



NATIONAL VETERANS AFFAIRS COUNCIL

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

NATIONAL GRIEVANCE

NG-5/2/19

7S/00387584

Date: May 2, 2019

To: Kevin Nelson
Department of Veterans Affairs
Labor & Employee Relations Specialist
Office of Human Capital Management (OHCM)
VBA Central Office
kevin.nelson2@va.gov
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 in the matter of the Department of Veterans Affairs for its repudiation of a national MOU regarding RVSR performance standards and its unilateral implementation of changes in conditions of employment without bargaining

STATEMENT OF THE CHARGE

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 unilaterally changing the policy regarding the computation of "excluded time" for VBA employees in violation of a national Memoranda of Understanding ("MOU") and without completing its bargaining obligations with the Union. To date, the Agency has failed to remedy this violation, and as such, continues to violate the Master Agreement, the MOU and federal law.

Specifically, the Agency violated Articles 2, 3, 27, 47 and 49 of the MCBA; repudiated the October 19, 2017 MOU on Rating Veterans Service Representatives National Performance Standards; committed unfair labor practices in violation of 5 U.S.C. § 7116(a); and any and all other relevant articles, laws regulations, and past practices not herein specified.



STATEMENT OF THE CASE

Background

On April 2, 2019, the Veterans Service Center Coach for the Detroit Regional Office, Melissa Djuric, sent an email to Rating Veterans Service Representatives (“RVSRs”) outlining a new policy concerning an increase in RVSR production goals to address claims backlogs. Among other things, Ms. Djuric noted that the RVSR must maintain 80% availability for work and instructed certain RVSRs to cease taking training courses while the backlog is being addressed. In addition, the RVSRs were informed that excluded time would be limited. Specifically, Ms. Djuric wrote: “[e]xcluded time for every deferral written will not be approved, this time is for extenuating circumstances and complex claims only...[e]xcluded time for Manual Reference updates/changes will not be approved....[and e]xcluded time for correcting errors will not be approved....”

Excluded time is used to account for work being done that does not factor into the calculation of an RVSR’s performance rating. In October 2017, the Agency and the Union entered into a MOU regarding National Performance Standards for RVSRs which explicitly allowed for excluded time. The MOU remains in full force and effect. The MOU states, in relevant part:

Bargaining unit employees who spend unreasonable time performing uncredited work, such as, but not limited to, requesting complex medical opinions, deferrals, generating letters, or other developmental activities, may bring the matter to the attention of their supervisor. The supervisor will consider whether the uncredited time is fairly and equitably accounted for in the weighted action calculation and either, allow excluded time or inform the employee that excluded time is not warranted. The employee may grieve the decision of the supervisor.

Unavailable or deductible time will not be held against an employee.

Excluded time (also referred to as deductible time) shall remain available to employees.

Additional training will be provided if requested by an employee.

If after implementation [of this MOU] either party is made aware of issues that

may adversely affect employees, both parties agree to discuss the issues and work to mutually resolve the issues for the employees. Should discussions not resolve the issues; the parties will implement the negotiating process.

See RVSRs National Performance Standards MOU (attached).

As such, the parties have agreed that employees' time must be fairly accounted for in their performance calculation and that excluded time be granted for uncredited work. It further allows the supervisor to deny excluded time on a case-by-case basis. In addition, it empowers employees to take initiative and seek out training to better perform their work. Finally, it requires that the parties return to the table, if necessary, to bargain over subsequent issues relating to the performance standards. Contrary to the letter and spirit of the agreement, Ms. Djuric's email effectively eliminates excluded time and training; and her actions were taken unilaterally without notifying the Union or providing an opportunity to bargain. Moreover, the MCBA provides that the Agency may not hold employees accountable for factors that affect performance that are beyond employees' control. MCBA, Art. 27, Section 8E. Here, Ms. Djuric's ostensible reason for defying a national MOU by changing the performance standards—to "make up for our losses over the past two quarters"—squarely conflicts with that section of the MCBA.

The Agency's actions also constitute a repudiation of the national MOU. The FLRA finds that an agency commits an unfair labor practice by breaching an agreement where the breach was clear and patent, and the provision breached goes to the heart of the parties' agreement. *Scott AFB*, 51 F.L.R.A. 858 (1996). Here, the Agency has clearly failed to honor the national MOU, and the provisions breached go to the heart of the agreement. Demonstrably, this MOU demonstrates the value the parties' placed on measuring performance by permitting excluded time, as well as, a focus on enhancing performance through training. Thus, the removal of these provisions meets the FLRA's definition of repudiation. Finally, the Agency failed to notify the national Union of these changes and bargain accordingly, as required by the MOU, MCBA and federal law.

NVAC is aware that the changes to the excluded time policy have taken affect in Regional Offices in Detroit, Jackson and St. Louis. The Union specifically reserves the right to add affected locations to this grievance as they become known.

Violations

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

- The National MOU on RVSR performance standards: requiring the Agency to make excluded time, as well as requested training, available to employees;
- Article 2 of the MCBA: requiring the Agency to comply with federal law and regulations;

- Article 3 of the MCBA: requiring the Agency to maintain an effective, cooperative labor-management relationship with the Union;
- Article 27 of the MCBA: requiring that circumstances beyond the control of the employee not be held against him;
- Articles 47 and 49 of the MCBA: requiring the Agency to comply with agreed-upon procedures for mid-term bargaining at the national level;
- 5 U.S.C. § 7116(a)(1) and (a)(5): requiring the Agency to consult and negotiate in good faith with the Union; and
- Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

Remedies Requested

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

- To cease and desist the further implementation of the excluded time policy;
- To return to the *status quo ante* until bargaining obligations are met;
- To fully comply with its contractual obligations under Articles 2, 3, 27, 47, and 49 of the MCBA and its statutory obligations under 5 U.S.C. §7116(a);
- To distribute an electronic notice posting to all bargaining unit employees concerning the Agency's failure to properly notify and bargain with the Union over changes to the excluded time policy; 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 AFGE Office of the General Counsel. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance.

Submitted by,



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 AFGE, AFL-CIO
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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
Tracy Schulberg, Acting Executive Director, VACO-LMR**

ATTACHMENT 1

MEMORANDUM OF UNDERSTANDING

Rating Veterans Service Representatives Performance Standards

The following constitutes an agreement between the Department of Veterans Affairs, Veterans Benefits Administration (VBA) and the American Federation of Government Employees (AFGE), AFL-CIO National VA Council (NVAC) #53, (Union) regarding the Rating Veterans Service Representatives Performance Standards.

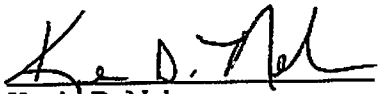
1. Bargaining unit employees who spend unreasonable time performing uncredited work, such as, but not limited to, requesting complex medical opinions, deferrals, generating letters, or other development activities, may bring the matter to the attention of their supervisor. The supervisor will consider whether the uncredited time is fairly and equitably accounted for in the weighted action calculation and either, allow excluded time or inform the employee that excluded time is not warranted. The employee may grieve the decision of the supervisor.
2. All RVSR's shall be provided training on and a demonstration of the new Workload and Time Reporting System (WATRS) prior to implementation of the proposed RVSR performance standards.
3. The VBA AFGE Mid-Term Bargaining Committee will monitor and assess the implementation of the national performance standards. The parties agree to gather output and quality data regarding RVSR performance under the new performance standards throughout the 90-day acclimation period. The AFGE Mid-Term bargaining committee will be provided this data within one week after the close of each month, on a 30-day interval, for up to 12 months. The data gathered and provided will include individual performance data by station. Local Presidents will be provided the same data for their office, upon request, from their local management. If at any point during this 12-month period the Union has concerns with this information, they can elevate these concerns to the Mid-Term Bargaining Committee for consideration.
4. Performance standards and elements, to the maximum extent feasible shall be reasonable, realistic, attainable, and sufficient under the circumstances to permit accurate measurement of an employee's performance per Article 27, Section 4. When quality, timeliness, and/or output are expressed in a standard, there must be a clear means of assessing whether objectives have been met.

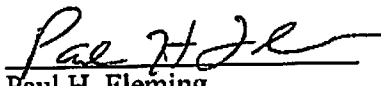
5. The Frequently Asked Questions (FAQ) will be prepared and presented to the employees at the same time as the performance standards.
6. Management will meet with the employees to discuss the critical and non-critical elements in these national standards. They should communicate and provide written national performance standards and conduct group meetings to address employee questions and concerns to all affected employees. The local union will be invited to attend the meetings.
7. When an employee moves from one level in a career ladder position to another level, the supervisory personnel shall meet with the employee to discuss the effective date and change in critical and non-critical elements as in Article 27. All questions should be answered within one week of the end of the meeting, or after receipt of a question.
8. In determining the quality and output level for employees, the number of months in the position establishes the expectation for the employee – not the grade.
9. The critical element of Quality will be based on a random review of an average of 5 random transactions, which reflect an appropriate mix of work performed by the employee throughout the whole month.
10. The Quality Checklist that will be used with these standards will be attached and provided to the employee along with the new national standards. If standards are provided electronically, the checklist will also be sent electronically. If standards are provided in a printed hardcopy form, the checklist will also be provided in hardcopy form. If there is a future change in the Quality Checklist, the employees that will be reviewed under this checklist will receive the new Quality Checklist in the same form that was previously provided. Training will be conducted on any new Quality Checklist that is later implemented. Any changes to the Quality Checklist in the future will not require these 2017 VSR standards to be renegotiated as Compensation Service will notify the Mid-Term bargaining Committee of the proposed change(s) in checklist separate from this standard.
11. When a transaction and/or claims-related action such as deferral is identified for Individual Quality Reviews, all associated tasks performed and any task that should have been performed in association with the transaction and/or action identified by the random generator will be reviewed.
12. Individual timeliness will be measured in average business days.

13. Unavailable or deductible time will not be held against an employee.
14. If the National Work Queue time in queue requirement changes or there are changes to the NWQ playbook, all bargaining obligations will be met at the national level before the employee is held to those changes.
15. If an employee is either assigned more cases in their queue or is given additional cases in a work list exceeding the expectations of the output element for his/her experience level, and the employee cannot complete them, the employee will not have a documented instance of failure to complete assigned work under the Timeliness element of the standard.
16. RVSR's will not be held accountable for the timeliness element for cases in their work queue which need to be processed by someone else for the timeliness element. In order to ensure RVSRs do not have cases held against them from a timeliness perspective while the case is processed by someone else (including but not limited to mentor, Military Records Specialist, JSRRC, second signer, etc.), local management will implement processes to ensure these cases do not unfairly impact the RVSR's timeliness. Local policy will determine when and how a case will be assigned to another reviewer's queue while not penalizing the RVSR with an instance of untimely action if case(s) under review with another employee is the sole cause of a RVSR's untimely TIQ.
17. Excluded time (also referred to as deductible time) shall remain available to employees.
18. Upon request, a list of the EPs that result in a weighted action by RVSRs will be provided to each employee and updated as needed.
19. Employees will have a sufficient workload at all times in order to enable them to achieve the Output element of the performance standard. Employees will notify a supervisor if they do not have sufficient claims in their queue.
20. VBA is responsible for ensuring that all employees receive the training necessary for the performance of the employees' assigned duties.
21. All employees covered by these performance standards must receive training on the new standards, transaction reports, changes to ASPEN or its replacement, an overview of the Employee Performance Report (EPR) interim tool, and review of all the questions on the FAQ. This training is considered to be excluded time.

22. Additional training will be provided if requested by an employee.
23. Local management will ensure ongoing training regarding substantive changes to manuals, regulations, and law which impact VSR's work assignments is addressed; the time spent in training is considered to be excluded time, and the local union will be notified.
24. Core technical requirements and station level training assigned to employees in TMS will have a reasonable completion date.
25. If a training event is to be conducted in person, and the employee is not available due to leave, compressed day off, or in lieu of holiday, the before the employee is held accountable under the training element of the standard.
26. The parties agree to adhere to Article 27 of the Master Agreement, where it does not conflict with the VA Accountability Act (38 USC 714). The parties agree that the provisions of the MOU will be retroactive to the original date of implementation.
27. Employees on a PIP at the time of implementation of the new standards may continue to be assessed for the duration of PIP period under the existing (old) performance plan.
28. If an employee requests a discussion with his/her rating official in writing to discuss his/her performance, it will be scheduled in a timely manner.
29. Where a critical element is not applicable to the employee's assigned duties, the rating official may annotate the element as "not applicable" on the Performance Appraisal Program (VA Form 0750), Actual Achievement, Section E, instead of "fully successful" so that the element does not affect the employee's Overall Rating, Section D.
30. Management will not hold employees accountable for factors or extenuating circumstances which affect performance that are beyond the employees' control in compliance with Article 27.
31. If after implementation either party is made aware of issues that may adversely affect employees, both parties agree to discuss the issues and work to mutually resolve the issues for the employees. Should discussions not resolve the issues; the parties will implement the negotiating process.

32. Management shall provide a copy of this MOU to the local president and/or designee at each AFGE local within 10 days of the date this MOU is signed.


Kevin D. Nelson
For the Agency


Paul H. Fleming
For AFGE/NVAC

10/19/17
Date