**NATIONAL GRIEVANCE**
**NG-08/08/18**

**Date:** August 8, 2018

**To:** Kimberly McLeod
Executive Director
Department of Veterans Affairs
Office of Labor-Management Relations
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***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 against the Department of Veterans Affairs related to its unilateral implementation of EO 13837**

## STATEMENT OF CHARGES

This letter constitutes a National Grievance pursuant to Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) ("MCBA"). The American Federation of Government Employees/National Veterans Affairs Council ("NVAC" or "the Union") is filing this National Grievance against you and all associated officials and/or individuals acting as agents on behalf of the Department of Veterans Affairs ("Agency") for violating the law and MCBA through its actions related to Executive Order 13837. By, and through issuing a July 17, 2018, Notice of Implementation and unilaterally implementing changes to the MCBA, the Agency: A) committed numerous unfair labor practices in violation of the Federal Labor Management-Relations Statute B) violated numerous provisions of the MCBA; and C) violated the terms of Executive Order 13837.

## STATEMENT OF THE CASE

### Background

On May 25, 2018, President Trump issued Executive Order 13837, "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time" ("EO"). This EO prescribed limitations on the use of official time as defined by 5 U.S.C. § 7131(d). Among the limitations discussed in the EO, official time was directed to be limited to no more than 25%

of a federal employee's paid time; and agencies were instructed to deny union officials the right to prepare, process and arbitrate grievances on official time. Exec. Order No. 13837, 83 Fed. Reg. 106, Secs. 4(a)(ii) and (v) (June 1, 2018). The EO, however, explicitly stated that "[n]othing in this order shall abrogate any collective bargaining agreement in effect on the date of this order." *Id.* at 9(a).

The parties' collective bargaining agreement, the MCBA, is currently in force, and was in force, at the time the EO was issued. On December 15, 2017, the Agency notified the NVAC that it was initiating renegotiation of the MCBA. The MCBA states clearly and unequivocally that "[i]f renegotiation of an Agreement is in progress but not completed upon the terminal date of this Agreement, this Agreement will be automatically extended until a new agreement is negotiated." MCBA, Duration of Agreement, Sec. 2. Pursuant to the Duration of Agreement, the MCBA was extended on March 15, 2018 and did not expire. When the EO was issued on May 25, 2018, the MCBA was in effect as a result of the March 15, 2018 extension.

On July 17, 2018, the Agency provided the Union with a Notice of Implementation of EO 13837, attached as Exhibit "A". The Notice identified numerous articles, or portions thereof, in the current MCBA that the Agency deemed in conflict with the EO, and indicated its intent to immediately terminate those identified provisions. The Notice offered post-implementation bargaining, if the Union presented its proposals within 14 days of receipt of the notice. Around the same time, the Agency began implementing the changes included in the Notice. On July 31, 2018, the Union submitted proposals, under protest, regarding the Agency's proposed changes.

The implementation of the EO was particularly chaotic due the Agency's lack of specificity in its Notice. Lacking in the Notice was a clear effective date; how the official time of national officers, district representatives, national representatives, and health and safety representatives will be addressed; the manner in which employees will reduce their official time; clarity on the listed repudiated sections which concern more than official time; and, the authority for the stated timelines for bargaining this matter. Moreover, facilities have begun implementing changes in an inconsistent and haphazard manner. For example, Hines VAMC eliminated the Local President's official time entirely; Milwaukee VAMC has cut off union representatives' PIV cards, preventing them from completing any work; Roanoke VARO has denied all official time for the Local Vice President; San Antonio VA is applying the official time limitation to a retired Local President; the Board of Veterans Appeals eliminated official time for all employees representing the Union above the Local level; and, the Denver VARO has applied the EO retroactively to limit the number of hours available to the Local.

**Violations**

The Agency violated Section 7116(a) of the Federal Service Labor Relations Statute (the "Statute") and the MCBA by making unilateral changes to conditions of employment that are greater than *de minimis* without providing the Union an opportunity to bargain. The Union also contends the Agency's implementation of the EO violates the plain language of the EO itself.

*A. Statutory violations*

The Agency's actions in issuing the Notice and unilaterally implementing changes to numerous articles of the MCBA constitute unfair labor practices in violation of the Statute. Specifically, by and through its actions, the Agency has: 1) repudiated the MCBA in violation of 5 U.S.C. § 7116(a)(1) and (5); 2) unlawfully compelled piecemeal bargaining in bad faith in violation of 5 U.S.C. § 7116(a)(5) and (8); 3) engaged in bad-faith bargaining in violation of 5 U.S.C. § 7116(a)(5); 4) impermissibly enforced a rule or regulation that is inconsistent with a valid collective bargaining agreement in violation of 5 U.S.C. §7116(a)(7); 5) engaged in unlawful bypass in violation of 5 U.S.C. § 7116(a)(5); 6) discriminated against employees based on their union activity in violation of 5 U.S.C. § 7116(a)(2); and 7) interfered with, restrained, and coerced employees in violation of 5 U.S.C. § 7116(a)(1) and (8).

1. By issuing the Notice and unilaterally implementing changes to the MCBA, the Agency committed the unfair labor practice of repudiation. The Agency's actions were a clear and patent breach of the MCBA, including provisions that go to the heart of the agreement. The Agency unilaterally eliminated more than 20 provisions of the MCBA. These include, but are not limited to, provisions allowing official time for the Union's participation in certain forums, such as labor-management committees, safety and health committees and diversity committees. The Agency also unilaterally modified the MCBA to prohibit the Union from filing grievances against the Agency on official time. These actions demonstrate a clear and patent breach of the MCBA.

2. As noted above, the parties began renegotiation of their term agreement prior to the Agency's issuance of the Notice. The appropriate time and forum for negotiating any changes to the valid and unexpired MCBA is during the term negotiations that have already been initiated. The Agency's insistence that the parties engage in mid-term bargaining of the changes in the Notice is an unlawful attempt to compel piecemeal bargaining. In addition, the lack of specificity in the Notice constitutes bad faith. These bad-faith actions constitute an unfair labor practice in violation of 5 U.S.C. § 7116(a)(5) and (8).

3. Section 7116(a)(5) states that "it shall be an unfair labor practice for an agency to refuse to consult or negotiate in good faith with a labor organization…." Thus, the Agency has engaged in bad faith bargaining by insisting on post-implementation bargaining. On July 23, 2018, the NVAC President demanded a briefing on the proposed changes to the MCBA, *see* July 23, 2018 letter, attached as Exhibit "B." To date, the Agency has not provided a briefing or responded to the letter.

4. Section 7116(a)(7) makes it an unfair labor practice for management to enforce any rule or regulation that is inconsistent with an applicable collective bargaining agreement if the agreement was in effect before the rule or regulation was prescribed. Here, the current MCBA is in full force and effect, and was in effect prior to the issuance of the EO. Therefore, the Agency committed an unfair labor practice by abrogating the MCBA and enforcing the provisions of the EO.

5. The Agency improperly bypassed the NVAC by dealing directly with bargaining unit employees concerning matters affecting employees' conditions of employment. A bypass interferes with the Union's rights under § 7114(a)(1) of the Statute "to act for …all employees in the unit," and constitutes an unfair labor practice in violation of §§ 7116(a)(1) and (5). Specifically, the Agency engaged with local Union officials to issue "return-to-work" orders and discuss how the EO would be implemented without first providing notice to the NVAC. As a result, many Union officials have returned to their former duty stations without proper training or an opportunity to bargain at the level of recognition prior to implementation.

6. Section 7116(a)(2) prohibits an agency from discriminating against employees because they engage in protected union activities. The Notice discriminates against union officials by prohibiting them from using official time to prepare or pursue grievances, while permitting non-union officials to use official time for their own grievances. Further, the Agency discriminates against employees assisting the Union by treating them differently from employees acting as personal representatives with no affiliation to the Union.

7. Under Section 7116(a)(1), the Agency cannot interfere with, restrain, or coerce employees who are exercising their rights assured by the Statute. Here, the Agency attempts to unlawfully prohibit employees from exercising or asserting a right under the MCBA, including the contractual right to official time.

*B. Contractual violations*

The Agency's notice unilaterally implemented changes to official time without bargaining. The Agency's actions violate numerous articles of the MCBA.

1. Separate and independent of the statutory violations outlined above, by repudiating numerous articles in the MCBA, the Agency violated the Duration of Agreement Clause because the MCBA was in full force and effect. By its own terms, the MCBA is automatically extended until a new agreement is negotiated, and neither party may unilaterally withdraw from any portion of the MCBA. Term negotiations are currently underway, which is the appropriate forum for changes.

2. The Agency violated Article 2 of the MCBA because it failed to comply with applicable federal statutes and regulations in the administration of matters covered by the MCBA, namely 5 U.S.C. § 7116(a), which requires an agency to "consult or negotiate in good faith with a labor organization" regarding changes in conditions of employment.

3. Separate and independent of the Agency's statutory bargaining obligation, the Agency violated its contractual bargaining obligations under Articles 47 and 49 of the MCBA, by failing to provide adequate written notice and opportunity to bargain to the President of NVAC, or her designee, prior to implementation of its proposed changes in conditions of employment affecting two or more local unions. Moreover, the Notice was contractually deficient in that it lacked specificity and led to

haphazard and contradictory directives throughout local facilities concerning the calculation and usage of official time.

4. The Agency violated Article 48 of the MCBA by prohibiting the use of official time to represent employees in grievances and arbitrations and to engage in lobbying functions. Additionally, each denial of official time by the Agency violates the relevant articles of the MCBA that provide for that time, including but not limited to, Articles 3, 4, 5, 7, 8, 17, 18, 25, 29, 43, 44, 47, 48, and 49.

*C. Violations of the Executive Order*

The Agency also violated the plain language of Executive Order. The EO explicitly provides: "Each agency shall implement the requirements of this order . . . to the extent permitted by law and consistent with their obligations under collective bargaining agreements in force on the date of this order." EO 13837, Sec. 8(a). It further states, "[n]othing in this order shall abrogate any collective bargaining agreement in effect on the date of this order." *Id.* at 9(a). The MCBA has not expired and remains in force. Thus, the Agency's attempt to implement the EO violates the EO's own terms.

Second, the EO instructed the Office of Personnel Management ("OPM") to examine existing regulations for consistency with the EO and to issue regulations if existing regulations were inconsistent. OPM has not promulgated any such regulations. Instead, OPM published guidance on July 5, 2018 paraphrasing the EO and encouraging federal agencies to consult with legal counsel and offices of labor relations with questions concerning implementation of the EO at each individual agency.

Finally, the limitations on official time as prescribed by the EO were deemed "effective 45 days from the date of this order." *Id.* at 4(c)(i). That language implicated an effective date of July 9, 2018. However, local facilities have unilaterally applied the EO retroactively by calculating a local union's "remaining" official time hours for the current fiscal year. This assumes that the one-hour-of-official-time-per-bargaining-unit-employee calculation, as prescribed by the EO, should have been divided by 12 to determine the amount of official time allocated per month and thereafter used to determine how much time remains in FY18. However, by its own terms, the EO provides for official time on a fiscal year basis. Demonstratively, on July 26, 2018, management officials at the Greater Los Angeles VAMC in California notified AFGE Local 2297 union officials that they had divided the Local's 300 bargaining unit employees by 12 months to determine that the Local is permitted 25 hours of official time per month. *See* Local 2297 notification, attached as Exhibit "C." The Agency then determined that since there were two months remaining in the current fiscal year—*viz.*, August and September—the Local would be granted 50 hours of official time for the remainder of FY18. Nowhere does the EO indicate that the calculation of official time shall be applied retroactively.

In sum, by failing to fulfill its obligations and unilaterally implementing changes that affect the bargaining unit, the Agency has violated, and continues to violate, the Statute, the MCBA, the EO, and any and all other relevant articles, laws, regulations, customs, and past

practices not herein specified. The Union expressly reserves the right to supplement this grievance until it is resolved.

**Remedies Requested**

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

- To return to the *status quo ante*;
- To cease and desist from any actions that abrogate its responsibilities under the law and the MCBA;
- To rescind the Notice of Implementation of EO 13837 until its bargaining obligations are met;
- To issue a notice posting acknowledging its obligations to the Union under the Statute;
- To fully comply with its contractual obligations under Articles 2, 47, 48, 49 and the Duration of Agreement Clause of the MCBA;
- To make whole any employee affected by the Agency's violations, including, but not limited to backpay, restoration of leave, and attorney's fees; 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. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance. If you have any questions regarding this grievance, please feel free to contact the undersigned at 202-639-6424.

Submitted by,

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