



# NATIONAL VETERANS AFFAIRS COUNCIL

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

## NATIONAL GRIEVANCE

**NG-3/15/2018**

**Date:** March 15, 2018

**To:** Kevin Nelson  
Labor & Employee Relations Specialist  
Office of the Chief Human Capital Officer  
VBA Central Office  
kevin.nelson2@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 in the matter of the Department of Veterans Affairs for 1) unilaterally implementing FY 18 Performance Management Plan without meeting its bargaining obligations and 2) for violating contractual requirements regarding performance appraisals**

## 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"), American Federation of Government Employees/National Veterans Affairs Council ("NVAC" or 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 Benefits Administration ("Agency" or "VBA") for 1) unilaterally implementing a FY 18 Performance Management Plan without meeting its bargaining obligations and 2) for violating contractual requirements regarding performance appraisals.

On February 18, 2018, the VBA unilaterally implemented an FY 18 Performance Management Plan (the "Plan") directing its Directors and District Managers to provide monthly performance feedback to their employees and authorizes them to take "appropriate personnel action" if an employee is unable to correct one or more unsuccessful ratings in a critical or non-critical element of the applicable performance plan. The Plan was first proposed in a November 16, 2017 letter from Willie Clark, Deputy Under Secretary for Field Operations. Mr. Clark's letter concludes with the following statement: "Employees are entitled to only one opportunity to correct a performance deficiency each appraisal year."



By implementing this policy without completing its bargaining obligations with the Union, the Agency has violated the MCBA, federal law, and any other relevant articles, laws, regulations, customs and past practices not herein specified.

## **STATEMENT OF THE CASE**

### **Background**

On November 17, 2017, VBA Labor & Employee Relations Specialist, Kevin Nelson, notified the VBA Mid-Term Bargaining Committee that the Agency had devised a performance management plan for VBA employees for FY18. The Plan was detailed in a November 16<sup>th</sup> letter from Willie Clark, Deputy Under Secretary for Field Operations, instructing VBA managers on how to carry out performance reviews and decisions. The Plan purports to approach performance reviews with “Compassion, Consistency and Common Sense” —in VBA nomenclature, “the 3 Cs”—while simultaneously violating employee rights and repudiating the MCBA. Other provisions of the Plan include a requirement that VBA bargaining unit employees (“BUEs”) receive monthly feedback on their performance; the establishment of a make-or-break time period of four (4) pay periods for underperforming BUE to meet performance targets; and the ability to remove employees for underperforming non-critical elements of their performance plans. On November 20, 2017, the Union submitted a demand to bargain over the changes. A telephonic briefing was held on December 13<sup>th</sup>. The parties exchanged proposals without reaching an agreement, nevertheless the Agency unilaterally implemented the Plan on February 18, 2018. To date the parties have not reached an agreement or a valid impasse.

The unilateral implementation of the Plan constitutes a violation of the MCBA and federal law. Specifically, the Agency violated Article 2 of the MBCA which requires the Agency to comply with federal law. VBA management’s continued disregard for the bargaining process, constitutes independent violations of the Federal Service Labor-Management Relations Statute (the “Statute”). Section 7106(b) of the Statute requires the Agency to bargain procedures and appropriate arrangements concerning employee discipline. In refusing to negotiate in good faith with the Union prior to implementing the Plan, the Agency has also committed an unfair labor practice under Sections 7116(a)(1) and (a)(5) of the Statute.

Article 47 sets forth the parties’ responsibilities regarding mid-term bargaining at the national level. The Agency has failed to first comply with the procedures set forth in Article 47 and, on February 18, 2018, proceeded to implement its policy without completing its bargaining obligations. The parties never reached agreement on the implementation of this policy and never reached a valid impasse.

Article 27, among other things provides a comprehensive procedure for the assessment of bargaining unit employee performance and the procedures to be followed before taking a performance based action against a bargaining unit employee. The passage of the VA Accountability and Whistleblower Protection Act of 2017 does not conflict with or otherwise invalidate Article 27 of the Master Agreement. The Plan suffers from the same deficiencies identified in the Union’s grievance of a similar plan announced for VSRs at the end of FY17. *See*

NG-9/29/17. The objections and violations identified in that grievance are hereby incorporated into this grievance as if full set forth herein.

The VBA has moved forward with unilateral implementation of the performance plan; thus, time is of the essence in the processing of this grievance as employees are under the constant threat of disciplinary action, up to and including removal. Coincidentally, the VBA has offered to engage in post-implementation bargaining, without regard to the employees adversely impacted by the application of the Plan in the meantime.

### **Request for Consolidation**

On March 14, 2018, Aaron Robison, on behalf of the Agency, denied a request to consolidate this dispute with the previously filed national grievance, NG-9/29/17. The Union hereby renews this request because this grievance involves similar facts and circumstances warranting consolidation in the interest of efficiency and the prevention of the use of taxpayer dollars on duplicative arbitration processes.

### **Violation**

By failing to fulfill its contractual and statutory obligations, the Agency violated, and continues to violate, the following:

- Article 2 of the MCBA: requiring compliance with all federal statutes and governmentwide regulations;
- Article 27 of the MCBA: which governs the process for assessing bargaining unit employee performance and the taking of performance based actions;
- Article 47 of the MCBA: requiring the Agency to bargain with the Union over changes to conditions of employment;
- 5 U.S.C. §7116(a)(1) and (2): requiring the Agency to bargain in good faith with the Union; and
- Any other law, rule, regulation, or Master Agreement provision not herein specified.

### **Remedy Requested**

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

- To rescind the Plan;
- To return to the *status quo ante* until the Agency completes its bargaining obligations;
- To make whole any bargaining unit employee impacted by the implementation of the Plan, including but not limited to the payment of the the union's attorney's fees payable under the Back Pay Act.
- To fully comply with its contractual obligations under Articles 2, 27 and 47 of the MCBA, and its statutory obligations pursuant to the Labor-Relations Statute;

- To post, and distribute to affected employees via e-mail, an appropriate notice by the highest appropriate VBA official acknowledging the Agency's illegal conduct and affirming its obligations under the Statute; 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 regarding this National Grievance, please contact the undersigned.

Submitted by,



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cc: Alma L. Lee, President, AFGE/NVAC  
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