AFGE WRITTEN SUBMISSION

General[1]

The successor Collective Bargaining Agreement ("CBA") will be the fourth Master Agreement (MCBA) between the Parties since the Civil Service Reform Act was passed. As parties with such a long and tested history, the MCBA should reflect the lessons learned. As a result, the proposals of the National Veterans Affairs Council of the American Federation of Government Employees ("NVAC," "Council," or "AFGE") are legal, complete, and provide for sufficient procedures and appropriate arrangements expected to be contained in a collective bargaining agreement. The proposals of the Department of Veterans Affairs ("VA" or "Department") fails to do so in all of these critical areas.

The Federal Service Impasses Panel ("FSIP") should reject the Department's full strikes of articles. The subjects covered in a collective bargaining agreement have a significant impact on the duty to bargain during the term of the agreement. Failure to cover numerous subjects in the MCBA places the parties in a perpetual state of bargaining, because a statutory bargaining obligation exists for uncovered matters. Such a result is ineffective, inefficient, and expensive. Because the Department fails to offer proposals to cover the subject, the Union's proposals should be awarded.

[1] The Union fully incorporates by reference its prior submissions, including its Brief on Jurisdiction (dated Jan. 27, 2020), its Request for Extension (dated May 4, 2020), and its Response to VA's Opposition to the Request for Extension (dated May, 5, 2020). The Union also notes that, by the Panel's denial of the Union's request for an extension (due to the VA's illegal failure to provide information requested, pursuant to 5 U.S.C. 7114(b)(4)), the Panel is fully aware that the Union has been denied the ability to present data supporting its positions.

Further, failure to cover subjects in the agreement requires each VA facility to enact their own policies, which will lead to inconsistency. The Government Accountability Office has found this to be the case:[2]

> Ambiguous VA policies lead to inconsistency in the way VA facilities carry out processes at the local level. In numerous reports, we have found that this ambiguity and inconsistency may pose risks for veterans' access to VA health care, or for the quality and safety of VA health care they receive.

Therefore, the VA's full strikes will have a deleterious effect on the mission of the Department.

In articles not fully struck, the Department submits proposals that subordinate the MCBA to Agency policy and future government-wide rules and regulations. Once a collective bargaining agreement is in effect, its terms govern over agency-wide regulations of the same matters, *Dep't of the Air Force, Seymour Johnson AFB*, 55 F.L.R.A. 163 (1999), and subsequently-issued government wide rules or regulation (except Government-wide rules or regulations issued under 5 U.S.C. § 2302) cannot supersede its terms, *NTEU and Treasury, IRS*, 13 F.L.R.A. 554 (1983). Here, the Department's repeated and persistent proposals demand that the Union waive its right to bargain terms and conditions of employment that are paramount to Department policy and subsequently issued government-wide rules and regulations.

This Panel has been clear that it will not entertain such proposals:

> The Agency is asking the Union to agree to allow a government-wide regulation that is issued after an agreed-upon CBA to control over the CBA. That notion is contrary to the Statute. While the Union can voluntarily agree to such a provision, it cannot be compelled to negotiate away a right provided to it under Statute. Because the Union has not agreed to such a waiver, the Panel orders the Agency to remove the term, "regulation" from its proposal.

U. S. Dep't of Treasury, Office of The Comptroller of The Currency, 2019 FSIP 014 at p. 11 (2019) (internal citations omitted). The proposals are scattered throughout the Department's

[2] GAO-15-290 High-Risk Series, at p.28 (February 2015).

submissions, each with some variation of "The Department will follow applicable law, government wide rules and regulations, and department policy." [3] These proposals demand a clear and unmistakable waiver; are non-negotiable; and, therefore, VA should be ordered to withdraw them.

Next, the Department removed nine articles from collective bargaining (Articles 52, 53, 54, 55, 57, 58, 59, 60, and 61). The Union is challenging the Department's decision in federal court. If the FSIP has in fact taken jurisdiction of these articles, then we strenuously request that decision be reconsidered in light of the challenge in federal court to VA's decision. The legal questions in that litigation are highly complex, bear on VA's unprecedented interpretation of 38 U.S.C. § 7422(d), and cannot be reviewed by any agency, *see* 38 U.S.C. § 7422(d).

The Department impermissibly submits proposals that limit or waive the Union's statutory right to designate its representatives. "Agencies and unions have the right to designate their respective representatives when fulfilling their responsibilities under the [Federal Sector Labor Management Relations] Statute." *Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 F.L.R.A. 495, 498 (2001); *see also AFGE Local 1547*, 70 F.L.R.A. 303, 305 (2017) ("It could also be said that the proposal runs counter to the basic tenet of labor law that parties have a nearly unfettered prerogative to determine the organization of, and delegation of duties within, their respective negotiating teams."). The Department's proposals either specifically designate the NVAC President as the Union's representative or limits the NVAC's President to one other

[3] Article 2, Section 1 (A); Article 11; Article 12, Section 2(A); Article 16, Section 1(A); Article 18, Section 3(B); Article 19, Section 1(A); Article 20, Section 1(A); Article 21, Section 1(A); Article 22, Section 1(A); Article 23, Section 1; Article 27, Section 1(A); Article 33, Section 1(B)(1) and (B)(3); Article 33, Section 2(B)(1); Article 40, Section 1(A); Article 43, Section 2(B); Article 44, Section 5 (C); and, Article 45, Section 6(A); Article 49, Section 3(A)(1) and (2).

designee. The Department has submitted approximately eight such proposals.[4] The Department's attempt to add the phrase "or designee" does not cure the defect, because it still designates the NVAC President as the representative in the first instance. It is the Union that determines the NVAC President's authority, not the Department. Because the Union chooses its own organization, it is within its prerogative to have a representative who is not the NVAC President or chosen by the NVAC President. The Department's proposals interfere with that designation and must be withdrawn.

Next, the Panel may not exercise jurisdiction over proposals concerning Executive Orders ("E.O.") 13836, 13837, or 13839, until the Federal Labor Relations Authority ("FLRA" or "Authority") has determined their negotiability. To the extent that the Panel has done so in the past, e.g., *USDOT, FTA, Wash, DC and AFGE 3313*, 19 FSIP 043 at 9-11, it exceeded its authority. Under the Statute, only the Authority, and not the FSIP, may resolve a claim that a proposal is nonnegotiable. *See* 5 U.S.C. § 7105(a)(2)(E); *AFGE v. FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985); *see also Dep't of Transportation, FAA, Washington, D.C. and Local R3-10, NAGE*, 96 FSIP 146 (1997) (finding the Union's wording premature because "the FLRA had yet to issue a decision that squarely addressed the enforceability of Executive Order 12871.").

Here, the Authority has not addressed the negotiability or enforceability of proposals pertaining to the above orders. If the Panel imposes the terms of the E.O., the Panel would have essentially made a negotiability determination – that the terms of the Executive Order were enforceable. The Union, moreover, has a pending negotiability appeal on the issue of official time, a matter implicated by E.O. 13837. Consequently, the Panel should withdraw authority

[4] (1) Article 1, Section 3 (D); (2) Article 1, Section 3 (F); (3) Article 43, Section 5(C); (4) Article 43, Section 5(H)(3); (5) Article 43, Section 6(B); (6) Article 43, Section 7(B); (7) Article 44, Section 6(B); (8) Article 48, Section 5(H).

until such time as the Union's petition has been resolved by a final decision on negotiability. Further, the Panel lacks jurisdiction to impose the E.O.s' terms, especially when any alleged impasse arises from a refusal to bargain or a question of negotiability. The Department has failed to bargain the implementation of the Executive Orders with the Union and there is a pending negotiability question. As a result, any issues concerning the Executive Orders are statutorily not at impasse and the Panel should order the VA to withdraw them.

Next, parties to a collective bargaining agreement cannot bargain for provisions that are contrary to the law. *See Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89 (1983). Yet, many, if not most, of the VA's proposals are contrary to law. While the Panel has stated, "The Panel's role is not to issue legal conclusions." That is precisely what it must do, as a function of its acceptance of jurisdiction. Accordingly, the Union requests the Panel to reconsider and withdraw jurisdiction on those proposals.

Finally, the Department's articulated interest in "maximum flexibility" should be rejected. There can be no dispute that the Statute's restricted scope of bargaining already provides agencies with "great 'flexibility' in collective bargaining." *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006). Therefore, the Department's flexibility is unharmed through the Union's proposals.

Article 1 – Recognition and Coverage

The Union proposes to keep the decades-long practice of maintaining a single bargaining unit and working together informally to resolve any disputes. Doing so prevents the parties from duplicating their entire representational structure, duplicating bargaining, and duplicating costs to

handle multiple units.[5] The Union, through its own research, found no instances of successful VA challenges to the consolidation of the unit during the life of the contract.

In addition, data reviewed from October 2015 through August 2019 shows that in 79 elections and clarifications of unit, the Union survived as a consolidated unit. The Department challenged in three cases, each requiring significant resources from the parties, all leaving the unit consolidated and undisturbed.[6] (Attachment 1). The Department refused to answer an information request asking how it would benefit from this, why it wants it, or to provide any instances in which it would have argued for separate units but could not. (Attachment 2).

In Section 6, the Union seeks information regarding bargaining unit changes once per quarter rather than once per year. The proposal is reasonable given the Department conceded at the table that the information is available at the push of a button and can be shared digitally. Therefore, it costs the VA no effort or resources and allows the Union to address potential issues as they arise, instead of putting them off until the end of a year.

One purpose of renegotiating a contract is to address issues that arose from ambiguous terms. In this section, the VA strikes language that clarifies that a bypass occurs even with employee organizations. The parties have had an issue with this in the past. One example of the value of the Union's proposal is when Nurses Organization of Veterans Affairs ("NOVA"), an employee association group, with VA assistance, claimed to negotiate on behalf of VA nurses.[7] The Union was not notified or invited to the discussions concerning conditions of employment of

[5] The Department refused multiple information requests asking for any study of costs, processes, administrative burdens or duplications of efforts and resources that would result from creating non-consolidated units within the VA.
[6] SF-RP-18-0020 of June 29, 2018b; SF-RP-19-0004 of March 28, 2019c; July 2015 VBA VACO mediation settlement, recouping 411 VBA employees into the unit.
[7] https://www.va.gov/lmr/docs/grievances/National_Grievance_NOVA-06-09-05.pdf

bargaining unit employees. The VA's proposals remove the clarity of what constitutes a bypass and will result in litigation.

In 5.A. the Department repeatedly strikes "only" from the lawful designation that only AFGE National Office may file for CUs or elections on behalf of the Union. By striking this word, it appears the Department believes it can designate someone other than the exclusive representative to file on behalf of the Union. This is clear interference with the Union's right.

The Department proposes removing Section 5 B-D which provides for keeping represented employees of Community Based Outpatient Clinics ("CBOCs") within the bargaining unit when moved between CBOCs. This allows the VA to shuffle bargaining unit employees from one location to another and also in and out of the bargaining unit. This proposal serves no purpose but to weaken the bargaining unit and attack the Union. When the Union asked the Department if this proposal was supported by any rationale other than Union animus, the Department offered no rationale. The Department should not be allowed to Gerrymander its CBOCs to strip its employees of their statutory right to Union representation.

Both parties have an interest in the certification list being correct. Therefore, the Union proposed a Section 7, which would have the parties convene annually to discuss the certification and amend it if required. The process would serve both parties. It confers no benefit on the Union that it does not also bestow upon the Department. Resultingly, the Department's refusal to discuss discrepancies as the Union proposed in Section 7 is not economical, effective, or efficient for the government. Failing to do so results in unnecessary litigation.

Article 2 - Governing Laws and Regulations

This proposal was never discussed by the parties. The Union proposes, in Section 1, a clear iteration of the order of authorities as they relate to the agreement; that the parties are

governed by law and any government-wide regulations in affect at the time of the agreement. This order of authorities is congruent with 5 U.S.C.§7116(a)(7) and 5 U.S.C § 7117. In Section 2, the Union includes a clear iteration of its lawful right to have the Agreement supersede Department policy, handbooks, and regulations. In Section 3, the Union seeks to preserve the over 1, 200 MOAs, MOUs, and supplemental agreements in place unless they conflict with the MCBA. This serves to preserve mutually agreeable working conditions and spare the parties the time and cost of renegotiating agreements which would necessarily need to be bargained.

Meanwhile, the Department has proposed radical changes to the status quo, including enormous statutory waivers. The Department's zipper clause proposal has not yet been determined to be a mandatory subject of bargaining. The Union takes the position that this is a permissive subject of bargaining. *HHS, Indian Health Serv., Claremore Indian Hosp., Claremore, OK*, 19 FSIP 031 (2019) ("the FLRA has taken no position on whether the topic of a zipper clause constitutes a mandatory or permissive topic of bargaining. In the lack of clear guidance on this topic, as well as the Agency's lack of sufficient justification for this proposal, the Panel believes it is appropriate to strike the entirety of the above-quoted language."). Here, the Department has included a zipper clause proposal in Article 2, Section 1 (C). The intent of this proposal is to waive the Union's right to demand bargaining during the life of the contract over any matter not already covered in the contract. So, this proposal is separately permissive because it clearly calls for a waiver of the statutory right to bargain. As the Authority has not decided on the negotiability of such clauses and it is independently permissive, FSIP must strike it.

The Department's proposal to eliminate all prior past practices, LSAs, MOUs, etc. places the parties in endless bargaining, because the MCBA cannot, and clearly does not, cover all

conditions of employment. Additionally, the Department's proposals to terminate past practices, Memoranda of Understanding ("MOUs"), and Memoranda of Agreements ("MOAs") are contrary to Article XX concerning local bargaining, which the Parties have already agreed upon. Any changes to local past practices, MOUs, and MOAs would constitute a change that requires bargaining at the local level. Extinguishing them in this proposal would directly negate the Parties' tentative agreement. Additionally, unlike *SSA and AFGE*, 2019 FSIP 19 (May 29, 2019) (where management provided notice of its intention to terminate MOUs at the same time it provided notice to reopen the agreement), the Department failed to raise the MOUs, so that the conditions of employment contained in them may be bargained during negotiations. Therefore, bargaining obligations still exist. Similarly, the Department's proposal to limit all bargaining to the national level is inconsistent with agreement on Article XX.

Because the Department has already agreed to bargaining below the level of recognition in Article XX, its proposal that all local CBAs be subject to agency head review is inconsistent with law. The process of 5 U.S.C. § 7114(c)(1) only applies to agreements at the level of recognition. Agreements below the level of recognition are only subject to review as outlined in a CBA. The Department's proposal would require that agreements below the level of recognition are subject to § 7114(c)(4) and the negotiability process that accompanies it. That is contrary to law.

The Department's proposal in H.2. is also inconsistent with law. The Statute requires that the period for approval is within "30 days from the date the agreement is executed." 5 U.S.C. § 7114(c)(2). The VA's proposal seeks to change the date of execution to the date it is received by the agency head authority to start its 30-day timeline. That is inconsistent with law.

Article 3 – Labor-Management Engagement

This proposal was never discussed. The Union proposed partnership protocols, allowed under the E.O., due to its tangible benefits to the taxpayer. A wealth of studies demonstrates objective benefits to cost, mission and good government through robust labor management engagement. As one recent study notes, "[h]igh-performing partnerships developed and implemented policies and programs that had the effect of promoting agency mission and reducing costs."[8]

Numbers show 70% of Agency and Labor leaders report engagement improves in the accomplishment of the agency's mission, 69% showed improved customer service, and 73% observed improved labor relations.[9] DoD studies show a substantial majority of management report improvements to operations and customer service because of engagement efforts.[10] A recent GAO report shows data establishing engagement efforts resulted in a 20% increase in individual performance, an 87% increase in retention, and is a top-flight driver for performance and engagement.[11]

Notably, the VA has successfully used labor management engagement. Multiple initiatives involving labor-management groups increased efficiency, effectiveness, and cost-saving. Significant examples abound.

[8] Masters, Marick F., and Robert R. Albright. "Federal-Sector Labor-Management Relations at the Crossroads: Lessons from partnership." Journal of Collective Negotiations in the Public Sector (2003): 245-270, 258.
[9] National Partnership Council, A Report to the President on Progress in Labor Management Partnerships, September 27, 1995, at 16, 18.
[10] Defense Partnership Council. Report on the Examinations of Partnership and Labor Relations in the Department of Defense, December 1999.
[11] GAO, The Keys to Unlocking Engagement: An Analysis of the Conditions that Drive Employee Engagement, GAO-15-585, 3, 17, 28 (Washington, DC July, 2015). See GAO, Federal Workforce: Lessons Learned for Engaging Millennials and other Age Groups, GAO-16-880T, 2 (Washington, DC September 29, 2016).

For 8 years, beginning in late 2005, the VA initiated safe patient handling, which was borne out of the Quality Council. The VA was the first health care system that invested heavily in educational programming and equipment. The return on investment was/is estimated at 8 to 1 in cost avoidance for employee and patient injury.

In 2012, the VA and AFGE were forced to address a pervasive classification issue at the Department, where thousands of employees were set to be downgraded.[12] The parties worked together for over a year in a classification work group to resolve classification issues at the Department.

In 2017, then-Secretary Shulkin engaged with NVAC President, Alma Lee, concerning suicide prevention after employees died by suicide at VA facilities. This engagement prompted the VA to implement programs for employees at risk.

All studies of labor-management partnership impacts have demonstrated clear cost savings. There is clear, hard data showing a 25% return on investment ("ROI") for all money invested in partnership: "[c]ost savings occur because of improved labor management relations in the Federal Government."[13]

While the VA generally claimed that any partnership requirements in the MCBA were struck because of official time and funding, the VA's proposal demonstrates that official time/funding are not the issue; anti-union sentiment is the issue. These groups save resources. Not having them costs. The Union's proposal should be awarded.

Article 4 - Labor-Management Training

[12] Steve Vogel, Washington Post, VA Halts Downgrades, July 12, 2012 (https://www.washingtonpost.com/blogs/federal-eye/post/va-halts-employee-downgrades/2012/07/03/gJQAgfzYLW_blog.html) (last visited June 1, 2020).
[13] National Partnership Council, A Report to the President on Progress in Labor Management Partnerships, September 27, 1995, at 15.

This proposal was never discussed by the parties. The same data showing improvements to mission, customer service, and cost savings cited above apply to Article 4. Previous studies have been clear in stating that "adequate resources for training and facilitators"[14] is a requisite for the success of a labor management relationship.[15] Speaking again of ROI, Federal studies establish that "providing adequate resources to support [joint] activities, [results in] recognizing that these activities can provide many-fold return on the investment in them."[16]

Here, joint training has a history of benefitting the parties. The Parties took the time to jointly develop training on the agreement, so that both union representatives and management officials were using the same interpretations. (Attachment 3). Both parties attended train-the-trainer sessions, then jointly administered 74 trainings across the country. (Attachment 4). The trainings are jointly requested by both local union officials and facility management. (Attachment 5). Clearly, there was value in the training, because requests continued through 2017, when the Department reopened the agreement.

Meanwhile, the Department moved from its original proposal of a total strike without explanation. The proposal unnecessarily eliminates training even when sponsored by the Union, entirely. Finally, the Department has not demonstrated why labor-management training should be excluded from the grievance procedure.

Article 5 - Labor-Management Committee

This proposal was never discussed by the parties. As with Article 3, the Union's proposal, as submitted, does not run afoul of Executive Order 13812 because it provides a

[14] GAO, Federal Labor Relations: A Program in Need of Reform, GAO-91-101, 71 (Washington, DC. July 30,1991).
[15] National Partnership Council, A Report to the President on Progress in Labor Management Partnerships, September 27, 1995, at 36.
[16] *Id.* at 49.

tangible benefit to the taxpayer. Again, the 25% ROI for any amount of expenditure the Department might make for the meeting constitutes a net gain for the Department. The Union proposed an increase in the number of representatives attending which represents the fact that the size of the bargaining unit has grown by over 25%. The Union, of course, would have been willing to modify its proposals if the article had been presented and negotiated.

The Department, on the other hand, moved from its original proposal of a total strike without explanation. The final proposals demonstrate that the VA team does not know the purpose of this Committee; it is not advisory, but an opportunity to exchange information. Each biannual session has been attended by the Secretary or Deputy Secretary, Undersecretaries, Assistant Secretaries and/or Key Officials, except Secretary Wilkie[17]. Some attended at least one time in every session. The exchange is valuable. It was during a Committee meeting that the Union presented the VA with critical concerns regarding its plan to authorize a full scope of practice for Nurse Practitioners ("NPs"). This change meant that NPs would operate outside the scope of their state licenses while working at the VA. The Union repeatedly expressed that the VA's change would not protect these employees' state licensure. The VA responded by seeking to address the Union's concern. Ensuring that healthcare workers remain in compliance with state licensing guidelines allows them to continue working for the VA, and in turn, care for the nation's veterans. This is a clear example of a tangible benefit of the Committee.

Additionally, the Department includes that 5 U.S.C. § 7131(d) official time may be used to participate. However, the inclusion here can be interpreted to mean that § 7131(d) time can only be used for matters explicitly designated in the MCBA as it is here.

Article 7 – Quality Programs

[17] Secretary Wilkie refuses to engage with the Union at all.

According to GAO[18] and Congress[19], the VA needs help developing procedures for quality care. The VA cannot be relied upon to establish its own policies to maintain quality. According to the GAO, "[a]mbiguous VA policies lead to inconsistency in the way VA facilities carry out processes at the local level. In numerous reports, we have found that this ambiguity and inconsistency may pose risks for veterans' access to VA health care, or for the quality and safety of VA health care they receive."[20] Even the Department stated, at the table, that management has "an obligation" and a "responsibility" to get Union "input," "ask for ideas" as well as to "consider those ideas," but refuses to put that obligation in the CBA, or answer any questions about the nature and scope of that obligation.

The Department's proposals seek a total strike of the Article, eliminating Union participation in developing comprehensive quality programs within the Department. The Department said of its full strike of the Article, "[w]e believe that ensuring quality is a function of management," and that "[w]e find the bulk of this to be an infringement of management rights, to put it succinctly, [including] everything after section 1. However, the Department did not limit its strike to everything after section 1. Its total strike is ill-advised. "Health care facilities must foster a culture that encourages constant reflection about system risks and weaknesses and promotes a non-punitive culture where employees are comfortable bringing

[18] "These risks to the timeliness, cost-effectiveness, quality, and safety of veterans' health care, along with other persistent weaknesses we have identified in recent years, raise serious concerns about VA's management and oversight of its health care system." GAO-15-290 High-Risk Series, at p.28 (February 2015).
[19] 38 U.S.C. § 1703C(3)(A)(C), quality programs require reports made in coordination with "veterans service organizations and other key stakeholders."
[20] *Id.*

issues forward."[21] These proposals remove the employees' voices from the measurement and analysis of patient care quality and safety, which is counter to the interest of the veterans.

Article 9 – Classification

This proposal was never discussed by the parties. Section 1 includes status quo language which provides that matters unrelated to classification are grievable, and this Panel has maintained its obligation to "impose a 'broad scope' grievance procedure unless the party moving to limit that scope--be it Agency or Union--is able to 'establish convincingly' the need for a limited scope." *Soc. Sec. Admin. & Am. Fed'n of Gov't Employees*, 19 FSIP 019 at p.8 (2019). The Agency offered no explanation for striking the grievance exclusion. An agency interest in maintaining flexibility does not meet the standard of "convincing burden," as required by this Panel.

The Union's proposal also includes the processes through which changes will be discussed, reviewed and amended, as well as standards for classification, the appeals process and the process for establishing new positions. While these provisions are currently required by agency policy (VA HBK 5003) the Department eliminates the procedures and appropriate arrangements expected in a CBA. Without them, the parties will be forced into negotiations over these topics at the local level. Therefore, the VA's proposals are incomplete.

Article 10 – Competency

This proposal was never discussed by the parties. The Union's proposal presents the Department with maximum flexibility in establishing competencies, and offers modest procedures and appropriate arrangements regarding training, notice, scope, and usage.

[21] The Lewin Group. Becoming a High Reliability Organization: Operational Advice for Hospital Leaders. Agency for Healthcare Research and Quality. Pub. No. 08-0022; 2008.

The Department's proposals eliminate training of its employees. The Government Employees Training Act, 5 USC Chapter 41, requires Agencies to have a training program and to encourage employees to recognize training needs. As the Department's proposals eliminate the procedures and appropriate arrangement expected in a CBA, they are incomplete.

Article 11 - Contracting Out

This proposal was never discussed by the parties. The Union's proposals are reasonable and standard proposals establishing the procedures for contracting out in the event the A-76 moratorium is lifted. This will allow the Department to begin contracting out immediately, without requiring bargaining before doing so.

The A-76 moratorium prohibits the VA from contracting out any services it wishes.[22] So, the Department's proposal is illegal on its face. Also, the Department's proposal to fulfill bargaining obligations simply restates the law and requires bargaining *ad seriatim*. In accordance with the Veterans Choice Act[23] and the VA Mission Act,[24] the Department should not take any action that would slow its ability to contract if appropriate and lawful; the Department's current proposal would cause unnecessary slowing to such a process due to bargaining each occurrence. To give the appearance (but not the reality) of greater latitude would certainly lead to more litigation, greater losses by the Department, and a waste of untold resources.

Article 12 - Details and Temporary Promotions

[22] CONSOLIDATED APPROPRIATIONS ACT, 2019, PL 116-6, February 15, 2019, 133 Stat 13, SEC. 741 ("None of the funds appropriated or otherwise made available by this or any other Act maybe used to begin or announce a study or public-private competition regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of Management and Budget Circular A–76 or any other administrative regulation, directive, or policy.")
[23] VETERANS ACCESS, CHOICE, AND ACCOUNTABILITY ACT OF 2014, PL 113-146, August 7, 2014, 128Stat 1754.
[24] JOHN S. MCCAIN III, DANIEL K. AKAKA, AND SAMUEL R. JOHNSON VA MAINTAINING INTERNALSYSTEMS AND STRENGTHENING INTEGRATED OUTSIDE NETWORKS ACT OF 2018, PL 115-182, June6, 2018, 132 Stat 1393.

This proposal was never discussed by the parties. The Union proposes standard definitions of detailing, "reasonable" notice requirements, a process for detailing and temporarily promoting employees, processes for starting and ending details and temporary promotions, medical details, details for lower grades, details and promotions for union representatives, rotations and an oversight process, all of which the Department rejects without justification. None of these negotiable processes for details and temporary promotions are onerous and none present an additional demand upon management except for the proposed oversight mechanism.

The oversight, however, is necessary. There have been at least 70 non-selection cases against the Department brought to the EEOC within the bargaining unit during the life of the contract, with the number increasing drastically in recent years. These procedures and appropriate arrangements are not only reasonable, their absence leads to a wild-west environment for which the Department has already been chastised by the GAO:[25]

> Ambiguous VA policies lead to inconsistency in the way VA facilities carry out processes at the local level. In numerous reports, we have found that this ambiguity and inconsistency may pose risks for veterans' access to VA health care, or for the quality and safety of VA health care they receive.

The Department is not in need of less standardization and processes.

The Department has not demonstrated why details and temporary promotions should be excluded from the grievance procedure. Notably, the Department's failure to comply with law, rule, and regulation has been the subject of many grievances and EEO complaints. The Department's proposals fail to provide the procedures and appropriate arrangements expected in a CBA; therefore, they are incomplete.

Article 13 - Reassignment, Shift Changes, and Relocations

[25] GAO-15-290 High-Risk Series, atp.28 (February 2015).

This proposal was never discussed by the parties. The Department has 49,000 vacancies, with 96% of VHA facilities having severe occupational shortages and 39% reporting at least 20 severe occupational staffing shortages; thus, shifting staff to allow coverage is a necessary daily occurrence.[26] According to VA OIG report on these shortages and the Department's response, it has resulted in "a workforce that feels abandoned and that nobody cares enough for them to get stable leadership."[27] Added to this, we are in the midst of a crisis in which the Department is shifting resources, staff, tours and responsibilities, including all hands facility screening, exacerbating staffing shortages.[28]

As it stands, the Agency is unable to handle this process in a regular, consistent and fair manner, leading to a huge volume of grievances, poor morale, and institutional instability. The current health care crisis highlights the need for a clear, well-articulated process for shifting staff where they are needed most. The Union's simple, commonsense approach to establishing procedures is not substantively different from past contracts. The proposals also do not seek to impinge on management rights by setting staffing and hours; rather, insisting only on definitions, processes, notifications, and procedures. The Department would be obligated to bargain these very provisions if not covered in the next MCBA.

The Department's proposal in 1.B. is contrary to law because it prospectively requires the union to agree to a matter being excluded under 38 U.S.C. 7422, when only the Secretary or designees can make such decisions.

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[26] The Department of Veterans Affairs Office of Healthcare Inspections, OIG DETERMINATION OFVHA'S OCCUPATIONAL STAFFING SHORTAGES, FY 2019, at p. i, REPORT #19-00346-241SEPTEMBER 30, 2019.
[27] *Id.* at ii
[28] The Department of Veterans Affairs Office of Healthcare Inspections, OIG INSPECTION OF VETERANS HEALTH ADMINISTRATION'S COVID-19 SCREENING PROCESSES ANDPANDEMIC READINESS, Report #20-02221-120, March 26, 2020.

The VA's proposal in Section 3 effectively makes an employee's transfer request consideration contingent on previously approved leave. Consequently, this has the inappropriate effect of negating a prior management decision. Otherwise, VA's proposals fail to adequately address procedures and appropriate arrangements expected in a CBA, therefore they are incomplete.

Article 14 – Discipline and Adverse Action

The Union's proposal includes maintenance of the just cause standard, a standard that is consistent with the statute,[29] the Executive Orders[30], and supported by case law.[31] VA has increased latitude to discipline employees under the VA Accountability Act,[32] which has allowed the VA to increase firings by 60% per year;[33] however, doing away with the gold standard of review (and fairness) does not serve the efficiency of the service. It additionally harms employees and sets the Department up for a deluge of litigation in which it is unlikely to prevail.

The Union further includes a call for progressive discipline, which is discouraged but not prohibited by the EOs,[34] and is a concept the Department champions in its own Handbook,[35] but the Union establishes the proposal does not limit discipline, writing:

> The concept of progressive discipline and the recommended guidance provided by the Table of Offenses and Penalties (see appendix A of this part) is not intended to preclude the exercise of discretion in determining appropriate action, but rather to serve as an aid to maintaining consistency.

[29] 5 U.S.C. § 7513(a) ("for such cause as will promote the efficiency of the service.").
[30] Executive Order 13839, Section 2.
[31] AFGE, Local1760andSoc. Sec. Admin., 22FLRA195, 198 (1986).
[32] 38 U.S.C. § 714.
[33] Isaac Arnsdorf, Trump's VA Is Purging Civil Servants, Politico Magazine, March 12, 2018 https://www.politico.com/magazine/story/2018/03/12/trump-is-trying-to-fix-the-vabut-its-backfiring-217348 (Last visited 4/23/2020).
[34] Executive Order 13839, Section 2(b)("Supervisors and deciding officials should not be required to use progressive discipline")(Emphasis added)
[35] Department of Veterans Affairs, VA DIRECTIVE 5021: Employee/Management Relations, Section 8(g) at I-13 (April 15, 2002).

The Union also proposes that Discipline be applied fairly and equitably (including an entire Section 6, Fairness and Timeliness), something that is both consistent with the EOs,[36] and a fundamental principle of due process, which would necessarily be applied by an arbitrator, and is a necessary a guidepost for managers.

In Section 3, the Union seeks to maintain a clear and well-articulated process for Investigations for Disciplinary actions. This is critical- VA has a shameful track record in violating the contract and the law during investigations, with over hundreds for denying representation and basic investigatory rights during the life of contract.[37] (Attachment 6).

The Union also seeks to distinguish between discipline and adverse action, something the Department repeatedly fails to do. VA's refusal to make this simple distinction continues to confuse the process and will lead to costly errors and litigation. The Department could not justify the change, and often seemed to confuse the two at the table.

Further, the Union seeks to add a section on the entirely new legal framework for adverse action created under the 38 U.S.C. §714, the Accountability Act, passed since our last contract. It is not reflected in the Departments proposals, and neither managers nor employees have demonstrated complete familiarity with the new system. The Union cannot guess what reason the Department has for hiding away the new legal system from employees and managers but insists upon reflecting the changes in the CBA.

The Union seeks to maintain Sections 7, 8, and 9 establishing how admonishments, adverse actions and suspensions and reprimands for Title 5 and Hybrid employees and separately, actions for Title 38 will be processed; the Department refuses to explain their

[36] Executive Order 13839, Section 2(b).
[37] It is all too common for VA managers to approach employees directly to resolve a grievance when a representative is already of record.

proposed deletion. The Union does not wish to kick the can down the road and bargain it later or to waive its right to bargain the procedure. Its absence will lead to abuse and chaos, for which GAO has chastised the Department.[38]

Finally, the Union proposes Section 14, seeking that suspensions up to 14 days will be stayed pending an arbitration decision provided that a grievance is filed within the timelines of the negotiated grievance procedure. The Department will not be prevented from making any suspensions it wishes, due process will be maintained, and faultless employees will not suffer potentially life ruining economic loss (a whole paycheck means rent, food, education, medicine) for suspensions which, during the life of this contract, *have been reversed or mitigated more often than not*.

The Department's proposals are a mix of confusion of legal requirements, unreasonable process, and unnecessary complexity. The Department does not want to be bound by progressive discipline, but VA's failure to follow progressive discipline can result in the reversal of its disciplinary actions. *See Sayers v. Dep't of Veterans Affairs,* No. 18-2195 (Fed. Cir. 2020) (finding that the penalty decision must be reviewed in Accountability Act actions.). It eliminates admonishments from the available disciplinary actions which ties an arbitrator's or administrative judge's hands when the VA has chosen an unreasonable penalty. This also does not serve the VA, because if options are not available, discipline will simply be overturned instead of mitigated. There is no authority for the standard of proof for disciplinary actions; the CBA is the authority and the Department fails to provide a standard in Section 2.A.3.

[38] The very same argument holds for Section 11, Notice of Disciplinary Actions.

The Department's definition of adverse action for Title 38 employees is inconsistent with 38 U.S.C. § 7461 and will only serve to cause confusion. "Major Adverse Action" is a term of art that should not be altered in an agreement.

The Department provides no basis for supervisors outside an employee's supervisory chain to take part in the discipline of an employee. Such supervisors will fail to consider all proper circumstances in imposing discipline, such as the employee's work performance or the needs of the employee's supervisor. The Department also fails to provide a check on the supervisor's claim concerning when the proposal was provided by eliminating the employee's acknowledgement of receipt.

The Department's proposals use different timelines for different actions. For consistency with authorities that do provide a set timeline and to eliminate confusion for management and the employee, the timelines should be the same. For consistency, all actions should have the same option to respond orally and in writing.

The Department's proposal in Section 3.B.5. implies that a representative will not be permitted if notice is provided beyond the 2-day requirement. As each authority for disciplinary action provides that employees are entitled to a representative, any limitation on that right is contrary to law.

The Department's proposal eliminates the appropriate arrangement of providing a few days' notice of the final decision. Employees need time to prepare for the final action. The action may not be sustained, so notice of the proposal is not sufficient time to prepare.

The Department's proposal in Section 3.B.8. constitutes guidance to management and has no place in the CBA. Similarly, Section 3.B.9. constitutes improper and incorrect legal advice. Disciplinary action may be appealable to MSPB when related to a whistleblower retaliation

action, USERRA, or other reasons. Because MSPB jurisdiction is provided by law, 5 U.S.C. §7701 *et. seq.*, it is not a condition of employment that is negotiable by the Parties.

VA misleads in its proposal that the Accountability Act "only afford[s] the employee an opportunity to reply in writing." This proposal is categorically false. The method of the employee's response is not provided in 38 U.S.C. §714, which leaves that matter a subject for bargaining.

Section 3 (B)(3)(a) and (2) and Section 4 (3)(a), allow the Department to unilaterally schedule oral replies without allowing Union representatives to be available. Given the Department' proposals on Official Time which gives it unilateral control over the use of official time for representation, these proposals give the Department an unfettered right to deny employees Union representation in disciplinary actions.

The VA has failed to demonstrate any basis to exclude removals from the grievance procedure. Further, elimination of the grievance procedure may also be contrary to law for actions taken under the Accountability Act, "If an employee who is subject to a collective bargaining agreement chooses to grieve an action taken under this section through a grievance procedure provided under the collective bargaining agreement, the timelines and procedures set forth in subsection (c) and this subsection shall apply." It also eliminates the employee choice required in 38 USC 7463(b).) Finally, VA has been shown to take questionable removal actions.[39] Therefore, its decisions warrant more review, not less.

Article 16 – Employee Awards and Recognition

[39] Isaac Arnsdorf, Politico Magazine, Trump Is Trying to Fix the VA But It is Backfiring, (March 12, 2018) (https://www.politico.com/magazine/story/2018/03/12/trump-is-trying-to-fix-the-vabut-its-backfiring-217348 last visited June 1, 2020).

The Department's proposals give it the unfettered right to determine how awards are distributed. Notably, the Department said that it "struck a lot of this [article] because it ties managements hands if it wanted to modify, change, improve the existing awards program." However, award decisions are not an exercise of rights protected by the Statute. A determination as to the amount of a performance award is not an exercise of management's rights to direct employees and assign work. *NTEU v. FLRA*, 793 F.2d 371 (D.C. Cir. 1986). Therefore, the Department would have to substantively bargain with the Union each time it made such a change.

Further, the GAO has lambasted the Department for failing to properly administer its performance awards program, recommending that the VA must "develop a modern, credible, and effective performance management system" along "with input from VHA stakeholders", which includes the Union," to "ensure that ratings-based performance awards are administered in a manner that is consistent with leading practices and promotes improved employee performance."[40] Each of the Union's proposals bring the Department closer to GAO's recommendation, and each of the Department's proposals strip away existing procedures and mechanisms for Department accountability.

While there is a significant amount of agreement to streamline the article, there are six points of difference. Also, the Union also seeks to keep awards decisions arbitrable, while Executive Order 13839 provides that awards should not be arbitrable.

In Section 1(C) and (E), the Union seeks transparency regarding the Department's award budget, allocated each year. According to GAO, the Department's oversight and monitoring of

[40] Government Accountability Office, VA MANAGEMENT CHALLENGES: ACTIONS NEEDED TO IMPROVEMANAGEMENT AND OVERSIGHT OF VA OPERATIONS, GAO-19-422R, at p.5 (April 10, 2019).

its awards is lacking, noting that "with limited monitoring taking place as part of its oversight, VHA lacks assurance that its medical centers are complying."[41] In Section 1(G), the Union moves to clarify that employees who have been disciplined during the year may get performance related awards. For example, as employees make contributions to improve efficiency, provide cost savings, and serve heroically on the frontlines during a pandemic which has claimed the lives of bargaining unit members, an unrelated discipline for tardiness shouldn't serve as a bar for their recognition if otherwise qualifying. Section 4 seeks to bring the MCBA into agreement with the Department's current policy;[42] the Department offers no explanation for failing to agree. When asked why it rejected Handbook 5017 terms, on September 18, 2019, the Department responded at the table, "no reason." Sections 6 and 7 establish Joint Awards Committees and Nominations Processes, both of which comport with GAO recommendations, and allow for a normalized process. The Department acknowledged on September 18, 2019, that the Handbook called for working with the Union to develop a fair award process. VA said it were open to a process for "effective collaboration," but the Union's proposal is the only version that passed across the table.

The Department's proposals fail to provide how awards will be distributed. It also fails to account for how awards will be given when employees qualify for more than one award. The Department's proposals will not incentivize employees to work harder and to perform better to achieve a performance award because of the ambiguous and uncertain nature of the process. Meanwhile, the Union's proposals are transparent, fair, and simple to administer.

[41] Government Accountability Office, VA HEALTHCARE: OVERSIGHT IMPROVEMENTS NEEDED FORNURSE RECRUITMENT AND RETENTION INITIATIVES, GAO-15-794, at p.19 (September 2015).
[42] Department of Veterans Affairs, EMPLOYEE RECOGNITION AND AWARDS, VA HANDBOOK 5017/15 (June 3, 2019).

The Department's proposal on the provision of information fails establish if the national or local union will get it. Also, VA has rejected providing the crucial information of why an award was made, missing the crucial point that awards are to encourage behavior.

Article 18 - Equal Employment Opportunity

This proposal was never discussed by the parties. The Union proposes reasonable procedures and appropriate arrangements for the Department's EEO program.

The Department wants to dismantle the article's provisions laying out processes and oversight, but the Department is not in the position to have less information concerning EEO matters. GAO established, and the VA concurred, that "inadequate oversight of medical center HR offices limits the Department of Veterans Affairs' (VA) and VHA's ability to monitor HR improvement efforts and ensure that HR staff apply policies consistently."[43] Resultingly, the VA has the highest rate of sexual harassment among employees of any federal agency.[44] Looking at the most recent numbers from the EEOC, the VA has the second highest number of complaints, after the US Postal Service, which is twice its size; however, the VA has 166% as many complaints go to charge than the USPS.[45]

The Department proposes gutting the article by deleting the following: all process from the EEO Program in Section 2; the Reasonable Accommodation provision in Section 3; affirmative employment plans in Section 4; Section 7's Diversity Councils and EEOC committees; and, Section 8's Special Emphasis Program Managers. The lack of clear procedures,

[43] Government Accountability Office, VETERANS HEALTH ADMINISTRATION: Management Attention Is Needed to Address Systemic, Long-standing Human Capital Challenges, GAO-17-30(September 2017).

[44] https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT

[45] US EEOC, ANNUAL REPORT ON THE FEDERAL WORK FORCE FISCAL YEAR 2018, Table B-3, (August 7, 2019).

when the Department has documented problems maintaining proper policy and oversight and has such a high rate of EEOC complaints being issued is a misguided proposal.

The Department's proposal to make materials available is not the same as proactively providing the information.

The Department's proposal to provide contact information for the EEO Director and EEO Officer(s) only serves to confuse employees. These positions are not a part of the Office of Resolution Management ("ORM") process (specifically required of the VA) and some report to the facility director, who may have an interest in preventing EEO complaints. Nothing in the agreement should refer to such individuals as it is coercive and violative of EEO regulations.

Finally, the Department's proposal evidences a misunderstanding of EEO representatives. Employees designated as EEO representatives represent the complainant, not the bargaining unit. Therefore, employees designated as EEO representatives cannot be union officials in the EEO process. The proposal would disqualify employees from EEO activity solely because they happen to be union officials. Therefore, it illegally discriminates against union officials in violation of 7116(a)(2).

Article 19 – Fitness for Duty

The Panel should withdraw jurisdiction on this article. The Authority must rule on the pending negotiability appeals before the Panel can impose proposals related to Article 19. The FSIP can resolve negotiability questions only when the Federal Labor Relations Authority has ruled on substantively identical proposals. *Davis-Monthan Air Force Base*, 05 FSIP 104 (FSIP 2005); *Carswell Air Force Base*, 31 F.L.R.A. 620 (1988). Here, the Parties have a pending negotiability appeal on the Article. The Department's refusal to bargain over Article 19 was based on a general statement of "management's rights." Because the Department has not

articulated which proposals violate management's rights, it cannot be determined if the proposals here are identical to past Authority decisions. Therefore, resolution by the Authority is necessary.

Substantively, the Union's proposals establish a procedure and process to guide managers and employees, as well as reasonable safeguards, based upon regulation[46] that the fitness for duty examinations are necessary and applied lawfully.

Notably, for the last three years with complete data, [47] the Department is removing persons with targeted disabilities at four times (or more) the rate of individuals without targeted disabilities. This is a crisis that will balloon in the wake of the COVID-19 pandemic without contractual obligations binding the Department.

YEAR	PWTD Participation Rate (EEOC goal 2%)	Percent PWTD removed	Percent PWOD removed	Ratio of Removals PWTD to PWOD
2015	**2.17%**	2.54%	0.59%	**4.32**
2016	**2.16%**	2.90%	0.61%	**4.77**
2017	**2.11%**	2.57%	0.72%	**3.58**

The Department's proposals fail to provide procedures or appropriate arrangements that would be expected in a CBA. Therefore, they are incomplete.

Article 20 - Telework

[46] 5 C.F.R. § 339.301;5 C.F.R. § 339.302; 5 C.F.R. § 339.303.
[47] Pursuant to (29 CFR §1614.203(d)(7)).

The Department's proposals evidence a concerning hostility to telework. The proposals impermissibly give the VA sole discretion to make unilateral changes to the telework program. The Panel has reviewed similar proposals recently. In rejecting an agency's "sole discretion" proposals, the Panel stated, "As for permanent changes to the program, the Telework Enhancement Act and the Labor Statute intend for the Telework program to be negotiated and any changes to the program to be negotiated with the Union." *Social Security Administration, Office of Hearing Operations and NTEU, Chapter 224*, 19 FSIP 023 (2019) ("*SSA*").

Here, the Department couches sole discretion language to unilaterally terminate participation in telework throughout its proposal: "In addition, because management requires maximum flexibility to ensure that its functions can be performed in a timely and efficient manner, the Department reserves the right to require more frequent days at the official duty station than provided in the Telework Agreement and to recall employees (either planned or unplanned) for operational needs;" "Reasonable business purposes for removal, include, but are not limited to, the following: . . . j. Other business purposes;" and, "Management has the right to adjust an employee's AWS and/or telework schedule to meet business needs, operational demands, or Mission related needs without the need for notification." Not only do unilateral changes alter the voluntary nature of the employee's participation in telework, the Department's failure to provide specifics for the Union to bargain potential changes, as required by the Telework Enhancement Act and the Statute, warrants the same treatment as in *SSA*.

Similarly, the Department's proposal gives it unilateral authority to determine AWS as it relates to telework, which is contrary to both the Telework Enhancement Act and Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. 6120 *et. seq.*, ("Work Schedules Act"). The Work Schedules Act provides that when an agency seeks to

terminate a particular schedule, it must negotiate with the union, and that resulting impasses be presented to the FSIP for resolution. *Dep't of State, Passport Services*, 60 F.L.R.A. 141 (2004). Here, management proposes, "Management has the right to adjust an employee's AWS and/or telework schedule to meet business needs, operational demands, or Mission related needs without the need for notification." Therefore, the proposal gives management authority contrary to that prescribed in the Statute.

Further, the Department's proposals fail to provide employees with any meaningful notice of changes, even if temporary, and in one instance refuses to provide any notice. Employees will be unable to make childcare arrangements without notice; they will be unable to arrange for transit subsidies or parking. The proposals are not only unworkable, but also absurd.

The Agency proposed several requirements that employees must follow when teleworking, such as using instant messaging to ensure that this technology accurately reflects their work status and keeping a written account of the work performed each day while teleworking. These proposals are contrary to the Telework Act, which requires that agencies must treat teleworks and nonteleworkers the same for purposes of work requirements or other acts involving managerial discretion.

The Department provides no basis for linking disciplinary action, generally, to telework. Outside of the misconduct provided in the statute, disciplinary actions should not form the basis for denying telework. Doing so is tantamount to double penalties for the same infraction.

While the Union disputes that VA can legally disclaim liability in this matter, the MCBA is not appropriate for waivers such as Section 4.D. as the Union cannot waive employee's individual rights. The proposals in Section 5.D.1-2 are the same and the parenthetical is

nonsensical as the employee's voluntary request for telework and the Agency's approval establish "mutual agreement."

The proposal in Section 6.A. requires employees to work during emergencies or use leave. Section 6.B. contradicts it by allowing employees to be excused from work if affected by emergencies. Employees should not be forced to take leave when impacted by emergencies. Where the official duty station is closed and the alternative workplace ("AW") is unsafe to telework, an employee may be permitted weather and safety leave in accordance with the Administrative Leave Act of 2016.

The Department's proposal in Section 6.D. does not relate to the subheading "Hours of Work" or the article "Telework."

The Department proposes to require teleworking employees to share office space with their co-workers at the official duty station. While the Panel has stated the purpose of the Telework Act is to save the federal government money by reducing real estate costs (*SSA*, 19 FSIP 023, p. 25), that purpose is inhibited when Management artificially limits telework to one day per week as proposed in Section 6.E. Therefore, employees in the office 4 days per week should not be required to share an office when employees who work in the Official Duty Station ("ODS") do not share an office. When read in the context of the Department's other proposals, this proposal impermissibly treats telework employees differently from non-telework employees in violation of the Telework Enhancement Act.

The clear demonstration of the success of the Union's proposals are realized today. On March 12, 2020, in relation to the COVID-19 pandemic, OMB issued a memorandum explaining

that "[a]ll Federal Executive Branch departments and agencies are encouraged to maximize telework flexibilities."[48]

However, on March 13, 2020, the Veterans Health Administration issued notices to the field to "**cease the authorization of granting access to telework systems (Rescue or CAG) until further notice. <u>Telework is not to be Authorized for administrative staff at this time.</u>**" (Emphasis in the original).[49] The Department needlessly exposed employees to COVID-19 because it failed to take steps to allow employees to telework. For example, some Medical Support Assistants are responsible for scheduling patients. This work can be completed over the phone; however, they were required to expose themselves and continue to be present at the facility because patient information requires certain security measures and the VA did not have enough equipment available. The same is true for employees who arrange for the payment of community providers when veterans are referred outside the VA system. While it does not require physical interaction with the veteran, the patient information security is required. Not only did it leave employees unnecessarily exposed, it is a failure of the VA's Continuity of Operations requirements.

After the media lambasted the Department for endangering its employees, the Department stated that "[m]anagers and supervisors are encouraged to maximize telework" and acknowledged that "we can maintain operations in the event of a large increase in teleworking employees."[50]

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[48] OMB Memorandum
[49] VHA Notice
[50] Bryant Furlow, The VA Will Now Let Some Administrative Staff Work From Home, ProPublica, March 25, 2020, https://www.propublica.org/article/va-veterans-health-administration-telework-policy-work-from-home-coronavirus (Last viewed May 4, 2020).

The Department has since invested an enormous amount of capacity into expanding telework, receiving $1.2 billion in additional funding for "up-front investment in Information Technology resources to support increased use of simultaneous telehealth appointments and upgrade associated bandwidth for employees and healthcare providers."[51] The Department has "scal[ed] bandwidth, capacity, inventory" for mass telework of "140,000 department employees [who] are teleworking daily," [52] and "also reduced the paperwork needed to be qualified to telework."[53] This change allowed the Department to continue healthcare services in response to the coronavirus and mitigate the risk of virus transmission.

The Department made the turn to widespread telework by purchasing 225,000 laptops "to support telework and telehealth initiatives" as well as more than 19,000 iPad devices.[54] The Department also secured another $13 million for **"**additional software licenses and telework support."[55]

The Department now has the capability to allow for mass telework because it has purchased the equipment and built the infrastructure during the pandemic. That capacity will remain after the pandemic subsides.

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[51] Letter from Russell T. Vought, Acting Director of OMB, to Michael R. Pence Michael R. Pence, President of the U.S. Senate, at p. 90(March 17, 2020)https://www.politico.com/f/?id=00000170-ed0e-d588-ab77-ed5f83a10000&nname=playbook&nid=0000014f-1646-d88f-a1cf-5f46b7bd0000&nrid=0000015c-fa0c-d1ff-a77e-fe3e58cb0000&nlid=630318 (Last visited May 4, 2020).
[52] Dwight Weingarten, Veterans Affairs Department Triples Telework Total, MeriTalk, (April 28,2020) https://www.meritalk.com/articles/veterans-affairs-department-triples-telework-total/(lastvisited May 1, 2020).
[53] Phil Goldstein, VA Expands Telehealth Services with new Device Purchases, FedTech(April 28, 2020) (Site last visited onhttps://fedtechmagazine.com/article/2020/04/va-expands-telehealth-services-new-device-purchases)
[54] Phil Goldstein, VA Expands Telehealth Services with new Device Purchases, FedTech (April 28, 2020) (Site last visited on https://fedtechmagazine.com/article/2020/04/va-expands-telehealth-services-new-device-purchases).
[55] Letter from Russell T. Vought, Acting Director of OMB, to Michael R. Pence Michael R. Pence, President of the U.S. Senate, at p. 94(March 17, 2020) https://www.politico.com/f/?id=00000170-ed0e-d588-ab77-ed5f83a10000&nname=playbook&nid=0000014f-1646-d88f-a1cf-5f46b7bd0000&nrid=0000015c-fa0c-d1ff-a77e-fe3e58cb0000&nlid=630318 (Last visited May 4, 2020).

Eliminating or arbitrarily curtailing telework will cost taxpayers millions of dollars.[56] Meanwhile, the removal of arbitrary barriers to telework during the pandemic, in VBA, is resulting in increased performance.[57] The VAs proposals are not in line with the intent of the Statute, nor with the reality of the benefits of telework.

Article 21 – Hours of Work and Overtime

The Department's first proposal, presented on August 1, 2019, was presented as a last best and final offer, explaining only, "this represents our last best and final offer. [We] don't think an encyclopedia of best management practices is necessary; this article shouldn't be a timecard manual." The Department was unable (or unwilling) to answer what processes and procedures would be in place in the absence of the contract language. The Department returned on August 20, 2020, again, refusing to explain the nature of its changes, only to again say it was done bargaining the article, and that it made changes to "included significant amount of language, [and] included definitions."[58]

In Section 1, the Union proposes "that production standards and performance metrics will not be designed to prohibit employees from taking their allotted breaks." In this proposal, the Union does not prohibit the Department from altering breaks if necessary, and the Department has ignored and evaded information requests seeking objection to this provision. (Attachment 7). Because management can still direct work, and the proposal is only that employees are not kept from breaks by design, the proposal is eminently reasonable.

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[56] Laurel Farrer, Forbes, Trump Versus Telework Federal Policy Will Cost Governement Millions, (Janauary 23, 2020) (https://www.forbes.com/sites/laurelfarrer/2020/01/23/trump-versus-telework-federal-policy-retraction-will-cost-government-millions/#4ab11b77114e last visited June 1, 2020).
[57] Jacque Gilbert, GovExec, The Veterans Benefits Administration May Be Having Its Best Year Ever, (May 20, 2020) (https://www.fedhealthit.com/2020/05/government-executive-veterans-benefits-administration-may-be-having-its-best-year-ever/ last visited June 1, 2020).
[58] The Department had said it wanted definitions excised, and the Union offered a counter doingjust that. The Department walked away from that request for reasons that were never explained.

In Section 2(b)(5), the Union proposes Maxiflex be made available upon the sole election of Management. The Department has ignored and evaded information requests from the Union on this Article, including this topic. The absence of such flexibility makes the Department less agile, effective, and efficient.

In Section 2(c)(a), the Union proposes that supervisors provide an explanation for denying a Compressed Work Schedule ("CWS"), and provide a sanitized copy to the Union. Depriving employees of the rationale for a denial can only lead to lost morale and a relatively inefficient and ineffective workplace.

In the same section, the Union proposes that "employees already established in a CWS will not be required to file a new request" upon the execution of a new agreement. The Department's proposal is not responsive to this potential issue and ignores the difficult administrative burden and significant cost of reviewing and renewing all existing CWS agreements all at once, upon the institution of a new agreement.

The Union further provides that it would like postings, notice and schedules to be furnished, all reasonable and unrebutted. The Department's ability to schedule work, maintain flexibility as needed to meet exigencies remains undisturbed; the Department should simply communicate scheduling expectations and changes with the employees. As such, the Union's proposals should be instituted.

The Union proposes a provision, Section 4(g), for overtime under emergency circumstances, which is certainly of moment as COVID-19 burns through the VA. The Union proposes a process by which the Department should be allowed to require work hours otherwise prohibited by the MCBA, a provision the Department has not responded to. The Union properly

foresaw that such language would be needed, and the Department would benefit enormously by having the process established in clear, reasonable terms.

In Section 4(L), the Union proposes the extraordinarily flexible provision, "[i]n the event of an extension into an evening or night shift for more than three hours, reasonable time should be allowed for eating within the first three hours." In the absence of this provision, which does not require anything ("should" provide "reasonable time,") the Department's refusal, without justification, seems mean-spirited and likely to imperil the quality of care provided.

VA proposes removing Section 6, directing the employees to a chart for VHA employee Premium Pay Entitlements. VA has not answered questions as to why or if it is simply to make the MCBA have fewer pages (a VA goal expressed regularly). VA has an endemic problem of paying people improperly. There have been large, rolling lawsuits on this topic; VA has paid out tens of millions of dollars for failing to properly pay employees. To the Union's understanding, this very issue is the reason the Department is centralizing its HR operations.

Finally, the Department proposes striking the Union's proposal for Section 7, the section creating a uniformed process for paid leave/standby pay. In the absence of this section (given the agreement on Article XX, Local Negotiations), (Attachment 8) each facility would be bargaining its own process. This is resoundingly inefficient and ineffective and productive of needless bargaining and litigation.

The Department's proposals regarding alternative work schedules (AWS), in Article 21, impermissibly insists that the Union waive its statutory right to negotiate and right to require the Department to demonstrate to the Panel that an AWS is causing adverse agency impact. The Work Schedules Act provides that when an agency seeks to terminate a particular schedule, it must negotiate with the union, and that resulting impasses be presented to the FSIP for

resolution. *Dep't of State, Passport Services*, 60 F.L.R.A. 141 (2004). Here, the Department's submitted proposals allow it to terminate these schedules unilaterally: "The Department will allow employees to use AWS based on operational needs;" "Decisions on CWS will be made at management discretion;" and, "CWS may be suspended when employees are involved in travel or training, or other requirements which conflicts with their CWS schedule." Resultingly, the Department's proposals are contrary to the Work Schedules Act and requires a waiver of the Union's statutory rights.

Article 22 – Investigations

This proposal was never discussed by the parties. The Union's proposals provide a modest process and appropriate arrangements, which the Department has actively evaded. There have been hundreds of ULPs in recent years over improper investigations and failure to allow for proper representation as required by law. (Attachment 6). The Department routinely conducts investigations and refuses to notify employees if they are the subject or classifies the investigation as a fact-finding to excuse itself from the contract's requirements. Providing employees with information does not in any way interfere with an investigation. The Department's proposals fail to provide procedures and appropriate arrangements expected in a CBA, therefore, the proposals are incomplete.

Article 23 – Merit Promotions

The Union's proposals provide clear procedures and appropriate arrangements necessary to curb unfair non-selections. Before the Department withdrew from the Federal Employee Viewpoint Survey, just 30.56% of employees believed VA applied merit promotions fairly.[59]

[59] Veterans Affairs National Center for Organization Development, DEPARTMENT OF VETERANS AFFAIRS2017 FEDERAL EMPLOYEE VIEWPOINT SURVEY RESULTS, (2018))https://www.va.gov/NCOD/docs/FEVS_Data/2017FEVSReportVA.pdf(last visited May 8, 2020)

The Department is aware of how complex the process is, and how much guidance and clarity are necessary, writing in its Handbook:

> Close adherence to the applicable promotion plan's requirements and procedures, laws, rules, regulations, and policies will greatly reduce the necessity for priority consideration. The importance of a full understanding of, and adherence to, the promotion plan's requirements by all concerned cannot be overemphasized.[60]

Yet, the Department has, from the beginning, insisted upon doing away with the article. The Department explained their proposal as a "total strike of extremely long article," and "I find pretty much the entire article to be burdensome, inefficient, and confusing," preferring to "affirm principles that you would find in OPM or Agency directive."

When the Union asked for evidence of any burden, the VA answered, "No, we don't have any evidence, but generally speaking, language of this sort doesn't increase efficiency." The Union submitted an information request, asking, amongst other things, for any evidence of harm or burden instituted by the contract language. The Department did not furnish a single instance of harm, inefficiency, or obstacle.[61]

Notably, the Department does, in fact, need as clear a process as possible. Just reviewing cases represented by the national office, at least 70 employees have prevailed against the VA for discriminatory non-selection during the life of this contract. This does not include the many who have either brought complaints individually or through their local.

Further, the Department's proposal in Section 2.B.10. seeks to exclude Excepted Service employees from the parties bargaining; however, nothing in the law excludes employees in the Excepted Service from the bargaining unit. Therefore, the VA's exclusion of them in these

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[60] Department of Veterans Affairs, VA HANDBOOK 5005 PART III CHAPTER 3, at III-20 (APRIL 15,2002).

[61] The Union in fact submitted three information requests: August 21, 2019, (Attachment 9) August 26, 2019 (Attachment 10) and October 8, 2019 (Attachment 11).The Union did not receive substantive responses (but for merit promotion plans from 11 of 481 VA facilities).

procedures is untenable. The proposals would force the parties to bargain over their promotions in a separate negotiation which is also impermissible as an example of piecemeal bargaining.

The Department's 5-day minimum posting period is insufficient. It creates the likelihood that many well-qualified candidates on leave would not learn of many postings, reducing the Department's chances at a qualified pool of applicants.

Even the Department's current policy, VA HBK 5005, states that "facility-wide" should be the first area of consideration because "not only does this provide for possible advancement opportunities for all facility employees, it also precludes overlooking well-qualified employees whose previous experience or education is directly related to a vacancy even though their present job is in an unrelated field."[62]

The Department's proposal to make career ladder promotions at its discretion lacks transparency. Employees should know what would cause management not to approve a career-ladder promotion. That way, they can understand what is necessary to obtain a promotion already designated for their position. The Union's proposals are more appropriate.

Article 25 – Official Travel

The sole point of contention in Article 25 is the Union's Section 5(A). The proposal requires the Department to use its processes to cover expenses for local travel in integrated facilities. The Department does not want to provide official time or travel for union representatives that are required to go between facilities. However, this prevents employees from accessing their entitlement to representation. Therefore, the expense is necessary.

Agency business requires union representatives to work jointly in the "conduct of public business"[63] and cannot do so without travel orders or expenses. There have been recent Panel

[62] Department of Veterans Affairs, VA HANDBOOK 5005 PART III CHAPTER 3 (APRIL 15, 2002).
[63] 5 U.S.C. § 7101.

cases (17031, 18075 and 19001) where the Panel ordered management to pay per diem and travel. In one recent case, where the Panel ordered the Union bear its own expense, the Panel found the Union derelict in failing to provide any "argument or present evidence to demonstrate why they are unable to cover their own expenses, how the Union may be at a disadvantage if their expenses are not shared by the Agency."[64]

In this case, the Union's resources have been stretched by paying for rent, office equipment, and additional representation, since the Department unlawfully repudiated the MCBA and relevant local CBAs. Current circumstances show no immediate change; accordingly, such expenses will have to be maintained. As it stands, VA is literally budgeted to cover these Union expenses.

Further, when management must travel between facilities to fulfill their duties under the Federal Service Labor Management Relations Statute ("FSLMRS" or the "Statute"), they are paid to do so, and their travel is covered. At the table, the Department acknowledged that Union and management officials often drive from integrated facilities together in Department owned vehicles, and that, without this language, management would be forcing the Union out of the vehicle. The Department acknowledged this would create additional burdens and logistical hurdles for management. It also defies common sense.

Article 26 – Parking and Transportation

In Section 1(A), the Union proposes that the Department will not start charging employees for parking where parking is now free, unless required by law. [65] The Department

[64] EPA,2020 FSIP 009 (2020).

[65] The Panel has ordered status quo for free parking for the Department because "the benefits in morale and savings to employees which would result from a continuation of the parties' practice outweigh the loss of fees to the Employer" in the past. *Department of Veterans Affairs and AFGE*, 90 FSIP 032 (1990).

proposes that it may cease parking without bargaining at any time, constituting a statutory waiver of the right to bargain.

During bargaining on December 3, 2019, the Department admitted that it is suffering no harm from the current language, that it does not know of any plans to begin charging for parking anywhere, and that it could not say it would ratify a contract where you could lose your parking without bargaining for it.

As the Panel has mentioned, parking may hinge upon a "balance between the Agency's space-allocation needs and the Union's ability to enforce the rights of it and its bargaining-unit members;"[66] the Department admitted at the table to no such needs, and has not furnished any concerns regarding space (or expense) to date.

Each agency is required to provide its employees with "a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees" and an agency must comply with the regulations promulgated pursuant to the law. 29 U.S.C. § 654(a). However, the Department's proposals in Section 3 seek to excuse itself from the standard of safety required by the law and its regulations by stating that it will "make a reasonable effort to provide a safe and secure parking area." The proposal falls far short of the statutory requirement. Notably, the Department recently admitted that their facilities are not up to Federal Protective Service standards, and obtained by request "$175 million in additional FY 2020 funding for the Department of Veterans Affairs (VA), Veterans Health Administration, Medical Facilities account to upgrade of all VA medical centers to the current

[66] *SSA and AFGE*, 2019 FSIP 019 (2019).

Federal Protective Service standard, in response to coronavirus."[67] Meanwhile, the Union proposes maintaining a safe parking environment.

The Union seeks to maintain the process by which parking violations are reviewed and processed, in Section 4, as opposed to leaving that process undefined, ambiguous, and incomplete. The Union also proposes that parking violations should not normally be the basis of discipline, acknowledging that management has the right to discipline for parking violations when appropriate.

The Department's proposal for additional parking considerations seeks to bargain over parking for non-bargaining unit employees, veterans, visitors, etc. Such bargaining is inappropriate for the agreement.

As a result, the Department's proposals are incomplete.

Article 27 – Performance Appraisal

The Agency never presented its proposal, but in response to the Union's proposals, stated that they mirrored the VA Handbook, which "appears to be working well." In its own proposals, the Department impermissibly eliminates the procedures for the performance improvement period. 5 USC 4302(c)(5) requires agencies to assist employees in improving unacceptable performance as a part of its performance appraisal system. The Accountability Act does not excuse this requirement and only applies to procedures for taking an adverse action, not for any pre-adverse action requirements. (Attachment 12).[68] Without a legal determination that the Department is excused from the opportunity to improve period required by Chapter 43, the

[67] Letter from Russell T. Vought, Acting Director of OMB, to Michael R. Pence Michael R. Pence, President of the U.S. Senate, at p. 89 (March 17, 2020) https://www.politico.com/f/?id=00000170-ed0e-d588-ab77-ed5f83a10000&nname=playbook&nid=0000014f-1646-d88f-a1cf-5f46b7bd0000&nrid=0000015c-fa0c-d1ff-a77e-fe3e58cb0000&nlid=630318 (Last visited May 4, 2020).
[68] AFGE, NVAC Council 52 and DVA, FMCS Case No. 181117-0161 (April 26, 2018). The decision is currently pending before the FLRA on the Agency's Exceptions.

Department's proposals eliminating it are improper. Because OPM regulations do not specifically provide for the time period or the contents of the program, it must be decided by bargaining. The Department fails to provide any proposals, so they are incomplete.

The simple fact is that all efforts to improve performance in the VA are aimed at employee accountability and not improving outcomes. GAO found facility wide performance systems flaws which impacted veteran care, made a series of recommendations, for which "VA concurred" with "the report's recommendations," and then found the VA did not implement any of the 40 recommendations, finding "identified deficiencies may not be adequately resolved, and VHA's ability to hold officials accountable for taking the necessary actions may be diminished."[69] Employees are being stripped of their rights and jobs, and the VA is refusing to implement performance accountability measures for the systems it concedes it needs. The VA's proposals are not animated by a desire to improve veteran care, they are driven by anti-employee animus.

As for the Union's changes, they are all either to shorten the article, rearrange it to make the article clearer, maintain processes which would necessarily have to be bargained at a later date, or include elements regarding communication and notice from the Department of Defense's successful Defense Performance Management and Appraisal Program (DPMAP).[70] The changes are objectively an improvement, both in clarifying processes and importing successful communication measures from the largest federal department in the government, DoD, vetted and tested over 6 years. The Union explained these changes to some

[69] United States Government Accountability Office, VETERANS HEALTH ADMINISTRATION: PASTPERFORMANCE SYSTEM RECOMMENDATIONS HAVE NOT BEEN IMPLEMENTED, GAO-19-350 (April2019).
[70] Department of Defense, DOD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: PERFORMANCE MANAGEMENT, DoDI 1400.25-V430 (August 5, 2014).

degree and hoped to discuss it further before the Department removed itself, several times, from bargaining this article.

Article 29 - Safety, Health, and Environment

This article is a matter of life and death, but the Department's proposals demonstrate a carelessness concerning the safety of its employees. On more than a dozen occasions, the Department used Article 29 as an example of bloat and unnecessary contract language. VA dismissively cut the article to pieces, getting rid of guarantees of PPE and a safe workplace, all without discussing the proposal. The proposals also remove the Union's participation in establishing, operating, evaluating, and improving the safety and health program contrary to law and government wide regulation. *See* 29 U.S.C. §§ 657 and 659; 29 CFR §§1903 and 1952.

Each agency is required to provide its employees with "a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees" and an agency must comply with the regulations promulgated pursuant to the law. 29 U.S.C. § 654(a). However, the Department seeks to shift its obligation to employees and the Union. Also, the Department's incomplete proposal does not specify how often trainings will occur.

The current coronavirus pandemic provides a real-time illustration of how the Department's proposals would be an abject failure. Despite a robust article concerning health and safety, the Department has taken the position that it can suspend the agreement and take any action it deems fit. Failure to involve the Union and the lack of coherent directives from headquarters has caused at least 2,348 employees to test positive for COVID-19; 30 employee deaths; and, 2,889 employees to be quarantined. The VA failed to implement policies that reduced the number of employees present at a facility, such as maximizing telework or

approving weather and safety leave. Worse yet, the VA exacerbated the issue by having employees that tested positive, or were awaiting results, continue to come in to work as asymptomatic spreaders. There was no justification for these decisions, because the VA maintains that it did not, and still does not, have any staffing issues. The VA belatedly acknowledged PPE shortages, which would have been immediately known had the VA engaged with the Union. The Department's proposals are incomplete and insufficient.

The Union seeks to preserve Section 4, Standards, which, amongst other things, guarantees enough personal protective equipment (PPE). Right now, the Department is "facing serious shortages of protective gear for its medical workers treating patients infected by the new coronavirus."[71] This PPE shortage is killing employees.

Despite occasional, flatly dishonest denials,[72] the Department now admits it is not able to keep its employees safe. "They also acknowledged low inventory of personal protective equipment for staff."[73] The Department misled its staff and hid its shortfall from the public.[74]

According to an internal VHA memo, despite the need, "Current supply levels do not support providing a mask to all VHA staff," noting that "[p]lans should include scenarios that permit extended mask use, permit limited re-use, permit staff to bring in their own facemasks

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[71] Ben Kesling, Wall Street Journal, VETERANS AFFAIRS HOSPITALS FACING'SERIOUS'SHORTAGE OF PROTECTIVE GEAR, INTERNAL MEMOS SHOW, (April 8, 2020)(https://www.wsj.com/articles/veterans-affairs-hospitals-facing-serious-shortage-of-protective-gear-internal-memos-show-11586384293Last viewed May 13, 2020).

[72] The Secretary has disavowed these dishonest denials of shortfalls in interviews with the press in recentweeks.3Ben Kesling, The Wall Street Journal, VA DIDN'T PUBLICLY ACKNOWLEDGESHORTAGES, TOP OFFICIALS SAY (April 22, 2020) (https://www.wsj.com/articles/va-secretary-says-department-faces-strains-in-equipment-supply-chain-11587594135Last Viewed May 13, 2020).

[73] Department of Veterans Affairs Office of Inspector General, OIG INSPECTION OF VHA'S COVID-19SCREENING PROCESSES AND PANDEMIC READINESS, VA OIG20-02221-120, at p. 22 (March26, 2020)

[74] Ben Kesling, The Wall Street Journal, VA DIDN'T PUBLICLY ACKNOWLEDGE SHORTAGES,TOP OFFICIALS SAY (April 22, 2020) (https://www.wsj.com/articles/va-secretary-says-department-faces-strains-in-equipment-supply-chain-11587594135Last Viewed May 13, 2020).

and N95 respirators, and allow decontamination of used N95 respirators."[75] The memo provides that "[t]he re-use of decontaminated masks should only be used under crisis scenarios."[76] In fact, that has become the case across the country as VA supervisors have been revealed in "internal emails suggesting that some staff now conserve the same surgical mask for a week … that mask would have been single-use only a month ago."[77]

Again - the Department admits the shortfall: Richard Stone, Executive In Charge of the sprawling Veterans Health Administration "acknowledged that he's been forced to move to 'austerity levels'"[78] The same week the Department claimed it didn't have any equipment shortfall, FEMA claimed Secretary Robert Wilkie sought 500,000 masks.[79]

Veterans Service Organizations have lost trust in the VA over this: The VA "is just making stuff up," said Rick Weidman, Executive Director for Policy and Government Affairs at Vietnam Veterans of America. "They're denying, denying, denying, and just like it's an Agent Orange claim, deny, deny until we all die."[80]

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[75] Zachary Cohen, CNN, A MEMO SHOWS, DESPITE DENIALS, VETERANS' HOSPITALS HAVESTRUGGLED TO MEET PPE DEMANDS, (April 22, 2020)(https://www.cnn.com/2020/04/22/politics/veterans-affairs-memo-ppe-shortage-coronavirus/index.htmlLast visited May 12, 2020).

[76] *Id.*

[77] Quil Lawrence, NPR News, Internal Emails Show VA Hospitals Are Rationing Protective Gear, (April12, 2020) (https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/831732560/internal-emails-show-va-hospitals-are-rationing-protective-gearLast visited May 12, 2020)

[78] Lisa Rein, Washington Post, VA HEALTH CHIEF ACKNOWLEDGES A SHORTAGE OFPROTECTIVE GEAR FOR ITS HOSPITAL WORKERS, (April 25, 2020)(https://www.washingtonpost.com/politics/va-health-chief-acknowledges-a-shortage-of-protective-gear-for-its-hospital-workers/2020/04/24/4c1bcd5e-84bf-11ea-ae26-989cfce1c7c7_story.htmlLast visited May12, 2020).

[79] *Id.*

[80] Rebecca Kheel, The Hill, VA UNDER FIRE AS CORONAVIRUS INFECTIONS AMONGVETERANS, STAFF SURGE,(April 25, 2020) (https://thehill.com/policy/defense/494610-va-under-fire-as-coronavirus-infections-among-veterans-staff-surgeLast visited May 13, 2020).

Now, a nationwide investigation has been launched into the Department's failure to provide all manner of PPE to employees, including but not limited to respirators and face masks.[81]

In Section 1(A), the Union seeks to preserve the provision committing the parties to law, policy and principles of providing a safe workplace. As the Department has violated all three, the need for the language is clear. Section 5, which the Union wishes to preserve, lays out the processes for reporting and abating unsafe working conditions.

Section 2 mirrors *the Department's own directives* mandating Union involvement in Health and Safety partnership, including "At least one representative from each of the National Unions, to be designated by the Unions" in a latticework of committees and councils.[82] Put plainly, the Department sought to "enable those representatives to assist in the implementation and administration of the OSH [Occupational Safety and Health] Program and advocate for safety and health in the workplace."[83] Now, the Department is dismantling its own safety processes in a fog of anti-Union animus. The Department is currently ignoring the provisions it seeks to strike, and people are dying as a result.

In Section 1(B), the Union seeks to preserve the language assuring "[t]he Department will abate recognized hazards that are causing or are likely to cause death or serious harm and protect employees in the interim." Employees are getting sick and dying because of Department negligence at the time of writing; preserving this language is imperative. Section 1(C) and (D),

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[81] Quinn Owen, ABC News, FEDERAL INVESTIGATION LAUNCHED AS VETERANS AFFAIRSLIFTS RESTRICTIONS ON MASKS FOR HEALTH WORKERS, April 17, 2020(https://abcnews.go.com/Politics/federal-investigation-launched-veterans-affairs-lifts-restrictions-masks/story?id=70197736Last visited May 12, 2020).

[82] Department of Veterans Affairs Veterans Health Administration, COMPREHENSIVEOCCUPATIONAL SAFETY AND HEALTH PROGRAM, VHA DIRECTIVE 7701, at. P. 5, 9, 11, 12,13, 14, 16, 19(May 5, 2017).

[83] *Id.*

and Section 3, include the Union in the process of abatement, something that is clearly necessary since the Secretary just admitted to Wall Street Journal that the Department has been misleading staff and the public regarding safety violations and PPE shortages during the current pandemic.

The Union seeks to preserve Section 8, Training, which is almost verbatim Section 5(d) of Directive 7701. The Department has, at all levels, engaged in jointly sponsored Union Management Health and Safety Training, even during the past year. The Department holds this work in high esteem, and owes its best practices to this collaboration, which the Department proposal burns to cinders without justification, alternative or argument. And, again, the alternative to a safe workplace is an unsafe one.

The Union seeks to preserve Section 10, Work-Related Injuries and Illnesses. The Department wishes to not only hide the process for obtaining lawful protections and entitlements in the event of a workplace illness, but to take away the processes that guarantee them.

VA is fighting the FECA claims of front- line workers who have contracted COVID while administering triage care to infected veterans. Nurses and doctors without masks, treating sick veterans, are seeing their workplace claims denied. Several employees contracted COVID from giving imaging tests to an infected veteran in Seattle, when management knew the veteran had contracted COVID, but failed to tell the employees. The Department then attempted to block the employees' efforts to claim a workplace injury. This language is necessary to stop rolling bad acts and protect the basic rights of employees at the VA.

Even in the absence of malice, "inadequate oversight, policy misinterpretation, and insufficient staff resources" plagues the VA workers compensation process, costing about $206.3

million every five years; the VA agreed with these findings.[84] Even when at their best, the VA improperly processes over 14% of the claims when filed,[85] and that was with an informed and empowered bargaining unit. Removing the information will cause more error and cost more money in the end.

In Section 9, the Union seeks to protect employees from retaliation, which, according to GAO, exists not just anecdotally,[86] but is proven by the data. A GAO analysis during the life of the contract shows that whistleblowers are *between 800% and 1000% more likely to be disciplined* than non-whistleblowers.

The Department wants to delete the contractual provision regarding whistleblower protection because it does not want to see whistleblowers protected.

Provision after provision of this article lay out common sense procedures, most of which the Department has committed to of its own accord in its Directive. We have seen the Department cannot be trusted to act without enforceable commitments to employee safety. The preservation of this article is a matter of life and death.

Article 31 – Silent Monitoring

The VA proposal runs afoul of Constitutional mandates and patient rights. It gives VA the unfettered right to search employees through monitoring. The VA's proposals are also devoid of any transparency and fails to provide notice to employees concerning its use for performance and conduct measurements. Therefore, the proposals are incomplete.

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[84] Department of Veterans Affairs Office of Inspector General, VETERANS HEALTHADMINISTRATION AUDIT OF WORKERS' COMPENSATION CASE MANAGEMENT, 10-03850-298 at p. i (September 30, 2011)..
[85] *Id.* at 1.
[86] "GAO's interviews with six VA whistle-blowers who claim to have been retaliated against provided anecdotal evidence that retaliation may be occurring." Government Accountability Office, ACTIONS NEEDED TO ADDRESS EMPLOYEE MISCONDUCTPROCESS AND ENSURE ACCOUNTABILITY, GAO-18-137 (July 2018)

While the current language was intended for phone calls, the Department indicated its use by other means. On July 11 and 12, 2019, the Department talked at great length about how it was using silent monitoring to secretly record the delivery of healthcare to veterans. The Union submitted an information request regarding the Department's claims on July 12, 2019. Roughly three months later, on October 9, 2019, the Department simply claimed the information request, comprised of quotes from the VA bargaining team, was "a mischaracterization" and inflammatory.

In their own words: Department bargaining team member Storm Morgan said on July 11, 2019, that "as health care has evolved, [silent monitoring] has begun being used for this," and that it is reasonable because such recording practices "have become an industry standard that monitoring occur to ensure accuracy and service delivery as we expect. The technology is designed for silent monitoring; it is a way we can promote best practices." When the Union asked which locations were using silent monitoring to record the delivery of healthcare, Ms. Morgan said it was being employed "across the country." Department bargaining team member Dr. Angela Denietolis corroborated that silent monitoring was being used in VHA. In responding to the Union's inquiry of where it was occurring, after noticing the Union's incredulity, Dr. Denietolis said, "I won't say." The Union submitted an information request regarding these statements that day. (Attachment 13).

The parties discussed the article again on July 12, 2019. The Union asked the Department if it believed Article 31 gave the Department rights to record more than phone calls. Ms. Morgan said, "Yes." In an effort to determine what methods were used, the Union asked if the use of actors and actresses, for "secret shopper" programs, was also considered silent monitoring. But the Department responded that it was not.

Put plainly, VA admitted during a discussion spanning two days to engaging in a widespread, illegal and deeply unethical recording of veterans' healthcare, then denying it. But it is documented as occurring just as the Department

originally articulated.[87]

The Department wishes to delete this article, and Article 50, surveillance, to maintain this practice. However, the Union's language needs to be preserved to safeguard the employees and the rights of veterans.

Article 33 - Temporary, Part-Time, and Probationary Employees

This proposal was never discussed by the parties. The Department's proposal simply restates the Department's rights and implies that the Department may act with impunity. The Department's proposals also do not provide any procedures or appropriate arrangements as it relates to these employees; therefore, they are not complete.

VA's failure to hire sufficient staff has produced chastisement by GAO and VA IG. Every provision in Article 33 creates a dependable framework through which the Department can maintain maximum flexibility and meet its staffing needs. As the Union proposed, and the Department refused:

> To serve the mission, the Department and the Union are committed to providing for necessary staffing and flexibility necessary to continue providing the best care. All decisions regarding temporary, part time and probationary employees shall be made with the welfare of the veterans as the foremost consideration.

The Department does not offer a justification for refusing to have a series of processes predicated upon maintaining staffing for veteran care because there is no conceivable legitimate

[87] Department of Veterans Affairs Office of Inspector General, ALLEGED INAPPROPRIATESURVEILLANCE JAMES A. HALEY VETERANS' HOSPITAL TAMPA, FLORIDA, Report No. 12-03939-175 (April 11, 2013); Bryant Jordan, Military.Com, Lawmaker Slams VA for Big Brother Surveillance, (January 23, 2020) (https://www.military.com/daily-news/2013/04/12/lawmaker-slams-va-for-big-brother-surveillance.html last visited June 1, 2020).

purpose to do so. The Department proposes striking processes which would either constitute permissive waivers (which the Union refuses) or need to be bargained later, all for the clear purpose of being allowed to exercise capricious authority over the process 1) beyond the bounds of management rights, and 2) beyond the interest of veteran welfare. This is, plainly, unacceptable.

The Department's haphazard approach to using flexible staffing is not an invention of the Union- it is a real problem with real world harm. A recent OIG report cited a "lack of adequate staffing plans" and a failure to utilize "options including hiring additional contract or temporary staff, or curtailing services to ensure that staffing shortages did not compromise healthcare"[88]

What's more, in the age of COVID-19, the VHA anticipates seeing absenteeism reach 40% of the full staff (not an increase of 40%, but 40% of the total staff of the VA) owing to sick and dying employees, school closures and enforced quarantines for exposed households.[89] That same VHA report calls for urgent "Staffing/Recruitment,"[90] foresees a need to bear costs for "appointments of temporary personnel,"[91] and has obtained an OPM waiver to rehire retired VA health care workers in emergency conditions.[92] With the threat of nearly half the staff out (and a 49,000 employee shortfall as the baseline) it would be a catastrophic error to cut the legs out of the article that provides for the structures around temporary, part time, and probationary

[88] Department of Veterans Affairs, CRITICAL DEFICIENCIES AT THE WASHINGTON DC VAMEDICAL CENTER, Report901) #17-02644-130 (March 17, 2018).
[89] 2Department of Veterans Affairs, COVID-19 Response Plan Incident-specific Annex to the VHA High Consequence Infection (HCI) Base Plan, Version 1.6, at p.4 (March 23, 2020).
[90] *Id.* at 74.
[91] *Id*. at 75.
[92] Department of Veterans Affairs Office of Public and Intergovernmental Affairs, AFTER OPM ACTION, VA INVITES RETIRED MEDICAL PERSONNEL BACK TO WORK (March 24, 2020)(https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5404Last visited May 16, 2020)

employees who are needed to meet the needs of the mission. The Department's proposals are reckless and would harm veteran care.

Article 35 – Time and Leave

The Parties mostly reached agreement on this article, leaving bereavement leave and LWOP for union activities as the sole outstanding issues. By the Department's placement, it appears employees requesting leave for bereavement purposes may only use sick leave. Accordingly, without the Union's proposal of limited mandatory approval of other types of leave for the death of a specified family member, employees will face the cruelty of supervisors during a trying time in their life.

In the other issue, the Department fails to demonstrate why a leave category of LWOP would not be addressed in the leave article. Instead, the Department moves it to Article 48, which is the Official Time article. Further, the Department's proposal to track union representatives' use of leave without pay as though it is official time (Article 48, Section 6(F)) is contrary to law and therefore nonnegotiable. Leave without pay is an absence from duty in a non-pay status. 5 C.F.R. 630.1202. On the other hand, the Authority has stated that:

> [o]fficial time is a type of time, distinct from regular duty time, in which an employee's activities are not directed by the agency but for which an employee is nevertheless entitled to compensation from the agency. In this connection, the Authority has explained that both official time and regular duty time – unlike non-duty time such as periods of leave – "shall be considered hours of work."

U.S. DHS, U.S. Customs and Border Protection and NTEU, Chapter 160, 68 F.L.R.A. 846 (2015). LWOP is not considered hours of work; therefore, it is impermissible to designate and track LWOP as though it is official time. Further, the Department's limitation on the use of LWOP specifically for union officials (Article 48, Section 6) is contrary to 5 U.S.C. §7116(a)(2) because it treats the use of LWOP for employees that perform Union activities differently from

the use of LWOP for employees that do not. Because the Department's proposals discriminate against employees for protected activities, it should not be awarded.

With the Department's significant limitation on official time, the need for LWOP for union activities is more important. Otherwise, managers will arbitrarily deny LWOP simply to frustrate the union's activity, while it pretextually claims that funding is the issue.

Article 37 – Training and Career Development

This proposal was never discussed by the parties. As of 2019, the GAO chastised the Department for failing to meet its obligations to remedy "inadequate training for VA staff" from a previous intervention 5 years earlier, a "high risk" factor endangering veterans' health. The GAO found VA failed to: meet leadership commitments; develop capacity; follow its own action plan; or, demonstrate progress on training. Added to that, the Department has lost national grievances in failing to abide by this Article[93] and cannot be relied upon to respect employee rights in this regard without a contractual enforcement mechanism. The Department has proven it cannot be trusted to provide sufficient training to its employee's without contractual obligations. More freedom will mean "higher risk" to veteran care.[94] Resultingly, the Union's proposals are more reasonable.

Article 39 – Upward Mobility

This proposal was never discussed by the parties. The Equal Employment Opportunity Act of 1972 stipulates that each agency head shall provide: (1) For the establishment of training and education programs designed to provide a maximum opportunity for employees to advance

[93] AFGE and Department of Veterans Affairs, FMCS-17-0929-55253 (2017).
[94] United States Government Accountability Office, Sustained Leadership Needed to Address High-Risk Issues, GAO-19-571T at p. 16 (May 23, 2019).

so as to perform at their highest potential[.]" VA proposes to eliminate the program; therefore, it is inconsistent with law.

Further, there is overwhelming evidence that the Department cannot fairly administer an upward mobility program without contractual obligations. As stated above, GAO has been sounding the alarm that the Department's inability to maintain clear and consistent policies is a "high risk" to veteran care for the life of this contract, recently finding that "our work [at the GAO] continues to indicate VA is not yet able to show progress in this area."[95] The GAO observes "misinterpretation or lack of awareness of VHA policy," as well as "reliability issues, and inadequate guidance."[96] According to the joint Department and Union training program, "[t]he purpose of this article is to define management and union responsibilities related to upward mobility at the facility or installation;"[97] and the GAO has established a long record that Department will not clearly define and abide by its responsibilities on its own.

And again, the Union's proposal is in the Department's interest. As of 2017, the Department had found that Upward mobility programs specifically and empirically helped fill nursing shortages. In a case study of a turnaround project in Texas, the OIG reported on a recent local turnaround in staffing shortages, and concluded that "the recruitment of nursing staff" was made possible, in part, because "the Upward Mobility program has been strengthened and developed more fully."[98]

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[95] United States Government Accountability Office, Sustained Leadership Needed to Address High-Risk Issues, GAO-19-571T at p. 7 (May 23, 2019).
[96] *Id.* at 6-7.
[97] Department of Veterans Affairs Office of Labor Management Relations and AFGE NVAC, 2011VA/AFGE MASTER AGREEMENT TRAINING: CAREER DEVELOPMENT, slide 9 (2011).
[98] Department of Veterans Affairs Office of Inspector General, ALLEGED STAFFING, QUALITY OFCARE, AND ADMINISTRATIVE DEFICIENCIES AMARILLO VA HEALTH CARESYSTEMAMARILLO, TEXAS, Report No. 14-03822-289 at p. 23 (July 6, 2017).

The Union submits a clear, simple, fair process- essentially the same process the parties agreed to previously. It is certainly a better alternative to the chaotic vacuum proposed by the Department.

Article 40 - Within-Grade Increases and Periodic Step Increases

This proposal was never discussed by the parties. When the Department itself argues to Congress that "VHA faces increasing challenges in its ability to attract or retain quality health care professionals when the salary gap continues to increase,"[99] the VA's interests are not served by hollowing out the process employees rely upon for pay increases, and appeal and grievance rights. This proposal represents the Department kicking the ladder out from under an unsteady workforce, which is at risk of not satisfying its mission because it is critically understaffed. And the Department is deeply worried about the staffing shortfall during COVID-19; "'[i]t could end up killing people,' one VA official who works for a regional system said."[100]

When defending an almost 11% increase in the Department's budget, VA Secretary Wilkie said the Department had successfully fired 8,000 employees and was rebuilding itself as "a bottom up organization."[101] A "bottom up organization" with a vastly increased budget doesn't seek to decrease pay increase protections for its employees. This proposal is, simply put, contrary to the Department's stated goals.

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[99] STATEMENT OF DANIEL R. SITTERLY ASSISTANT SECRETARY HUMAN RESOURCES AND ADMINISTRATION OPERATIONS, SECURITY, AND PREPAREDNESS DEPARTMENT OFVETERANS AFFAIRS BEFORE THE UNITED STATES SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERALMANAGEMENT (July 23, 2019).

[100] Zachary Cohen, CNN, VETERANS AFFAIRS' STAFFING SHORTAGE RAISES CONCERNS AMIDCORONAVIRUS OUTBREAK, (March 14, 2020) (https://www.cnn.com/2020/03/14/politics/veterans-affairs-coronavirus-staffing-shortages/index.html Last visited May 16, 2020).

[101] Katie Malone, MeriTalk, HOUSE APPROPS MEMBERS RAISE CONCERNS ABOUT SIZE OF VABUDGET REQUEST, (March 4, 2020) (https://www.meritalk.com/articles/house-approps-members-raise-concerns-about-size-of-va-budget-request/Last visited May 16, 2020).

The Department has, by design, presented no argument that it is ill-served by the process in the MCBA. As such, the reasonable protections to pay increases should remain to counter employee's low pay, as identified by the Department.

The Department's proposal also misstates the regulation. The regulation does not prohibit grievances based on denials of WIGIs. Further, excluding WIGI denials from the grievance procedure will only serve to increase the cases at the MSPB where an appeal can be filed.

Article 43 – Grievances

The Union's proposals reflect the longstanding interest of the parties to resolve grievances at the lowest possible level before resort to arbitration. They encourage informal resolution before the filing of a grievance. The parties' multi-step grievance procedure, which have been in place since at least the 1997 MCBA, provides several attempts for resolution before engaging a third-party neutral. And the process works. There is anecdotal evidence that a vast majority of the grievances filed are resolved without proceeding to arbitration.

On the other hand, the Department's proposals demonstrate its clear goal of making the filing and processing of grievances difficult, instead of resolving disputes. As a result, the entirety of its proposals violates 5 U.S.C. 7121(b)(1)(A).

The Department's proposals in Sections 5(G), (H)(5), (I), and (J), grant it unilateral authority to determine the sufficiency of grievances and cease processing them. Section 7121(b)(1)(C)(iii) provides that either party may refer an unsettled grievance to arbitration. So, the Department's proposals to unilaterally prevent the Union from referring a grievance to arbitration are contrary to law. The Department's proposal in Section 6(H), grants it unilateral authority to consolidate grievances. Also, the Department's proposals seek to unfairly have the Union shoulder all the arbitration costs, even when the Department unilaterally drives up the cost

by requiring a court reporter, choosing a costly arbitrator, bifurcating an arbitration hearing, and determining the location of the hearing, all without the mutual consent of the Union. The one-sidedness of the Department's proposals shocks the conscience and eradicates the fairness requirement in the Statute. Also, the Department's proposals contain several pitfalls to unilaterally terminate the grievance. These are contrary to the statutory requirement of a simple grievance procedure.

Further, the Department's proposals seek waiver of the Union's right to present and process grievances by mirroring the Statute but omitting certain words. *FAA & Local R3-10, NAGE, SEIU, AFL-CIO*, 96 FSIP 146 (1997) (stating that the "conspicuously omitted reference to section 7106(b) could be construed as a waiver of the union's rights under that subsection."). Here, the Department's proposal in Section 1(A) begins to restate the grievance procedure requirements listed in 5 U.S.C. §7121(b) of fair, simple, and expeditious processing, but then omits the requirements of assuring the Union's right to present and process grievances. The Department's omission constitutes a waiver of the Union's statutory rights and as such, the proposal is permissive. The Department's proposals impermissibly allow it to unilaterally determine matters that are not reserved management rights and are therefore nonnegotiable.

Next, the Department seeks numerous grievance exclusions, when currently, the Parties enjoy a broad grievance procedure. This Panel has noted that grievance exclusions should be imposed only when one party is able to "establish convincingly that, in the particular setting, its position is the more reasonable one."[102]

Here, given the particular setting of the unique authorities for the VA, the Union's proposals are the more reasonable ones. First, the Department's claim that their proposals reduce

[102] *AFGE v. FLRA*, 712 F.2nd 640, 649 (D.C. Cir. 1983).

burdensome litigation will not be sustained by excluding grievances. Instead, the exclusions may increase litigation and certainly make it more complex. Employees must have an avenue to be heard; therefore, closing off one avenue simply increases the filings in other available avenues. Where employees do not feel heard in grievance proceedings, they can turn to administrative grievance proceedings, Equal Employment Opportunity Commission ("EEOC") complaints, Office of Special Counsel ("OSC") filings, Merit Systems Protection Board ("MSPB") filings, Office of Personnel Management ("OPM"), Department of Labor ("DOL"), the media, and courts. Additionally, the broad grievance procedure prevents multiple filings, because the election of remedies is between the statutory procedure or the negotiated procedure, not a statutory procedure and another statutory procedure.[103] For example, no statutory authority prohibits employees from filing: a Civilian Board of Contract Appeals ("CBCA") complaint and an OSC complaint for failing to reimburse an employee; an administrative grievance and an MSPB appeal for an employee's demotion; an EEO complaint and an unfair labor practice charge ("ULP") for a removal; or, an EEO complaint and an OPM appeal for failure to pay overtime. But, the filing in an available negotiated grievance procedure prohibits the other forums. *See* 5 USC §7121(d).

Further, an administrative grievance procedure is not an adequate alternative. Use of an agency grievance procedure placing decisional authority in an agency official does not qualify as an election of remedies. *US Forces Korea/Eighth US Army and NFFE Local 1363*, 17 FLRA 718, 727 (1985) (ALJ Decision). Therefore, a party could file an administrative grievance and a ULP.

[103] With the exception of 5 U.S.C. 7116(d), which prohibits the filing of a ULP when the same issue can be raised to the MSPB.

Without a broad grievance procedure, multiple avenues for litigation are available and may be forced, which is more burdensome and not efficient for either party. It creates a burden on the Department of Justice and the Courts because matters that are not subject to a statutory procedure, and without an administrative avenue for exhaustion, can proceed directly to court. Further, when an administrative avenue is available, grievance exclusions create a burden on other agencies. Each of the other agencies have constrained resources.[104]

It will be less efficient to divert cases that currently go to arbitration to the MSPB. MSPB's policy is generally to adjudicate all appeals within 120 days of receipt by the Regional Office. However, it is not a hard and fast rule and administrative judges can suspend a case, for up to 60 days, which does not count against their time. *See* 5 CFR § 1201.28. Resultingly, MSPB cases normally take between 120-220 days to complete. Notably, MSPB is allowed 180 days for Accountability Act cases. 38 USC 714(d). On the other hand, the parties' current process can be resolved within 3 months, but that time frame is rarely reached due to the Department's unavailability due either to complaints of a high case load or simple intentional delay.

The Department also fails to account for the fact that the MSPB does not have the bandwidth to support being a substitute for grievance arbitrations reserved for the largest federal sector contract in the country. MSPB issued 5,112 decisions in FY 2019 and established a growing backlog 2,529 cases in that time.[105] The increased workload for MSPB, by shifting grievance arbitrations, will delay adjudications and harm the VA and affected employees. Notably, in 2013, an increase in furlough filings with the MSPB caused years-long failures to

[104]Nicole Orgsky, Federal News Network, New Accountability Office Hasn't Made a Dent in Vas Culture of Retaliation, (July 24, 2019) (https://federalnewsnetwork.com/veterans-affairs/2019/07/new-accountability-office-hasnt-made-a-dent-in-vas-culture-of-retaliation-whistleblowers-say/ last visited June 1, 2020).
[105] U.S. Merit Systems Protection Board, MSPB FISCAL YEAR 2019 ANNUAL REPORT, at p. 1 (January 31,2020).

meet the 120 days guideline.[106] A common complaint with the delays in EEO cases is that unsuccessful agencies are left with higher backpay liability. This also leaves the employee in litigation limbo and delays compensation. Any return to work order will leave the Department to cover the additional costs of retraining the employee.

With the VA's increase in adverse actions, there is no doubt that the increased workload for the MSPB will be significant. According to OPM, Department terminations for performance and discipline are up about 73% since the beginning of the MCBA.[107]

Year	Terminations
2011	2094
2012	2036
2013	2264
2014	2590
2016	2666
2017	3097
2018	3633

[106]Merit Systems Protection Board, Judge's Handbook (October 2019) https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT last visited June 1, 2020).

[107] OPM, FEDSCOPE, (2020) (https://www.fedscope.opm.gov/ibmcognos/bi/v1/disp?b_action=powerPlayService&m_encoding=UTF-8&BZ=1AAABv6ePmJp42pVOQW6DQAz8jE2SQyOvFyI4cFjYReFQSAOXnqptsqmiUoiA~6sCVCXtrTOyZI~HI3tVua3q8mhyHQ9j17tcr5H5GpJvRCgCtVPCJyOjROosldpPDCU7Qci88aZbo47p~qDqfYycnbp2dO2InF265ux6DBL0qbVfDqVeHezp03644a1yN9vb8dq1wwoDjZzdltVv~4MNmeretWdkWmevyMQkAmR6QqafOdpMYZ6u0m1aFoVJ67wsCvVs4n8HeclLfCECQURCEAAQBARMMBHgHohMyFOaahqkSNvR~ZEAOUSWhOwE8jtytAjiLsAMZDnZHyBmzt3yzFzLCwu_AVRTb_0%3D last visited May 18, 2020).

Additional delays will be realized due to vacancies at the MSPB. MSPB had already been unable issue decisions in petitions for review (PFRs) and other cases at headquarters (HQ), such as enforcing MSBP decisions; the backlog of these cases at the time of this report's publication numbers 2,529. MSPB had also already been unable publish reports of merit systems studies or promulgate substantive regulations, such as in response to statutory changes by Congress.[108]

Also, the MSPB process is more formal and complex than the arbitration process. MSPB allows for discovery, which includes depositions, motions to compel, and, motions for sanctions, none of which are part of the arbitration process. Non-attorney union representatives can and frequently do appear as representatives at arbitrations; however, a shift to MSPB will require additional attorneys. Because it is a more intensive process, it increases attorney fee liability for the VA, as well as taking more time from VA attorneys.[109] Time which, based on their perpetual unavailability for expeditious hearings, they do not have.

Similarly, in another component of the MSPB, OSC, VA currently accounts for over half of its caseload, with 54 out of 104 disclosures this year, as of April 10, 2020. A shift from the grievance procedure will only increase OSC's burden.

Additionally, grievance exclusions are not reasonable in the setting of this agreement because history demonstrates that the Department often gets it wrong. Generally, the MSPB reverses 4% of the federal agency actions it has reviewed, but it has reversed the VA's actions 16% of the time.[110] The GAO has examined the Department's ability to properly

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[108] *Id.*

[109] Nicole Orgysko, Federal News Network, Employment Attorneys See More Proposed Firings Fewer Settlements Under VA Accountability Act, (February 5, 2018) https://federalnewsnetwork.com/workforce-rightsgovernance/2018/02/employment-attorneys-see-more-proposed-firings-fewer-settlements-under-va-accountability-act/ last visited June 1, 2020).

[110] Isaac Arnsdorf, Politico, Trump is Trying to Fix the VA But It Is Backfriing (March 12, 2018) https://www.politico.com/magazine/story/2018/03/12/trump-is-trying-to-fix-the-vabut-its-backfiring-217348 last visited June 1, 2020).

administer discipline and has found that it is incapable of doing so, listing its failure as one of the reasons the VA is a department at "high risk" of fraud, waste and abuse. The Union was unable to find another agency in the federal government that was so plainly criticized for mismanagement relating to its administration of adverse actions and nationwide policy as the Department, and no agency so singularly inappropriate – with such a poor particular setting– as the VA.

The GAO's criticism is stark. "We remain concerned about VHA's ability to oversee its programs, hold its workforce accountable,[111] and avoid ambiguous policies and inconsistent processes that jeopardize its ability to provide safe, high-quality care to veterans."[112] A series of GAO reports explain the concern.

A recent GAO study found the Department's handling of employee misconduct and discipline had deep, far reaching flaws. The GAO found that the Department didn't have accurate records (a point the Panel should be cognizant of when evaluating evidence furnished in these briefs), didn't abide by its own processes, let senior officials off easy, and went after whistleblowers.[113]

[111] Reference to GAO-18-137, documenting improper processing of misconduct.
[112] United States Government Accountability Office, ACTIONS NEEDED TOADDRESS EMPLOYEE MISCONDUCT PROCESS AND ENSURE ACCOUNTABILITY, GAO-18-137 (July 2018).
[113] The GAO had five findings: 1) the VA does not collect reliable information of misconduct and disciplinary actions, 2)the VA doesn't have the documentation to demonstrates it adheres top its own disciplinary policies, 3) senior officials are not investigated properly and held accountable, 4)whistleblower reports are not investigated, and 5) evidence may suggest retaliation against whistleblowers.

On other occasions, GAO has chastised the Department as plagued with "inconsistent policy implementation across its health care system,"[114] and said HR offices are without oversight, accountability or consistency.[115]

If the GAO tells us the Department isn't following its own rules regarding discipline and adverse actions, is unfair, is disciplining whistleblowers, and is letting managers off lightly, that is the gold standard argument against granting grievance exclusions.

The Department's Office of Inspector General concurs with GAO. One such OIG investigation finds that the VA Office of Human Resources and Administration is riddled with corrupt mismanagement and that senior officials in the VA Office of Human Resources and Administration "engaged in prohibited personnel (b)(6) practices, abused [their] authority, and … failed to follow policy."[116] The Department does not need less accountability, which is what grievance exclusions will provide.

Next, the Department has no basis for excluding improper warnings, counseling, and leave restriction letters. Where each of these issuances may be used for further discipline against employees, there must be an avenue for redress when any of these items are improperly issued.

While maintaining that it is improper for the Panel to consider the Executive Orders, the Union submits that the Department's proposal excluding "Matters related to the content and rating of a performance appraisal or proficiency, including performance-based actions" goes well

[114] United States Government Accountability Office, VETERANS HEALTH ADMINISTRATION: ADDITIONAL ACTIONS COULD FURTHER IMPROVE POLICY MANAGEMENT, GAO-17-748, at p. i (September 2017)
[115] United States Government Accountability Office, VETERANS HEALTH ADMINISTRATION:MANAGEMENT ATTENTION IS NEEDED TO ADDRESS SYSTEMIC, LONG-STANDINGHUMAN CAPITAL CHALLENGES, GAO-17-30, at p.59 (December 2016).
[116] Department of Veterans Affairs Office of Inspector General, ADMINISTRATIVEINVESTIGATION–PROHIBITED PERSONNEL PRACTICES, ABUSE OF AUTHORITY,MISUSE OF POSITION, AND FALSE STATEMENTS, OFFICE OF HUMAN RESOURCES ANDADMINISTRATION, VACO, Report No. 10-00853-257, (September 22, 2010)

beyond the EO's exclusion of actions involving "Ratings of record." Performance-based actions do not necessarily include ratings of record as failures in performance are noted and corrected *to prevent* an unsuccessful rating of record. The Panel should also review the VA's frequent misapplication of OPM's requirements necessitating review, such as grievances concerning matters periphery to ratings of record (Attachment 15)[117], including measurements of performance beyond the employee's control.

Non selections are a large issue at the VA, as discussed above. So, they also do not justify an exclusion.

Excluding decisions on official time leave management without any check on their decisions allowing it to interfere with the Union's ability to meet its representational requirements under the Statute. This exclusion leaves no administrative avenue for redress when VA impermissibly prevents the Union from fulfilling its statutory duties. Denials of official time are generally not permitted as ULPs[118], because they are violations of the CBA, not the Statute. The Union will be left to file lawsuits because there is no administrative avenue for review. Therefore, it unnecessarily increases the burden on DOJ attorneys and the courts and delays the Union in its ability to fulfill its representational function.

In sum, the Department's proposed exclusions have no justification to override the favor of a broad grievance procedure.

The Department's proposal in Section 5.C. and 6.C. interferes with the Union's right to designate their representative by requiring the employee, instead of the Union, to designate the Union representative. This violates 7121(b)(1)(C)(i) and (ii).

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[117]NG-11/5/18 (November 5, 2018); NG-5/2/19 (May 2, 2019); NG-02/3/2020 (February 3, 2020).

[118] FLRA, OGC ULP Case Law Outline, p. 74 (https://www.flra.gov/system/files/webfm/OGC/ULP%20Case%20Law%20Outline/ULP%20Case%20Law%20Outline%20PLmay21%202015%20sep22%202015.pdf).

The Department unfairly requires extreme levels of specificity for the Union's grievance but allows itself to be nonspecific in its own responses to the grievance. It can raise issues at any time, which also is inefficient. The parties should be fully aware of all issues that will be presented in arbitration. Raising new matters at arbitration forces the parties into additional days of hearing, which is costly and preventable by simply raising the issue in the grievance decision.

The Department's proposed time frame for filing grievances violates the fairness required in 7121(b)(1)(A). It fails to account for the occurrence of incidents unknown to an employee or the Union. When the Department takes years to perform its own investigations of incidents, seven days is an insufficient amount of time to discover most issues. Further, a lack of official time will exacerbate the union's inability to assist; therefore, a lower time frame is unreasonable given the circumstances. Then, the Department's gives itself a "goal" of 7 days, while giving the grievant strict timelines, rendering its proposal an unfair grievance procedure in violation of 7121(b)(1)(A). It does not allow a grievant to *generally* file its grievance within 7 days. Also, the Department only meets a 45-day decision period for national grievances 37% (20 times out of the last 53 national grievances) of the time. Therefore, there is no reason to believe it can meet a 7-day aspirational goal.

The Department's proposals require that all invocations be made at the national level but only provides seven days to do so. The proposal is wholly unreasonable. For a bargaining unit that consists of upwards of 260,000 employees across the United States, it would require more time to be a fair process. The logistical requirements are also exacerbated by the lack of official time.

The Departments proposals on counting the days is unworkable. It is unclear as to which teleworking employees are relevant. Is it those filing the grievance or receiving the grievance? Is

it the ones responding to the grievance or receiving the response? Again, bargaining unit employees are spread across the United States, clearly one office may be closed while others are not. The proposal only causes confusion concerning when the timeline would start, violating simplicity requirements of 7121(b)(1)(A).

The Form's requirements contradict earlier-proposed requirements. It requires employees to send the form to the Council President who then sends it to the Department. Somehow, the Council President is also responsible for knowing the employee's supervisor and delivering it to them too. Not only is that an internal management matter, it contradicts Section 6.C., which requires the employee to deliver it to the Council President, LMR, and the LR department. Therefore, the form makes the VA's proposals internally inconsistent.

Because large swaths of the Department's proposals are unlawful, the Panel should order the VA to withdraw them. The remainder of the Department's proposals are unreasonable, inconsistent and/or incomplete. Therefore, the Union's proposals are the more reasonable one.

Article 44 – Arbitration

The entirety of the Department proposals allows it to make unilateral decisions throughout the process and make processing a grievance to arbitration difficult in violation of 5 USC §7121(b)(1)(A). The Union, instead, proposes prevailing arbitration procedures, rather than the harness-work proposed by the Department.

The Department's proposal on location is nonsensical. It starts by requiring all hearings to be in Washington, D.C. despite potential disputes coming from 260,000 employees across the United States. Then, for some unknown reason, it allows the hearing site to be an employee's official duty station, but only if they are teleworking employees. As a result, only non-telework employees must come to Washington, D.C. for their dispute. This arbitrary proposal also violates

the Telework Enhancement Act as telework and non-telework employees are not to be treated differently. Also, while both parties must pay their own expenses, the Department gives itself the right to unilaterally change the location for its own fiduciary reasons.

The VA's proposal allows one party to choose multiple arbitrators throughout one grievance. While the Union agrees that if either party refuses to participate, the other party should be allowed to unilaterally select, unilateral selection when both parties are willing to participate violates the fairness requirement of 7121(b)(1)(A).

The Department's proposals require that the moving party, normally the Union, pay all arbitration expenses. This violates the fairness requirements of 7121(b)(1)(A). Union grievances are in direct response to a management action. Therefore, it is wholly unreasonable to have the party holding a potential bad actor accountable to have to pay for all arbitration expenses, including a mutual postponement. The fact that this requirement is without regard to success makes it unconscionable. It is ever more shocking to continue to require that the Union pay all expenses for matters beyond its control, like the VA's demand for bifurcation. Finally, it is illegal to have a third party, including the Union, pay the Department's attorney fees. *See* 31 USC 1301(d). There must be a specific authorization for payment to the government for employees' performance of their official duties.

The Department prohibits an arbitrator from considering any matter not raised in the grievance form and decisions but allows the Department to raise new matters, like arbitrability at any time. *See* Art. 43 5.L. This violates the fairness requirement in the Statute.

The Department's proposal making the burden of proof clear and convincing evidence is unreasonable. The Department is routinely found to have committed violations of law. Instead of ceasing the conduct, the Department chooses to increase the bar for finding its misconduct. This

proposal is offered in bad faith and should not be considered. Preponderance of the evidence is the standard of proof used routinely used in the arbitral context and the Department offers no basis for using a higher standard. Whining about losing too much is not a valid basis.

The Department's proposal in Section 5.E. misstates the law and will only result in confusion. Consistent with the Statute, arbitration decisions are required to be binding. 7121(b)(1)(C)(3).

The Department's timelines of 7 days, 21 days and 28 days are arbitrary and are untethered to reality.

The Department proposal determines the Union's email capabilities by requiring that it use email with delivery receipt when the Department is not providing that medium of communication for the Union. *See* Art. 51.

The Department's arbitrability proposals are nonsensical. They unnecessarily complicate the procedure and only serve to increase the costs that it proposes be borne by the Union. The Department's proposal demonstrates the unfairness of its proposed process by requiring the Union to meet a clear and convincing standard of proof but giving itself a substantial evidence standard for arbitrability issues. They further delay the arbitration process by requiring two hearings when one is sufficient, in violation of the expeditious process requirements of § 7121(b)(1)(B).

The Department's proposal requires the Union to provide the Department with information it is legally required to maintain.

The Department proposes that it may grant time to employees that are Union witnesses. It fails to specify what time will be granted. It also makes Union witnesses' time discretionary, while management witnesses will always get paid time. It further begs the question what occurs

when management officials are union witnesses? What about union officials that are management witnesses? Because of the lack of clarity and practicality, this proposal should be rejected.

The Department proposes making witnesses available that are "requested by the grievance merits arbitrator," but there is no basis for such a request in the other proposals. Section 6.G. requires each party to secure their own witnesses. There is no process that requires submission of witnesses to the arbitrator for the arbitrator to "request" them.

The Department's proposal confuses legal requirements by using 30 calendar days as the benchmark for compliance when the timelines to file exceptions or other statutory reviews are not strictly 30 calendar days. More than 30 days may be allowed for Exceptions to the Authority, due to holidays, the mailbox rule, and any closures. Extensions of the 30 days is allowed for petitions for review to the MSPB. For Petitions for Review to the Federal circuit, employees have 60 days to file.

In one part, the Department requires the hearing to be scheduled to be *held* within 90 days of invocation. In another, it requires that the hearing be *scheduled* within 90 days of invocation. A timeline to schedule the hearing is not the same as a timeline to hold the hearing. Therefore, it is internally inconsistent. Additionally, it is the Department that fails to be available for expeditious hearings, routinely claiming it is "unavailable" for hearings within a 3-month or even 6-month timeframe. The proposal improperly allows the Department to claim unavailability and unilaterally extinguish a grievance in violation of the spirit of s7121.

The Department makes contradicting proposals: 1) that the Union pay for the VA's transcript even when the Union does not request a transcription; and, 2) that the party requesting the transcriptionist pay for all parties' transcripts.

The Department's proposals are arbitrary, convoluted, and shockingly one-sided. Therefore, the Department should be ordered to withdraw its proposals.

The Union adds common sense procedures. In the familiar pattern of the VA's failing to provide information[119], the Union proposes a process for the Department's failure to provide information related to a grievance. Instead of "choosing lots," the parties flip a coin. Where the Department is responsible for fees in the statutory process (e.g. hearing location, etc.); the Union will not be responsible for fees simply because the grievance procedure is chosen. The Union does not wish to see the arbitrator shackled in their administration of due process because the Union is not afraid of seeing due process served. The Department intends to violate the contract and the law and wants to limit the remedies that will be applied to it when it does.

Every single proposal by the Department can be understood as a proposal to frustrate due process; no other explanation has been offered, and no other explanation would serve. As such, the Panel should impose the standard, orthodox and equitable proposals furnished by the Union.

Article 45 – Dues Withholding

"Consonant with its intent to allow the employee alone to control the manner of dues payment, Congress fashioned section 7115(a) so that an agency's obligation to honor dues check-off authorizations is mandatory and nondiscretionary. The section states that an "agency *shall* honor the assignment [of dues] and make an appropriate allotment pursuant to the assignment." *AFGE, AFL-CIO, Local 2612 v. FLRA*, 739 F.2d 87, 89 (2d Cir. 1984) (*quoting* 5 U.S.C. § 7115(a)); *see also* 5 C.F.R. § 550.311(a)(1) (emphasis in original). Further:

> The employer is viewed as a neutral and passive intermediary between the employee and the union. Although this regulation appears to apply primarily to disputes between the employee and the union concerning the amount of dues

[119] As the VA did for this very filing.

> owed, it also indicates that the employer is properly viewed as performing the passive and ministerial function of turning over employee's dues to the union. … [T]he withholding employer acts solely as the employee's agent.

AFGE Council 214 v. FLRA, 835 F.2d 1458, 1460, 1461 (D.C. Cir. 1987). "Congress intended the Statute, and not the collective bargaining agreement covering a unit, to govern the area of dues withholding." *US Dept. of the Treasury, US Mint & AFGE, Council 157,* 35 F.L.R.A. 1095, 1099 (1990).

Here, the Department's proposals are inconsistent with the law and require statutory waivers. The Department is no longer a neutral, but an obstacle to an employee's voluntary dues remittance. The Department proposes: that the employee must personally submit a written VA Dues Allotment Form (Section 1(4)); that the Department will begin deducting such dues as soon as operations allow (Section 4(A)); that the employee must reenroll every year with a re-enrollment period of 7 days (Section 4(B); Section 5(C)(b) and Section 6(A)); and, that the Department will stop dues upon an employee's revocation "as federal law and Department operations allow" (Section 5(A)). The Department's proposals allow it to ignore an employee's election or revocation for the vague standard of "as operations allow" and provides a barrier to an employee's election by forcing them to re-enroll during a short window of time each year.

Next, the Department's proposals impermissibly discriminate against employees that want to join the Union. The Department does not require that other voluntary allotments be renewed on an annual basis. Because the Department treats the dues allotment differently from other voluntary allotments, it violates 5 U.S.C. § 7116(a)(2).

The Department's proposal in Section 7(A) that it will immediately terminate dues withholding if exclusive recognition ceases is contrary to law. Exclusive recognition is not

required for dues withholding under the Statute. *See* 5 U.S.C. § 7115(c). Therefore, this proposal is outside the duty to bargain.

The Department's proposal in Section 8(H) that it will publish a monthly report of the total dues and dues contributed from each VA local is a violation of the Privacy Act. The Privacy Act prohibits agencies from disclosing information contained in records, without consent, unless permitted by one of the exceptions. 5 U.S.C. § 552a(b). There can be no dispute that a dues allotment form is a record protected by the Privacy Act. The Department's own proposed form includes a Privacy Act Statement, presumably because the information collected is subject to the Privacy Act. Because the Department proposes to publish information from a source protected by the Privacy Act without each employee's consent, it is not negotiable.

Further, the Department's proposal that it will unilaterally terminate an employee's allotment if they do not re-enroll during a 7-day period violates the Statute's exhaustive list of circumstances where an agency may unilaterally act. The Statute provides two instances where an agency shall terminate a dues allotment without the employee's request: when the agreement involved ceases to be applicable to the employee; or the employee is suspended or expelled from membership in the exclusive representative. *See* 5 U.S.C. 7115(b). The parties cannot propose a non-statutory termination for dues remission: "The initiation and termination of dues withholding is controlled by section 7115 of the Statute, not by a dues allotment agreement between the parties."[120] The Department's proposals run afoul of the law, its supporting regulations and a mountain of case law establishing that the parties must honor the election of an employee to join (or not join) the Union.

[120] *Fed. Emps. Metal Trades Council, AFL-CIO, Mare Island Naval Shipyard*, 47 FLRA 1289, 1292(1993).

While the Agency may establish procedures[121]and the parties can negotiate around the periphery of the process, both parties are prohibited from acting in any way to "interfere with, restrain or coerce employees in their exercise of rights" to have their desire to freely participate or abstain from dues checkoff.[122] The Union's proposals provide for that reasonable procedure, while the Department's interferes with employees' rights.

Next, the Department's proposed form (Section B) is also non-negotiable. The statements in the form seek to interfere with, restrain, or coerce employees concerning their decision to join the Union in violation of 5 U.S.C. §7116(a)(1). The Department's proposals that "I have been informed that if I choose not to join the AFGE, that I am not eligible to participate in Union elections, meetings, votes, or other Union activities" and "I have been informed that if I decide to join the Union, I will undertake a legal obligation to allow AFGE to deduct, for a minimum of twelve (12) months, Union dues from my paycheck, and the Union may increase my dues without my consent" are not only false, but involves the Department in the Union's affairs. The proposal "I have been informed that the AFGE may not discipline non-member VA employees" also involves the Department in the Union's affairs. The remainder of the Department's proposals have no apparent use for the Parties and, more importantly, do not concern conditions of employment. Therefore, the entirety of the form is outside the scope of bargaining and should be withdrawn.

Much of the Department's justification for the elimination of official time, office space, and equipment is that the Union's dues provide it with the funding to do so itself.[123] Yet, here,

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[121] "The head of each agency may establish procedures under which each employee of the agency is permitted to make allotments and assignments of amounts out of his pay for such purpose as the head of the agency considers appropriate." 5 U.S.C. § 5525.
[122] *AFGE and Dep't of Veterans Affairs*, 51 F.L.R.A. 1427, 1433 (1996)
[123] The Department illegally refused to respond to an information request seeking authority and justification for s its proposal. (Attachment 15).

the Department is championing illegally cutting off the Union's funding. If this attempt is credited, the basis for the Department's other proposals is null and void and provides more of a basis to keep the official time, space, and equipment intact, if not increased.

Article 46 - Local Supplement

This proposal was never discussed by the parties. The Department's proposals seek to prohibit local negotiations which is contrary to tentatively agreed upon language. The Department proposes "There will be no local supplemental agreements negotiated under this Agreement" and "Terms and conditions of future Memoranda of Understanding and Memoranda of Agreement will be determined exclusively at the national level. . ." However, on August 27, 2019, the Parties signed Article XX agreeing to local negotiations for any local changes to policy or procedures. (Attachment 8). The Department's proposals are directly contrary to the agreed upon provisions, therefore, the Panel should order the VA to withdraw it.

Similarly, the Department's proposals to terminate past practices, Memoranda of Understanding ("MOUs"), and Memoranda of Agreements ("MOAs") in Article 46 are contrary to Article XX. Any changes to local past practices, MOUs, and MOAs would constitute a change that requires bargaining at the local level. Extinguishing them in this proposal would directly negate the Parties' tentative agreement.

The Union's proposal provides the procedures for local parties to use in their negotiations and is consistent with the parties' August 27, 2019 agreement on Article XX.

Article 47 - Mid-Term Bargaining

This proposal was never discussed by the parties. The Department's proposals explicitly relegate the Union's bargaining rights to consultation rights, and almost mirror the requirements of 5 U.S.C. §7113: "The following procedures will apply when the Department creates a

statutory *duty to engage* the Union;" "The Union will have seven (7) calendar days to review the proposed changes and submit to the Department its written views and recommendations;" "If the Union does not provide any written views or recommendations after seven (7) calendar days the Department may implement the proposed change;" and, "[I]f the Department chooses not to adopt all Union recommendations, the Department will provide the Union with a written statement of the reasons for taking the final action." The Department's proposals fail to account for the Union's statutory right to bargain at midterm and therefore constitute a waiver of the Union's rights. They should be ordered to withdraw the proposals.

The Union, however, offers simple, common sense proposals for any future bargaining obligations: clarification on the scope of midterm bargaining (both management and Union initiated changes); a requirement for face-to-face bargaining (made more meaningful when virtual bargaining is in its nascency, and not yet a dependable and known quantity); and, reasonable and well-considered ground rules for bargaining (supplanting those that bore a grievance for the bargaining of this MLA). Given the Department's hundreds of grievances and ULPs for failing to properly bargain midterm changes (Attachment 16a, 16b, 16c), and given that, since 2011, the Department has proposed over 2, 277 mid-term changes (Attachment 17), a simple procedure is necessary for these occurrences. So, the Department's failure to provide any procedures to accomplish mid-term bargaining are incomplete and the Union's proposals should be selected.

Article 48 – Official Time

Prior to the Civil Service Reform Act, union representatives were required to use annual leave, leave without pay, or administrative leave at an agency's discretion to engage in representational activities. Meanwhile management was paid for their time and received

reimbursement for their travel whenever they engaged in activities under Title VII of the CSRA, also known as the Federal Service Labor-Management Relations Statute ("FSLMRS" or "the Statute"). The purpose of official time in the FSLMRS was to eliminate the imbalance between management's and the union's finances. There can be no dispute that the Department's $220.7 billion budget for FY 2020 cannot be matched by the Union's dues intake. Not even the annual revenue for the Council, AFGE, and AFL-CIO combined can come close. So, there should be no illusions of the financial imbalance that exists between the parties. The proper approach, given the intent of the Statute, would be to look to the amount of time VA management is using for activities related to the Statute, which is also official time[124].

As to the proposals, first, it should be called official time because that is the name under the Statute. *SSA, OHO and ALJIFPTE*, 20 FSIP 001 (2020) ("*SSA*"). "Taxpayer funded union time" is inaccurate as describing paid time for activities under the Statute because this same appellation applies to and is used by management officials.

Next, the Authority must rule on the pending negotiability appeals before the Panel can impose proposals related to the Executive Orders concerning Article 48. The FSIP can resolve negotiability questions only when the Federal Labor Relations Authority has ruled on substantively identical proposals. *Davis-Monthan Air Force Base*, 05 FSIP 104 (FSIP 2005); *Carswell Air Force Base*, 31 F.L.R.A. 620 (1988). Here, the Parties have a pending negotiability appeal on the Article. The Department's refusal to bargain Article 48 was based on the May 25, 2018 Executive Order 13837. The Authority has not yet determined that the terms of

[124] In the Legislative history of the adopted form of the Statute, Representative Clay stated that labor organizations "should be allowed official time to carry out their statutory representational activities *just as Management uses official time* to carry out its responsibilities." 124 Cong.Rec. 29,188 (1978) (remarks of Rep. Clay).

the Executive Order are enforceable. In the absence of such a determination, FSIP has no authority to interpret the bargaining obligation.

Should the Panel improperly determine the proposals, despite a pending negotiability appeal, it should award an amount of time greater than 1 hour per bargaining unit employee, because it is reasonable, necessary, and in the public interest. *See SSA.*

The Department has, within the past few weeks, mislead its staff and the public about its capacity to handle a pandemic.[125] The Department makes up 31% of reports of waste, fraud and abuse, despite being only 18% of the Federal workforce.[126] It is classified as a "high risk" agency, threatening veteran care, according to the GAO.[127] The Department cannot be trusted to implement national policy, according to the GAO.[128] The Department also does not have a dependable, capable or stable human resources arm, according to the GAO.

Given this backdrop, it is the employees and their Union that sounded the alarm on nearly every crisis.[129] It was management who created the crises, hid them, and retaliated against the

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[125] Ben Kesling, The Wall Street Journal, VA DIDN'T PUBLICLY ACKNOWLEDGE SHORTAGES,TOP OFFICIALS SAY (April 22, 2020) (https://www.wsj.com/articles/va-secretary-says-department-faces-strains-in-equipment-supply-chain-11587594135Last Viewed May 13, 2020).

[126] "VA employees accounted for about 31 percent of cases submitted from across the federal government to the Office of Special Counsel (OSC)—an independent agency where federal employees can report evidence of waste, fraud, abuse, and retaliation." United States Government Accountability Office, ACTIONS NEEDED TO ADDRESS EMPLOYEE MISCONDUCT PROCESS AND ENSUREACCOUNTABILITY, GAO-18-137 (July 2018).

[127] United States Government Accountability Office, SUBSTANTIAL EFFORTS NEEDED TO ACHIEVEGREATER PROGRESS ON HIGH-RISK AREAS, GAO-19-157SP, at p. 58 (March 2019).

[128] United States Government Accountability Office, SUSTAINED LEADERSHIP NEEDED TOADDRESS HIGH-RISK ISSUES, GAO-19-571T at p. 6 (May 22, 2019); United States Government Accountability Office, ACTIONS NEEDED TO ADDRESS EMPLOYEE MISCONDUCT PROCESSAND ENSURE ACCOUNTABILITY, GAO-18-137 at p. I (July 2018)

[129] OAWP received 1,965 disclosures during its first year, 922 of which were found to be 38 U.S.C.323(g)(3) whistleblower disclosures. Department of Veterans Affairs, Office of Accountability and Whistleblower Protection Congressionally Mandated Report for October 1, 2017 through September 30,2018, at p. 7 (2018). On top of these many cases, there is already "significant backlog." Tamara Bonzanto, "Protecting Whistleblowers And Promoting Accountability: Is VA Doing Its Job?," The House subcommittee On Oversight And Investigations Committee On Veterans' Affairs U.S. House Of Representatives, HR116 (OCTOBER 29, 2019).

whistleblowers. Whistleblowers are between 800% and 1,000% more likely to be disciplined than non-whistleblowers.[130] The OIG says the VA's whistleblower protection office is failing, [131] the legislature has no confidence in the office,[132] and the only voice standing for employees and their complaints in defense of the public interest is the Union.[133] An empowered and sufficiently resourced partner in labor relations is clearly in the public interest.

This argument for the public interest is not the same argument that could be made for any other agency; the Department of Veterans affairs is unique in its mismanagement, and singularly situated in that the necessary corrective for its particular brand of mismanagement is, clearly and demonstrably, the Union. Therefore, greater than 1 hour per bargaining unit employee is in the public interest.

Greater than 1 hour is also reasonable and necessary. This Union represents the biggest bargaining unit in the government; it is the biggest consolidated bargaining unit in the country. It represents employees at the Veterans Health Administration, the Veterans Benefits

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[130] 9Government Accountability Office, ACTIONS NEEDED TO ADDRESS EMPLOYEE MISCONDUCTPROCESS AND ENSURE ACCOUNTABILITY, GAO-18-137 (July 2018).

[131] 10[The VA Office of Accountability and Whistleblower Protection] OAWP acted in ways that were inconsistent with its statutory authority while it simultaneously floundered in its mission to protect whistleblowers. Even recognizing that organizing the operations of any new office is challenging, OAWP leaders made avoidable mistakes early in its development that created an office culture that was sometimes alienating to the very individuals it was meant to protect. Those leadership failures distracted the OAWP from its core mission and likely diminished the desired confidence of whistleblowers and other potential complainants in the operations of the office. Department of Veterans Affairs Office of Inspector General, FAILURES IMPLEMENTING ASPECTSOF THE VA ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT OF 2017, VA OIG18-04968-249, at p. Page ii (October 24, 2019).

[132] Leo Shane III, Military Times, LAWMAKERS HAVE 'NO CONFIDENCE' IN VA'SWHISTLEBLOWER PROTECTION OFFICE (October 30, 2019)(https://www.militarytimes.com/news/pentagon-congress/2019/10/30/lawmakers-have-no-confidence-in-vas-whistleblower-protection-office/ Last visited May20, 2020).

[133] VETERANS HEALTH ADMINISTRATION: MANAGEMENT ATTENTION IS NEEDED TOADDRESS SYSTEMIC, LONG-STANDING HUMAN CAPITAL CHALLENGES, GAO-17-30, at p.59(December 2016).See United States Government Accountability Office, SUSTAINED LEADERSHIPNEEDED TOADDRESS HIGH-RISK ISSUES, GAO-19-571T at p. 60 (May 22, 2019).

Administration, the National Cemetery Administration, the Canteen Services, the Office of Information and Technology, VA Central Office, Procurement and Acquisition, Vet Center, Consolidated Mail Order Pharmacies, and Community Based Outpatient Clinics. It represents doctors, plumbers, radiation therapists, canteen retail employees, lawyers, social workers, nurses, and grounds keepers. Virtually every series that OPM has devised is found in the employees included in the consolidated VA-AFGE bargaining units as certified by the Federal Labor Relations Authority (FLRA). This bargaining unit is comprised of over 260,000 employees located in every state, and includes Washington, D.C. and Puerto Rico. This is an enormous and complex unit.

The service is complex, and management is, according to the GAO, "ambiguous" and "inconsistent" in its policy application.[134] Management also engages in widespread retaliation. There have been hundreds of ULPs for retaliation in recent years, and as many for anti-Union animus. This Agency has violated its obligations so many times during these expedited negotiations, it has already been found to have violated the Statute and contract during the bargaining of ground rules as well as in unilaterally repudiating the official time article, in addition to myriad pending grievances. The Union overwhelmingly prevails in its grievances. When asked, VA is unable to produce accurate records of its grievances.[135]

Engaging in labor relations with this Department is demanding work. The fact that the Union generates and wins so much litigation is evidence of enforcement of basic workplace rights. These grievances are not picayune matters, they are pay, safety, and basic fairness. We

[134] United States Government Accountability Office, SUBSTANTIAL EFFORTS NEEDED TOACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS, GAO-19-157SP, at p. 58 (March 2019).
[135] United States Government Accountability Office, ACTIONS NEEDED TO ADDRESS EMPLOYEEMISCONDUCT PROCESS AND ENSURE ACCOUNTABILITY, GAO-18-137 (July 2018)

have real work to do protecting employees, the mission, and the integrity of the service. Cutting the MCBA is not the answer, and neither is cutting official time. The answer to too much crime is not to rescind laws, and it is not to take police off the street.

The question of how much time is reasonable in such a dispute relies, to a significant extent, on how much time has been used to do the work in the past and how much time is used by management. However, any claim by the Department on the number of hours used by the Union, is categorically false, because the Department fails in its record-keeping. The Department, which has a legal obligation to track official time usage (including management's use), as well as the numbers and types of personnel actions it has taken, does not keep accurate records, and has no idea how much time has been used and for what purpose.[136]

The Union, for its part, has never been accused of wasting representational time, miscounting representational time, or failing to make full use of its representational time. The tangible work that the Union has performed throughout the life of the agreement is shown by the following: roughly 275 national grievances,[137] thousands of unlisted local grievances; hundreds of thousands of informal meetings; thousands of committee meetings; thousands of approved trainings; thousands of ULPs; thousands of bargaining sessions; numerous safety inspections; and, time on Capitol Hill to lobby for the welfare and integrity of the mission of the agency. Moreover, the Department has not argued, and in fact *cannot argue*, that the time spent representing the employees is improper, wasteful, or misused.

The best argument the Department has offered to reduce the amount of official time is that it is an expense. However, the Department spends money in a profligate manner. The

[136] United States Government Accountability Office, VA COULD BETTER TRACK THE AMOUNT OF OFFICIAL TIME USED BY EMPLOYEES,GAO-17-105 at. p.i, 18 (January 2017).
[137] AFGE NVAC Website, National Grievance and Settlements, http://afgenvac.org/?page_id=565Lastvisited May 21, 2020).

Department's budget for FY 2020 was $220.7 billion and it is requesting a record-breaking $243.3 billion for FY 2021.[138] So, the funds the Union receives from dues is miniscule in comparison. The Department calculates that official time costs it $49,000,000 for all the unions at the VA.[139] That is .02% of the Department's budget last year. However, official time has allowed the Unions to keep the VA accountable, better than it does itself,[140] which is in the public interest. The Department has spent more to get much less. During the life of this contract, an employee whistleblower sounded the alarm on $6 billion in gross waste,[141] and since the Department declared impasse, another employee blew the whistle on some $224 million in "gross waste," by the Department, and was commended by the OSC for speaking out against an agency known for retaliation.[142] Compared to its actual waste, $49 million in spending with valid returns is a worthwhile expenditure.

We know that the Department's claimed costs of official time are incorrect and more likely inflated for the purpose of arguing its decrease to the Panel. We know that the Department is not a good steward of its resources otherwise. We know that there is no evidence that the Union uses its official time improperly. It is well-established that the Department does not abide

[138] Department of Veterans Affairs Office of Public and Intergovernmental Affairs, VA STRENGTHENS CARE AND BENEFITS FOR VETERANS WITH $243 BILLION BUDGET REQUEST FOR FISCAL YEAR 2021, (February 10, 2020) (https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5393 last visited June 1, 2020).
[139] Eric Katz, GoveExec, VA Issues Eviction Notices to Unions at Its Facilities, (November, 2019) (https://www.govexec.com/workforce/2019/11/va-issues-eviction-notices-unions-its-facilities/161338/ last visited June 1, 2020).

[140] Eric Katz, VA's Whistleblower Protection Office Again Faces Allegations of Retaliation, Intimidation, (March 5, 2020) (https://www.govexec.com/management/2020/03/vas-whistleblower-protection-office-again-faces-allegations-retaliation-intimidation/163538/ last visited June 1, 2020).
[141] Letter from Jan R. Frye, Department of Acquisition & Logistics Department of Veterans Affairs to Secretary Robert A. McDonald, (March 19, 2015)(https://www.govexec.com/media/gbc/docs/pdfs_edit/051415e1.pdfLast Visited May 22, 2020).
[142] Letter from Henry J. Kerner, Office of Special Counsel to President Donald J. Trump, OSC File No. DI-17-3205, (December 12, 2019).

by contract or law and does not wish to be held to account. For that reason, every minute of time provided for in the Union's proposal is reasonable, necessary and in the public interest.

The Department's proposals on a bank and cap are unreasonable and would prohibit the Union from performing its representational responsibilities. The VA fails to account for the law unique to the VA, the Accountability Act, which requires: 1) increased representation due to the shift to higher level discipline; 2) provision of that increased representation in a truncated amount of time; and, 3) increased representation due to increases in the number of disciplinary actions by the VA.[143] The VA's proposals fail to account for the increased mid-term changes it proposes, nationally and locally, which, under the VA's proposals, would decrease the time the Union has to represent employees in VA's increased disciplinary actions. It fails to account for its unique limitation on settlements, leading more cases of every type to go forward.[144] All of which require more representation time by the Union than ever before.

Notably, the EEOC's recent proposed amendment that official time for union representatives must come from the labor statute[145] also presents a unique circumstance, not contemplated by Executive Order 13837. Currently, such official time is a separate grant under the EEOC's regulations. *See* 29 CFR 1614.605. Without that grant, the Union's need for official time is increased, especially given the unique to VA extraordinarily high number of EEO complaints against the Department and exceeding complaints of retaliation.

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[143] Isaac Arnsdorf, Politico Magazine, Trump Is Trying to Fix the VA But It is Backfiring, (March 12, 2018) (https://www.politico.com/magazine/story/2018/03/12/trump-is-trying-to-fix-the-vabut-its-backfiring-217348 last visited June 1, 2020).

[144] Department of Veterans Affairs, Settlements From October 1, 2017-December 31st, 2017, (2020) https://www.va.gov/settlements/fy-18-va-settlements.pdf last visited June 1, 2020).

[145] Official Time in Federal Sector Cases Before the Commission, 84 FR 67683 (Proposed December 11, 2019) (to be codified at 29 CFR 1614).

Further, § 7131(a) and (c) time should not be linked in any manner to § 7131(d) time. There is no statutory requirement that (a) and (c) time be governed by "reasonable, necessary, and in the public interest." By its specific reference in the Statute, they already are acknowledged as such and distinguishable from § 7131(d) time. They should not be capped or counted against any other time whatsoever. And the Union should not be coerced or discouraged in its lawful use of statutory time by diminishing the time for its other statutory duties of representing employees. Therefore depleting (d) time due to the use of (a) and (c) time is contrary to the clear intent of the Statute that each and all be available.

Capping an individual's time is also deleterious. These arbitrary individual caps prohibit union officials from obtaining the experience needed to be an effective representative. Union representatives may raise the same issues repeatedly, or refuse to settle matters, because they are unaware of the previous outcomes. That is not efficient for either party.

Further, the Department's proposal to unilaterally suspend an employee's use of official time for the duration of the agreement (Article 48, Section 5(H)) violates 5 U.S.C. 7131(a) and (c) and the Union's statutory right to designate its representatives. The Department's proposal to track union representatives' use of leave without pay as though it is official time (Article 48, Section 6(F)) is contrary to law and therefore nonnegotiable. *See* Article 35 *supra*.

Next, the Department's proposals prohibiting official time for lobbying activities (Article 48, Section 5(D)) waives the Union's right to bargain for such grants of time. Agencies must bargain over union proposals to grant official time for representatives to lobby Congress concerning either desired or pending legislation addressing conditions of employment. *AFGE Local 12*, 61 FLRA 209 (2005). Therefore, it is a mandatory subject. Also, the Department's proposal to deny official time even if it is reasonable, necessary, and in the public interest

because it exceeds an arbitrary cap (Article 48, Section 5(I)) is contrary to law. The Statute provides that official time *shall* be granted in any amount the parties agree is reasonable, necessary, and in the public interest. *See* 5 U.S.C. §7131(d).

The Union's proposals present a more complete and reasonable process.

Article 49 – Rights and Responsibilities

The Union's proposal maintains simple, clear rights for representatives in the workplace. The Department wants to remove those guarantees and has done so to continue denying representation, retaliating, and illegally withholding information.

The Department proposes to delete the provision in Section 2(B) that it "supports and will follow statutory and contractual prohibitions against restraint, coercion, discrimination, or interference with any Union representative or employee in the exercise of their rights." Whistleblowers are between 800% and 1,000% more likely to be disciplined than non-whistleblowers,[146] and there have been more than 100 ULPs alleging retaliation against the Department (Attachment 18). The Department has a retaliation problem that is not served by removing the recitation of protections from the agreement.

The Union wishes to maintain Section 3, securing the process for providing representation at formal discussions and investigations. The Union has successfully grieved violations of this at the national level,[147] and over hundreds ULPs have been filed wherein the Department failed to provide proper representation. (Attachment 6). Again, the Department's failures are not served by removing the information from the agreement.

[146] Government Accountability Office, ACTIONS NEEDED TO ADDRESS EMPLOYEE MISCONDUCTPROCESS AND ENSURE ACCOUNTABILITY, GAO-18-137 (July 2018).
[147] *AFGE and Department of Veterans Affairs*, 114 LRP 6478, 2013(2013).

The Union's proposal in Section 4(D) that the Department provide information "within a reasonable time in the context of the purpose for which the information is needed" is a necessity. The Department illegally refused to respond to dozens of valid information requests relating to these negotiations, including its failure to provide information for this submission, all of which prejudiced the Union. There are hundreds of ULPs against the Department for illegally disregarding information requests, many of which were found to violate the Act. (Attachment 20). The proposed standard of time is inherently reasonable, and the necessity of the provision has been established through years of violations and enforcement actions.

The Union seeks to maintain a provision in Section 5 wherein the Department agrees to disseminate the list to all bargaining unit employees and new hires. The Union has agreed to strike the time limit from the existing provision, in order to anticipate any potential burden, but the Department has not given any explanation. The simple explanation is that the Department does not want employees to know who their representatives are, or to be able to obtain representation. This explanation is supported by the mountain of ULPs and grievances the Department has earned by denying employees representation. The Department has not suffered under this provision, nor has it claimed to.

The Union has proposed the Department must give notice, and bargain where required, before "verbal or written surveys" regarding "conditions of employment." The Department has often been guilty of bypass, with countless bypass ULPs, many of which were found to be a violation by the Authority.

The Department impermissibly submits proposals to waive the Union's right to participate in formal discussions and Weingarten meetings. The right to be represented at formal discussion and Weingarten meetings include the right to actively participate in the meetings.

See DOJ, Federal Bureau of Prisons, FCI Englewood, Littleton, Colo., 70 F.L.R.A. 372 (2018) (Preventing a union representative from actively participating in an investigative meeting is an unfair labor practice); *NASA Office of the Inspector General*, 50 F.L.R.A. 601 (1995). The Department's proposals eliminate language concerning the Union's participation in such meetings. In as much as the Department strikes this language to prohibit the Union's participation, it seeks a waiver and is nonnegotiable

Article 50 – Surveillance

This proposal was never discussed by the parties. In this case, however, there is no doubt as to why the Department wants to gut the article. As discussed in Article 31, the Department admitted on July 12, 2019 to engaging in a widespread, illegal, and deeply unethical recording of veterans' healthcare. In this article, as in Article 31, the Department demands waiver for future expansions for each new election or change to reasons or methods for all surveillance.

The OIG has reprimanded the Department - at the Chief Negotiator's own facility - for improper surveillance of employees and veterans.[148] After being caught secretly recording veterans receiving medical care, the OIG recommended, and the Department "concurred," that the VA must establish "policy [that] addresses the clinical uses of covert and overt video surveillance cameras in a clinical setting, including public notification, informed consent, approval, and responsibility for use of these devices, as well as detail procedures for staff." Yet, here, the Department proposes fewer restrictions for more potential abuse.[149]

[148] Department of Veterans Affairs Office of Inspector General, ALLEGED INAPPROPRIATESURVEILLANCE JAMES A. HALEY VETERANS' HOSPITAL TAMPA, FLORIDA, Report No. 12-03939-175 (April 11, 2013).
[149] *Id.* at p.ii

The Union does not waive its right to bargain, and the Department has not indicated any interest that is in anyway harmed by either having procedures in place regarding its surveillance of employees or its obligation to bargain changes.

The Department's proposal fails to provide any procedures or appropriate arrangements related to its exercise of a management right. Where the Department has engaged in inappropriate surveillance, [150] transparency is necessary. Therefore, the Union's proposals are more complete.

Article 51 – Use of Official Facilities

At dispute in this article is whether the Union may be allotted space in the VA's facilities. Even if the Executive Order is considered, the VA does not violate it by allowing free use of government space because free or discounted use is "generally available for non-agency business by employees when acting on behalf of non-Federal organizations."

The Union notes that NOVA, SEA and VAEA are currently permitted free use of government property and equipment by employees when acting on behalf of these non-Federal organizations, and that the EO would call for the same for AFGE.

The Nurses Organization of the Veterans Administration (NOVA) is granted free facility space by the Department of Veterans Affairs.[151] They are in VHA facilities all over the country. In fact, one chapter (Chapter 161) lists its business address on its tax form, in which it makes plain it pays no rent or lease, as the VHA facility at the Veterans Health Care System of

[150] Department of Veterans Affairs Office of Inspector General, ALLEGED INAPPROPRIATESURVEILLANCE JAMES A. HALEY VETERANS' HOSPITAL TAMPA, FLORIDA, Report No. 12-03939-175 (April 11, 2013); Bryant Jordan, Military.Com, Lawmaker Slams VA for Big Brother Surveillance, (January 23, 2020) (https://www.military.com/daily-news/2013/04/12/lawmaker-slams-va-for-big-brother-surveillance.html last visited June 1, 2020).
[151] Nurses Organization of Veterans Affair, FORM 990 RETURN OF ORGANIZATION EXEMPT FROMINCOME TAX (December 2016), at. p. 1

the Ozarks.[152] Every single chapter listed on the NOVA website is a VHA owned facility,[153] and they do not pay for rent or a lease.

The Senior Executive Association (SEA), operating out of the Department's space for free, scrupulously declares $147,871 worth of "services or facilities furnished by a governmental unit without charge."[154]

The Veterans Affairs Employee Association has cost free space at the VA; their headquarters is in the Department of Veterans Affairs Headquarters.[155] Their taxes are clear - they did not pay for rent or lease in 2017 or 2018.[156]

As the Panel has opined in the past, "it is appropriate to treat the Union similar to other entities that may utilize Agency space and Agency resources."[157]

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[152] Nurses Organization of Veterans Affair, Chapter 161, FORM 990 RETURN OF ORGANIZATIONEXEMPT FROM INCOME TAX (December 2011),(https://apps.irs.gov/app/eos/displayAll.do?dispatchMethod=displayAllInfo&Id=1816458&ein=453714483&country=US&deductibility=all&dispatchMethod=searchAll&isDescending=false&city=&ein1=&postDateFrom=&exemptTypeCode=al&submitName=Search&sortColumn=orgName&totalResults=1&names=Nurses+Organization+of+Veterans+Affairs+&resultsPerPage=25&indexOfFirstRow=0&postDateTo=&state=All+States last visited May 25, 2020).

[153] Nurses Organization of the Veterans Administration, CHAPTERS, (2020) (https://www.vanurse.org/page/Chapters last visited May 25, 2020).

[154] The Senior Executive Association FORM 990 RETURN OF ORGANIZATION EXEMPT FROMINCOME TAX (December 2018) at. p. 11(https://projects.propublica.org/nonprofits/display_990/581683046/10_2019_prefixes_57-59%2F581683046_201810_990EZ_2019103116804226 last visited May 25, 2020)/

[155] About Us, Veterans Affairs Employee Association (2020)(https://www.govemployee.com/va/insurance.htmlLast Visited May 25, 2020).

[156] Veterans Affairs Employee Association FORM 990 RETURN OFORGANIZATION EXEMPT FROM INCOMETAX (December 2017) at. p. 11(https://apps.irs.gov/pub/epostcard/cor/822835402_201712_990EZ_2018050115279164.pdflast visited on May 25, 2020).

[157] *U.S. Dep't of Health and Human Services, Indian Health Service, Claremore Indian Hospital, Claremore, Oklahoma and AFGE, Local 3601*, 19 FSIP 031, at p.11 (November 18, 2019).

Further, the Union's use is nominal. As with official time, the Department's claims concerning the Union's use of office space and equipment are unreliable, at best. [158] However, GAO has evaluated the Union's footprint:

> At the smallest facility, about 0.65 percent of the overall space was designated for representational activities (240 out of 37,068 square feet). At the largest facility, about 0.11 percent of the overall space was designated for representational activities (2,777 out of 2,546,036 square feet).[159]

This space is reasonable, and the cost (whose estimation the GAO says the Department has bungled) is modest compared to savings inured from activist whistleblowers calling attention to the waste, fraud and abuse of the Department. Even today, the Department's collection of $1.4 million[160] falls far short of the $7 million it spends annually to maintain vacant buildings[161] and that expenditure continues to increase[162]. For the Department to consider such a small percentage of space used by the Union a waste, what does it label the use of sprawling Executive suites by facility Directors? The Department's priorities are clearly confused.

Further, Union offices are generally not in patient-care areas; they are in administrative areas. So, any claim that the space will be used for clinical care is insincere. Veterans and the Department's mission benefit from having the Union working on site, working with phones, mail systems, computers and email, in a properly equipped modern workplace. The Department proposes to strip all those tools from the employees' Union representatives, predicated upon only

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[158] "VA does not collect or track data from individual facilities on the amount of space designated for representational activities" and "VA does not track information on the costs associated with unions' use of designated space across the agency, and we were not able to obtain consistent information on costs from selected facilities." United States Government Accountability Office, VA COULD BETTER TRACK THE AMOUNT OF OFFICIAL TIME USED BY EMPLOYEES, GAO-17-105 at. p. 16 (January 2017).

[159] *Id.* at. p.16 (January 2017)

[160] https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5459

[161] https://www.blogs.va.gov/VAntage/38922/va-announces-plan-dispose-reuse-vacant-buildings-24-months/

[162] https://www.gao.gov/assets/700/696377.pdf

the EOs, based upon a misapplication of the EO's scope, and with no other underlying interest. As such, whereas the Department provides similar entities with space and resources, and whereas the Union's footprint is modest, and whereas the Department has sought to avoid bargaining this subject, the Panel should impose the Union's proposed language.

Article 56 – Title 38 Hybrids

The Department provides no basis for striking this article which addresses a frequently misunderstood type of employee. "The CBA is meant to act not only [as] a legal instrument explaining employee rights and employer obligations, but act as a source of information for employees." *U.S. Dep't of Agriculture, OGC and AFGE Local 1106*, 20 FSIP 12, p. 21 (May 21, 2020). Here, Title 38 Hybrid employees are treated like Title 38 employees for appointment and advancement purposes, but like Title 5 for all other conditions of employment. Because of that, employees and supervisors are frequently confused by the difference. VA policy is contained in thousands of directives, handbooks, and manuals, which is impossible for an employee to navigate to find answers. Eliminating the article only discourages employees and supervisors from learning more about these employees. Therefore, it should be maintained.

Article 63 – Research Grants

This proposal was never discussed by the parties. The Department has no basis for striking this article and eliminating procedures and appropriate arrangements related to these grants. Therefore, it is not complete, and the Union's proposals are more reasonable.

Article 66 – Technology for Administering, Tracking, and Measuring VBA Work

This proposal was never discussed by the parties. Bearing in mind that in Article 21, the Department refused to agree to a provision establishing "that production standards and performance metrics will not be designed to prohibit employees from taking their allotted

breaks," the Department certainly should not be trusted to walk away from all the processes and procedures governing the technology for administering, tracking, and measuring employee's work in the Veterans Benefits Administration ("VBA").

The Union's proposals are comprised almost exclusively of procedures and appropriate arrangements relating to the Department's use of methods of technology. Of course, these proposals were not contested as outside the scope of bargaining (they were never raised). These provisions are all mandatory subjects not just for term negotiations and will all be mandatory subjects of bargaining if an employee is monitored, or if work is tracked or measured. That means these proposals will be back in play, at the table, as written, with no arguments against them having been raised, the day the contract goes into effect.

The Union's Section 1 establishes the scope, which includes a new proposal that the Department is not allowed to unilaterally expand the scope of surveillance against employees for disciplinary purposes. Similar processes are laid out in Section 5. Whereas the Department asks the Union to waive its bargaining rights regarding silent monitoring and surveillance, and admits (allegedly, in error) to widespread secret surveillance, the Union's proposal should prevail.

Sections 2 and 3 propose how monitoring will be established, and how results can be appealed. It is a necessary procedure and its absence would buy the Department an identical bargaining obligation in the immediate future.

Section 4 establishes an annual review to improve processes and efficacy, invites employees to give input to improve the process, and includes a local bargaining provision which has been subsumed into Article XX: Local Negotiations. (Attachment 8).

The Department's strike eliminates procedures and appropriate arrangements for the Department's changes to technology as they affect how work is measured for performance. Therefore, they are incomplete.

Article 67 – Skills Certification

The Department failed to submit Article 67 for bargaining. Under the Parties' Ground Rules, the Department was required to submit its complete set of proposals for bargaining within 30 days of the signing of the Ground Rules. The Department submitted its proposals on May 2, 2019 and it did not include Article 67. Further, the Parties agreed that "No additional articles may be proposed after this date." (Ground Rules, VII. Proposals D, Attachment D.) Notably, the Department did not submit a proposal concerning Article 67. Because the Parties have explicitly agreed that additional articles may not be submitted after May 2, 2019, the Panel must release jurisdiction on this article.

Substantively, the Union proposed only modest revisions to the article. The Department chose not to submit an initial proposal, submitted no counters, and yet submitted the article to impasse. Where the Department has offered no alternative language, and where this brief is the first forum in which the article has been discussed, despite the Union's unopposed initial proposal, the Panel should (and seemingly, must) impose the Union's proposed language.

Duration of Agreement

The Panel has consistently noted that the parties must negotiate in an effective and efficient manner and the best way to accomplish this is by saving agencies and taxpayer dollars consumed during protracted and perpetual negotiations.[163]

[163] *U.S. Department of Agriculture, OGC and AFGE, Local 1106,* 2020 FSIP 012, at p. 5 (May 21, 2020). *See, e.g., HHS and AFGE,* Local 3601, 2019 FSIP 031 (2019).

First, the Department has claimed, to the Panel, that its bargaining obligations do not tax its capacity at all. The Panel will recall that, on April 1, 2020, the Department claimed that, even under the shadow of COVID-19, their labor management representatives were "free to devote their complete attention to getting this [negotiation] done." Taking the Department at their word, the business of the VA runs along unencumbered by the labor relations work done in negotiations. In fact, the Department has at least 19[164] full time labor management professionals on staff in its DC office.

The time it takes to bargain successor agreements cannot constitute an unreasonable burden. In fact, the Statute specifically imagines a contract lasting three years. Extending the MCBA so far beyond that is contrary to the express vision of the statute.[165] The Legislative history makes clear the Union should have access to the bargaining process to propose changes, and sealing the terms in a 10 (or even 7 year) tomb is contrary to Congress' intent.[166] Congress is clear, when reflecting on the three-year contract bar doctrine, that three years is sufficient to "lend[] stability to collective bargaining relationships" while allowing "reasonable intervals" to revisit arrangements as needed.[167]

Further, the Department's justification that a 10-year agreement prevents perpetual bargaining is disingenuous speculation. First, there is no history between the parties to bargain

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[164] Department of Veterans Affairs, Office of Labor Management relations, Staff Directory (2020) (https://www.va.gov/LMR/Staff_Directory.asp Last visited May 27, 2020).
[165] 5 U.S.C. § 7111(f)(2).
[166] "The parties have a mutual duty to bargain not only with respect to those changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement." S. REP. 95-969, 104, 1978 U.S.C.C.A.N. 2723, 2826(1978).
[167] Subcommittee on Postal Personnel And Modernization Of The Committee On Post Office And Civil Service House Of Representatives Ninety-Sixth Congress First Session, LEGISLATIVE HISTORY OFTHE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, at 692 (November 19, 1979)(https://www.flra.gov/system/files/webfm/Authority/Archival%20Decisions%20&%20Leg%20Hist/LEG%20HIST%20OF%20THE%20FSLMRS%20Nov%2019%201979.pdf last visited May 27, 2020).)

every 3 years. The 1997 agreement was in place until the Department reopened the agreement in 2003. The 2011 agreement was in place until the Department reopened the agreement in 2017. Both parties had the ability to reopen the agreement at the three-year mark but chose not to do so. Clearly, there is no history that demonstrates the Union seeks to bargain every 3 years. In fact, reality is far from it. The Union did not reopen the 1997 MCBA or the 2011 MCBA.

Next, the Department's other proposals literally place the parties in perpetual bargaining, by failing to cover topics, and reopening conditions of employment in past practices, MOUs and local agreements that are not in conflict with the agreement. The Department manifests what it claims it wants to prevent.

Speaking candidly, this Department seeks to weaken employees' rights. Secretary Wilkie announced, when initial proposals were exchanged, his desire to remove the "many benefits that favor" the employees.[168] The Department has made illegal proposals to gut the contract and illegally evaded its bargaining obligation. The Department's intent has been evinced in its: illegal repudiations of parts of the MCBA; unlawful proposals; walking away from the table twice; refusal to bargain official time; proposals on space and grievance exclusions; and, dropping dozens of articles which were never discussed, presented for the first time by email four minutes before scheduled bargaining concluded. The 10-year duration is an effort to put a padlock on a hollowed-out contract and to keep future generations of management from repairing the damage.

Additionally, the Panel has been disapproving of old agreements,[169] which it would be creating here if the Department's proposal is accepted. A ten-year duration keeps the conditions

[168] Department of Veterans Affairs Office of Public Relations, VA Proposes New AFGE Collective Bargaining Agreement, (May 2, 2019) (https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=5246last visited May 27, 2020)
[169] *Federal Bureau of Prisons, FCC Beaumont, Texas*, 13 FSIP 52 (FSIP 2013),

of employment the same through three different Presidential terms. Such a long duration prevents the parties from addressing changes for a long period of time. Even today, the modern workforce changes rapidly. Within the span of *three* years, the VA saw the Accountability Act, three Executive Orders, and a pandemic. Changes to telework, video conferencing platforms, internet bandwidth, and even the potential unavailability of the U.S. Postal Service are imminent. The negotiations required to address such changes would be prevented with such a long duration, while a three-year duration allows either party to determine if they need earlier changes. The Union's proposals are more in line with the intent of the Statute and more reasonable.

Article XX Staffing

This proposal was never discussed by the parties, but its need is manifest as the Department is in a staffing crisis, as discussed in the Articles above.

VHA has a critical staffing problem: "the difficulties in recruiting and retaining skilled health care providers and human resource staff at VHA's medical centers make it difficult to meet the health care needs of more than 9 million veterans. As a result, VHA's 168 medical centers have large staffing shortages, including physicians, registered nurses, physician assistants, psychologists, [and] physical therapists."[170]

The need to address staffing of the nation's largest hospital system is paramount. Staffing issues do not just affect the delivery of patient care, it adds pressure to the current employees that must take on the responsibilities of the vacant positions. This results in overworked and unhappy employees, which impacts patients. [171]

[170] United States Government Accountability Office, HIGH RISK SERIES: SUBSTANTIAL EFFORTS NEEDEDTO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS, GAO-19-157SP, at p.59, (March 2019).
[171] https://www.cnn.com/2020/03/14/politics/veterans-affairs-coronavirus-staffing-shortages/index.html

The Union's proposals seek a sensible, clear path to staffing the Department in a simple, negotiable way. To be clear - the Department submitted this undiscussed proposal to impasse as *de facto* fully negotiable. But the Department did not choose to take it up or explain why its well-documented and costly failures to staff the service should not be repaired. The employees of the VA, hundreds of thousands strong, are working on the frontlines, now in pandemic conditions, with insufficient manpower. The Department's proposals refuse to address the deficiency and fix the problem.

The Panel finds itself in a unique position. Veterans Service Organizations ("VSOs") have been unable to make the Department address its staffing shortfall. Congress has been unable to make the Department address its staffing shortfall. The Department's own Inspector General has been unable to make the Department address its staffing shortfall. The Panel, however, has the power to fix this and make a real positive change not just for the beleaguered employees but for the veterans. Take this opportunity and implement a *de facto* negotiable Staffing program in the VA.

Article XX Phased Retirement

This proposal was never discussed by the parties. The Department does not have a basis for striking this article and the need for keeping experienced employees available for the workforce is evident.

In the next five years, roughly 30% of the employees at the Department of Veteran Affairs will be eligible to retire.[172] The Department has had, *for years*, a 49,000 staffing shortfall;

[172] Office of Personnel Management, FEDERAL WORKFORCE DATA: FEDSCOPE, (https://www.fedscope.opm.gov/last visited on May 28, 2020); Eric Katz, GOVEXEC, The Federal Agencies Where the Most Employees Are Eligible to Retire(JUNE 18, 2018)(https://www.govexec.com/pay-benefits/2018/06/federal-agencies-where-most-employees-are-eligible-retire/149091/last visited on May 28, 2020)..

according to the Department's OIG, the shortfall is critical.[173] The Department needs to maintain its workforce: 96% of VHA facilities severe occupational shortages and 39% of the facilities reporting at least 20 severe occupational staffing shortages, shifting staff to allow coverage is a necessary daily occurrence.[174] Meanwhile, the Department is trying to hold onto retirees and repeatedly rehires retirees.[175]

The Department acknowledged the use and effectiveness of phased retirement when it began accepting applications for phased retirees in 2016 or 2017.[176] However, the Department has been unsuccessful in its rollout and, as of a few months ago only had 33 phased retirements.[177] Notably, it has not implemented the program for bargaining unit employees.

The Union's proposals seek to properly implement this program for the benefit of employees, the Department, and veterans. The Department needs a process, a partner, and contract language establishing a phased retirement program. The Department's failure to establish a process and partner with the employees themselves is hurting veterans. A robust Phased Retirement program would keep valuable employees in the workforce to transfer their knowledge, which is a goal shared by the VA.

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[173] 2The Department of Veterans Affairs Office of Healthcare Inspections, OIG DETERMINATION OFVHA'S OCCUPATIONAL STAFFING SHORTAGES, FY 2019, at p. i, REPORT #19-00346-241SEPTEMBER 30, 2019.

[174] *Id.*

[175] https://www.blogs.va.gov/VAntage/43453/veterans-benefits-administration-rehiring-federal-retirees/ https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5404

[176] https://federalnewsnetwork.com/retirement/2018/09/phased-retirement-participation-still-vastly-short-of-initial-predictions/

[177] Nicole Ogrysko, Federal News Network, Phased Retirement Participation Picks Up Steam, But Still Hasn't Come Close to Initial Expectations, (February 6, 2020) (https://federalnewsnetwork.com/retirement/2020/02/phased-retirement-participation-picks-up-steam-but-still-hasnt-come-close-to-initial-expectations/last visited May 28, 2020).

Conclusion

The Union's proposals are more complete, more reasonable, and cover adequate subjects to prevent perpetual bargaining. Importantly, the Union's proposals are also legal.

Respectfully submitted,
For the Union,

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