



NATIONAL VETERANS AFFAIRS COUNCIL

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

7S/403946

NATIONAL GRIEVANCE NG-4/14/2023

Date: April 14, 2023

To: Denise Biaggi-Ayer
Executive Director
Office of Labor-Management Relations
U.S. Department of Veterans Affairs
Denise.biaggi-ayer@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 failing to pay timely and proper compensation to AFGE bargaining unit employees and the statutorily required monetary damages resulting from its failure**

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”), the 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 agents on behalf of the Department of Veterans Affairs (“Department”) for failing to pay timely and proper compensation to AFGE bargaining unit employees (“BUEs”) and thereafter denying BUEs the statutorily required payments as damages. To date, the Department has failed to remedy this violation and as such continues to violate the MCBA and federal law.

Specifically, the Department violated Articles 2, 3 and 36 of the MCBA; the Fair Labor Standards Act (“FLSA”), codified as 29 U.S.C. 201 *et seq*; the Back Pay Act, codified as 5 U.S.C. § 5596; the DOL and OPM regulations implementing the FLSA; and any and all other relevant articles, laws, regulations, customs, 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 March 18, 2023, the Department notified NVAC President Alma L. Lee of a pay error by the Defense Finance and Accounting Service (“DFAS”) that resulted in certain BUEs not receiving their regularly scheduled pay on Friday, March 17 (*see* email message, attached hereto as Exhibit “A”). The notice indicated that the employees had been notified, and that the Department hoped that the pay could be corrected and paid no later than close of business on Monday, March 20, 2023. Following a review of payroll data provided pursuant to 5 U.S.C. § 7114(b)(4), the Union discovered that there were nineteen (19) BUEs impacted by the error. Ten of the employees were FLSA non-exempt, and nine were FLSA-exempt. Although the Department confirmed that all employees had received their pay by March 20, it failed to pay these BUEs damages or interest, as required by law.

Violations

Pursuant to Article 36, Section 1 of the MCBA, employees are entitled to timely receipt of all wages earned for the applicable pay period. FLSA non-exempt¹ employees are entitled to damages on the wages that were paid untimely. Under 29 U.S.C. § 216(b), a federal agency that violates the FLSA is liable to affected employees for **an additional equal amount of missed wages** in liquidated damages, unless the agency can establish an affirmative defense under 29 U.S.C. § 260. *U.S. Dep’t of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Jesup, Ga. and AFGE, Local 3981*, 69 F.L.R.A. 197 (2016). Under § 260, liquidated damages are “mandatory” unless the agency can demonstrate that: (1) the act or omission that triggered the FLSA action was in good faith; and (2) the agency had reasonable grounds for believing that its act or omission was not a violation of the FLSA. *Id.* Because a federal agency bears the “substantial burden” of establishing the affirmative defense under § 260, “the award of liquidated damages is the norm, and the denial of liquidated damages is the exception” [under the FLSA]. *Id.* Thus, the ten FLSA non-exempt employees were entitled to liquidated damages.

Similarly, the Department’s failure to pay the nine FLSA-exempt employees in a timely manner constituted an unjustified and unwarranted action which **required the payment of interest** on the delayed amounts. Under the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(i), an award of backpay is authorized when: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; (2) the personnel action resulted in the withdrawal or reduction of the employee’s pay, allowances or differentials; and (3) but for such action, the grievant otherwise would not have suffered the withdrawal or reduction. *See U.S. Dep’t of Health and Human Services and National Treasury Employees Union*, 54 F.L.R.A. 1210, 1218 (1998). As a matter of law, any error or delay in making timely payment of wages can constitute an unjustified or unwarranted personnel action under the Back Pay Act. *U.S. Dep’t of Defense Education Activity, Arlington, Va. and Federal Education Association*, 29 F.L.R.A. 117 (2000).

¹ OPM’s regulations, at Subpart B of § 551 of title 5 of the Code of Federal Regulations, establish the criteria used to determine an employee’s status under the FLSA. The overtime provisions of the law apply to FLSA non-exempt employees, while exempt employees are not entitled to such benefits.

As can a violation of a collective bargaining agreement. *See U.S. Dep't of Defense, DOD Dependents Schools and Federal Education Association*, 54 F.L.R.A. 773, 785 (1998). Interest is an inseparable element of back pay. Here, the failure to timely pay BUEs on March 17 falls within the "withdrawal or reduction of the employee's pay" criterion of the Back Pay Act. It also violated Article 36, Section 1 of the MCBA. Therefore, any FLSA-exempt BUE not covered by the liquidated damages provision, above, would instead be entitled to the interest owed on the delayed pay pursuant to the Back Pay Act. By failing to provide affected BUEs either liquidated damages under the FLSA, or interest pursuant to the Back Pay Act, the Department knowingly violated these laws.

Article 2 of the MCBA requires that the Department comply with applicable federal statutes and regulations in the administration of matters covered by the MCBA. Therefore, in violating the FLSA, the Back Pay Act, the Department also violated Article 2. Further, Article 3 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 willfully ignoring statutory pay requirements, the Department renounced its commitments under Article 3 of the MCBA and triggered further collective bargaining disputes. The Department also violated any and all other relevant articles, laws, rules, regulations, customs, and past practices not herein specified.

Remedies Requested

To remedy the above violations, the Union asks that the Department do the following:

1. To cease and desist further violations of the MCBA, the FLSA and the Back Pay Act;
2. To make-whole any bargaining unit employee affected by the DFAS pay error on March 17 by paying either liquidated damages pursuant to the FLSA, or accrued interest on the backpay received in accordance with the Back Pay Act, to include the payment of reasonable attorneys' fees;
3. To fully comply with its contractual obligations under Articles 2, 3 and 36 of the MCBA; and
4. 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. The undersigned is the designated representative for this grievance. If you have any questions regarding this National Grievance, please contact the undersigned at AFGE Office of the General Counsel.

Filed by,



Shalonda Miller

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

EXHIBIT A

Shalonda Miller



From: Biaggi-Ayer, Denise <Denise.Biaggi-Ayer@va.gov>

Sent: Saturday, March 18, 2023 9:21 AM

To: Alma Lee <PresidentLee@afgenvac.org>; Amy Morgan <AMorgan@afgenvac.org>; Burke, Mary-Jean <Mary-Jean.Burke@va.gov>; Bill Wetmore <bwetmore@afgenvac.org>; Bailey, Mark <mbailey@nage.org>; Moore, Claudia <Claudia.Moore@va.gov>; Shapiro, Jeffrey J (MIAMI VA) <Jeffrey.Shapiro@va.gov>; Mitchell, Kevin G. <Kevin.Mitchell2@va.gov>; Polnak, Christine <Christine.Polnak@va.gov>; David Palmer <dpalmer@local200united.org>; Westmoreland, Irma L. <Irma.Westmoreland@va.gov>; John Stead-Mendez <JStead-Mendez@NationalNursesUnited.Org>

Subject: DFAS Pay issue

CAUTION: This email originated from outside the organization. Do not click links or open attachments unless you verify the sender and know the content is safe.

Good morning and apologize for the weekend message.

We wanted to alert you the Defense Finance Accounting Service (DFAS) informed VA that a few VA employees did not receive their pay yesterday. DFAS and VA are working through the weekend to contact the impacted employees and ensure they receive payment by Monday close of business. Employees should confirm their myPay bank account information. If employee account information is incorrect, the Local Payroll office should submit a CRM "Pay" Ticket.

Thank you,
Denise

Denise Biaggi-Ayer
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