rescission of the adverse action and reinstatement. However, VA did not work with the Union on how it would implement the remedy and instead dealt directly with bargaining unit employees concerning implementation of the Ross Award. Resultingly, the Parties mutually agreed to request assistance from the FLRA Collaboration and Dispute Resolution Office in an effort to resolve disputes concerning VA's compliance with the Ross Award.

### **Settlement Agreement**

The Parties reached agreement resolving certain disputes concerning VA's compliance with the Ross Award. The Parties executed the agreement with the last signature provided on July 5, 2022. The relevant terms of the agreement provide:

1. Section II.G.iii. provides, "Within seventy-five (75) calendar days of this Agreement, VA counsel will provide AFGE counsel with a Microsoft Excel spreadsheet identifying: (1) the names of all Eligible AFGE BUEs whose Employee Notification was either returned to VA as undeliverable or who have not yet provided the Remedy Election Form or Address Verification Form to VA, as appropriate, (2) the last four digits of the Eligible AFGE BUE's Social Security Number, (3) the name of the Eligible AFGE BUE's VA facility, and (4) the mailing addresses used for the original Employee Notification."
2. Section II.F.iii. provides, "Make-whole relief will be calculated and provided consistent with the Back Pay Act, 5 U.S.C. §5596, applicable government-wide regulations, 5 C.F.R. §550.801, *et seq*, and the 2011 Master Agreement. . . ."

Seventy-five calendar days from the date of the Agreement was September 18, 2022. Because September 18th was a Sunday, Section IV.I. of the Settlement Agreement made the due date Monday, September 19, 2022. However, VA did not provide the information by

September 19, 2022. The Union raised the issue to the Department's representatives and the Department agreed to provide the information by October 7, 2022. However, on October 7, 2022, the Department sent an email communication that it was waiting on a list from one of the Administrations. Resultingly, the Department would provide the list by October 14, 2022. However, the Department did not provide the information by October 14, 2022 and did not communicate that any further extension was needed. The Agency's delay is a plain breach of the Settlement Agreement and prevents AFGE from providing any information it may have to assist VA's efforts in reaching affected bargaining unit employees.

As to the make-whole relief, some bargaining unit employees have been reinstated since November 2021, but the Department has not yet made the employees whole. The same is true for those who elected to be made whole without reinstatement. The delay in the make whole relief has compounded the harm to bargaining unit employees affected by the original violation, leading to home foreclosures and homelessness in some instances. Other employees have received debt letters related to back pay payments that they have not yet received. When AFGE raised these concerns with the Department's representatives, they could not identify any estimated timeframe whereby employees could expect to be made whole, and instead, referred AFGE and affected employees to the responsible HR representative.

## **Violations**

By failing to honor the deadlines in the Settlement Agreement and make bargaining unit employees whole within a reasonable time, the Department violated, and continues to violate, the following:

- Sections II.G.iii and II.F.iii of the Settlement Agreement;
- Article 2 of the MCBA: requiring compliance with all federal statutes and governmentwide regulations;
- Article 49 of the MCBA: which requires that the parties have due regard for the obligations imposed by 5 U.S.C. Chapter 71;
- 5 U.S.C. §7116(a)(1) and (5): requiring the Agency to honor unambiguous terms of settlement agreements;
- Any other law, rule, regulation, or Master Agreement provision not herein specified.

## **Remedies Requested**

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

- Cease and desist from further violations of the Settlement Agreement and the Federal Service Labor-Management Relations Statute;
- Comply with the Settlement Agreement within 30 days of resolution of the grievance;
- To pay reasonable attorney's fees; 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. Ibidun Roberts of Roberts Labor Law and Consulting, L.L.C., is the designated representative for this National Grievance. If you have any questions regarding this National Grievance, please contact her at (202) 235-5026 or [iroberts@robertslaborlaw.com](mailto:iroberts@robertslaborlaw.com).

Submitted by,



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Enclosure

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