BEFORE JAMES W. ROBINSON, ARBITRATOR

In the Matter of Arbitration Between

VETERANS ADMINISTRATION
CENTRAL OFFICE
Hines, Illinois

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES: NATIONAL VA COUNCIL, AFL-CIO
Washington, D. C.

OPINION
AND
AWARD

FMCS File No.
201024-00736

Independence Day Program

The hearing in this matter was conducted remotely online on November 17, 2020 by James W. Robinson who was selected as the arbitrator from a panel provided by the Federal Mediation and Conciliation Service. The parties were accorded the right to offer witnesses, submit post-hearing briefs, and enter exhibits into evidence. Briefs were received on January 30, 2021 from the parties.

APPEARANCES:

For the Union -

Thomas P. Dargon Jr, Staff Counsel
National VA Council
American Federation of Government Employees, AFL-CIO
Washington, D.C.

For the Agency -

Robert Vega, Trial Attorney
Office of Chief Counsel
Veterans Administration Central Office
Hines, Illinois

WITNESSES:

Presented by the Union -

David Bump, National Representative
National VA Council, AFGE
Portland, Oregon

Sona Anderson, President
AFGE Local 1201
San Diego, California

Presented by the Agency -

Kenneth Smith, Assistant Deputy Secretary - Field Operations
Department of Veterans Affairs

INTRODUCTION

Union represents employees of the Department of Veterans Affairs [Agency] under the terms of the Master Agreement (hereinafter the agreement), the cover of which is dated May 2011 [Joint Exhibit 1]. On May 2, 2019 at 5:58 A.M., a specialist in the agency human resources office sent an Informational Notification email [Jt. Ex. 2] to the under secretary for benefits who, in turn, sent a 6:05 A.M. email to VBA (benefits administration) employees, describing an Independence Day Veterans Challenge [Un. Ex. 1]. The challenge was that if ratings claim benefits processing employees across the agency could process 255,000 claims during an eight weeks period, they would receive a paid day off, creating a 4-days weekend for the Independence Day period. The employees did, in fact, satisfy the challenge and received the day off.

Union submitted a formal grievance in this matter [Jt Ex 4] on May 3, 2019, the date and timeliness of which are not disputed, that reads [in pertinent part]:

> By failing to fulfill its obligations, the VA violated, and continues to violate, the following.
>
> * Article 2 . . . requiring the Agency to comply with federal law and regulations;
> * Article 3 . . . requiring the Agency to maintain an effective, cooperative labor-management relationship with the Union;
> * Articles 47 and 49 . . . 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;
> * Any other relevant articles, laws [etc.]

Agency did not issue a written response; and Union invoked arbitration, leading to the instant matter [Jt Ex 5].

ISSUE

Agency challenges procedural arbitrability The parties the did not submit a joint stipulation of the issue and deferred to the Arbitrator. The Arbitrator defines the issue as:

> Did agency violate the terms and conditions of the collective bargaining agreement and/or relevant statutory laws and regulations when it instituted the Independence Day Challenge?

SECTIONS OF THE AGREEMENT

ARTICLE 2 - GOVERNING LAWS AND REGULATIONS

Section 1 - Relationship to Laws and Regulations
In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

ARTICLE 3 - LABOR-MANAGEMENT COOPERATION

Section 1 - Guidance
The parties agree that the following sections should be interpreted as *suggestions, not prescriptions.*

(emphasis added)

Section 2 - History

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B. In December, 2009, Executive Order 13522 was issued, creating Labor Forums. Pursuant to the spirit of that Executive Order and this Master Agreement, the Department shall allow employees and their Union representatives to have predecisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 USC 7106; provide adequate information on such matters expeditiously to Union representatives where not prohibited by law; and make a good attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 USC 7106(b)(1), through discussion in its Labor-Management Forums.

Section 3 - Purpose
While the parties are no longer required by Presidential Executive Order to engage in Partnership, the desire and intent in this Article is to describe and encourage effective labor-management cooperation. The Department and the Union are committed to working together at all levels to *** ensure a quality work environment for employees, and effect a more efficient administration of VA programs. The parties support and encourage cooperative labor-management relationships at all levels.

Section 4 - Principles
Labor-management cooperation is premised on open communication between Union and Department officials. Because different approaches may effectively foster communication in different settings, specific methods for cooperation will be jointly determined by the affected parties. Normally, these efforts should be guided by the following principles:

A. Cooperation;
B. Mutual respect;
C. Open communication and sharing of information at all points along the decision-making process;
D. Trust;
E. Efficiency;
F .Consideration of each other's views and interests;
G. Identification of problems and workable solutions;
H. Understanding of, and respect for, the different roles that the Department and the Union can play in achieving mutual goals; and,
I. Minimizing or eliminating collective bargaining disputes.

Section 5 - Scope

A. In a cooperative labor-management relationship, the parties may discuss any topic, including:
1. involving personnel policies, practices, and working conditions;
2. types, and grades of employees as well as methods, means and technology of work; and,
3. on labor-management committees.

B. If an agreement is reached using cooperative methods, by mutual consent the parties may choose to fulfill the collective bargaining obligation through such cooperation.

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ARTICLE 16 - EMPLOYEE AWARDS AND RECOGNITION

Section 1 - Background and Purpose

Recognition of employees through monetary and non-monetary awards reflects the parties' efforts to promote continuous improvement in Department performance. The employee recognition program provides a positive indication of the parties' commitment to providing quality public service. [It], as described in this article, has the following characteristics:

A. It is an incentive program; that is, employee recognition is based on achievement and improvement. Achievements are linked to the Department' mission of providing high quality care and service to veterans and the public. The program is intended to motivate employees to strive for excellence. Strong emphasis is placed on recognition of efforts to improve service to veterans and the public.

B. It recognizes the accomplishments of employees both as individuals and as members of groups or teams. Because of the interrelationship of work performed by employees, enhanced Department performance is sought through teamwork, not through competition among individuals. * * * It is also based on the concept that groups or teams which improve Department performance deserve recognition. * * * The intent of this program is to promote a positive work environment and to link awards to employee contributions that enhance Department performance.

C. Further, it is the intent of this program to ensure that employees will be appropriately rewarded regardless of changes in the Department organizational structure, work processes, or work initiatives.

* * *

Section 6 - Time-Off Awards

Time-off awards may be granted to an individual or group of employees for contributions that benefit the Department. These awards may be granted for contributions such as, but not limited to, the following:

A. A significant contribution involving completion of a difficult project or assignment of importance to the mission of the Department;

B. The completion of a specific assignment or project in advance of an established deadline and with favorable results;

* * *

ARTICLE 44 - ARBITRATION

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Section 2 - Arbitration Procedure

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C. The procedures used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. * * *

ARTICLE 47 - MID-TERM BARGAINING

Section 1 - General

A. The purpose of this article is to establish a complete and orderly process to govern mid-term negotiations at all levels. ***

B. Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded from mid-term bargaining will be identified within each article.

C. As appropriate, the Union may initiate mid-term bargaining at all levels on matters affecting the working conditions of bargaining unit employees.

Section 2 - National

A. The Department will forward all proposed changes for which there is a bargaining obligation to the President of the NVAC or designee(s) along with copies of all necessary and relevant documents relied upon. ***

B. If either party initiates a demand to bargain, briefings will occur within 20 workdays of the demand to bargain. Proposals will be submitted 20 workdays after the briefing. ***

C. The Department's bargaining obligation is triggered when the Union submits a bargaining demand. When the Union's bargaining demand is submitted, the parties will discuss the proposed change and share their interests and concerns.

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Section 4 - Local

A. On all policies and directives or other changes for which the Department meets its bargaining obligation at the national level, appropriate local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated national policy and agreements. Upon request, the Union will be briefed on the proposed subject prior to the demand to bargain.

B. Proposed changes in personnel policies, practices, or working conditions affecting the interests of one local union shall require notice to the President of that local. Proposed changes in personnel policies, practices, or working conditions affecting the interests of two or more local unions within a facility shall require notice to a party designated by the NVAC President with a copy to the affected local unions.

C. Upon request, the parties will negotiate as appropriate. The Union representative shall receive official time for all time spent in negotiations as provided under 5 USC 7131(a).

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ARTICLE 49 - RIGHTS AND RESPONSIBILITIES

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Section 2 - Rights and Responsibilities of the Parties

A.In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the obligations imposed by and this Agreement, and the maintenance of a cooperative labor-management working relationship.

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Section 4 - Notification of Changes in Conditions of Employment

A.The Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain. * * *

CONTENTIONS OF THE PARTIES

Union puts forward the following contentions in support of its grievance.

1. Agency violated its bargaining obligations by implementing a change in employment before notifying Union and bargaining with it over the change (5 U.S.C. 7116(a) and Articles 47 and 49).

2. It is well established that Agency must meet its obligation to negotiate prior to making changes in established conditions of employment; and awards are undeniably a condition of employment.

3. Agency unilaterally - and impermissibly - determined which employees were eligible, amount of the awards, etc.

4. Agency failed to provide notice adequate to permit meaningful opportunity to bargain.

5. The challenge was not covered by the master agreement.

6. Arbitrator should award *status quo ante* relief.

Agency puts forward the following contentions to support its rejection of grievance.

1. This matter is not arbitrable because agency obligation to bargain is triggered when Union submits a bargaining demand, which it did not in this matter.

2. The "covered by doctrine" contains two prongs: whether subject matter of a change is contained expressly in the agreement; and whether it is so inseparably bound up with the contract that negotiations are presumed to have foreclosed additional bargaining.

3. It is incongruous to impose a statutory duty to bargain on matters that are barely more than trivial and even more so when the matters have no substantial impact on conditions of employment.

4. FLRA determinations, based on NLRB case law define "substantial impact" as a radical shift from procedures that were already in place.

5. The Independence Day Challenge is covered expressly by Article 16 of the agreement and did not constitute a material or substantial change in employment.

DISCUSSION

The threshold question is whether this matter is arbitrable, Agency having contended that it is not. Agency bases its challenge on its contention that it could not have failed to bargain because Union did not submit a bargaining request. While it is correct that no bargaining request was submitted, the circumstances of the announcement and the promulgation would make a request difficult to submit. The issue is arbitrable.

Article 16, Section 6 (B), of the agreement envisions specifically group time-off awards for performance of a task of exactly the sort in the instant matter. The language of this article addresses management-employee award panels in the apparent context of *individual* awards but is silent on *group* awards. Therefore, it is reasonable to conclude Agency possessed authority to establish an Independence Day group time-off award challenge. However, there remains the union contention that it possessed the right to engage in mid-term bargaining about implementation of the challenge. Article 47(B) provides that matters excluded from mid-term bargaining are identified as such in the agreement, while other agreement language limits the bargaining requirement to changes in (undefined) "working conditions." No evidence of changed working conditions *per se* was presented, although there were allegations of mandatory overtime and exclusion of trainees. The only significant change was that one group of

employees received a four days holiday weekend on a *one-time basis*. Agency contends that such a one-time, temporary change does not rise to the importance requiring bargaining.

Thus, the remaining issue is whether such an agency change was of a magnitude and type that Agency was *required* to bargain. The Federal Labor Relations Authority concluded in *29 FLRA No. 12*

> In summary, we conclude that the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable *union-initiated* proposals *concerning matters which are not addressed in the agreement* and were not clearly and unmistakably waived by the union during negotiation of the agreement. Previous Authority decisions not consistent with this conclusion will no longer be followed. (emphasis added)

As noted above, time-off awards are addressed in the agreement.

Further, in *71 FLRA No. 190*

> * * * we conclude that a "more than de minimis" test is not the appropriate standard to apply to determine whether a purported *agency-initiated* change is significant enough to impose upon an agency a statutory duty to bargain. By definition, "de minimis" signals triviality. Therefore, it is incongruous to impose a statutory duty to bargain on matters that are barely more than trivial, but *even more so, when the matters have no substantial impact on conditions of employment.* Accordingly, the *Authority will not use "more than de minimis" as a test to determine whether an agency has a duty to bargain over changes to conditions of employment.*
>
> Because the Authority never provided a rationale for departing from the substantial impact standard (which was applied under EO 11,491) and because the de minimis standard is inconsistent with the purposes of the Statute, the Authority finds that *a substantial-impact test is the appropriate means for determining whether a change to a condition of employment is significant enough to trigger a duty to bargain.* Specifically, an agency will not be required to bargain over a change to a condition of employment unless the change is determined to have a *substantial impact on a condition of employment.* (emphasis added)
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> * * *
>
> two questions must be addressed before deciding whether a purported change to a condition of employment requires bargaining. First, it must be shown that there is a management-initiated change to a personnel policy, practice, or matter, whether established by rule, regulation, or otherwise. Second, it must then be shown that the change affects working conditions. (emphasis added)

Group time-off awards are provided for clearly in the agreement. In the instant matter, it was initiated by management. Did the Independence Day Challenge constitute a substantial change in working conditions? The Arbitrator concludes that it did not under FLRA guidelines. It affected one group of employees in a positive way without harming the working conditions of any other employees. Overall working conditions were not changed. At the conclusion of the challenge, everything returned to "normal." Union points to absence of a zipper clause in support of its claim. However, a zipper clause is

not necessary to support Agency claim if other bars to bargaining exist, such as the substantial impact test.

AWARD

The grievance is denied based on the evidence presented, the language of the collective bargaining agreement, and FLRA guidelines concerning substantial impact. Agency did not violate the collective bargaining agreement, statute, or FLRA rulings by instituting the Independence Day Challenge.

This matter was conducted by the use of computer technology. The award was rendered in the Township of Lawrence, County of Mercer, State of New Jersey, on February 12, 2021.

James W. Robinson