FEDERAL MEDIATION AND CONCILIATION SERVICE
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In the Matter of Arbitration between

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
NATIONAL VA COUNCIL
.

ARBITRATION AWARD

Union,
-and-

U.S. DEPARTMENT OF VETERANS AFFAIRS,

Agency.
--X
FMCS Case No. 200207-03752

Arbitrator: Steven C. Kasarda

Hearing Dates: August 7, 2020

Date of Decision: December 28, 2020

Appearances:

For the Union: Thomas Dargon, Jr, Esq., Staff Counsel, National VA Council, Office of the General Counsel, American Federation of Government Employees, AFL-CIO

For the Agency: Tokay Hackett, Esq., Staff Attorney, Personnel Law Group U.S. Department of Veterans Affairs, Office of the General Counsel

INTRODUCTION

The above Union and Agency are Parties to a Collective Bargaining Agreement (hereinafter "CBA") that provides for the Arbitration of unresolved disputes that may arise during the term of the Agreement. This Agreement provides, inter alia, that said disputes are submitted to Federal Mediation and Conciliation Service (hereinafter

“FMCS”) for the appointment of an Arbitrator. FMCS notified Arbitrator Steven C. Kasarda, that he had been selected by the Parties. American Federation of Government Employees, Local 2145, as the exclusive representative, brings this grievance.

The Collective Bargaining Agreement between Department of Veterans Affairs, (hereinafter “Agency”) and American Federation of Government Employees, (hereinafter “Union”) became effective on March 15, 2011 and continues in effect. In accordance with the Grievance Procedure therein, the Rules and Regulations of the Federal Mediation and Conciliation Service, the United States Code and with the consent of both Parties, the undersigned was designated as Arbitrator to hear and determine the following issues in this case.

ISSUES

In accordance with Article 44, Section 2(F) of the 2011 Master Agreement, the Parties mutually agreed to the following Joint Issue Statement:

1. **Whether the Agency’s implementation of VA Handbook 5011/32 violated law or contract.**
2. **Whether the Agency committed an unjustified or unwarranted personnel action.**
3. **What shall be the remedy, if any?**

THE HEARING

An agreement was reached with the Parties on the date, time, and manner of the Hearing. The Parties selected August 7, 2020, to conduct the Hearings in this matter. Due to Covid-19 restrictions, the Hearing was held virtually on that date via, Microsoft Teams at which time both Parties appeared with their witnesses and proof. Full opportunity was

afforded the Parties to be heard, offer evidence, arguments and to examine and cross-examine witnesses. At the conclusion of the Hearings, both Parties stated that they presented their respective cases in full and on September 25, 2020, submitted closing briefs.

Arbitrator's Exhibits

1. FMCS Appointment Letter

Joint Exhibits

1. 2011 Master Agreement.
2. VA Handbook 5011, Part III, Chapter 3 (Title 38 Leave Program), dated April 15, 2002.
3. VA Handbook 5011/32 (Hours of Duty and Leave), dated July 26, 2018.
4. VA-OHRM HRML No. 05-18-05 (VA Handbook 5011, Variable Work Schedule – Change in Leave Charge and Accrual Rate), dated August 2, 2018
5. VA-OHRM HRML No. 05-18-05 No. 05-18-06 (VA Handbook 5011/32: Implementation of Variable Work Schedules and Changes to Leave Charge, Leave Accrual Rate, and Maximum Carryover for Full-Time Physicians, Dentists, Chiropractors, Podiatrists, and Optometrists), dated August 3, 2018
6. VA-OHRM Bulletin (Leave Conversion for Full-Time Title 38 Physicians, Dentists, Chiropractors, Podiatrists, and Optometrists), dated August 28, 2019
7. VA-OHRM Frequently Asked Questions (Leave Changes for Full-Time Physicians, Dentists, Chiropractors, Podiatrists, and Optometrists), dated September 24, 2019.
8. VA-DUSHOM Memorandum (Authorization of One-Time Modification to Leave Conversion Rates Based on Policy Revision in VA Handbook 5011/32, Daily to Hourly Leave), dated November 12, 2019.
9. AFGE National Grievance-10/9/19, dated 10/9/19.
10. VA Response to NG-10/9/19, dated 11/21/19.
11. AFGE Notice to Invoke Arbitration, dated November 25, 2019.

12. AFGE Request for Information, dated April 28, 2020.

13. VA Response to AFGE Request for Information, dated June 25, 2020.
    a. Excel file: AFGE Physician BUE Leave Balances as of September 14, 2019

Agency Exhibits

None

Union Exhibits

1. James Martin VATAS Leave Balances, dated September 9, 2019.

2. James Martin VATAS Leave Balances, dated October 3, 2019.

Witnesses

William Hall Wetmore, VI - Third Executive Vice President of the National Veterans Affairs Council of the American Federation of Government Employees.

Dr. James Henry Martin – Emergency Physician, Captain James A. Lovell Federal Health Care Center, North Chicago, Illinois.

Jeffrey Michael Kleiner, HR consultant with the VHA Workforce Management Consulting Office, HR Center of Expertise.

STIPULATED FACTS

1. The case is arbitrable.

2. Nationwide, AFGE represents approximately 270,000 bargaining unit employees at the VA.

3. Approximately 18,000 of these employees are appointed to the positions of Physician, Dentist, Podiatrist, Chiropractor, or Optometrist (collectively, "Physicians").

4. Physicians are compensated based on 24/7/365 availability. They do not receive overtime pay or premium pay.

5. Physicians may be required to regularly work schedules that include workdays exceeding 8 hours, such as 10 or 12-hour shifts.

6. Historically, Physicians had an annual leave accrual rate of "1 day" per pay

period, totaling “26 days” per calendar year. The minimum charge rate was also “1 day.”

7. Historically, Physicians had a sick leave accrual rate of “1-half day” per pay period, totaling “13 days” per calendar year. The minimum charge rate was “1 day.”

8. On July 26, 2018, the VA published VA Handbook 5011/32 (Hours of Duty and Leave). In this policy, the VA changed the annual leave accrual rate to “8 hours” per pay period and the sick leave accrual rate to “4 hours” per pay period. It further changed the minimum charge rate for both annual leave and sick leave to “1 hour.”

9. On August 2, 2018, the VA issued Human Resources Management Letter No. 05-18-05, which placed implementation of VA Handbook 5011/32 “on hold” pending system changes to the VA Time and Attendance System.

10. On August 3, 2018, the VA issued Human Resources Management Letter No. 05-18-06, which contained further guidance on implementation of VA Handbook 5011/32.

11. On August 28, 2019, the VA Office of Human Resources Management issued a Bulletin stating that policy changes in VA Handbook 5011/32 would be effective September 15, 2019.

12. On September 15, 2019, the VA converted the accrued annual and sick leave balances of Physicians from “days” to “hours” by multiplying their annual leave balances by “8 hours” and their sick leave balances by “4 hours.”

13. On November 12, 2019, the VA issued a Memorandum (Authorization of One-Time Modification to Leave Conversion Rates Based on Policy Revision in VA Handbook 5011/32, Daily to Hourly Leave). This Memorandum authorized a “one-time modification of the annual and sick leave conversion rates” for Physicians as of September 15, 2019.

14. To date, the VA has not implemented this one-time modification.

COLLECTIVE BARGAINING AGREEMENT

EMPLOYEE RIGHTS AND PRIVILEGES | ARTICLE 35 - TIME AND LEAVE

ARTICLE 35 - TIME AND LEAVE

Section 1 - General

A. Employees will accrue and use sick and annual and other types of leave in accordance with applicable statutes, OPM regulations, and this Agreement.

B. All leave charges shall be in increments of one-quarter hour, except in the case of Title 38 physicians, dentists, chiropractors and optometrists, who accrue and use leave in full-day increments.

C. For clearly compassionate and appropriate reasons, the Department may increase the stated limits applicable to all forms of leave in accordance with applicable government-wide regulation and law.

D. Employees will not be denied leave based solely on their leave balance.

E. No arbitrary or capricious restraints will be established to restrict when leave may be requested.

F. Changes to the Department's automated time and attendance system shall be negotiated in accordance with government-wide law, regulations and this Agreement.

UNION RIGHTS AND PRIVILEGES | ARTICLE 47 - MID-TERM BARGAINING

ARTICLE 47 - MID-TERM BARGAINING

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. When a new law is enacted and the Department decides not to issue a national policy, the Union will be notified prior to implementation.

POSITIONS OF THE PARTIES

The Union argues that, in the past, Physicians earned 1 "day" of annual leave per pay period, with each "day" of annual leave accounting for a full day of work, regardless of the length of the Physician's workday. Physicians regular tour of duty may be 8-, 10- or 12-hour days and their days of leave are consistent with their regular work day. The Union argues that this rule has been in effect for decades and is codified in Article 35, Section 1(B) of the 2011 Master Agreement. The Union contends that there is no factual

dispute that on September 15, 2019, the Agency unilaterally converted the accrued leave balances of Physicians from "days" to "hours" without accounting for each employee's unique tour of duty and, did so based on the incorrect assumption that all Physicians worked 8-hour days. In doing so, the Agency's actions resulted in the immediate elimination of large sums of accrued leave for employees working these alternative work schedules, such as those with regularly scheduled 10 or 12-hour shifts. The Union provided the following example, a Physician working 12-hour shifts with 20 days of accrued annual leave went from having an accrued annual leave balance worth 240 hours on September 14, 2019 to an accrued annual leave balance worth 160 hours the next day. As such, one-third of their accrued annual leave (80 hours) was eliminated. As such, the Union asks this Arbitrator to find the Agency violated law and contract by implementing VA Handbook 5011/32 and retroactively converting the accrued leave balances of Physicians to their financial detriment. The Union also requests that this Arbitrator sustain its Grievance, and order the relief:

1. As to Issue Statement #1, the Agency violated law and contract by implementing VA Handbook 5011/32. The Agency violated Article 35, Section 1(B) by retroactively converting the accrued leave balances of Physicians. The Agency violated Article 47 and 5 U.S.C. §7116(a)(5) by failing to notify and bargain with the Union.

2. As to Issue Statement #2, the Agency committed an unjustified or unwarranted personnel action.

3. As to Issue Statement #3, the Union is entitled to the following relief:

   A. Within 30 days, and consistent with this Award, the Agency shall make-whole any Physician impacted by the Agency's violations pursuant to the Back Pay Act.

   B. Within 30 days, and consistent with this Award, the Agency shall distribute a remedial notice posting to all AFGE bargaining unit

employees by email. It shall be signed by Renee Oshinski, VA-DUSHOM.

C. The Arbitrator shall retain jurisdiction for purposes of resolving any dispute concerning implementation of this Award and the attorneys' fees to which the Union is entitled.

The Agency argues that the Union has failed to establish that the Agency violated any articles of the MCBA or 5 U.S.C. Section 7116. Conversely, Article 2 and Article 3 U.S.C. Section 7116(a)(1) and (a)(5) which required the Agency to maintain an effective, cooperative labor-management relationship with the Union was not violated because the Agency appropriately notified, consulted, and negotiated with the Union in good faith with respect to the revisions to VA Handbook 5011. Further, the Agency argues that they consistently engaged the Union about the noted revisions and on September 26, 2017 a MOU was ultimately agreed upon between the parties via the Midterm Bargaining process. Moreover, the Agency did not violate Article 35 because leave policy is not considered a condition of employment, and it is not subjected to collective bargaining. The Agency was obligated to change VA Handbook 5011 in order to comply with Public Law 114-315. Further, the Agency did not violate Article 47 and 49 of the Master Agreement because the Agency complied will all agreed-upon procedures for mid-term bargaining at the national level.

Furthermore, the Agency continued to take steps to keep the Union employees apprised of the progress of the implementation of the leave changes. For instance, in an August 2, 2018 Office of Human Resources Management (OHRM), Work Life and Benefits, issued Human Resources Management Letter (HRM) No. 05-18-05. (See, Joint Exhibit 4) The letter specifically stated that the purpose was to provide guidance regarding

the delayed implementation of the policy in VA Handbook 5011. The letter went further to apprise the field that implementation of VA Handbook 5011 was currently on hold pending completion of system changes in the VA Time and Attendance System (VATAS) and the Defense Finance and Accounting Services (DFAS).5 Thereafter, on August 3, 2018, the Agency issued another updated, HRML No. 05-1-06 which clarified the reasons for the delay in implementation due to issues with systems compliance between the changes in VATAS and DFAS. (See, Joint Exhibit 5).

Further, on August 20, 2019, OHRM published a bulletin announcing that leave conversions for full-time Title 38 physicians, dentists, chiropractors, podiatrists and optometrists would be effective September 15, 2019 and all impacted employees would see the conversion on the leave and earning statement received on October 4, 2019. (See, Joint Exhibit 6). Lastly, in a November 12, 2019, Renee Oshinski, VA Deputy Under Secretary for Health for Operations and Management signed a memorandum that attempted to remedy any problems with employee transferring to the new leave policy. (See, Joint Exhibit 8). The Agency argues that the purpose of the memorandum was to authorize a one-time modification of the annual sick leave conversion rates for full time employees transitioning from a daily to hourly leave system as a result of the policy change in VA Handbook 5011/32 on September 15, 2019. (See, Joint Exhibit 8). The Agency continued to act in good faith to ensure a smooth transition to the new leave policy. The Agency continues to work assiduously with DFAS for the proper implementation of the new leave policy.

FACTS AND TESTIMONY

AFGE/NVAC represents 270,000 employees at VA facilities across the country, approximately 18,000 are Physicians. These Physicians are compensated based on "24/7/365 availability," are not eligible for premium pay or overtime pay, and regularly have schedules that include workdays exceeding 8 hours, such as 10 or 12-hour shifts. Stip. Facts 4-5. Physicians accrued 26 "days" of annual leave and 13 "days" of sick leave per calendar year, and they used or "charged" that leave in increments of "days." Stip. Fact 6-7. On July 26, 2018, the VA published VA Handbook 5011/32, which changed the leave accrual rate from "days" to "hours" (i.e., for annual leave per pay period, from "1 day" to "8 hours"; for sick leave per pay period, from "1/2 day" to "4 hours") and the minimum charge rate from "1 day" to "1 hour." Stip. Fact 8. According to subsequent VA publications and guidance, these policy changes were placed "on hold" pending system enhancements to the VA Time and Attendance System ("VATAS") . Stip. Facts 9-10. The policy changes in VA Handbook 5011/32 finally became effective on September 15, 2019. Stip. Fact 11. On that day, the Agency retroactively converted accrued leave balances from "days" to "hours" without accounting for each Physician's unique tour of duty; instead, the Agency used a universal 8-hour multiplier, Stip. Fact 12. On November 12, 2019, the Agency agreed to "fix" its retroactive conversion and make-whole impacted Physicians. Stip. Facts 13-14.

Dr. James Martin

Dr. James Martin, testified that he is an Emergency Physician at the Captain James A. Lovell VA Medical Center, local and national Union representative, and member of the

VA Special Medical Advisory Group. Dr. Martin testified he has worked 12-hour shifts since joining the VA in May 2006 (Tr. 40). Dr. Martin testified that there are many other Physicians at his facility work similar compressed tours that exceed 8-hour workdays. (Tr. 44). Dr. Martin explained that since joining the VA, he has accrued leave benefits according to his 12-hour tour of duty. Dr. Martin explained that his "1 day" of earned annual leave per pay period was worth "12 hours" and his "1/2 day" of earned sick leave per pay period was worth "6 hours" (Tr. 45-46). Also, his paid federal holidays covered his entire 12-hour shift (Tr. 46). These accruals have not changed during Dr. Martin's tenure with the VA. Dr. Martin noted, that when he was recruited to work at the VA, this system was presented as a "benefit" and "inducement" that "attracted" Physicians to the VA during the recruitment process, especially those coming from the private sector (Tr. 46).

Dr. Martin testified that on September 15, 2019, the Agency converted all Physicians' accrued leave balances from "days" to "hours" using a universal 8-hour multiplier to account for each employee's workday (Tr. 48). Dr. Martin testified that prior to this conversion, several Union representatives, including Dr. Martin, raised concerns with senior VA leadership in Washington, D.C., noting that this conversion would adversely affect Physicians on compressed work schedules (Tr. 48). Dr. Martin testified that prior to September 15, 2019, he had accrued leave balances: "43 days" of annual leave (516 hours based on 12-hour shifts) and "89 days" of sick leave (1,068 hours based on 12-hour shifts) (Tr. 50-51). <u>Union Ex. 1.</u> Dr. Martin also testified that after the Agency's conversion of retroactive leave, He was "stripped me of one-third of my leave time." Tr. 53; <u>Union Ex. 2.</u> Dr. Martin testified that the Physicians he represents, were "quite upset" with the retroactive conversion of accrued leave, because it "stripped" Physicians of the

value of accrued leave that was earned in the months and years prior to the September 15, 2019, change in policy (Tr. 54-55).

William Wetmore

William Wetmore testified that he is the Third Executive Vice President for AFGE/NVAC and a retired Attorney-Advisor who worked at the Board of Veterans Appeals for 42 years and has been a Union representative since 1992 (Tr. 21-240. Mr. Wetmore testified that he served as a full-time member of the Union Negotiating Team for the 8 years leading up to the execution of the 2011 Master Agreement (Tr. 24-25). Joint Ex. 1. Mr. Wetmore testified that he was present for negotiations concerning Article 35 (Time and Leave) (Tr. 25). As relevant to this dispute, the Parties memorialized the manner in which Physicians "earn and use leave" in Article 35, Section 1(B) (Tr. 25) Joint Ex. 1 ("All leave charges shall be in increments of one-quarter hour, except in the case of Title 38 physicians, dentists, chiropractors and optometrists, who accrue and use leave in full-day increments"). Mr. Wetmore testified that this leave system for Physicians had already been in effect for "decades" (Tr. 26). Mr. Wetmore explained for compensation of their long and irregular tours of duty, "the fairest way of treating their leave was to say you've worked a day, you get a day of leave" (Tr. 26). Mr. Wetmore testified that the Agency's decision to retroactively convert their leave balances on September 15, 2019 was a "big change . . . from the contract, and certainly a big change for the bargaining unit" (Tr. 29). Mr. Wetmore explained that it was a "change" in "conditions of employment," "as exemplified by the fact that we bargained those issues with the Department for decades" (Tr. 29-30). Mr. Wetmore testified that the discussions during the September 2019 Labor-

Management Relations meeting were "informal" and "predecisional" in nature, and they did not satisfy the Agency's statutory and contractual obligations to bargain with the Union (Tr. 100-102). Mr. Wetmore stated that if the Agency wanted to convert accrued leave balances, that would be a change in conditions of employment that required pre-implementation notice and bargaining with the Union (Tr. 102-103).

Jeffrey Kleiner

Jeffrey Kleiner testified that he is the HR Consultant for VHA Workforce Management Consulting Office. Mr. Kleiner further testified that he was "the backup" for a now-retired colleague who oversaw the Agency's revision and implementation of VA Handbook 5011/32 ,but he did not work "directly" with the Agency leaders responsible for implementing this policy change (Tr. 65). Mr. Kleiner testified that following the September 15, 2019, effective date for the implementation of VA Handbook 5011/32, the Agency published the VA-DUSHOM Memorandum (Authorization of One-Time Modification to Leave Conversion Rates Based on Policy Revision in VA Handbook 5011/32, Daily to Hourly Leave), dated November 12, 2019, Joint Ex. 8, as a result of "concerns that were coming from the facilities," including the VA Chief of Staff and Chief Medical Officers (Tr. 67-68). Mr. Kleiner testified that these concerns were "primarily regarded those individuals that were on compressed work schedules" as of September 15, 2019 (Tr. 68). Mr. Kleiner stated the VA-DUSHOM Memorandum was published to "alleviate" the "perceived loss" of accrued leave for impacted Physicians because the September 15, 2019, conversion did not account for "distinction between an individual that was on a regular schedule . . . versus those on a compressed schedule" (Tr. 68-69). Mr.

Kleiner testified that the conversion did not account for the “mode number of hours underneath [a Physician’s] compressed work schedule” and the Agency has not implemented the “one-time modification” referenced in the VA-DUSHOM Memo, Mr. Kleiner surmised that the indefinite delay was due to “IT systems” that “need to be in place” (Tr. 73-77).

Mr. Kleiner explained that under the prior version of VA Handbook 5011, which was in effect from April 15, 2002, to September 15, 2019, all Physicians earned and charged a “full day” of annual leave, meaning they earned an entire day and used an entire day based on their unique tour of duty (Tr. 80) Joint Ex. 2.

Mr. Kleiner acknowledged the negative financial impact that the Agency’s retroactive leave conversion had on the calculation of separation payments and retirement calculations (Tr. 89-91). Mr. Kleiner further acknowledged that the Agency had not even begun the process of identifying the “dominant mode” of hours (i.e., hours worked per day) for Physicians affected by the policy change (Tr. 84-85).

DISCUSSION AND OPINION

The Federal Service Labor Management Relations Statute, 5 U.S.C. Chapter 71, states that a federal agency has a duty to bargain with the labor organization certified as the representative of bargaining unit employees over changes in conditions of employment. 5 U.S.C. §7116. “Conditions of employment” are broadly defined as “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions.” 5 U.S.C. §7106(a)(14). At a minimum, an Agency’s obligation to bargain includes "affording the exclusive representative notice of

proposed changes and an opportunity to [bargain.]" Dep't of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9, 10-11 (1981). It should be noted that any "notice" of a proposed change in conditions of employment must be sufficiently specific and definitive to provide the union with a reasonable opportunity to request bargaining. Memphis District Corps of Engineers and NFFE Local 259, 53 FLRA 79 (1997). An agency's notice must also advise a union of the planned timing of the change. NFFE v. FLRA, 369 F.3d 548 (D.C. Cir. 2004).

Here, the Record reflects, the testimony of Mr. Wetmore that this provision of the 2011 Master Agreement memorialized the leave entitlements for Physicians, which had already been in effect for "decades" at the time this language was negotiated by the Parties' at the national level. Dr. Martin testified that after the Agency's September 15, 2019, conversion of retroactive leave, it "stripped me of one-third of my leave time." As the Record reflects, Dr. Martin is just one of the 18,000 similarly situated Physicians that were affected by the Agency's conversion. As such, the Agency's actions are far from de minimis.

Furthermore, Mr. Kleiner confirmed the testimony of Mr. Wetmore and Dr. Martin that historically, and pursuant to VA Handbook 5011 and the 2011 Master Agreement, Physicians earned annual and sick leave, per pay period, based on their unique tour of duty (Tr. 80) Joint Ex. 2.

The Agency argues that "the leave policy wasn't considered a condition of employment" (Tr. 36). As to the Agency's defense as to whether "leave" is considered a condition of employment under the Statute. The Agency further argues that if there was any "change" such change was "de minimis"

It is well settled that "Leave" is a "condition of employment," and as such, there has been has numerous leave-related disputes. See, e.g., AFGE Local 2317 and Marine Corps Logistics Base, Albany, 29 FLRA 1587, 1612 (1987) (confirming issue of leave forfeiture is negotiable); Dep't of the Air Force, Wright-Patterson AFB and AFGE Council 214, 38 FLRA 887 (1990) (finding agency committed ULP by unilaterally changing administrative regulation governing leave procedures); Dep't of the Treasury, IRS and NTEU Chapter 19, 62 FLRA 411 (2008) (affirming arbitration award finding agency violated contract by unilaterally changing leave procedures). Notice of a proposed change in conditions of employment must be sufficiently specific and definitive to provide the union with a reasonable opportunity to request bargaining. Memphis District Corps of Engineers and NFFE Local 259, 53 FLRA 79 (1997). An agency's notice must also advise a union of the planned timing of the change. NFFE v. FLRA, 369 F.3d 548 (D.C. Cir. 2004).

The Union correctly argues that arbitrators have the authority to resolve statutory unfair labor practice claims which are raised in the grievance process. AFGE Local 3529 and Defense Contract Audit Agency, 57 FLRA 464 (2001); NTEU Chapter 168 and Dep't of the Treasury, Customs Service, 55 FLRA 237 (1999). An unfair labor practice ruling made by an arbitrator has the same force of law as a determination made in an unfair labor practice proceeding by an FLRA ALJ. AFGE Council 236 and General Services Administration, 63 FLRA 651, 652 (2009) ("In a grievance proceeding that alleges an unfair labor practice under section 7116 of the Statute, an arbitrator functions as a substitute for an Authority ALJ").

Here, the Record is void of any qualifying notice prior to its September 15, 2019, conversion of retroactive leave. As such, the Agency failed to provide specific notice of the change, and since retroactive leave conversion constitutes a change to conditions of employment, it is subject to pre-implementation bargaining. It should be noted that the Union was noticed in the August 20, 2019, OHRM bulletin announcing that leave conversions for full-time Title 38 physicians, dentists, chiropractors, podiatrists and optometrists would be effective September 15, 2019 and all impacted employees would see this conversion on the leave and earning statement received on October 4, 2019. It also should be noticed that what is absent from this notice or any other notice is that all leave already accrued will be retroactively converted and, as such, will be reduced by, in some cases, as much as one-third.

Based on the forgoing, the Agency violated its statutory duty to bargain by failing to notify and bargain with the Union prior to implementing the retroactive conversion of Physicians' accrued leave balances. Accordingly, I find that the Agency committed an unfair labor practice under 5 U.S.C. §7116(a)(5) and violated its contractual duty under the 2011 Master Agreement.

REMEDY

In applying the Back Pay Act, an arbitrator must determine whether there has been an unjustified or unwarranted personal action, and then whether there is a causal relationship between the improper personnel action and loss of pay. A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel

action under the Act. U.S. Department of Defense, Department of Defense Dependent's Schools and Federal Education Association, 54 FLRA 773, (1998).

"An award of backpay is authorized . . . only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials." Tinker AFB, 63 FLRA 59 (citing Dep't of Health & Human Servs., 54 FLRA 1210, 1218-19 (1998)). Restoration of lost leave because of an unjustified or unwarranted personnel action is a proper remedy under the Back Pay Act. Social Security Administration and AFGE Local 3509, 63 FLRA 661 (2009).

Here, the appropriate remedy requires the Agency to provide "make-whole relief" to impacted Physicians pursuant to the Back Pay Act. The Agency must identify Physicians impacted, the amount of restored leave owed to them, whether they are current, former, or retired employees, and in what manner Agency will make them whole. To that end, this Arbitrator will retain jurisdiction for the implementation of this Award and for purposes of resolving any dispute concerning relief which the Union is entitled based on thes findings. Should the Parties be unable to voluntarily resolve these issues the Union may file a formal petition with the Arbitrator.

AWARD

On the substantial and credible evidence of this case and the record in its entirety this Arbitrator finds:

1. The Agency violated law and contract by implementing VA Handbook 5011/32. The Agency violated Article 35, Section 1(B) by retroactively converting the accrued leave balances of Physicians. The Agency further

violated Article 47 and 5 U.S.C. §7116(a)(5) by failing to notify and bargain with the Union.

2. The Agency committed an unjustified or unwarranted personnel action.

3. As such, the Union is entitled to the following relief:

   a. Within 60 days, and consistent with this Award, the Agency shall make-whole any Physician impacted by the Agency's violations.

   b. During this 60-day period both Parties must act in good faith in making whole the Physicians impacted by the Agency's violations.

   c. Within 45 days, and consistent with this Award, the Agency shall distribute a remedial notice posting to all AFGE bargaining unit employees by email. It shall be signed by the appropriate person consistence with the statue.

   d. The Arbitrator shall retain jurisdiction for purposes of resolving any dispute or issue concerning implementation of this Award.

I so Award.

Dated: December 30, 2020
White Plains, New York

Steven C. Kasarda, Arbitrator

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

The undersigned under penalty of perjury affirms that he is the Arbitrator in the within proceeding who has executed the forgoing instrument and issued the above Award on December 30, 2020 for delivery to the Parties by email:

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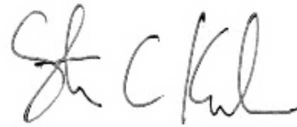

Steven C. Kasarda, Arbitrator