



Out of Many/One Union  
AFGE NVAC/AFL-CIO

# NATIONAL VETERANS AFFAIRS COUNCIL

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

## NATIONAL GRIEVANCE

NG-01/14/20

**Date:** January 14, 2020

**To:** Kevin Nelson  
Labor & Employment Relations Specialist  
Office of Human Capital Management  
Veterans Benefits Administration  
Department of Veterans Affairs  
[Kevin.nelson2@va.gov](mailto:Kevin.nelson2@va.gov)  
*Sent via email only*

**From:** Christopher Zatrutz, Staff Counsel, National Veterans Affairs Council (#53) (“NVAC”), American Federation of Government Employees, AFL-CIO (“AFGE”)

**RE:** **National Grievance against Department of Veterans Affairs for violating the MOU, Master Agreement, and federal law by repudiating the MOU on overtime**

### 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 Department for repudiating the parties’ October 30, 2019 Memorandum of Understanding on overtime. To date, the Department has failed to remedy this violation, and as such, continues to violate the Memorandum of Understanding, MCBA and federal law.

Specifically, the Department violated Articles 2, 21, and 49; October 30, 2019 Memorandum of Understanding; 5 U.S.C. §7116(a)(1) and (5); and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

### STATEMENT OF THE CASE

#### **Background**

The Department’s Fiduciary Program appoints fiduciaries for veteran beneficiaries who are unable to manage their own financial affairs. Once it is determined that a veteran beneficiary needs a fiduciary, the case is transferred to a regional Fiduciary Hub. Within each Hub are various offices in various states. Cases are initiated with an in-home exam by a Field Examiner with the veteran beneficiary. The Field Examiner also conducts initial and periodic exams with



fiduciaries. Legal Instrument Examiners (“LIEs”) review, advise, and supervise a veteran beneficiary’s estate.

On December 18, 2019, the Veterans Benefits Administration’s (“VBA”) Northeast District issued a directive requiring “a minimum of 16 hours of Overtime (OT) . . . for all Field Examiners and LIEs between [December 18, 2019] and December 31, 2019.” (Attachment A). Overtime could not be commenced until hours were approved on December 20, 2019. (Attachment B). This directive, without prior notice, immediately required Field Examiners and LIEs to complete 16 hours of overtime in 12 days. This included two weekends and two days when most federal offices were closed – Christmas Eve and Christmas day.

Previously, on October 30, 2019, the Department and the Union agreed to a Memorandum of Understanding regarding mandatory overtime for Fiduciary Hub employees (“MOU”). The MOU is effective from October 1, 2019 to September 30, 2020. (Attachment C, ¶1). The Department’s directive violates several provisions of the MOU.

### *Failure to Provide Notice*

The MOU requires the Department to “strive to announce the following month’s mandatory overtime by the 15th of the current month.” (Attachment C, ¶10). To comply with the MOU’s notice requirement, the Department was required to notify Field Examiners and LIEs of the 16 hours of mandatory overtime by November 15, 2019. Instead, the Department announced the overtime on December 18, 2019 – more than a month overdue. (Attachment A). Additionally, the overtime requirement was effective immediately, so the employees were deprived of ANY advance notice, never mind the notice due under the MOU.

The Department’s excessively late notice coupled with its reason for the overtime indicates that it did not reasonably attempt to comply with the notice requirement. The Department’s directive explains “[this] mandate is due to the shortage of 4,851 exams and the [Under Secretary for Benefits’] expectation that we meet targets as a nation.” (Attachment A). In guidance offered to employees regarding the overtime, the Department reiterated that the overtime was intended solely for the purpose of completing field exams so the Department could reach its goal. (Attachment B).<sup>1</sup> Yet, the Department was constantly tracking its progress and knew, well in advance, that it would be short of its goal. (Attachment D).<sup>2</sup> The Department knew all along that it would need to impose mandatory overtime to reach its goal, but it waited until the last possible moment to tell its employees.

What’s more, the MCBA requires the Department to “make a reasonable effort to give the employee as much notice as possible when planned overtime is required[.]” (Article 21, Section 4(E)). The totality of the circumstances suggest that the Department failed to make a reasonable effort to provide notice of the overtime to employees. Its knowledge of the need for

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<sup>1</sup> “. . . all overtime monies must be used specifically towards the completion of field exams”; “. . . the expectation of our division is to complete 1299 field exams by COB on 12/31”; “. . . this is an opportunity for our division to deliver results on a national level and receive the recognition and respect that you would earn by hitting this target.”

<sup>2</sup> “December is traditionally a slower month regarding output across VBA. . .”; “I anticipate we will be about 750 cases short of where we should be for output at the end of December. . .”

overtime was clear. The Department tracks the Fiduciary Hubs' output and was keenly aware that December is a historically low output month. (Attachment D). Therefore, the Department's failure to provide advance notice was far from reasonable.

#### *Failure to Abide by Maximum Hours*

The MOU requires the Department to limit mandatory overtime to "20 hours per month per employee." (Attachment C, ¶5). The Department imposed 16 hours of mandatory overtime on Field Examiners and LIEs on December 18, 2019. (Attachment A). Employees had to wait two days for their hours to be approved on December 20, 2019. (Attachment B). This left employees with 12 days to complete the overtime. The overwhelming majority of employees were forced to complete the overtime in 6 days, once accounting for Christmas Eve, Christmas, and 4 weekend days. Thus, by requiring employees to complete the overtime in such a short amount of time, the Department contravened the purpose of allotting employees a full month to complete their required overtime hours. By giving employees only 12 days to complete 16 overtime hours, the Department effectively doubled the maximum overtime output.<sup>3</sup> This means that, while the Department didn't literally exceed the 20 hour maximum, its constriction of the time period for employees to complete the hours was equivalent to imposing 40 overtime hours within one month.

#### *Failure to Consider Accommodations*

The MOU requires the Department to make various accommodations available to employees specifically for overtime, subject to its review.

First, the MOU permits employees to request "flex" weeks to excuse them from overtime in order to "accommodate family, vacation, etc." (Attachment C, ¶8). The Department imposed mandatory overtime during the Christmas Holiday, Hanukkah, and Kwanzaa – a time when employees are quite literally accommodating family and often take leave. This is also the period for use-or-lose leave. Despite this, all Field Examiners and LIEs were required to complete the 16 hours – even those on leave (Attachment B) – lest they be subject to disciplinary action. (Attachment E). The Department's refusal to accommodate those on leave and those seeking flex time violated the MOU.

Second, the MOU permits employees to request to be excused from overtime for hardship reasons, which includes "family needs." (Attachment C, ¶12). Again, despite this, the Department threatened disciplinary action against employees who failed to complete the mandatory overtime. (Attachment E). Therefore, the Department's refusal to accommodate those with a hardship violated the MOU.

The Department's obligation to accommodate employees seeking "flex" time or a hardship is reinforced by the MCBA. When imposing mandatory overtime, the MCBA requires the Department to "give due consideration to the employee's personal circumstances." (Article 21, Section 4(E)). Accordingly, the Department's blanket requirement that all Field Examiners

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<sup>3</sup> If employees have 12 days to complete 16 hours, that's 1.33 hours/day. If employees have 30 days to complete 40 hours (double the 20 max.), that's 1.33 hours/day.

and LIEs complete the 16 overtime hours – or be subject to discipline – demonstrates the Department’s failure to consider personal circumstances that would aggravate an employee’s ability to complete the overtime hours. Employees on leave, those seeking “flex” time, and those with a hardship were all subject to the overtime requirement although the MOU and MCBA granted them rights intended to ease such a burden.

## **Violation**

A party fails to bargain in good faith and commits an unfair labor practice when its breach of a collective bargaining agreement is “clear and patent and is so fundamental to the parties' basic statutory rights and status as to undermine and make a mockery of the basic collective bargaining relationship[.]” *U.S. Dep't of Labor, Occupational Safety & Health Admin. Chicago, Illinois*, 19 FLRA 454, 467 (1985) (adopting the Administrative Law Judge's finding). The Federal Labor Relations Authority has found parties in repudiation of smaller component agreements as well. *See Dep't of the Air Force Warner Robins Air Logistics Ctr. Robins Air Force Base, Georgia*, 52 FLRA 225, 232 (1996) (an agreement regarding the Agency’s smoking policy).

To determine whether a party repudiated an agreement, the Authority examines two elements. First, whether the breach was clear and patent. *See Dep't of the Air Force 375th Mission Support Squadron Scott Air Force Base, Illinois*, 51 FLRA 858, 862 (1996). Second, whether the provision goes to the heart of the agreement. *See id.*

Here, the Department’s failure to provide advance notice to employees amounted to a clear and patent breach of the MOU. The MOU expressly requires the Department to make an effort to announce next month’s overtime by the 15<sup>th</sup> of the current month. (Attachment C, ¶10). Instead, not only did the Department announce overtime during the same month, its delay in notifying the employees caused the Department to further violate the MOU. The delay truncated the timeframe allotted by the MOU to employees to complete their overtime from a month to 12 days. (Attachment C, ¶5).

Accordingly, both the Department’s notice delay and its compressing of the timeframe amount to a fundamental breach of the parties’ agreement as to mandatory overtime. Without enforcement of the notice required to impose overtime, the maximum amount, and length to complete overtime, the remaining provisions of the MOU would serve little if any purpose. Therefore, the Department’s clear and patent breach of the MOU was so fundamental that it served as a repudiation of the MOU altogether.

By failing to fulfill its obligations, the Department violated, and continues to violate, the following:

- Article 2 of the MCBA: requiring the Department to comply with federal law and regulations;
- Article 21 of the MCBA: requiring the Department to provide advance notice of overtime and consider accommodations;
- Article 49 of the MCBA: requiring the Department to have due regard for the obligations imposed by 5 U.S.C. Chapter 71;



- Memorandum of Understanding: requiring the Department to provide advance notice of overtime and setting a minimum timeframe and a maximum hour amount;
- 5 U.S.C. §7116(a)(1) and (5): requiring the Department to bargain in good faith;
- Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

### **Remedies Requested**

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

- To immediately prorate the mandatory overtime amount for future months to account for the two-fold increase in the maximum mandatory overtime amount from December 18, 2019 – December 31, 2019;
- To fully comply with its contractual obligations under the MOU and Article 21 of the MCBA and its statutory obligations under 5 U.S.C. §7116(a);
- To post an electronic notice, signed by the VA Secretary, to all VA bargaining unit employees that the Department violated the MCBA and law and that the Department will refrain from further violations of the MCBA and law;
- To make whole the Union and any employee affected by the Department's violations;
- To agree to any and all other remedies appropriate in this matter.

### **Time Frame and Contact**

This is a National Grievance, and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions, please contact the undersigned at AFGE Office of the General Counsel. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance.



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