NATIONAL GRIEVANCE
NG-6/3/2020

Date: June 3, 2020

To: Michael Picerno
Acting Executive Director
Office of Labor-Management Relations
U.S. Department of Veterans Affairs
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Sent via electronic mail only

From: Shalonda Miller, Staff Counsel, National Veterans Affairs Council (#53) ("NVAC"), American Federation of Government Employees, AFL-CIO ("AFGE")

RE: **National Grievance against the Department of Veterans Affairs for failure to comply with various COVID-19 notice and reporting requirements.**

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) ("MCBA"), the American Federation of Government Employees/National Veterans Affairs Council ("the Union") is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Department of Veterans Affairs, Veterans Health Administration (the "Department" or "VA") for its failure to: 1) follow the U.S. Department of Labor's ("DOL") requirements concerning the notification and abatement of unhealthy working conditions that exit at a given facility; 2) assist bargaining unit employees ("BUE") with the completion of forms and documents necessary for submission to the Office of Workers' Compensation Programs ("OWCP"); 3) notify BUE of their rights under the Federal Employees' Compensation Act ("FECA"); and, 4) maintain a log of COVID-19 related workplace injuries or infections as required by the Office of Safety and Health Administration ("OSHA"). On a continuing and ongoing basis, the Department has failed to remedy these violations, and as such, continues to violate the MCBA and federal law.

Specifically, the Department violated Articles 2, 29, 41, and 47 of the MCBA, 5 U.S.C. §7116(a), Department of Labor ("DOL") regulations, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 651 *et seq*., 5 U.S.C. § 7901, 29 C.F.R. § 1904, and any and all other relevant articles, laws, regulations, and past practices not herein specified. The Union specifically reserves the right to supplement this grievance based upon the discovery of new evidence or information of which it is not presently aware, or otherwise, as necessary.

STATEMENT OF THE CASE

Background

Workplace safety and health regulations require federal agencies to take steps to protect workers exposed to infectious diseases like the 2019 Novel Coronavirus ("COVID-19"). The Occupational Safety and Health Act ("OSH") of 1970, codified at 29 U.S.C. § 651 *et seq.*, requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 USC § 654(a)(1).

The Center for Disease Control and Prevention ("CDC") guidelines also require the Department keep its workplace in a safe and healthy condition and to prevent employees from contracting COVID-19. The guidelines call for the development of policies and procedures that allow for the prompt identification of infected employees. Here, since the onset of the COVID-19 pandemic, the Department has not only failed to notify bargaining unit employees ("BUEs") of their potential exposure to virus, but also failed to warn employees when their colleagues were either experiencing symptoms or tested positive for COVID-19. In addition, the parties' MCBA requires that the Department notify AFGE local unions' Health and Safety Representatives of any situations that place bargaining unit employees in dangerous or unhealthful conditions. MCBA Article 29, Section 7E. Yet, the Department has failed to do so.

Relatedly, the Department has an obligation under 5 U.S.C. § 7901 to establish a health service program to promote and maintain the physical and mental fitness of employees, which includes access to medical testing. Nevertheless, BUE continue to report to the Union that COVID-19 testing is unavailable to them; despite VA leadership's claim to Congress just last week that any employee who wants a test can receive one.[1] The following are examples of VA locations where employee testing is not occurring: Salem, Richmond, Hampton, Houston, Tuscaloosa, Palo Alto, Portland, Las Vegas, Bay Pines, Fort Wayne, Huntington and Fort Harrison.

In May, the DOL expanded its procedures to address COVID-19 worker's compensation claims. Under the new procedures, the Office of Workers' Compensation Programs ("OWCP") triggered the application of Chapter 2-0805-6 of the FECA Procedure Manual, which now provides that exposure to COVID-19 was proximately caused by what the agency considers "high-risk employment." According to OWCP, examples of high-risk employment include first responders, front-line medical and public health personnel, and those whose employment causes them to come into direct and frequent in-person and close proximity contact with the public, such as VA BUE. The Department has failed to notify BUE of this presumption of workplace exposure; and, failed to support an employee's claim that the virus was contracted in the workplace. These acts are resulting in BUE continuing to have their COVID-related worker's compensation claims denied by the DOL.

[1] *See* https://www.govexec.com/workforce/2020/05/va-says-its-providing-covid-19-test-any-employee-who-asks-one-employees-say-s-not-true/165781/.

The Department also has a contractual obligation to assist BUE with preparing necessary forms and documents for submission to OWCP, and to "immediately" inform employees of their rights under FECA. MCBA Article, 41, Section 2. The Department has failed in this regard.

The Occupational Safety and Health Administration's ("OSHA") recordkeeping requirements include tracking certain work-related injuries and illnesses on an OSHA 300 log. Specifically, OSHA regulations mandate that "[i]t shall be the responsibility of the head of each Federal agency…to….keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action." 29 U.S.C. § 668(a)(3). A COVID-19 diagnosis or exposure is a recordable event if an employee is exposed as a result of performing their work-related duties. The MCBA requires that the OSHA log be completed within seven (7) calendar days. MCBA, Article 29, Section 10. While the Union does not dispute that the log is being maintained by the Department, the Union contends that the actual number of BUE either exposed or succumbing to COVID-19 is grossly underrepresented. The Department has failed to timely complete the OSHA 300 log.

Violations

The VA's failure to notify BUE of their rights as it relates to the employees' health and safety in light of the COVID-19 pandemic constitutes a violation of the MCBA and federal law. Further, it constitutes a change in conditions of employment, thereby triggering the Department's bargaining obligation. The Department's failure to bargain is an unfair labor practice.

In addition, the Department has failed to:

- warn employees when co-workers were experiencing symptoms of COVID-19, have tested positive for COVID-19, or were exposed to COVID-19 in the workplace pursuant to Article 29 of the MCBA;
- comply with OSHA's recordkeeping requirements concerning workplace exposure to COVID-19 pursuant to 29 C.F.R. § 1904 and Article 29 of the MCBA;
- notify employees of the presumption of workplace exposure to COVID-19pursuant to FECA and Article 41 of the MCBA;
- assist employees with filing FECA claims for worker's compensation pursuant to Article 41 of the MCBA;
- provide certain health services to employees, such as COVID-19 testing, pursuant to 5 U.S.C. § 7901;
- follow the recommendations and descriptions of mandatory safety and health standards promulgated by DOL and OSHA as set out in *Guidance on Preparing Workplaces for COVID-19*;
- follow the guidelines promulgated by the CDC to keep its workplace in a safe and healthy condition and to prevent employees from contracting COVID-19 set forth in the CDC's *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019*; and,
- develop policies and procedures for prompt identification of infected employees as recommended by the CDC's interim guidance, *Implementing Safety Practices for Critical*

Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19.

Remedies Requested

The Union asks that, to remedy the above situation, the Department agree to the following:

- To fully comply with its contractual obligations under Articles 2, 29, 41, and 47 of the MCBA and its statutory obligations under 5 U.S.C. §7116(a);
- To ensure BUE are protected from recognized hazards and unhealthful working conditions;
- To abate recognized hazards that are causing or are likely to cause death or serious harm and protect employees from such hazards;
- To fully comply with reporting and notice requirements established by the DOL and CDC in light of the COVID-19 pandemic; and,
- To agree to any and all other remedies appropriate in this matter.

Time Frame and Contact

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

Submitted by,

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