

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

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American Federation of Government )  
Employees, AFL-CIO, )  
National Veterans Affairs Council, )  
(Union), )  
and )  
U.S. Department of Veterans Affairs )  
(Veterans Benefits Administration), )  
(Agency) )  
\_\_\_\_\_ )

FMCS Case No. 17-51613-A

National Grievance  
(File Removal Project)

**ARBITRATOR**

Joseph Licata, Esq.

**ARBITRATION  
OPINION AND AWARD**

**HEARING INFORMATION**

Date: September 28, 2017

Time: 10:00 a.m.

Location: Washington, DC 20420

Issued: January 30, 2018

**BRIEFS RECEIVED**

December 1, 2017

**AWARD DUE DATE**

February 1, 2018

**APPEARANCES**

*FOR THE UNION*

Thomas P. Dargon, Esq.  
Staff Counsel, NVAC AFGE

*FOR THE AGENCY*

W. Iris Barber, Esq.  
Office of the General Counsel  
US Department of Veterans Affairs

## INTRODUCTION

The U.S. Department of Veterans Affairs and American Federation of Government Employees (“AFGE”) are party to a Master Agreement that has been in effect since March of 2011, as automatically renewed after March 2014. The Master Agreement, among other things, contains provisions concerning the adoption of applicable laws and regulations, contracting out, mid-term bargaining, and arbitration procedures for grievance disputes.

On October 5, 2016, the AFGE National Veterans Affairs Council (“Union”) filed a grievance alleging that the Veterans Benefits Administration (“VBA” or “Agency”) violated the Master Agreement and federal law by contracting out bargaining unit work with respect to the VBA “File Removal Project”. The Project concerned the extraction and removal of inactive disability and compensation files and the conversion of those files to a digitized format. The Union claims that bargaining unit members lost overtime opportunities as a result of the Agency’s unilateral action.

On November 22, 2016, the Agency denied the grievance on statutory and contractual grounds and because the Union allegedly failed to bargain over the subject when given opportunities to do so.

On December 12, 2016, the Union invoked the arbitration procedures of Article 44 of the Master Agreement. On February 10, 2017, the undersigned Arbitrator received notice from the Federal Mediation and Conciliation Service (“FMCS”) that, pursuant to the parties’ request, I had been appointed to hear and decide this matter under FMCS Case No. 17-51613-A.

On September 28, 2017, the undersigned met with the parties for an arbitration hearing, which was held at Agency Headquarters in Washington, D.C. Thomas Dargon, Esq. represented the Union. The Union presented three witnesses: (1) Samuel Branch, Winston-Salem VBA

Regional Office, (2) David Bump, National Representative, AFGE/NVAC, and (3) Diane Price, AFGE Procurement Law Specialist. The Agency was represented by W. Iris Barber, Esq. The Agency presented two witnesses: (1) Derek Herbert, Assistant Director, VBA Veterans Claims Intake Program (“VCIP”) and (2) Kevin Nelson, Labor & Employee Relations Specialist, VBA Office of Human Resources.

In addition, the undersigned entered in evidence the following Exhibits:

<b><u>Exhibit No.</u></b>	<b><u>Date/Description of Document</u></b>
<b>JOINT EXHIBITS</b>	
J1	2011 Master Agreement.
J2	Full Service Shipping Contract, dated 9/9/16.
J3	NG-10/5/16, dated 10/5/16.
J4	VA-LMR Response to NG-10/5/16, dated 11/22/16.
J5	AFGE/NVAC Notice to Invoke Arbitration, dated 12/12/16.
J6	Joint Stipulations.
<b>UNION EXHIBITS</b>	
U1	Position Description File Clerk, GS-0305-4 PD # 6314-A (last updated 12/06/07).
U2	October 16, 2012 Memorandum of Understanding Veterans Claims Intake Processing.
U3	June 24, 2016 Email communication from Kevin Nelson to Dennis Freeman re: “Courtesy Union Notification – File Removal Project.
U4	July 8, 2016 Demand for Bargaining through Dennis Freeman, AFGE Acting Chair, VBAMTBC to Kevin Nelson, Chief Negotiator, VBA Office of Labor Management Relations re: File Removal Project.
U5	August 2, 2016 Email communication from Kevin Nelson to Dennis Freeman re: attachment of slides for the RMC Privacy Act briefing that is scheduled for today at 12:00 p.m.
U6	December 9, 2016 Email communication from Kevin Nelson to Dennis Freeman re: Union Notification – Full Service Shipping (FSS) Expansion Initiative.

<b>AGENCY EXHIBITS<sup>1</sup></b>	
A1	June 5, 2013 Labor Forum General Program Overview (VCIP).
A2	May 23, 2013 Email communication from Kevin Nelson to Valerie Reilly re: VCIP Roanoke File Bank Clearing Project.
A3	Copy of map of the United States showing Transition to Digital Files status as of September 29, 2017.
A4	September 27, 2017 Email communication from Derek Herbert to Kevin McAllister and subsequent email communication from Kevin McAllister to Derek Herbert attaching the current number of file clerks employed by regional offices (total 53).
A5	VA/AFGE Mid-Term Bargaining Committee Meeting Agenda, San Diego RO, October 3-7, 2016.
A6	July 14, 2016 Email communication from Kevin Nelson to Dennis Freeman acknowledging receipt of the Demand to Bargain Notice regarding the Agency's Courtesy Union Notification on the File Removal Project.

The parties' respective representatives elected to submit post-hearing briefs by December 1, 2017 in order to close the record before this Arbitrator. Briefs were timely received and the record declared closed upon receipt. Both parties were expertly represented throughout this proceeding.

Finally, the undersigned issues the within Opinion and Award in accordance with both the procedures described in Article 44 of the Master Agreement, and the rules and regulations of the Federal Mediation and Conciliation Service.

### **THE ISSUES IN DISPUTE**

The parties agreed to limit this matter to a determination of liability, if any, on the part of the Agency, regarding the use of an outside contractor(s), in lieu of bargaining unit file clerks, to

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<sup>1</sup> As agreed upon during the hearing, by email dated October 3, 2017, the Agency supplemented Exhibits A3 – VCIP File Bank Extraction Map – w/date; Exhibit A4 (first page) – file clerk numbers request; and Exhibit A6 – Management Response Email dated July 14, 2016.

help achieve the goals of the VBA File Removal Project. Accordingly, the following issues were mutually submitted:

1. Whether functions performed by the Contractor in the VBA File Removal Project were previously performed by bargaining unit employees?
  - a. If “Yes” for Issue #1, did the Agency comply with federal law, rule, regulation, and contract in awarding a private contract to the Contractor to perform work in the VBA File Removal Project?
2. Did the Agency fulfill its bargaining obligations with AFGE/NVAC regarding the VBA File Removal Project?

The parties agreed that the undersigned would retain jurisdiction over remedial relief if, of course, the grievance is sustained.

### **SUMMARY OF THE POSITIONS OF THE PARTIES**

#### **Union**

The Union’s grievance must be granted because there is no evidence in the record to refute its presentation that the functions performed by the Contractor in the VBA File Removal Project were previously performed by bargaining unit employees. The Agency made assertions in its opening statement that these functions were not performed by bargaining unit employees but did not present any evidence to support that contention. Further, in awarding the File Removal Project to the Contractor(s) in September of 2016, the Agency failed to comply with laws, rule, regulation, and Article 11 of the Master Agreement by failing to conduct a private-public cost competition prior to converting bargaining unit functions to private contractors. The Agency also violated Article 11 of the Master Agreement and the Federal Labor Relations Act of 1978 by unilaterally implementing the File Removal Project in September of 2016, despite the Union’s antecedent bargaining demand.

Based on the foregoing, the Union requests that the Arbitrator enter a finding of liability against the Agency and retain jurisdiction over the issue of remedial relief.

### **Agency**

The Agency's actions from 2013 to date show that bargaining unit members have never participated in the File Removal Project. Defining function to mean the purpose for which something is designed or exists, the Agency views the function of its file clerks as not only the work described in their job descriptions but, most importantly, the work actually assigned by management. The Agency has consistently maintained that Regional Office file clerks were never assigned the work of the File Removal Project. The Agency complied with the prerequisites of Article 11, Section 3 of the Master Agreement by giving notice to the Union concerning its implementation of the File Removal Project in Roanoke, Virginia and its intended expansion of the Project, as funding was made available. In return, the Union did not follow up its demand for bargaining with a MOU but, instead, in 2016, filed a grievance.

Finally, the Agency complied with all applicable laws because its actions are encompassed by at least two regulatory exemptions to the requirement of conducting a private-public cost competition and because, since 2009, Congress placed a moratorium on funding such cost competitions.

For all these reasons, the Agency requests that the Arbitrator deny the grievance.

### **FINDINGS**

1. The VBA provides a variety of benefits and services to service members, veterans and their families. The services at issue relate to the delivery of disability benefits – a tax-free monetary benefit paid to veterans with disabilities that are the result of a disease or injury incurred during active military service.

2. The VBA provides such services through 56 Regional Offices (ROs) staffed with File Clerks (“Clerks”), Claims Assistants, Veterans Service Representatives (“VSRs”), and other employees.

3. The duties performed by Clerks are set forth in accordance with a Position Description, last updated on December 6, 2007, as set forth verbatim below:

## **POSITION DESCRIPTION**

### **FILE CLERK, GS-0305-4 PD #6314-A**

#### **INTRODUCTION**

The File Clerk works as a member of the Triage Team and may be assigned to another team within the Veterans Service Center (Pre-Determination, Rating, Post-Determination, or Appeals). The incumbent is responsible for a bank of claims files designated by a set of terminal digits and receives and reviews incoming mail from the mailroom, other various VA operating elements and service organizations.

#### **DUTIES AND RESPONSIBILITIES**

Responsible for organizing the mail and input of data into COVERS all mail which cannot be located in the file bank. The search lists generated by these systems are used to conduct systematic searches throughout the Regional Office, service organizations, and District Counsel. Attaches mail to located folders utilizing COVERS systems to determine likely location of hard-to-find folders.

Responsible for assuring that all folders within assigned digits are properly bar coded into the Files Section upon receipt.

Assists in retirement of certain veteran’s records to Federal Record Centers assuring that all records meet criteria for transfer.

Analyzes request received for permanent and temporary transfer of claims folders annotating file charge card to show the station receiving the file on a permanent transfer and is responsible for purging these charge cards after a period of four months have elapsed from the date of transfer.

Responsible for refilling folders, sorting and arranging mail, pulling active mail, and processing no record mail daily. Use COVERS equipment if folder is a no-record to determine its location.

Incumbent is responsible for drop filing mail received from all operating elements and that all “file material” is filed in the pertinent folders and file system, i.e., general file, lock files, military or temporary military or another Regional Office.

Responsible for sequence checking of claims folders on a continuing basis to eliminate or reduce the problem of misfiled folders, removing charge cards eligible for disposal, pulling and repairing folders in need of renovating, volume preparations, and shifting to avoid overcrowded drawers.

Responsible for contraction or expansion of the files storage as deemed necessary participating in all aspects of records inventories and record reconciliation while maintaining necessary liaison with other employees of other operating elements who affect release of folders and location of documents.

Responsible for making folders immediately available for VSC, calls for extract information and “vet waiting” in service organization.

Must interact with all levels of personnel when handling requests for veteran’s folders. Must keep customer service in mind at all times and be helpful, courteous, and polite. Work requires a great deal of standing, walking, stooping, reaching, lifting, pulling, and transporting files typically in filing activities.

The incumbent may perform other related duties as assigned including the training of newly assigned personnel.

**FACTOR 1. KNOWLEDGE REQUIRED OF THE POSITION**

Thorough knowledge is required of the contents, arrangement and filing procedures related to the VA system of records used in retirement procedures, and the types and purposes of documents by the Agency. Must possess a thorough knowledge of the functions and procedures of the Office within the Agency in order to be able to search and locate records on a timely basis. Must be able to understand and use COVERS equipment to access various VA records.

**FACTOR 2. SUPERVISORY CONTROLS**

The supervisor and/or team leader assigns work priorities and is available to assist with problems arising in the files element. The employee works independently and work is reviewed through spot checking for accuracy and timeliness.



### **FACTOR 3. GUIDELINES**

Written guidelines are set forth in VA manual and office precedent in procedures related to searching aids and technical guidance. The employee uses his/her own judgment in selecting from the variety of procedures for specific situations.

### **FACTOR 4. COMPLEXITY**

This position requires performance of several related duties involving judgment of the employee in determining the proper or more timely choices in performing various functions of the file unit particularly in the searching function.

### **FACTOR 5. SCOPE AND EFFECT**

The function of the position is to provide folders in relation to request of operative elements. This timely and accurate provision facilitates the work of the office serviced.

### **FACTOR 6. PERSONAL CONTACTS**

Contacts are with Co-workers and supervisors of immediate and related units throughout the Regional Office, and personnel from other Regional Offices and VA Medical Center's, as well as Service Organization Representatives.

### **FACTOR 7. PURPOSE OF CONTACTS**

The purpose of the contacts is to advise on search problems and to obtain helpful information in the search area and to exchange information about files.

### **FACTOR 8. PHYSICAL DEMAND**

Work requires a great deal of walking, standing, pushing (carts), bending, stretching, hand and wrist motions, with occasional lifting and carrying of boxes and bulky files that may weigh up to 40 pounds, etc., on a daily basis. Also includes relocation of file cabinets, furniture, etc., on an occasional basis.

### **FACTOR 9. WORK ENVIRONMENT**

Work is performed in an office setting, primarily in the files area of the VSC. Employee also delivers files to and searches in all other division areas.

4. Consistent with the above job description, Derek L. Herbert, Assistant Director of the Veterans Claims Intake Program, ("VCIP") described the primary responsibility of Clerks as moving paper files in support of VBA's active case load, with the common primary goal of

reducing the active claims backlog. To the best of Mr. Herbert's knowledge, which was not firsthand, Clerks did not ordinarily process inactive files to retirement.

5. However, Union witness, Sam Branch testified to the contrary. In January of 2008, Mr. Branch was assigned as a GS-4 Clerk at the Agency's Winston-Salem, North Carolina RO. Mr. Branch did not dispute that Clerks primarily were assigned to service and process active files. However, Mr. Branch testified that, from 2008-2010, he was responsible for managing inventory in the file bank and for performing the requisite components of a file removal/retirement project. As Branch testified, Clerks processed files slated for retirement by the VBA. The VBA distributed a list of inactive files to be retired to the Winston-Salem RO supervisor or Coach. Clerks, following the instruction of their Coach or supervisor then extracted, boxed, palletized, and staged such files to be shipped to a scanning facility in St. Louis, Missouri and then to an off-site storage facility.

6. On cross-examination, Mr. Branch testified that, from January 2008 through 2010, he participated in at least three such (3) file retirement relocation projects – each one occurring approximately every three to six months. The purpose of the work was to help reduce the RO's growing inventory of claims files. When such work was to be performed, Branch testified that approximately 12 to 14 Clerks, split into two teams, performed the work on a mandatory overtime basis. Mr. Branch testified as to his belief that the project was being performed across all ROs, stating that his RO had a designated window of time to work on the project and adding that the VBA could not receive such files from all ROs at the same time.

7. When asked on cross-examination how he knew that these were inactive claims files, Mr. Branch testified that his supervisor specifically explained that the purpose of the project was to remove inactive claims files from the RO that had “not been worked” in several

years and were being “retired.” Mr. Branch’s testimony is consistent with one provision of the aforementioned GS-4 File Clerk Position Description: “Assists in retirement of certain Veteran’s records to Federal Record Centers assuring that all records meet criteria for transfer.” (Exhibit U1, first page).

8. In 2010, Mr. Branch was elevated to a GS-5/6 Claims Assistant and assigned to a 12-person Claims Assistant team in the Benefits Delivery at Discharge (“BDD”) Unit responsible for the Winston-Salem RO.<sup>2</sup> The BDD Unit was responsible for obtaining records of all military personnel being discharged within 60-120 days. According to Branch, every such record east of the Mississippi River was sent to the Winston-Salem RO.

9. Mr. Branch also testified to the similarities between the intermittent inactive file projects and the ordinary active files’ projects. According to Mr. Branch, Claims Assistants received a list of from their Coach containing the Records Management Number for each active file that needed to be extracted from the file bank on the 20<sup>th</sup> Floor of the RO. Claims Assistants then located the physical file, scanned it with their handheld device, pulled the file from the file bank, re-boxed the extracted files with an inventoried label, packaged and palletized the boxes, and physically loaded the boxes onto a truck or trailer for shipment to an off-site scanning facility. Once scanned, the records were ready to be uploaded to the VBMS system, and thereby made available to any RO for a determination of benefits eligibility regarding each returning vet.

10. Union witness David Bump has been a National Representative for the Union since 2011. He was hired by the Agency in 2001. Mr. Bump was assigned to the Agency’s Milwaukee, Wisconsin RO from 2001 to September of 2016. There, he was employed as a VSR

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<sup>2</sup> With less detail provided, Mr. Branch testified that Clerks continued to perform this work after he left the Clerk position in 2010.

for four years and a Senior VSR for over ten years.<sup>3</sup> Mr. Bump testified that, as a VSR and Senior VSR (up to 2015), he personally observed Clerks and Claims Assistants performing functions related to file location, extraction, and retirement projects on “a forced” overtime basis in the Milwaukee, Wisconsin RO. Mr. Bump’s testimony was comparatively less detailed than that offered by Mr. Branch’s observations.

11. In 2010, Agency Secretary Shinseki announced what came to be known as the VA’s Transformation Plan with respect to active files. Under the Plan, the VBA was charged with implementing new technology solutions to eliminate the active claims backlog and process all claims faster and at a higher quality. The Plan was built around the goal of eliminating the active claims backlog by 2015.<sup>4</sup>

12. As of 2012, according to Mr. Herbert, the Agency had approximately one million pending claims, referred to by him as “Rating Inventory”. Mr. Herbert specified that the Rating Inventory is targeted for extraction by Clerks due to the age of the active claim, for example, files greater than 120 days in the system.<sup>5</sup>

13. In light of the backlog of active claims files, storage at the ROs became problematic. As part of the Plan, in 2012, the Office of Business Process Integration (OBPI) and the VCIP were created to coordinate intake capabilities for source materials, whether they are in paper or electronic form, in direct support of Veterans benefits delivery. The VCIP was charged with the management of the transition of VBA files from a paper environment to a fully digital

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<sup>3</sup> Since September 18, 2016, Mr. Bump has been employed by the Agency as an Authorized Quality Review Specialist assigned to the Portland, Oregon RO.

<sup>4</sup> As of the September 27, 2017 hearing, VBA still had a significant active claims’ files backlog, although it has substantially reduced the backlog since 2010.

<sup>5</sup> Non-Rating Inventory involves a different workload, for example, where a Veteran requests the Agency to take action on his or her file, e.g., dependency designations. Such inventory is not as closely tracked as Rating Inventory.

operating environment. Toward that end, Clerks were responsible for retrieving, packaging and shipping active claims files to the VCIP for scanning into the Veterans Benefits Management System (“VBMS”) (a software program that would allow any RO to determine eligibility of a claim no matter where it was filed). The paper file would then be shipped to the Agency’s Records Management Center.

14. In mid-2012, VBA notified the Union’s Mid-Term Bargaining Committee of anticipated changes in working conditions for bargaining unit employees impacted by the Plan to convert active files. It was clear that Clerks were to be trained to meet the needs of the Plan and it is inferred that their work efforts would have to be focused even more on handling and processing active files.

15. The parties engaged in good faith negotiations and, on October 16, 2012, they executed a Memorandum of Understanding (“MOU”) (Exhibit U2).

16. Paragraph 2 of the MOU identifies the primary focus of VCIP as of October 2012: “VCIP is responsible for implementing plans and procedures relating to the intake capabilities and execution/management of document conversion services contracts on behalf of support of VBA Transformation.”

17. Paragraph 3 of the MOU states that “[a]ny changes to the VCIP process following implementation will be provided to the Union and the VBA Mid-Term Bargaining Committee for further input. The agency agrees to fulfill all bargaining obligations.” Again, the Plan was originated with the intent to process active files for conversion in order to reduce storage, increase nationwide access to claims initially filed at one RO and, most importantly, to reduce the backlog in claims’ processing.

18. In 2013, the VBA decided to also ship all inactive claims files at the Roanoke, Virginia RO for scanning and long-term storage elsewhere in order to alleviate chronic storage overflow. It is not disputed that many VBA facilities were reaching or exceeding capacity and that the Office of Management and Budget (“OMB”) precluded the VBA from expanding existing physical space. The Roanoke File Removal Project required the extraction of inactive files from ROs, the placement of the files in boxes, the placement of the boxes on pallets, the staging of the pallets, the transportation of the palletized boxes of inactive file claims’ folders to a scanning facility for conversion, and, finally, the transportation of scanned files to a long-term storage facility. The Agency determined to use a Contractor, “CACI” to perform the extraction-conversion functions and to also house the scanned paper files in its long-term storage facility. A private-public cost competition was not undertaken.

19. On May 23, 2013, Mr. Kevin Nelson, a Labor and Employment Specialist employed by the Agency, provided the Mid-Term Bargaining Committee with an “Information Paper” on the “VCIP Roanoke File Bank Clearing Project” (Exhibit A2). The notification states: “[m]any VBA ROs are reaching or exceeding capacity and/or funding for file storage” and that “Roanoke must clear out file banks by the end of FY13 due to a major renovation.”(Id.). According to the Information Paper, the Agency hired CACI -- one of the VBA’s Document Conversion Service vendors -- to remove 170,000 claims files from the Roanoke, Virginia RO using their own personnel. The last sentence reads: “**Future Plan:** Pursuant to sufficient funding in FY14 and FY15, similar projects will be scheduled and prioritized by OFO.”

20. The Agency also provided a briefing to the Union during a June 5, 2013 Labor-Management Forum in the form of a 10-page Power Point slide presentation. The timelines of the File Removal Project at the Roanoke RO are listed at page (or slide) 9 of the presentation:

- “5/29: CACI employees reported to the VARO and began prepping claim files for shipment to their scanning facility located in Mt. Vernon, KY” -

- “6/10: Tentative start date for shipping” -

- “9/27: All inactive files will be removed and shipped for scanning. Active files remain in the Service Center” -

21. Mr. Bump, as a National Representative of the Union, testified as to his awareness of the foregoing facts concerning the Agency’s disclosure of the Roanoke, Virginia RO File Removal Project and intended future plans. As stated previously, Mr. Bump testified that he was aware that Clerks and Claims Assistants were retiring files at the Milwaukee, Wisconsin RO up to 2015. The Union did not submit either a bargaining demand or file a grievance regarding the 2013 File Removal Project or the Agency’s announced intention to expand the Project to other ROs in FY 2014-2015.

22. The Agency also made a contemporaneous determination to include the Baltimore, Maryland RO together with the Roanoke RO for the File Removal Project. The Union claims that it was not notified about the Baltimore, Maryland RO. After the 2013 Labor-Management Forum, contractors began extracting files from the Baltimore & Roanoke ROs.

23. In June of 2015, according to Mr. Branch, he observed Contractors also extracting inactive files and staging them for transfer to a scanning facility. In September of 2015, Branch was promoted to a VSR position. Mr. Bump’s generalized observations at the Milwaukee RO included 2015-2016 as well

24. As of 2016, all ROs – apart from Roanoke and Baltimore – were waiting in the wings for budgetary appropriations in order to bring the File Removal Project to their respective locations (Exhibit A3). In triage fashion, the OMB targeted ROs with extreme overcrowding

and/or leases coming up in moving the Project forward nationwide. Mr. Herbert testified that the Central VBA Office and RO leadership work together to identify those offices with a critical need for the space then occupied by the inactive files.

25. On June 24, 2016, Mr. Nelson sent an email to the Union VBA Mid-Term Bargaining Committee entitled, “Courtesy Union Notification – File Removal Project.” (Exhibit U3). Mr. Nelson characterized his email as a “Courtesy Notification” and stated that the “project will have no impact on the conditions of employment for the bargaining unit employees.” (Id.). Notably, Mr. Nelson wrote, “Management is planning an upcoming file removal project . . . in New York, Philadelphia and St. Petersburg ROs. After these 3 ROs, the plan would be to complete the same actions in all the remaining ROs until all paper files have been removed.” (Id.).

26. The Union submitted a demand to bargain on July 8, 2016 (Exhibit U4); and, in response, the Agency provided an Initial Briefing on August 2, 2016 (Exhibit U5). In the briefing slide entitled, “Full Service Shipping”, the Agency noted that FSS efforts in New York, Philadelphia, and St. Petersburg were a “continuation of previous efforts in Baltimore and Roanoke”. The Agency added that “FSS is different from traditional shipping . . . because complete file bank extraction . . . [is] not something VBA executes on a regular basis or has the ability to support without diverting significant claims processing resources.” (Id. at 2).

27. The Union had 20 working days from Mr. Nelson’s August 2, 2016 briefing to submit a MOU (proposals) to the Agency regarding its demand for bargaining. It did not submit a MOU for consideration within the 20 days (or at all).

28. On September 9, 2016, the Agency executed an “Amendment of Solicitation/Modification of Contract” to “Systems Made Simple, Inc.” (Exhibit J2, pages 1-88).



In the “Description of the Amendment/Modification”, the words, “Intake, Conversion and Mail Handling Services” appear. Under Section 5.19, “Full Service Shipping”, “Introduction”, it is noted that FSS “requires the Contractor to deploy resources to three designated VA facilities to retrieve, pack, track, and ship source materials to the ICMHS Conversion facility for processing”. Mr. Herbert reluctantly testified on cross examination that bargaining unit employees could perform the mail handling and shipping duties performed by contractor personnel.

29. On October 3-7, 2016, the Mid-Term Bargaining Committee met for face-to-face negotiations in San Diego, California (Exhibit A5). As Mr. Nelson testified, the agenda for these face-to-face meetings is created in partnership.

30. On October 5, 2016, the parties scheduled time for “Discussion on Full Service Shipping.” (Id.). The Agency presented a supplemental briefing and offered subject matter experts by telephone to answer questions from Union representatives. In this same meeting, the Union submitted the instant grievance to management.

31. On December 9, 2016 (well after the Agency’s November 22, 2016 grievance denial), Mr. Nelson sent another email notification to the Mid-Term Bargaining Committee entitled, “Union Notification – Full Service Shipping (FSS) Expansion Initiative.” (Exhibit U6). The notification concerned the nationwide expansion of the File Removal Project to thirty additional ROs across the country. The email stated that “[t]he primary purpose of FSS is to rapidly extract all inactive paper claims . . . on a National level . . . .” (Id.). Mr. Nelson’s email also stated that there was no duty to bargain with the Union on the FSS initiative and related expansions because “there are no changes to the conditions of employment for the bargaining unit employees. . . .” (Id.).

32. As of the week of the instant arbitration hearing, 20 different contractors had completed work at 43 out of the 56 ROs. (Exhibit A3). And, as Mr. Herbert testified, the hope is to completely finish removing the inactive files from all ROs by June of 2018.

33. Finally, due to the digitalization of paper files, the Agency has substantially reduced its need for the Clerk position and reclassified those occupying the position. No loss of employment was mentioned by either side as a result of the Project.

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE 2 - GOVERNING LAWS AND REGULATIONS**

#### **Section 1 - Relationship to Laws and Regulations**

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

#### **Section 2 - Department Regulations**

Where any Department regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern.

### **ARTICLE 11 - CONTRACTING OUT**

#### **Section 1 - Periodic Briefings**

Periodic briefings will be held with AFGE officials at the local and national levels to provide the Union with information concerning any Department decisions that may impact bargaining unit employees in implementing Office of Management and Budget (OMB) Circular A-76.

#### **Section 2 - Site Visits**

The Department will notify the local union if a site visit is going to be conducted for potential bidders seeking contract for work performed by bargaining unit employees. A local union representative may attend such a site visit.

#### **Section 3 - Union Notification**

When the Department determines that unit work will be contracted out, the Department will notify the local union to provide them an opportunity to request to negotiate as appropriate.

#### **Section 4 - Employee Placement**

When employees are adversely affected by a decision to contract out, the Department will make maximum effort to find available positions for employees. This effort will include:

- A. Giving priority consideration for available positions within the Department;

- B. Establishing an employment priority list and a placement program; and,
- C. Paying reasonable costs for training and relocation that contribute to placement.

**Section 5 - Inventory of Commercial Activities**

The Department will maintain an inventory of all in-house commercial activities performed by the Department and will update this inventory annually. The inventory will include information on all completed cost comparisons and will be made available to the Union upon request.

**Section 6 - Reopener**

The parties agree that any agreement reached in Mid-term Bargaining regarding Contracting Out may be incorporated in this Agreement.

**ARTICLE 43 - GRIEVANCE PROCEDURE**

**Section 1 - Purpose**

The purpose of this article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for Title 5, Title 38 Hybrids and Title 38 bargaining unit employees in resolving grievances that are within its scope, except as provided in Sections 2 and 3.

**Section 7 – Procedure**

- A. Grievance meetings under this procedure will be face-to-face at the location of the grievant. By mutual agreement, the parties to the grievance may agree to teleconference the grievance meeting. The Union is entitled to have an equal number of representatives at all steps of the grievance procedures as the Department.
- B. Employees and/or their representatives are encouraged to informally discuss issues of concern to them with their supervisors at any time. Employees and/or their representatives may request to talk with other appropriate officials about items of concern without filing a formal grievance if they choose. In the event of a formal filing of a grievance, the following steps will be followed.

**Step 1**

An employee and/or the Union shall present the grievance to the immediate or acting supervisor, in writing, within 30 calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature. The immediate or acting supervisor will make every effort to resolve the grievance immediately but must meet with the employee/representative and provide a written answer with 14 calendar days of receipt of the grievance. If there is to be more than one Departmental official involved in the grievance meeting, the Union will be so notified in advance. ...

## **ARTICLE 44 - ARBITRATION**

### **Section 1 - Notice to Invoke Arbitration**

Only the Union or the Department may refer to arbitration any grievance that remains unresolved after the final step under the procedures of Article 43 – Grievance Procedures. A notice to invoke arbitration shall be made in writing to the opposite party within 30 calendar days after receipt of the written decision rendered in the final step of the grievance procedure.

### **Section 2 - Arbitration Procedure ...**

D. The arbitrator's fees and expenses shall be borne equally by the parties. If either party requests a transcript, that party will bear the entire cost of such transcript.

F. The parties will attempt to submit a joint statement of the issue or issues to the arbitrator. If the parties fail to agree on a joint submission, each shall make a separate submission. The arbitrator shall determine the issue or issues to be heard.

G. The arbitrator's decision shall be final and binding. However, either party may file an exception to the arbitrator's award in accordance with applicable law and regulations. The arbitrator will be requested to render a decision within 60 days. Any dispute over the interpretation of an arbitrator's award shall be returned to the arbitrator for settlement, including remanded awards.

H. An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level. Where it is mutually agreed between the NVAC President and the Department within 30 days after a local union has filed a notice for arbitration, an arbitration dispute will be elevated to the national level. The arbitrator has full authority to award appropriate remedies including reasonable legal fees pursuant to the provisions of Section 702 of the Civil Service Reform Act, in any case in which it is warranted.

## **ARTICLE 47 - MID-TERM BARGAINING**

### **Section 1 – General**

A. The purpose of this article is to establish a complete and orderly process to govern mid-term negotiations at all levels. The parties are encouraged to use an IBB approach in all mid-term negotiations and will ensure that negotiators are trained in this approach prior to the inception of bargaining.

B. Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded from mid-term bargaining will be identified within each article.

- C. As appropriate, the Union may initiate mid-term bargaining at all levels on matters affecting the working conditions of bargaining unit employees.

## **Section 2 - National**

- A. The Department will forward all proposed changes for which there is a bargaining obligation to the President of the NVAC or designee(s) along with copies of all necessary and relevant documents relied upon. When a new law is enacted and the Department decides to issue a national policy, the Union will be notified prior to implementation.
- B. If either party initiates a demand to bargain, briefings will occur within 20 workdays of the demand to bargain. Proposals will be submitted 20 workdays after the briefing. Any Union demand to bargain must be received by the designated Department official within 20 workdays from the date the NVAC President or designee receives the proposed change. The date of receipt shall be documented on a simple form agreed upon by both parties. Extensions or reductions of the 20 workday time period will be by mutual agreement.
- C. The Department's bargaining obligation is triggered when the Union submits a bargaining demand. When the Union's bargaining demand is submitted, the parties will discuss the proposed change and share their interests and concerns.
- D. The parties may first attempt to reach agreement by conducting telephone negotiations. In addition the parties will meet face-to-face quarterly. Such negotiations should normally begin no later than 10 workdays after the Department chairperson receives the Union's demand to bargain. Telephone negotiations shall normally be for up to three hours per day, commencing at a mutually agreeable time on consecutive days unless concluded sooner.
- E. If the parties are unable to reach agreement, negotiations will normally proceed to face-to-face bargaining. When traditional bargaining is used, the Union's written proposal(s) will be submitted prior to bargaining. The parties retain the right to modify, withdraw, or add to any interest, concerns, or proposals they may have discussed or exchanged earlier.
- F. Bargaining sessions will be for 8-½ hour days at mutually agreeable times which include a break for lunch. However, the parties, by mutual agreement, may extend or shorten such bargaining sessions as necessary. The parties agree to utilize ADR mechanisms, as appropriate, without waiving either party's statutory rights.
- G. Each party may have up to four negotiators which by mutual agreement may be increased based on the complexity and/or number of issues to be negotiated. The parties will exchange the names of the bargaining team members for the specific issue(s) to be negotiated. This does not preclude the attendance of experts by mutual consent of the parties. Travel and per diem will be paid by the Department pursuant to the Federal Travel Regulations for bargaining team members. These members will be allowed official time to complete the bargaining obligation. An automated data base for existing and future

memorandums of understanding will be established and maintained by the Department. This data base will be made accessible to both the national and local Union officials.

### **DISCUSSION**

In a contractual interpretation dispute, the union bears the burden to prove that its interpretation and application of the provisions of the negotiated agreement are correct. See, Honolulu Gas Co., 41 LA 1094 (Tsukiyama 1963); and Pittsburgh Plate Glass Co., 45 LA 696 (Jenkins 1965). Accordingly, here, it is the Union's burden to carry throughout an analysis of the stipulated issues presented to this Arbitrator. After carefully reviewing the record evidence and skillful arguments of the parties' representative, for the reasons which follow, I must conclude that the Union has failed to carry its burden of proof. I address each stipulated issue in turn, as set forth below.

**1. Whether functions performed by the Contractor in the VBA File Removal Project were previously performed by bargaining unit employees?**

The functions of the Contractor in the VBA File Removal Project involved the complete extraction and shipping of floors of inactive files from 2 ROs in 2013 and from 3 or more ROs in 2016 (culminating with a nationwide sweep of all ROs to be completed by the end of 2018). At best, the Union has demonstrated that at 2 ROs, bargaining unit Clerks and Claims Assistants intermittently retired select inactive claimants' files, as predetermined by management based on age and potential storage concerns. Here, I credit the testimony of Union witness, Sam Branch regarding his direct involvement with the periodic or intermittent retirement of select files at the Roanoke, Virginia RO and I also credit the testimony of Union witness David Bump – though Bump's testimony was not predicated on his assignment to process inactive files at the Milwaukee, Wisconsin RO.

The work of the Clerks at the Winston-Salem RO involved mail handling and processing of active claimants' files. However, as Mr. Branch explained, he participated in at least three (3) file retirement assignments – each one occurring approximately every three to six months. The work was performed on a mandatory overtime basis. The assignments involved the efforts of 12-14 Clerks who split into two teams and removed certain inactive files (as opposed to floors of inactive files) as selected by supervisors. In June of 2015, Branch witnessed contractors performing file extraction work at the Winston-Salem RO. Mr. Bump testified that, as a VSR and Senior VSR at the Milwaukee, Wisconsin RO he personally observed Clerks and Claims Assistants performing functions related to file location, extraction, and retirement projects in the Milwaukee, Wisconsin RO over the course of his tenure in those positions (i.e., from 2001-2015).

In contrast, to the best of his knowledge, which is derived from speaking with RO leadership, Mr. Herbert did not believe that the Agency was using Clerks to remove and ship inactive files. However, given the breadth of the Agency's operation -- over 56 ROs – the fact that Mr. Herbert may not have discovered the anecdotal evidence concerning the Winston-Salem and Milwaukee ROs is somewhat understandable. In fact, the collective testimony of all three witnesses is somewhat consistent with the relative composition of the GS-4 File Clerk Position Description, only one provision of which addresses the handling of inactive files: "Assists in retirement of certain Veteran's records to Federal Record Centers assuring that all records meet criteria for transfer." (Exhibit U1, first page). To assist in retiring "certain Veteran's records" implies that management selects the records for retirement, as was the case herein. In contrast, as depicted by the same job description, the day to day routine functions performed by Clerks involve processing active claims' mail and handling files pertaining to active claims.

To put matters in perspective, the inactive files' functions performed by the personnel at the Winston-Salem and Milwaukee ROs appear to have escaped notice, not only by Mr. Herbert, but by the Union, as well. On this latter point, it is not disputed that, in 2013, the Agency provided the Union with the full details of the File Removal Project concerning the Roanoke, Virginia RO, which included a conspicuous statement of the Agency's future intent to expand the Project to other ROs. Despite Mr. Bump's involvement at the National level in 2013, it is somewhat evident that the Union was unaware of the intermittent file retirement work taking place at the Winston-Salem and Milwaukee ROs. Otherwise, one would have reasonably expected to have witnessed the Union interpose a demand for bargaining at that time. It did not. Accordingly, despite the collective testimony of Messrs. Branch and Bump, I must infer that, as of 2013, the performance of file retirement work by Clerks on a national level was not as pronounced as the Union claims.

Based on this record, although I find that Clerks did assist in the periodic retirement of inactive files to meet storage needs in at least 2 ROs, I ultimately conclude that such work was comparatively slight in relation to their primary function of handling mail and processing active files for conversion. Cf. United States Department Of The Treasury, 68 F.L.R.A. 1027 (2015)(bargaining unit members regularly performed desk-side support at 35 locations and that work was expanded by 100% but doled out to a private contractor).

Nonetheless, as qualified above, I answer the first stipulated issue in the affirmative.



- a. If “Yes” for Issue #1, did the Agency comply with federal law, rule, regulation, and contract in awarding a private contract to the Contractor to perform work in the VBA File Removal Project?<sup>6</sup>**

I will address the governing laws first and the contract second.

In answering in the affirmative to Issue 1.a., above, I have carefully reviewed the governing laws, that is, 41 U.S.C. §1701 (a) “Public-private competition”; 31 U.S.C. §501 note: “(a) Requirement for Public-Private Competition”; and OMB Circular A-76. For the reasons which follow, however, I find that the Union has failed to sufficiently demonstrate that the Agency’s implementation of the File Removal Project contravened the legal landscape applicable to this dispute:

### **GOVERNING LAWS**

#### **41 U.S.C. §1701 (a) Public-private competition.—**

(1) **When conversion to contractor performance is allowed.**--A function of an executive agency performed by 10 or more agency civilian employees may not be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that—

#### **31 U.S.C. §501 note: “(a) Requirement for Public-Private Competition --**

(1) Notwithstanding any other provision of law, none of the funds appropriated by this or any other Act shall be available to convert to contractor performance an activity or function of an executive agency that, on or after the date of enactment of this Act [Dec. 26, 2007], is performed by Federal employees unless – (A) the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function . . . .”

#### **OMB Circular A-76 (2003) (in moratorium)**

**3. Authority.** Reorganization Plan No. 2 of 1970 (31 U.S.C. § 1111); Executive Order 11541; the Office of Federal Procurement Policy Act (41 U.S.C. § 405);

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<sup>6</sup> Article 2, Section 1 – “Relationship To Laws And Regulations” of the Master Agreement provides: “In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved”.

and the Federal Activities Inventory Reform (FAIR) Act of 1998 (31 U.S.C. § 501 note).

The above statutes and OMB Circular A-76 must be construed in *para materia*. The aforementioned statutory provisions serve as the enabling or authorizing legislation for A-76. A-76 is the guide for determining whether or not a private-public cost competition must be undertaken; and, if so, A-76 provides the means to achieve the end result. And, although A-76 has been in moratorium since 2009, in my opinion, it is still alive and well for determining whether or not it was even applicable to a particular activity, such as, the File Removal Project. If it was not, and I find it was not, then the Union's statutory challenge must fail.

As last amended in 2003, A-76 contains a strong statement of policy in favor of the fair use of private contractors to help facilitate the provision of governmental services:

**“4. Policy.** The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition”.

A-76 limits a federal agency's ability to contract out work previously performed by federal employees without a government study that compares the costs of the project being done by federal employees versus contractors. A-76 requires a covered governmental agency to identify all activities performed by government personnel as either “commercial or inherently governmental”. A-76 requires government to perform inherently governmental activities, in contrast to “commercial activities” using government personnel. The packaging and shipping of inactive disability and compensation claims files is a “commercial activity” within the meaning of A-76.

Under A-76, Attachment D, Section B, “Definitions”, an “Activity” is defined as “a specific task or grouping of tasks that provides a specialized capability, service or product based

on a recurring government requirement.” An activity may be an entire function or may be a part of a function and it may be “inherently governmental or commercial in nature”. Here, the Agency makes a good argument that the File Removal Project was/is a commercial activity performed on a non-recurring or special project basis. For example, unlike the subcontracting out of foodservice operation on an air force base, which may have no end date in sight or at least no end date specified in the awarded bid, the File Removal Project here was undoubtedly of finite duration – indeed, it was the “Swan Song” of the performance of such work, scheduled to be completed by the end of the 2017-2018 fiscal year. And since active paper files were being shipped by Clerks and Claims Assistants for scanning and upload to VBMS, I find that the age of the paper claims file at the VBA was coming to an end as well. Therefore, I must find and conclude that the File Removal Project did not meet the definition of a “commercial activity” under A-76 because it did not involve a “recurring activity” performed by the VBA or its personnel.

Finally, in the alternative, I find and conclude that the File Removal Project is aptly described as either a “new requirement” or a “segregable expansion to an existing commercial activity performed by governmental personnel”. It is a new requirement in that the complete extraction and conversion of retired disability files nationwide had never been undertaken by the Agency prior to 2013-2016. At the very least, the File Removal Project must be deemed to be a segregable expansion of the intermittent retirement of certain select files at the RO level prior to that point in time.

For all these reasons, I find and conclude that the Union did not sufficiently show that the Agency’s implementation of the File Removal Project without a private-public competition study violated existing law or government wide regulations.

## **GOVERNING CONTRACT**

To a certain extent, the disposition of the Agency's compliance with law resolves an allegation that the Agency failed to live up to its obligations under Article 11 of the Master Agreement. Otherwise, as will be explained below, I find that the Union failed to show that the Agency skirted its contractual obligations when implementing the File Removal Project in 2013 or, again, in 2016. I will address the Agency's compliance with each Section of Article 11 below.

### **ARTICLE 11 - CONTRACTING OUT**

#### **Section 1 - Periodic Briefings**

Periodic briefings will be held with AFGE officials at the local and national levels to provide the Union with information concerning any Department decisions that may impact bargaining unit employees in implementing Office of Management and Budget (OMB) Circular A-76.

Although A-76 is currently in moratorium, I find that the Agency, nonetheless, did provide advanced briefings to the Union in both 2013 and 2016.

The Agency provided a briefing to the Union during a June 5, 2013 Labor- Management Forum in the form of a 10-page Power Point slide presentation. The timelines of the File Removal Project at the Roanoke RO are listed at page (or slide) 9 of the presentation:

- "5/29: CACI employees reported to the VARO and began prepping claim files for shipment to their scanning facility located in Mt. Vernon, KY" -
- "6/10: Tentative start date for shipping" -
- "9/27: All inactive files will be removed and shipped for scanning. Active files remain in the Service Center" -

In the 2016 briefing, the Agency presented a Power Point Slide demonstration to the Union. In the Slide entitled, "Full Service Shipping", the Union was advised that that the FSS

efforts in New York, Philadelphia, and St. Petersburg were a “continuation of previous efforts in Baltimore and Roanoke”. The Agency added that “FSS is different from traditional shipping . . . because complete file bank extraction . . . [is] not something VBA executes on a regular basis or has the ability to support without diverting significant claims processing resources.” (Id. at 2).

Finally, on December 9, 2016, the Agency provided the Union with a notification detailing its plan to roll out the File Removal Project on a nationwide basis. Accordingly, I am satisfied that the Agency satisfied its “briefing” obligations under Article 11, Section 1 of the Master Agreement.

**Section 2 - Site Visits**

The Department will notify the local union if a site visit is going to be conducted for potential bidders seeking a contract for work performed by bargaining unit employees. A local union representative may attend such a site visit.

I acknowledge that the Agency was previously unaware that bargaining unit members at the Winston-Salem, North Carolina and Milwaukee, Wisconsin ROs participated in intermittent file retirement assignments on a mandatory overtime basis. I add that the Union’s inaction regarding the 2013 Roanoke, Virginia RO project tends to demonstrate that it, too, was unaware of the bargaining unit claim. For this reason, it is hard to fault the Agency for not inviting the Union to site visits in 2016, especially with respect to the Philadelphia, New York, and St. Petersburg RO File Removal Projects which were contracted for prior to the Union’s grievance filing. Nonetheless, even if a site visit obligation could be fairly imposed upon the Agency, I must ultimately find that the Agency’s failure to invite the Union amounted to harmless error.

Specifically, I observe, the Agency fully disclosed to the Union, in advance, which sites were targeted for contracting. The Agency also gave the Union advanced notice of the details of the work to be performed by the Contractor at each facility. Finally, it must be presumed that the Union knew, or could have easily ascertained, the layout of each RO facility in question and the

number of bargaining unit Clerks assigned to each. Therefore, even if, for the sake of discussion, I found that the Agency did not comply with Section 2, above, I would be compelled to conclude that the error did not result in any prejudice or harm to the Union's interests, nor did it in any way, shape or form, alter the outcome of this grievance arbitration dispute.

### **Section 3 - Union Notification**

When the Department determines that unit work will be contracted out, the Department will notify the local union to provide them an opportunity to request to negotiate as appropriate.

On this major point of contention, I find that the Union has failed to show that the Agency did not provide it with notice of the File Removal Projects and an opportunity to negotiate. Notably, following the 2013 briefing concerning the Roanoke RO File Removal Project and potential future expansion of the Project to other ROs in FY 2014-2015, subject to funding, the Union did not submit a demand for bargaining. I add here that the Union's National Representative was involved with, or aware of, the 2013 disclosures and he was, therefore, in a unique position to raise a red flag given his alleged experience with the performance of virtually identical job duties at the Milwaukee, Wisconsin RO. Subsequently, the Contractor began extracting files from the Baltimore, Maryland and Roanoke, Virginia ROs – again, without objection.<sup>7</sup>

On June 24, 2016, Mr. Nelson sent an email to the Union VBA Mid-Term Bargaining Committee entitled, "Courtesy Union Notification – File Removal Project." (Exhibit U3). The Union submitted a demand to bargain on July 8, 2016 (Exhibit U4); and, in response, the Agency

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<sup>7</sup> The Union claims that it did not receive notice of the implementation of the File Removal Project at the Baltimore, Maryland RO in 2013. The Agency, through the testimony of Mr. Nelson, maintains that the Union was informed of the Baltimore Project during the June 5, 2013 Labor Forum. However, even if the Union is correct on this score, I find that the Union's apparent unawareness of the bargaining unit claim in 2013, and corresponding inaction on its part regarding the Roanoke, Virginia RO, leads to a reasonable inference that disclosure of the Baltimore, Maryland RO Project would have been equally uneventful.

provided an Initial Briefing on August 2, 2016 (Exhibit U5). In the briefing slide entitled, “Full Service Shipping”, the Agency noted that FSS efforts in New York, Philadelphia, and St. Petersburg were a “continuation of previous efforts in Baltimore and Roanoke”. The Agency added that “FSS is different from traditional shipping . . . because complete file bank extraction . . . [is] not something VBA executes on a regular basis or has the ability to support without diverting significant claims processing resources.” (Id. at 2).

Under Article 47, Section 2 (B.) (Mid-Term Bargaining), the Union had 20 working days from Mr. Nelson’s August 2, 2016 briefing to submit a MOU (proposals) to the Agency regarding its demand for bargaining. The Union, however, did not follow up its bargaining demand with a bargaining proposal. In light of the Union’s abstention from a continuation of the mid-term bargaining process, on September 9, 2016, the Agency executed a contract with the Contractor and thereby implementing the File Removal Project at the New York, Philadelphia, and St. Petersburg ROs.

On October 3-7, 2016, the Mid-Term Bargaining Committee met for face-to-face negotiations in San Diego, California (Exhibit A5). As Mr. Nelson testified, the agenda for these face-to-face meetings is created in partnership. On October 5, 2016, the parties scheduled time for “Discussion on Full Service Shipping.” (Id.). The Agency presented a supplemental briefing and offered subject matter experts by telephone to answer questions from Union representatives. In this same meeting, the Union responded to the agenda by submitting the instant grievance to management.

On December 9, 2016, Mr. Nelson sent another email notification to the Mid-Term Bargaining Committee entitled, “Union Notification – Full Service Shipping (FSS) Expansion Initiative.” (Exhibit U6). The notification concerned the nationwide expansion of the File

Removal Project to thirty additional ROs across the country. The email stated that “[t]he primary purpose of FSS is to rapidly extract all inactive paper claims . . . on a National level . . . .” (Id.). Mr. Nelson’s email also stated that there was no duty to bargain with the Union on the FSS initiative and related expansions because “there are no changes to the conditions of employment for the bargaining unit employees. . . .” (Id.). Three days later, on December 12, 2016, the Union filed for arbitration with the intent to include the full expansion of the File Removal Project within the scope of its claims.

In light of the foregoing, I note that, regardless of the reason for the Union abstaining from pursuing the bargaining process, the key point here is that, in both 2013 and 2016, the Agency afforded the Union both notice and opportunities to negotiate over any negotiable aspect of the Agency’s File Removal Project. Accordingly, in my opinion, the Union has failed to adequately show that the Agency violated Article 11, Section 3 and Article 47, Section 2 of the Master Agreement.<sup>8</sup>

#### **Section 4 - Employee Placement**

When employees are adversely affected by a decision to contract out, the Department will make maximum effort to find available positions for employees. This effort will include:

- A. Giving priority consideration for available positions within the Department;
- B. Establishing an employment priority list and a placement program; and,
- C. Paying reasonable costs for training and relocation that contribute to placement.

In this matter, Clerks were not adversely affected within the meaning of Section 4. They were not subject to layoff and did not need retraining. Mr. Branch testified that Clerks worked mandatory overtime during the intermittently run special projects at the

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<sup>8</sup> The Union also alleged that the Agency violated the terms of the 2012 VCIP MOU, Section 3, requiring any changes to the VCIP process following implementation to be provided to the Mid-Term Bargaining Committee for further input. For the reasons stated above, I find no liability on the part of the Agency under the 2012 MOU.



Winston-Salem RO. Mr. Bump, on cross examination, acknowledged that Clerks worked “forced overtime” on such projects at the Milwaukee, Wisconsin RO. Putting aside the question of whether the loss of mandatory or forced overtime should be viewed as a detriment, I find that the aforementioned contractual provision squarely addresses only employee displacement flowing from an outsourcing determination. Therefore, with respect to the Union’s alleged harm, i.e., lost overtime, I conclude that the above provision is inapplicable.

**Section 5 - Inventory of Commercial Activities**

The Department will maintain an inventory of all in-house commercial activities performed by the Department and will update this inventory annually. The inventory will include information on all completed cost comparisons and will be made available to the Union upon request.

The Union does not contend that the Agency violated this Section and, in any event, the inventory requirement – which flows from A-76 – would not apply to the File Removal Project which, as discussed previously, falls within one or more exemptions to A-76’s cost competition and inventory requirements.

**Section 6 – Reopener**

The parties agree that any agreement reached in Mid-term Bargaining regarding Contracting Out may be incorporated in this Agreement.

No agreement was reached during Mid-Term Bargaining in 2013 or in 2016.

Therefore, this section is not applicable.

In construing Articles 11 and 47 as a whole, it is clear that the parties did not (even if they legally could) contractually prohibit the Agency from contracting out commercial activities such as the File Removal Project. Rather, under Articles 11 and 47, the parties’ negotiated procedural protections which, where applicable, were fulfilled by the Agency (with the lone potential exception being an inconsequential failure to invite the Union to site visits). Therefore,

I find and conclude that the Union has failed to demonstrate that the Agency ran afoul of the Mater Agreement in connection with the implementation of the File Removal Project.

**2. Did the Agency fulfill its bargaining obligations with AFGE/NVAC regarding the VBA File Removal Project?**

5 U.S.C. § 7106 states, in relevant part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws . . .

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

With respect to the FLRA Statute, I have previously concluded that the Agency did comply with external law in implementing the File Removal Project without a cost competition study and did comply (or substantially comply) with the procedural prerequisites to contracting out as set forth under Articles 11 and 47 of the Master Agreement. Article 11, in fact, appears to completely cover the subject of contracting out and the requisite procedural aspects of such a determination that must be adhered to. Thus, it strongly appears that, having satisfied both external law and Article 11 of the Master Agreement, the Agency's determination to contract out

the work of the File Removal Project was otherwise a proper exercise of a management right under 5 U.S.C. § 7106(a)(2)(B). See, Def. Language Inst. v. FLRA, 767 F.2d 1398, 1398 (9th Cir. 1985) (Management has the authority under Title VII of the Civil Service Reform Act, 5 U.S.C. §§ 7101-7135, to make determinations with respect to contracting out). Therefore, I must conclude that the Union failed to adequately demonstrate that the Agency had any further obligation to negotiate the implementation of the File Removal Project.

Having said this, I further add that, apart from a contract defense, I find that a balancing of the interests involved in this case yields a conclusion strongly in favor of the Agency. The Agency's interests -- moving full speed ahead with a massive undertaking to clear out all inactive files on a nationwide basis within 2 or 3 years, in order to free up storage and convert the VBA from a paper to a digital environment. The Union's interests -- preventing the sporadic or incidental loss of "forced" or "mandatory" overtime - assuming that such loss amounts to a detriment. Indeed, in terms of a balancing of interests and inquiry as to whether unit members will experience an adverse impact, this case stands in direct opposition to other FLRA cases where the disputed work amounted to core duties performed by bargaining unit personnel on a daily basis and loss of employment resulting from contracting was a realistic concern. See, e.g., AFSCME Local 3097 Union v. Department of Justice (Justice Management Division), 31 F.L.R.A. 322 (1988)(the contracting out of particular library functions or services will result in those functions or services being performed by contractor personnel instead of bargaining unit employees and corresponding potential loss of employment); and, U.S. Department Of Transportation Maritime Administration James River Reserve Fleet (Agency) And National Association Of Government Employees Local R4-47 (Union) 0-AR-1815, 35 F.L.R.A. 1213 (1990)(the Arbitrator, in rejecting the Union's allegation that contracting out had "an adverse

impact” on unit members, observed that, as a result of the Agency’s action: (1) no unit jobs were abolished, (2) there was no reduction in force, (3) no work was taken away from unit employees, (4) no job responsibilities were shifted, and (5) the number of unit employees increased. The Arbitrator also rejected the Union’s claims over loss of potential overtime in the future).

Similarly, in this matter, I find and conclude that a balancing of the interests involved adequately supports a finding of non-negotiability and, potentially, a finding that the Union has failed to show that bargaining unit members will an adverse impact due to the loss of sporadic overtime that they were forced to work prior to the grievance filing.

Finally, assuming, for the sake of discussion, that I look past the Agency’s sound contract defense and that I were to conclude that the occasional loss of forced overtime amounts to an adverse impact, I must, nonetheless, reject the Union’s claim that the Agency violated its statutory duty to bargain in good faith by contracting out the File Removal Project before fully completing bargaining with the Union (citing, Department of Justice, Federal Bureau of Prisons, 68 FLRA 546 (2015)). The Union also suggests that its failure to submit proposals immediately did not excuse the Agency from its bargaining obligation (citing, DOJ, INS and DOJ, INS and AFGE Nat’l Border Patrol Council, 55 FLRA 892, 900-02 (1999)). The Union adds that bargaining must be completed prior to implementation of changes in conditions of employment. (citing, Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9, 11 (1981)).

In rejecting the Union’s final arguments, I find that the Union did not make its interest in bargaining clear. If anything, as viewed through the lens of the Union’s course of conduct from 2013-2016, the converse appears to be closer to the truth. In 2013, with respect to the Roanoke, Virginia RO, I observe, the Union did not submit a demand for bargaining, a proposal, or a MOU, despite a high-ranking Union officer’s familiarity with the performance of such work by

bargaining unit Clerks and Claims Assistants at the Milwaukee, Wisconsin RO. And, then, in 2016, with respect to the Philadelphia, New York and St. Petersburg ROs, the Union abandoned its mid-term demand for bargaining after the August 2, 2016 briefing, in effect, waiting for the Agency to implement the expansion of the File Removal Project on September 9, 2016, and then filing a grievance on October 5, 2016.

In light of the foregoing, I find it extremely difficult to conclude that the Union made its interest in bargaining clear, at least not to the extent that the Agency should be deemed responsible for the deterioration of the bargaining atmosphere prior to the grievance dispute. If anything, both parties ultimately abandoned the bargaining process in favor of pursuing to conclusion their competing legal positions over the implementation of the expansion of the File Removal Project.

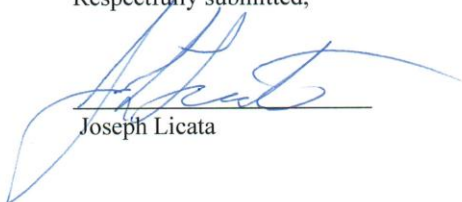
Based on the foregoing, I find and conclude that, under the FLRA: (1) the Agency had the management right to contract out the File Removal Project, subject only to compliance with external law and contractually established procedural prerequisites – which it did satisfy; (2) the Agency’s interests in contracting out strongly outweighed the Union’s interests in preventing the loss of occasional “forced” overtime opportunities for its members – assuming that such a loss can be fairly deemed “an adverse impact”; and (3) the Union, as evidenced by a course of conduct from 2013-2016, did not demonstrate a clear interest in pursuing bargaining, despite having opportunities to do so. For all these reasons, I must conclude that the Union has failed to demonstrate that the Agency violated its statutory duty to bargain.

Based on the record as a whole, and despite the Union’s good efforts, I must respectfully deny the grievance.

**AWARD**

For the reasons set forth more thoroughly herein, I find and conclude that the Union, AFGE National Veterans Affairs Council, failed to sufficiently demonstrate that the Agency, Veterans Benefits Administration violated the Master Agreement or external law by implementing the File Removal Project in the manner which it did from 2013-2016. The grievance is denied.

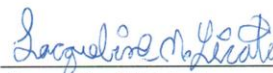
Respectfully submitted,

  
\_\_\_\_\_  
Joseph Licata

Dated: January 30, 2018

State of New Jersey    )  
  ):SS  
County of Bergen        )

On the 30<sup>th</sup> day of January, 2018, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

  
\_\_\_\_\_  
Jacqueline M. Licata

JACQUELINE M. LICATA  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires 11/9/2020

