NATIONAL GRIEVANCE
NG-09/29/17

Date: September 29, 2017

To: Kimberly McLeod
Acting Executive Director
Department of Veterans Affairs
Office of Labor-Management Relations
810 Vermont Avenue, NW
Washington, DC 20420
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Sent via electronic mail only

From: Michael A. Gillman, 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 the VBA Office of Field Operations' issuance of letters to VSRs regarding their performance under national performance 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"), 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 Agency for the distribution of the attached letters from the VBA Office of Field Operations (the "OFO Letters").

The letters constitute a violation of the MCBA and federal law. Specifically, the Agency violated Article 27, which provides a comprehensive procedure for the assessment of bargaining unit employee performance. In addition, the OFO Letters constitute a change in the employees' performance standards, which requires the Agency to bargain with the Union prior to implementation. The Agency utterly failed to bargain in good faith with the Union prior to the distribution of the OFO Letters to bargaining unit employees. Finally, the OFO Letters establish a performance rating system that rates employee performance during two-pay periods to assess the performance of the employee for the entire fiscal year, in violation of 5 C.F.R §430.208(a)(1) and (2).

STATEMENT OF THE CASE

Background

On or about September 1st, 2017, the Agency, through the VBA Office of Field Operations, directed local managers in the VBA to send a letter to each Veterans Service Representative (VSR) employed by the Agency. Four different form letters were provided to local managers with instructions on whom to send the letters to in accordance with certain performance benchmarks set by the Agency. Each VSR received a letter according to the Agency's assessment of their performance as fitting in to one of the following four categories: Letter #1 – Exceptional, Letter #2 – Fully Successful, Letter #3 – Less Than Fully Successful, and Letter #4 – Unacceptable.

OFO Letters 3 and 4 were sent to VSRs who, in the Agency's words, "[were] not meeting the Output performance expectations." The letter explained that these individuals would be given two pay periods (beginning September 3, 2017 and ending on September 30, 2017) to meet the fully successful level or else be subject to adverse action up to and including termination of employment. The letters explained that the recipients' performance during these final remaining pay periods of FY17 would be considered the employee's performance level for the entire FY17.

Misinterpretation of the Accountability Act

The Agency improperly relies on the VA Accountability and Whistleblower Protection Act of 2017 (the "Accountability Act") for its conduct; however, the Accountability Act has no effect on the performance appraisal management system as required under Chapter 43 or the performance appraisal article of the parties' Master Agreement (Article 27). The Accountability Act provides that "the ***procedures*** under Chapter 43 of title 5 shall not apply ***to*** a removal, demotion, or suspension under this section." The new law is not relevant until there is a proposal for an action under its authority. To be pointed, there has been no change to pre-proposal requirements under Chapter 43 or the Master Agreement. Notably, Chapter 43 also governs performance appraisals. The Agency's interpretation would require that performance appraisals are no longer required under the Accountability Act. Such an interpretation would be incorrect to the point of nonsensical. Demonstrably, another section of the Accountability Act requires that protection of whistleblowers be made a critical element in the evaluation of a supervisor's performance. Clearly Congress would not include mandates on elements in a performance appraisal for an Agency it intended to rid of the requirements of Chapter 43. Only those procedures beginning with proposals of adverse actions and onward have been superseded. As a result, other requirements of Chapter 43 continue to exist.

Separately, Chapter 43 exists alongside and independently from the requirements of Article 27 of the parties' Master Agreement. The process provided in Article 27 is not simply an incorporation of the requirements of Chapter 43, but goes well beyond those requirements.

Where the Accountability Act abrogates collective bargaining agreement provisions, it does so explicitly. For example, the parties' Master Agreement provides that an employee/union

may respond to an adverse action within 14 calendar days from receipt of a proposal of adverse action. See Master Agreement, Article 14, Section 8(B). But the Accountability Act provides that "[t]he period for the response of a covered individual to a notice of a proposed removal, demotion, or suspension under this section shall be 7 business days." 38 U.S.C. §714(c)(1)(B). The Accountability Act provides further, "[t]he procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures." 38 U.S.C. §714(c)(1)(D). Thus, the 14-calendar day response period is clearly abrogated by the 7-business day response period from the Accountability Act. No such explicit abrogation exists for the protections contained in Article 27 of the Master Agreement. The procedures in Article 27 do not in any way conflict with any procedures specified in the Accountability Act, because they are required to occur prior to a proposal. Therefore, insisting on compliance with Article 27 of the Master Agreement is in no way inconsistent with any procedures set forth in the Accountability Act. Thus, the performance assessment program spelled out in the OFO Letter violates Article 27 in several areas.

Illegal PIPs

Article 27 of the Master Agreement governs the performance appraisal process for bargaining unit employees. The OFO letters amount to a repudiation of the collectively bargained performance appraisal and performance approval process set forth in that Article. In its stead, the letters establish a performance assessment process that conflicts with the Master Agreement.

For example, Article 27, Section 8(A) provides that each employee will receive an annual performance appraisal sometime during the period beginning October 1 through September 30. The Agency then has 60 days from the end of this appraisal period to issue a written performance evaluation. The OFO Letters make no mention of or allowance for a critical aspect of performance evaluation, the employee self-assessment. According to the terms of the Master Agreement, an employee self-assessment is *essential* to the appraisal process and is a *critical* source of employee performance information. *See* MCBA, Article 27, Section 8(C) and (D). The "process" spelled out in the OFO letters are not in accordance with these provisions. Rather, the OFO letters make no allowance for the self-assessment process, and instead institute a single make-or-break trial period the failure of which automatically renders an employee subject to performance based employment actions.

Under the Master Agreement, before a bargaining unit employee's performance may be rated as unacceptable and therefore subject to a performance based action, the Agency must comply with Article 27, Section 10 of the MCBA which governs performance improvement plans. This section requires that an employee be given a performance improvement plan (PIP) in accordance with the following requirements:

> (1) the employee's supervisor must identify the specific, performance related problems
> (2) the supervisor must develop the PIP in consultation with the employee and local union representative a written PIP that identifies the employee's specific performance

deficiencies, the successful level of performance, the methods that will employed to measure the improvement, and provisions for counseling, training or other appropriate assistance.
(3) the PIP must be tailored to the specific needs of the employee
(5) placing an employee on a 100% review alone does not constitute a PIP
(6) the PIP will afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problems
(7) the supervisor must meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period.

The two-pay period trial period outlined in the OFO letters does not remotely resemble the process spelled out in the collective bargaining agreement. It does not meet the requirements of a PIP in accordance with the Master Agreement. Despite this fact, the letters themselves state that failure to perform at "expected levels" during this trial may lead to adverse action up to and including termination from employment. Implementing this trial period (a PIP of another name), rather than the contractually mandated PIP process, violates Article 27 of the Master Agreement.

Invalid Standards

The OFO Letters further violate Article 27 in that they are indicative of a performance appraisal process that is contrary to the performance plan promulgated by the Agency. The VSR performance standards that went into effect March 1, 2017 (upon which the OFO Letters are premised) contain three critical elements: quality, output, and timeliness. Now for the first time since the new standards went into effect, the Agency has indicated that employees will only be appraised based on their level of *output*. Article 27, Section 9 provides that "[p]erformance on each critical and non-critical element shall be appraised against its performance standard." Unilaterally holding VSRs accountable for only one critical element of the performance standard improperly advantages certain VSRs over others and violates the Master Agreement at Article 27, Section 9.

Article 27, Section 5(H) provides that "normally, elements are not weighted or assigned different priorities" and that if they are assigned different priorities, "the Department will inform the employee, at the time the elements and standards are communicated, whether aspects of any job elements are to be accorded a different priority." Here the Agency took the abnormal step of completely ignoring the critical elements of timeliness and quality and decided to assess VSR performance by the output metric alone. This decision by the Agency was only communicated to the VSRs at the same time that they informed VSRs that their performance was unacceptable and only two weeks before the start of their make-or-break test period. The Agency's actions in the OFO Letters are a departure from the established performance standards and the Agency's failure to provide adequate advance communication of the prioritization of output over all other metrics violates the Master Agreement.

Article 27, Section 5(C) provides that "performance standards and elements to the maximum extent feasible shall be reasonable, attainable, and sufficient under the circumstances to permit accurate measurement of an employee's performance, and adequate to inform the employee of what is necessary to achieve a 'fully successful' level of achievement." The implementation of the VSR performance standards, and the subsequent attempt by OFO to hold VSRs accountable under them, have failed the basic test of reasonableness provided in the Article 27, Section 5(C). The new national VSR performance standards have been a moving target ever since they were first promulgated and implemented on March 1, 2017. Not long after these standards were implemented, management discovered that the new standards failed to effectively assess performance and additional changes were implemented. Many of the output targets were adjusted while management made changes to what would constitute a unit of output for the purposes of the standards. The changes to these performance standards were made effective June 30, 2017, yet the Agency failed to provide guidance on what would count as an actual "transaction" and what would not until July 12, 2017. On September 15, 2017, in the midst of the all-or-nothing output assessment period outlined in the OFO letters, the OFO sent out a notice to the field that the software tools that are used to actually assess performance and inform employees of their performance under the standards were not working properly. The notice indicated that there was no anticipated resolution time. Even as late as September 21, 2017, Willie Clark, the Deputy Under Secretary for the Office of Field Operations, in a briefing to Union leadership explained that "we have not yet finalized the VSR standards." Imposition of discipline based on moving-target standards that fail to provide an accurate measurement of an employee's performance cannot be allowed in light of the protections contained in Article 27, Section 5(C).

Failure to Bargain

In effect, using performance on only one of the critical elements to decide who will be subject to a performance based action and who will not constitutes a change in the performance standards themselves. While management has the right to determine performance standards (so long as the standards otherwise comply with the law, rule, regulations, and the Master Agreement), when it makes changes to those standards it must bargain with the union over the impact and implementation of those standards. Article 27, Section 5(E) of the Master Agreement provides that the union must be given reasonable written advance notice (no less than 15 calendar days) when the Agency changes performance standards and that "[p]rior to the implementation of the above changes, the Department shall meet all bargaining obligations." The OFO letters announce the changes to the performance standards effective immediately allowing for no notice to the union and no opportunity to bargain prior to implementation. By so doing, the Agency has violated Article 27, Section 5(E) of the Master Agreement in additional to its bargaining obligations under Article 47 and 5 U.S.C. §7116(a)(5).

Violation of Government-wide regulation

The OFO letters also violate Office of Personnel Management regulations which require that an employee's performance be rated on actual job performance over the appraised period and

that an agency shall not issue a rating of record that assumes a level of performance by an employee without an actual evaluation of that employee's performance. But the OFO letters do exactly that. Despite the fact that VSRs have operated under at least three different sets of performance standards during FY17, the Agency's letters state that performance for the entire fiscal year will based only on the last two pay periods of the fiscal year. By so doing the Agency has violated 5 C.F.R §430.208(a)(1) and (2).

Violation

By failing to fulfill its contractual and statutory obligations, the Agency violated, and continues to violate, the following:

- Article 27 of the MCBA: which governs the process for assessing bargaining unit employee performance;
- Article 47 of the MCBA: requiring the Agency to bargain with the Union over changes to conditions of employment;
- Article 2 of the MCBA: requiring compliance with all federal statutes and government-wide regulations;
- 5 U.S.C. §7116(a)(1) and (2): requiring the Agency to bargain in good faith with the Union
- 5 C.F.R. §430.208(a)(1) and (2): prohibiting the issuance of a performance rating of record that assumes a level of performance, without an actual evaluation of that employee's performance; and
- Any other law, rule, regulation, or Master Agreement provision not herein specified.

Relief Requested

- Management will rescind the attached OFO letters sent to bargaining unit employees;
- Management will cease and desist from implementing any changes to conditions of employment without first fulfilling its statutory and contractual bargaining obligations;
- Management will remove any documentation regarding any adverse action related to this matter from affected employees.
- Management will 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, attorneys' fees, etc.;
- Management will post an electronic notice to all affected employees that the Agency will not engage in this conduct in the future; and,
- Any other appropriate relief.

Time frame and Contact

This is a National Grievance; the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please feel free to contact the undersigned at AFGE Office of the General Counsel.

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