NATIONAL GRIEVANCE
NG-09/09/2021

7H/00398302

Date: September 9, 2021

To: Ophelia A. Vicks
Acting Executive Director
Office of Labor-Management Relations
U.S. Department of Veterans Affairs
ophelia.vicks@va.gov
Sent via electronic mail only

From: Sarah Hasan, 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 Miscalculating FMLA in VATAS**

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 ("Department") for miscalculating bargaining unit employees' ("BUE") FMLA totals in VATAS, resulting in overbalances and BUEs' inability to use approved FMLA. To date, the Department has failed to remedy this violation, and as such, continues to violate the Master Agreement and federal law.

Specifically, the Department violated Articles 2, 35, 47 and 49 of the MCBA; 5 U.S.C. Section 7116 (the "Statute"); 29 C.F.R. 825.200(d)(1); 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

Under MCBA Article 35, Section 16, bargaining unit employees can take up to 16 weeks of leave under the Family Medical Leave Act ("FMLA") during any 12-month time period for certain qualifying conditions, or up to 12 weeks of FMLA leave for other criteria. Once employees are approved FMLA leave, they are entitled to use it on a rolling-basis until the anniversary of their approval date, at which point the employee's entitlement to a new bank of FMLA would be triggered, assuming the employee was eligible for FMLA leave.

Based on a system-wide update to the VA Time and Attendance System ("VATAS"), FMLA leave is being calculated in a manner such that all employees' FMLA calendars start at the same time. This has caused employees to exceed their FMLA allowances in VATAS, although these employees may not yet have exhausted approved FMLA leave based on their last FMLA approval. In other words, the VATAS update has totaled FMLA usage over two separate allotments of FMLA during the same calendar year for some employees, though these employees have properly requested and been granted FMLA for two separate 12-month periods. As a result, employees are either being improperly denied FMLA leave and/or being marked AWOL.

There are a number of AFGE Locals reporting this problem on a continuous and ongoing basis. These include, but are not limited to, the following Locals:

Local 1108 in Spokane, Washington;
Local 85 in Leavenworth, Kansas;
Local 1224 in Las Vegas, Nevada;
Local 1732 in Madison, Wisconsin,
Local 31 in Washington, DC; and
Local 520 in Columbia, South Carolina.

The Department violated the Statute when it changed conditions of employment, specifically, how FMLA leave was calculated in VATAS, without first notifying or bargaining with the Union.

The Department's change in calculating an FMLA "year" also violated federal regulations at 29 C.F.R. 825.200(d)(1) which allows for the calculation of an FMLA "year" to be made at the discretion of the employer so long as it is consistently and uniformly applied all employees. Changes to the FMLA "year" must be made only after providing 60 days notice to employees and with a transition that allows for employees to retain the full benefit of 12 weeks of leave under whichever method affords greatest benefit to the employee.

The Department also violated numerous Articles of the MCBA. Article 2 of the MCBA sets forth the requirement that the Agency comply with federal law. Article 35 of the MCBA establishes that employees will accrue and use leave in accordance with applicable statutes, OPM regulations and the MCBA. Section 16 specifically provides that BUE are entitled to 16 weeks (*viz*., 640 hours) of LWOP during any 12-month period for certain reasons covered by the Family and Medical Leave Act ("FMLA" or the "Act"). Under the Act, only the amount of leave *actually* taken may be counted against an employee's FMLA entitlement. Notably, federal holidays do not count toward an employee's entitlement to FMLA. 5 CFR 630.1203(e).

Moreover, the Agency-wide system's flaw impacts AFGE's entire bargaining unit with

regard to the accrual of creditable service and other benefits. For example, 5 USC § 8332(f) provides that an aggregate non-pay status of greater than 6 months in any calendar year is not creditable service for purposes of retirement benefits.

Violations

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

- Article 2 of the MCBA: requiring the Department to comply with federal law and regulations;
- Article 3 of the MCBA: requiring the Department to maintain an effective and cooperative labor-management relationship with the Union;
- Article 35 of the MCBA: entitling employees up to 16 weeks of FMLA leave to be used in a 12-month period depending on the circumstances;
- Article 47 of the MCBA: requiring the Department to notify and bargain with the NVAC over proposed changes in personnel policies, practices, or working conditions affecting two or more local unions;
- Article 49 of the MCBA: requiring the Department to bargain with the Union prior to making changes in conditions of employment;
- 5 U.S.C. § 7116(a)(1) and (a)(5): requiring the Department to consult and negotiate in good faith with the Union;
- 29 C.F.R. 825.200(d)(1) which requires FMLA calculations to be consistently and uniformly applied all employees, 60 days notice to employees before changing the FMLA "year," and allowing employees to retain the full benefit of 12 weeks of leave under whichever method affords greatest benefit to the employee during the intervening transition; 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 Department agree to the following:

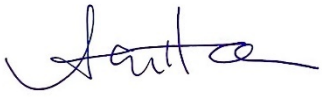
- Return to the *status quo ante* concerning the calculation of FMLA leave in VATAS;
- Make whole all affected BUEs who have either been denied FMLA that was previously approved or charged AWOL;
- Pay reasonable attorney's fees under the Back Pay Act;
- Fully comply with its contractual obligations under Articles 2, 3, 35, 47 and 49 of the MCBA; its statutory obligations under 5 U.S.C. Section 7116(a); and its regulatory obligations under 29 C.F.R. 825.200;

- Distribute an electronic notice posting to all bargaining unit employees concerning the Agency's unfair labor practice in changing the calculation of FMLA without first informing or bargaining with the Union;
- Agree to comply with any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.
- Agree to any and all other appropriate remedies 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. 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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