NATIONAL GRIEVANCE
NG-12/07/18

Date: December 7, 2018

To: Steven Novy
Acting Executive Director
Office of Labor-Management Relations
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, D.C. 20420
Steven.Novy@va.gov
Sent via electronic mail only

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

Re: **National Grievance against the Department of Veterans Affairs related to its repudiation of the use of official time by Title 38 employees**

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 for its failure to comply with its contractual and statutory obligations when it repudiated the right of Title 38 employees to use official time pursuant to the Master Agreement.

Specifically, by the Notice provided to the Union on November 8, 2018 (attached as Exhibit 1) (the "Notice"), which prohibits Title 38 employees from using official time, the Agency violated and repudiated the official time provisions of the Master Agreement[1] and committed unfair labor practices under 5 U.S.C. §7116(a)(1), (5), and (8).

[1] The scope of the repudiation extends to all of the provisions listed in the Notice in addition to those provisions governing official time that are not listed therein, "as well as any Memorandum of Understanding ("MOU"), past practices, supplemental agreements, and collectively bargained agreements with AFGE that are currently in effect." *See* Exhibit 1, p. 1.

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STATEMENT OF THE CASE

Background

On November 8, 2018, the Agency notified the Union that "employees described in 38 U.S.C. §7421(b) ("Title 38 employees") may no longer utilize official time because the use of official time by Title 38 employees negatively impacts patient care." The Notice explained that the changes would become effective November 15, 2018. The Notice and the Agency's implementation of its provisions violate the Master Agreement and federal law as specified below.

The Agency's Notice constitutes a breach of the Master Agreement and repudiation under federal law.

By its very terms, the Agency's Notice communicates its unmistakable intent to breach provisions of the Master Agreement. It uses the word *repudiation*, a term of art in federal sector labor relations for the unfair labor practice of committing a contractual breach that is clear and patent and involves a provision that goes to the heart of the parties' agreement. Here, the Agency's actions constitute a clear and patent breach of the Master Agreement, including provisions that go to the heart of the agreement itself. The Agency unilaterally eliminated at least 27 separate provisions of the Master Agreement in addition to similar provisions found in local supplemental agreements, memoranda of understanding, and past practices. When the Agency commits clear and patent breaches of contract provisions that go to heart of the agreement, it has committed an unfair labor practice called "repudiation," which is a form of bad faith bargaining. Bad faith bargaining of this type is an unfair labor practice under 5 U.S.C. §7116(a)(1) and (5). Nationwide, the Agency has repudiated the Master Agreement by refusing to allow Title 38 employees to use official time that has already been bargained for in the Master Agreement.

The Agency's implementation of the Notice exceeds its scope and violates federal law

While the Secretary does have the right to exclude specific matters relating to Title 38 employees from the collective bargaining process, 38 U.S.C. §7422 plainly states that the authority of the Secretary to exclude certain matters from the reach of the collective bargaining process "*is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5* (relating to labor-management relations)." Thus, the Secretary has no right to abridge those labor rights that are granted by statute and exist independently from the contractual provisions repudiated in the Notice.

One such right is secured by 5 U.S.C. §7131(a), which provides that employees representing a union in negotiations under chapter 71 "shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status." In contrast to official time allocations that are subject to the collective bargaining process under §7131(d), this right is not dependent upon the result of the collective bargaining agreement between the parties and thus cannot be subject to the Agency's repudiation of the same. Nevertheless, the Agency has prevented union officials (who are also Title 38 employees) from representing local unions at the bargaining table in violation of 5 U.S.C. §7131(a) improperly relying on the Notice for justification. The Agency has violated 5 U.S.C. §7131(a) by denying official time for Title 38 union representatives for the purposes of bargaining under §7131(a). The Agency's actions in these circumstances constitute an unfair labor practice under 5 U.S.C. §7116(a)(1) and (5). Among other locations, this violation has occurred at the Greater Los Angeles Health Care System in its negotiations with AFGE Local 2297 and Minneapolis VA Healthcare System in its negotiations with AFGE Local 3669. By the same token, any denial of official time for Title 38 employees for participation in proceedings before the FLRA (secured by §7131(c)), would also exceed the scope of the Notice and would violate federal law.

Chapter 71 of Title 5 also protects the rights of an exclusive representative to designate individual representatives of its own choosing. The Authority has held that it is an unfair labor practice under §7116(a)(1) and (8) to interfere with a union's designation of its representatives. The Agency's actions have effectively eliminated this choice by preventing the Union from *choosing* Title 38 employees to be union representatives. For example, at the Greater Los Angeles Health Care System and the Minneapolis VA Healthcare System, the Agency has refused to meet with Title 38 employees who are also union representatives outside their tours of duty to fulfill the Agency's statutory mid-term bargaining obligations. In refusing to meet at such times, the Agency has not relied on patient care concerns but rather cites the inconvenience to management that would result. In so doing, management officials at these facilities have interfered with the Union's rights under the Statute to choose its representatives.

In sum, by failing to fulfill its obligations described above the Agency has violated, and continues to violate federal law, the Master Agreement and any and all other relevant articles, laws, regulations customs, and past practices not herein specified. The Union expressly reserves the right to supplement this grievance until it is resolved.

Remedy

In light of the violations described above, the Union asks that the Agency agrees to the following:

- To return to the status quo ante;
- To cease and desist from further violations of the Master Agreement and federal law;
- To rescind the Notice;

- To post a notice in all VA locations where Title 38 employees have been denied official time;
- To make whole any employee affected by the Agency's violation, including, but not limited to back pay, restoration of leave, and attorney's fees; 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. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance. If you have any questions regarding this grievance, please contact the undersigned at 202-639-6424.

Submitted by,

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CC: Alma L. Lee, President, AFGE/NVAC
Mary-Jean Burke, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
Ibidun Roberts, Supervisory Attorney, AFGE/NVAC