NATIONAL VETERANS AFFAIRS COUNCIL
American Federation of Government Employees, Affiliated with the AFL-CIO

NATIONAL GRIEVANCE
NG-03/04/2025

Date: March 4, 2025

To: Denise Biaggi-Ayer
Executive Director
Office of Labor Management Relations
U.S. Department of Veterans Affairs
Denise.Biaggi-Ayer@va.gov
VALMRLitigation@va.gov
Sent via electronic mail only

From: Ibidun Roberts of Roberts Labor Law and Consulting, L.L.C., on behalf of National Veterans Affairs Council (#53) ("NVAC"), American Federation of Government Employees, AFL-CIO ("AFGE")

RE: **National Grievance against the Department of Veterans Affairs for failure to comply with the Darby Award.**

STATEMENT OF CHARGES

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 (2023) ("MCBA" or "Master Agreement"), American Federation of Government Employees/National Veterans Affairs Council ("the Union") is filing this National Grievance against you and all other associated officials and/or individuals acting as agent on behalf of the U.S. Department of Veterans Affairs ("VA," "the Agency," or "the Department") for its failure to comply with the Darby Award.

Specifically, the VA violated Articles 2 and 49 of the MCBA, 5 U.S.C. §7116(a)(1), (5) and (8), and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

STATEMENT OF THE CASE

Background

Ross Award

On September 29, 2017, the Union filed a grievance against the Department relating to its elimination of performance improvement plans ("PIPs") as required by Article 27 of the MCBA. Notably, instead of the 90-day PIP required by Article 27, Section 10 of the Master Agreement, the Agency provided employees with a "two pay period" opportunity to improve.

The Department had not asserted that the 38 U.S.C. §714 removed its obligation to provide employees with an opportunity to improve.[1] Instead, the Department asserted that it was no longer obligated to provide the 90-day duration of the performance improvement plan in the Master Agreement. The Union timely invoked arbitration on the grievance and the parties selected Arbitrator Jerome Ross to resolve the dispute presented by the grievance. Arbitrator Ross conducted a hearing on April 26, 2018, and, on August 23, 2018, he issued his decision sustaining the Union's grievance.

Specifically, he found that:

> [T]he [Accountability Act] did not remove VA employees' opportunity to demonstrate acceptable performance, as required by federal law. Consequently, the [Accountability Act] also did not act to supersede any negotiated contractual provisions that provide bargaining unit employees the opportunity to demonstrate acceptable performance. Article 27, Section 10 of the Master Agreement falls under that category. Accordingly, the [Accountability Act] also did not authorize the Agency to disregard its obligations under that negotiated provision.

(Attachment A at pp. 12-35.)

As a result, he ordered the Agency to "(1) resume compliance with the requirements set forth in Article 27, Section 10 of the Master Agreement; (2) rescind any adverse action taken against bargaining unit employees for unacceptable performance who did not first receive a PIP complying with the provisions of Article 27, Section 10; (3) as a result, reinstate and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits."

However, on September 24, 2018, the Agency filed exceptions to Arbitrator Ross's Award asserting that it was contrary to law, that the Arbitrator exceeded his authority, and that the award failed to draw its essence from the parties' CBA. Because the VA filed exceptions, the arbitrator's award could not become final. On November 16, 2020, the Federal Labor Relations Authority (the "Authority" or "FLRA") denied VA's exceptions. *U.S. Dep't of Veterans Affairs, Veterans Benefits Admin. and AFGE, Nat'l Veterans Affairs Council #53*, 71 F.L.R.A. 1113 (2020) ("*Decision*"). Notably, the Authority found that the Award is consistent with law because "[] Section 10, which requires the Agency to give an employee a PIP and ninety days to improve *prior* to initiating a performance-based action, is not contrary to the Accountability Act." *Decision* at 1116 (emphasis in original). The issuance of this decision made the arbitrator's award final.

However, VA still did not comply with the Ross Award and instead, on November 27, 2020, filed a request for the FLRA to reconsider its decision. On December 8, 2020, VA also filed a request for the FLRA to stay the implementation of the *Decision*.

[1] The Agency's position subsequently evolved to assert that performance improvement plans, as a whole, are contrary to 38 U.S.C. §714.

On February 22, 2021, VA's Office of the Chief Human Capital Officer issued a bulletin instructing that the Department should resume the issuance of PIPs as required by the Ross Award. However, the Department had not taken any action to rescind adverse actions taken against bargaining unit employees for unacceptable performance without first receiving a PIP or make the affected bargaining unit employees whole.

Because the FLRA's decision was final on November 16, 2020, and the Authority had not stayed the decision, on May 17, 2021, the Union filed an unfair labor practice charge ("ULP") alleging that the Department had failed to comply with the Ross Award.

While the ULP charge was pending, on June 25, 2021, the FLRA denied the Department's requests for reconsideration and for a stay.

On or around September 2021, VA began notifying affected employees of their entitlement to rescission of the adverse action and reinstatement. However, VA did not work with the Union on how it would implement the remedy and instead dealt directly with bargaining unit employees concerning implementation of the Ross Award. Resultingly, the Parties mutually agreed to request assistance from the FLRA Collaboration and Dispute Resolution Office in an effort to resolve disputes concerning VA's compliance with the Ross Award.

Ultimately, the Parties reached agreement resolving disputes concerning VA's compliance with the Ross Award. The Parties executed the agreement with the last signature provided on July 5, 2022. (Attachment A at 10.)

Darby Award

On October 17, 2022, the Union filed a national grievance related to the Department's failure to comply with the Ross Award and associated Settlement Agreement. Pertinently, the Department failed to provide make whole relief in a timely manner. On October 31, 2022, the Union amended its national grievance to add, pertinently, that the Department unilaterally determined that individuals who retired on disability following their removal under Section 714 for unacceptable performance were excluded from the Settlement Agreement. The Union timely invoked arbitration on the grievance and the parties selected Arbitrator James M. Darby to resolve the disputes presented by the grievance. Arbitrator Darby conducted a hearing on September 6-7, 2023 and virtually on September 26, 2023. On May 15, 2024, he issued his decision sustaining in part and denying in part the Union's grievance[2].

Specifically, he found that:

> The Agency violated the July 5, 2022 Settlement Agreement and committed an unfair labor practice by failing to provide eligible bargaining unit members with make-whole relief in a timely manner. The Agency violated the July 5, 2022 Settlement Agreement and committed an unfair

[2] Arbitrator Darby denied the Union's disability discrimination claim.

labor practice by refusing to provide make whole relief to Carlos Valenzuela-Durr due to his accepting a disability retirement.

As a remedy, the Agency shall:
1) Cease and desist from failing to comply with the July 5, 2022 Settlement Agreement in a reasonable amount of time and refusing to provide make whole relief to disability retirees.
2) Post an electronic notice (approved by the undersigned and the Union and sent electronically to all bargaining unit employees) signed by the Secretary of the Department of Veterans Affairs.
3) Provide back pay plus interest (consistent with the Back Pay Act, 5 U.S.C. §5596) within 60 days to all remaining eligible individuals who have not been made whole as of the date of this award. In the event the Agency determines it has insufficient information from individual employees to comply with this Award, the Agency shall promptly notify those employees and the Union and the 60 days shall commence upon receipt of such information.
4) Provide back pay and interest within 60 days to Carlos Valenzuela-Durr, to be offset by the disability retirement compensation he earned, and otherwise grant him the relief and options provided in the July 5, 2022, Settlement Agreement. The Agency shall also immediately provide the Union with the names and addresses of other similarly situated bargaining unit employees.
5) In the event the Agency fails to comply with any of the foregoing provisions the undersigned will accept an application with supporting documentation for an award of compensatory damages for individuals who have still not been made whole.

(Attachment B at p. 25.)

The Union timely filed Exceptions to Federal Labor Relations Authority ("FLRA") regarding the arbitrator's analysis of the Union's disability discrimination claim. The Department did not file any exceptions to the Award.

On July 5, 2024, after a request by the Union, Arbitrator Darby clarified that his award applied to any individual similarly-situated to Mr. Valenzuela-Durr. (Attachment C.)

On December 30, 2024, the FLRA accepted the withdrawal of the Union's Exceptions, making Arbitrator Darby's decision final. (Attachment D.)

Violations

On a continuing and ongoing basis, the Department has failed to post the electronic notice ordered by Arbitrator Darby. Notably, the Department has not submitted any draft posting for approval by the Union or the Arbitrator.

Also, the Department has failed to provide back pay plus interest to all the remaining eligible individuals who have not been made whole within 60 days of the award becoming final. Similarly, the Department has failed to provide back pay and interest (to be offset by the disability retirement compensation he earned) within 60 days of the award becoming final to Carlos Valenzuela-Durr, or any of the other identified individuals similarly situated to him (Attachment E). The Department has also failed to provide individuals similarly-situated to Mr. Valenzuela-Durr with the relief and options provided in the July 5, 2022, Settlement Agreement.

By failing to honor the arbitration award, the Department violated, and continues to violate, the following:

- the Darby Arbitration Award;
- the Ross Settlement Agreement;
- Article 2 of the MCBA: requiring compliance with all federal statutes and governmentwide regulations;
- Article 49 of the MCBA: which requires that the parties have due regard for the obligations imposed by 5 U.S.C. Chapter 71;
- 5 U.S.C. §7116(a)(1), (5), and (8): requiring the Agency to honor unambiguous terms of settlement agreements and arbitration awards;
- Any other law, rule, regulation, or Master Agreement provision not herein specified.

Remedies Requested

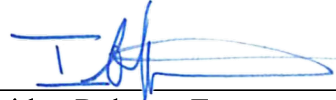
The Union asks that, to remedy the above situation, the Department agree to the following:

- Cease and desist from further violations of the Settlement Agreement and the Federal Service Labor-Management Relations Statute;
- Comply with the Darby Arbitration Award within 30 days of resolution of the grievance;
- Provide the Union with reasonable documentation concerning the status of, and details regarding, the remedy provided to impacted bargaining unit employees;
- To make whole bargaining unit employees who were harmed by the Department's violations;
- To pay reasonable 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. Ibidun Roberts of Roberts Labor Law and Consulting, L.L.C., is the designated representative for this National Grievance. If you have any questions regarding this National Grievance, please contact her at (202) 235-5026 or iroberts@robertslaborlaw.com.

Submitted by,



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Enclosure

cc: Alma L. Lee, President, AFGE/NVAC
Bill Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
Thomas Dargon, Deputy General Counsel, AFGE/NVAC

Settlement Agreement between
Department of Veterans Affairs
&
National Veterans Affairs Council,
American Federation of Government Employees, AFL-CIO

Re: National Grievance, NG-9/29/17
Performance Improvement Plans
FMCS Case No. 181117-01691

I. Preamble

American Federation of Government Employees, AFL-CIO, National Veterans Affairs Council #53 (“AFGE/NVAC” or “Union”), and the Department of Veterans Affairs (“VA” or “Department”) (collectively “the Parties”), hereby agree to settle certain disputes arising out of the Union’s National Grievance dated September 29, 2017 (“National Grievance”), FMCS Case 181117-01691, concerning the VA’s failure to provide performance improvement plans (“PIP”) consistent with Article 27, Section 10 of the 2011 Master Agreement to AFGE bargaining unit employees (“AFGE BUEs”) prior to taking a performance-based adverse action under the VA Accountability and Whistleblower Protection Act, 38 U.S.C. §714 (“Section 714”).

On August 23, 2018, Arbitrator Jerome H. Ross issued an award sustaining the National Grievance, finding that VA violated the 2011 Master Agreement by failing to provide PIPs to AFGE BUEs prior to taking performance-based adverse actions under Section 714 (“Ross Award”).[1] Arbitrator Ross ordered VA to (1) resume compliance with the 2011 Master Agreement, (2) rescind any adverse action taken against AFGE BUEs for unacceptable performance who did not first receive a PIP in compliance with the 2011 Master Agreement, and (3) reinstate and/or make whole any such AFGE BUEs consistent with the Back Pay Act. VA filed exceptions to the Ross Award with the Federal Labor Relations Authority (“FLRA”). On November 16, 2020, the FLRA issued a decision denying VA’s exceptions and upholding the Ross Award.[2] VA then filed a motion for reconsideration and request for stay with the FLRA. On June 25, 2021, the FLRA denied VA’s motion for reconsideration and request for stay.[3]

VA did not initiate compliance with the Ross Award once it became final and binding on November 16, 2020. On May 17, 2021, the Union filed an unfair labor practice charge with the FLRA, Charge No. SF-CA-20-0240, to enforce the Ross Award. VA later took steps to implement the Ross Award by contacting AFGE BUEs directly and offering reinstatement and/or make whole relief. The Parties mutually agreed to request assistance from the FLRA Collaboration and Dispute Resolution Office (“FLRA-CADRO”) in an effort to resolve disputes concerning VA’s compliance with the Ross Award.

This Settlement Agreement (“Agreement”) resolves all disputes and claims between AFGE/NVAC and VA as to VA’s compliance with the Ross Award with the exception of the category of AFGE BUEs identified in Section II(D) and any claims that may arise through breach of this Agreement.

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[1] See Exhibit 1.
[2] *U.S. Dep’t of Veterans Affairs and AFGE, National VA Council*, 71 FLRA 1113 (2020) (Chairman Kiko dissenting in part).
[3] *U.S. Dep’t of Veterans Affairs and AFGE, National VA Council*, 72 FLRA 407 (2021) (Chairman Kiko dissenting in part).

II. Terms of Agreement

By execution of this Agreement, the Parties agree to the following:

A. Eligible AFGE BUEs: The Parties agree that the following categories of AFGE BUEs are eligible for relief under this Agreement as stated below ("Eligible AFGE BUEs").

i. **No Individual Appeal Filed**: This category includes employees who received performance-based adverse actions under Section 714 between June 23, 2017 and the effective date of this Agreement and who did not appeal that action.

ii. **Individual Appeal Filed:** This category includes employees who received performance-based adverse actions under Section 714 between June 23, 2017 and the effective date of this Agreement and who did appeal that action, regardless of the result. However, this category does not include AFGE BUEs identified in Section II(D).

iii. **Resignation In Lieu Of**: This category includes employees who received a proposed performance-based adverse action under Section 714 and who resigned from federal service prior to VA issuing a final decision under Section 714 between November 16, 2020 and the effective date of this Agreement.

iv. **Individual Settlement Agreement**: This category includes employees who received a performance-based adverse action under Section 714 and who later executed an individual settlement agreement with VA between November 16, 2020 and the effective date of this Agreement.

v. **Mixed Conduct/Performance or Unreported Performance Actions**: This category includes employees who (a) received a "mixed conduct/performance action" under Section 714 between June 23, 2017 and the effective date of this Agreement where the proposal would not have been sustained solely based on the misconduct charge(s), or (b) an "unreported performance action" under Section 714 between June 23, 2017 and the effective date of this Agreement. The Parties agree to use the procedures in Section II(H) of this Agreement to review and identify the employees to be included in this category of Eligible AFGE BUEs.

  a. A "mixed conduct/performance action" is an adverse action under Section 714 based on charges of a combination of misconduct and unsatisfactory performance based on failure of critical element(s) or "substantially similar charges." For purposes of this Agreement, "substantially similar charges" to unsatisfactory performance include but are not limited to charges of Unacceptable Performance, Failure of a Critical Element, Failure to Maintain Acceptable Performance, Negligent Performance of Duties (where the specifications identify a failure to meet performance standards), Failure to Meet Performance Standards/Plan, and Narrative Charges in which the underlying narrative includes failure to meet performance standards/plan. The underlying performance charge must involve failure to meet performance standards/plan.

  b. An "unreported performance action" is an adverse action under Section 714 based on unsatisfactory performance based on failure of critical element(s) for an AFGE BUE who was not previously identified as an Eligible AFGE BUE by VA.

vi. **Retirement In Lieu Of**: This category includes employees who received a proposed performance-based adverse action under Section 714 and who retired

from federal service prior to VA issuing a final decision under Section 714 between November 16, 2020 and the effective date of this Agreement.

vii. **Last Chance Agreement**: This category includes employees who received a proposed performance-based adverse action under Section 714 but who executed an intervening Last Chance Agreement and were later removed for violating that Last Chance Agreement between November 16, 2020 and the effective date of this Agreement.

B. Relief for Eligible AFGE BUEs: The Parties agree that VA will provide the following relief to each category of Eligible AFGE BUEs.

i. **No Individual Appeal Filed**: Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.

ii. **Individual Appeal Filed:** Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.

iii. **Resignation In Lieu Of**: Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.

iv. **Individual Settlement Agreement**: Eligible AFGE BUEs in this category are entitled to maintain their individual settlement agreement with VA or rescind their individual settlement agreement with VA and receive reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement. If an Eligible AFGE BUE elects to rescind their individual settlement agreement with VA, they must return and remit to VA any compensation paid to them through that individual settlement agreement as a condition of receiving reinstatement and/or make-whole relief under this Agreement. Nothing in this Agreement shall be construed as affecting the Department's obligations to any party in the Individual Settlement Agreement other than the Eligible AFGE BUE.

v. **Mixed Conduct/Performance or Unreported Performance Actions**: Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.

vi. **Retirement In Lieu Of**: Eligible AFGE BUEs in this category are entitled to a one-time, lump sum payment equivalent to twenty percent (20%) of their gross annual salary as of the date of their retirement from VA.

vii. **Last Chance Agreement**: Eligible AFGE BUEs in this category are entitled to a one-time, lump sum payment equivalent to fifteen percent (15%) of their gross annual salary as of the date of their removal from VA.

C. Ineligible AFGE BUEs: The Parties agree that the following categories of AFGE BUEs are ineligible for relief under this Agreement.

i. **Non-AFGE BUEs**: Employees who did not encumber a position included in the AFGE bargaining unit are ineligible for relief under this Agreement.

ii. **Non-Section 714 Adverse Actions**: Employees who received adverse actions under legal authorities other than Section 714 are ineligible for relief under this Agreement.

iii. **Employee Received PIP**: Employees who received a PIP consistent with Article 27, Section 10 of the 2011 Master Agreement prior to VA issuing a proposed

performance-based adverse action under Section 714 are ineligible for relief under this Agreement.

iv. **Employee Previously Made Whole**: Employees who, prior to the effective date of this Agreement, were previously made whole by VA are ineligible for relief under this Agreement. This includes, for example, employees who successfully appealed their adverse action and were later reinstated with make-whole relief. The Parties agree that no employee is entitled to duplicate relief/payment under this Agreement.

v. **Resignations/Retirements In Lieu Of, Individual Settlement Agreement, and Last Chance Agreement Before November 16, 2020**: Employees who, before November 16, 2020, resigned or retired in lieu of receiving a Section 714 adverse action, executed an individual settlement agreement after receiving a Section 714 adverse action, or were removed for violating a Last Chance Agreement executed in lieu of receiving a Section 714 adverse action are ineligible for relief under this Agreement.

D. **Category of AFGE BUEs Not Covered by this Agreement.** The Parties agree that this Agreement does not cover AFGE BUEs who appealed their performance-based adverse action(s) under Section 714 to the Merit Systems Protection Board ("MSPB") unsuccessfully and, as of April 21, 2022, had filed a Petition for Review ("PFR") pending before the MSPB or the United States Court of Appeals for the Federal Circuit. This category includes only the following AFGE BUEs.

Espindola, Belinda, DA-0714-19-0552-I-1
Shannon-Bailey, Laurie, PH-0714-21-0012-I-1

E. **Rescission and Correction**: The Parties agree that Eligible AFGE BUEs identified in Sections II(A)(i), (ii), (iii), (iv), and (v) of this Agreement are entitled to rescission of the performance-based action taken under 38 U.S.C. §714 and correction of their eOPF. This entitlement is without regard to the employee's election of relief or any waiver of relief.

F. **Reinstatement and/or Make-Whole Relief**: The Parties agree that Eligible AFGE BUEs identified in Sections II(A)(i), (ii), (iii), (iv), and (v) of this Agreement are entitled to reinstatement and/or make-whole relief as set forth below. This means that an Eligible AFGE BUE may elect to either (1) return to their previous position/grade at VA and receive the make-whole relief (i.e., reinstatement with make-whole relief), or (2) not return to their previous position/grade at VA and instead receive only the make-whole relief (i.e., make-whole relief without reinstatement). For purposes of this Agreement, reinstatement and make-whole relief are defined as follows.

i. **Reinstatement**: If an Eligible AFGE BUE elects reinstatement with make-whole relief, VA will:

a. Reinstate the Eligible AFGE BUE to their previous position/grade at VA. If, during their period of separation from VA, that position was reclassified to a higher grade, VA will reinstate the Eligible AFGE BUE to the higher grade.

b. If the Eligible AFGE BUE's previous position/grade at VA is no longer available, VA will reinstate the BUE to a substantially similar position at the VA (i.e., a position with similar responsibilities and duties at the

same grade and facility, on the same work shift (i.e., days, evenings, or nights), in the same bargaining unit.

c. If a substantially similar position to the Eligible AFGE BUE's previous position/grade at VA is not available, VA will provide the Eligible AFGE BUE and applicable AFGE Local President or other AFGE Elected Officer with a list of 4 available positions (or the maximum number of available positions if less than 4) at the previous grade for which they are qualified. The VA will use best efforts to identify positions that are in the same bargaining unit, at the same geographic location, on the same work shift (i.e., days, evenings, or nights). The list will indicate whether the position is a career ladder position. If the Eligible AFGE BUE was previously in a career ladder position, they will be placed in a career ladder position if one is available. No Eligible AFGE BUE will suffer a loss in pay as a result of their election to be reinstated, with the exception of an Eligible AFGE BUE who elect to maintain a lower-graded position (i.e., demotions).

1. The Eligible AFGE BUE will have fourteen (14) calendar days to accept or select a position from the list. If the Eligible AFGE BUE fails to accept or select a position, VA will select the position for the Eligible AFGE BUE.
2. VA reserves its right to take appropriate action if the Eligible AFGE BUE does not return to duty. The Eligible AFGE BUE may avail themselves of any right afforded by law or contract in responding to action taken by VA, if any.

ii. **No Reinstatement**: If an Eligible AFGE BUE elects to not be reinstated or fails to make an election, VA will generate an SF-50 noting the employee's resignation effective on the date the Eligible AFGE BUE executed the Remedy Election Form or ninety (90) calendar days from the date of the Employee Notification, whichever is earlier.

iii. **Make-Whole Relief**: Make-whole relief will be calculated and provided consistent with the Back Pay Act, 5 U.S.C. §5596, applicable government-wide regulations, 5 C.F.R. §550.801, *et seq*, and the 2011 Master Agreement. Regardless of whether an Eligible AFGE BUE elects to be reinstated to their previous position, VA will provide make-whole relief as follows.

a. **Back Pay**: Back pay will be calculated and paid consistent with 5 C.F.R. §550.805. Back pay will only continue to accrue to the date the Eligible AFGE BUE executed the Remedy Election Form or ninety (90) calendar days from the date of the Employee Notification, whichever is earlier.

b. **Lost Overtime**: Lost overtime compensation will be calculated and paid using a formula of historical monthly overtime average multiplied by total months of separation from VA. The "historical monthly overtime average" will be calculated by dividing the total amount of all overtime compensation paid to the employee in the six (6) month period preceding their separation from VA by six (6). The "total months of separation from VA" is the total number of months elapsed between the employee's separation date from VA and the date the Eligible AFGE BUE executes the Remedy Election Form.

c. **Interest**: Interest will be calculated and paid consistent with 5 C.F.R. § 550.806.

d. **Within Grade Increase**: The Eligible AFGE BUE shall receive any within grade increases for which they would have been eligible between the employee's separation date from VA and the date the Eligible AFGE BUE executes the Remedy Election Form.

e. **Career Ladder Promotion**: The Eligible AFGE BUE shall receive any career ladder promotions for which they would have been eligible between the employee's separation date from VA and the date the Eligible AFGE BUE executes the Remedy Election Form, unless, prior to the adverse action, the VA issued a written notice of failure to meet the criteria for promotion in accordance with Article 23, Section 4 of the 2011 Master Agreement.

f. **Replacement Earnings**: VA will make offsets and deductions from the gross back pay award for replacement earnings consistent with 5 C.F.R. §550.805(e).

g. **Leave Restoration**: Annual and sick leave that would have been earned during the period of separation from VA will be restored and credited to the employee. Annual leave exceeding the legal annual maximum will be credited to a separate leave account consistent with 5 C.F.R. §550.805(g).

h. **Student Loans**: For purposes of federal loan forgiveness, VA will advise Eligible AFGE BUEs that their eOPF has been corrected and they may contact the Department of Education with questions concerning eligibility for student loan forgiveness.

i. **Health Insurance**: VA will make all appropriate contributions to the Eligible AFGE BUE's federal health insurance benefit program, if applicable, and assist the Eligible AFGE BUE with submitting any medical claims that arose during their period of separation from VA.

j. **Retirement**: VA will make all appropriate contributions to the Eligible AFGE BUE's retirement plan and Thrift Savings Plan, if applicable.

iv. **Prohibition of Duplicate Relief Awarded in Subsequent Proceedings**: The Parties agree that Eligible AFGE BUEs may not receive duplicate relief/payment.

G. **Procedures to Notify and Provide Relief to Eligible AFGE BUEs**: The Parties agree to utilize the following procedures to notify and provide relief to each category of Eligible AFGE BUEs.

i. **Initial Employee Notification from VA**: Within fourteen (14) calendar days of this Agreement, VA will draft and transmit, by certified mail with return receipt requested, a copy of all relevant Employee Notifications[4] to the Eligible AFGE BUEs as set forth below.

a. **No Individual Appeal Filed**: Eligible AFGE BUEs in this category will receive a copy of the Employee Notification (General), Remedy Election Form (General), and Frequently Asked Questions.[5]

b. **Individual Appeal Filed:** Eligible AFGE BUEs in this category will receive a copy of the Employee Notification (General), Remedy Election Form (General), and Frequently Asked Questions.

c. **Resignation In Lieu Of**: Eligible AFGE BUEs in this category will receive a copy of the Employee Notification (Resignation), Remedy Election Form (General), and Frequently Asked Questions.

[4] See Exhibit 2.
[5] See Exhibit 3.

d. **Individual Settlement Agreement**: Eligible AFGE BUEs in this category will receive a copy of the Employee Notification (Settlement), Remedy Election Form (Settlement), and Frequently Asked Questions.

e. **Mixed Conduct/Performance or Unreported Performance Actions**: Eligible AFGE BUEs in this category will receive a copy of the Employee Notification (General), Remedy Election Form (General), and Frequently Asked Questions. Eligible AFGE BUEs in this category will receive the Employee Notification and Frequently Asked Questions consistent with Section II(H) of this Agreement.

f. **Retirement In Lieu Of**: Eligible AFGE BUEs in this category will receive a copy of the Employee Notification (Retirement), Address Verification Form, and Frequently Asked Questions.

g. **Last Chance Agreement**: Eligible AFGE BUEs in this category will receive a copy of the Employee Notification (Last Chance Agreement), Address Verification Form, and Frequently Asked Questions.

ii. **Employee Deadline to Respond and Waiver**: The Eligible AFGE BUE must provide the executed Remedy Election Form or Address Verification Form to VA, as applicable, no later than one-hundred fifty (150) calendar days from the date of the Employee Notification. If the executed Remedy Election Form or Address Verification Form is not provided to VA within one-hundred fifty (150) calendar days from the date of the Employee Notification, the Eligible AFGE BUE will be deemed to have waived their rights to relief under this Agreement.

iii. **Second Employee Notification from VA**: Within seventy-five (75) calendar days of this Agreement, VA counsel will provide AFGE counsel with a Microsoft Excel spreadsheet identifying: (1) the names of all Eligible AFGE BUEs whose Employee Notification was either returned to VA as undeliverable or who have not yet provided the Remedy Election Form or Address Verification Form to VA, as appropriate, (2) the last four digits of the Eligible AFGE BUE's Social Security Number, (3) the name of the Eligible AFGE BUE's VA facility, and (4) the mailing addresses used for the original Employee Notification.

a. **Address Review by Union**: Within thirty (30) days of receiving this Microsoft Excel spreadsheet from VA counsel, Union counsel will attempt to obtain updated mailing addresses and return the Microsoft Excel spreadsheet to VA counsel.

b. **Second Mailing by VA**: Within fourteen (14) days of receiving the Microsoft Excel spreadsheet from Union counsel, VA will transmit another copy of the applicable Employee Notification to the Eligible AFGE BUE using the mailing addresses provided by Union counsel. However, this second mailing by VA will not extend or toll the deadline in Section II(G)(ii) of this Agreement.

H. **Joint Review of Mixed Conduct/Performance and Unreported Performance Actions**: As soon as possible, VA will provide AFGE NVAC with electronic copies of all proposals and final adverse actions issued under Section 714 between June 23, 2017 and the effective date of this Agreement. On a monthly basis (absent mutual agreement), the Parties will jointly review any employees identified by AFGE virtually to determine if they are an Eligible AFGE BUE as defined in Section II(A)(v) of this Agreement (Mixed Conduct/Performance and Unreported Performance Actions). Once the Parties agree to the identity of Eligible AFGE BUE(s) as defined in Section II(A)(v) of this Agreement, the Parties will execute addenda to this Agreement and VA will notify and provide relief to the Eligible AFGE BUE consistent with this Agreement. The Parties

agree to utilize the mediation services provided by FLRA-CADRO, or any other mutually agreed upon neutral mediation services to resolve eligibility disputes if requested by either party. If necessary, unresolved eligibility disputes will proceed to binding mediation-arbitration via the Federal Mediation and Conciliation Service. Mediation services or mediation-arbitration costs, if any, shall be borne equally by the Parties.

I. **No Retaliation or Reprisal**: VA will not retaliate against any Eligible AFGE BUE for participating in this process and availing themselves of the rights and benefits to which they are entitled under the Ross Award and the terms of this Agreement.

J. **Information to AFGE**: Upon request, VA agrees to provide AFGE counsel with an updated electronic listing of all Eligible AFGE BUEs in each category set forth in Section II(A) of this Agreement with the following information:

- **i.** Employee Name
- **ii.** Duty Station
- **iii.** Previous VA Position
- **iv.** Previous Grade/Step
- **v.** Reinstated VA Position, if applicable
- **vi.** Reinstated Grade/Step, if applicable
- **vii.** Execution Date of Remedy Election Form or Address Verification Form
- **viii.** Gross Amount of Make-Whole Relief Paid

K. **Tax Withholding**: The Parties make no representation as to the taxability of the payments under this Settlement Agreement or as to the tax treatment that such payments will receive from the Internal Revenue Service. All Eligible AFGE BUEs should consult with a tax professional, if desired.

L. **Attorneys' Fees**: VA agrees to pay the Union $55,112.90 in attorneys' fees pursuant to the Back Pay Act. The Parties hereby agree that no additional request(s) by AFGE or payment(s) by VA will be made for attorneys' fees concerning the matters and actions required in Sections II(H) and III of this Agreement, including document review, joint review meetings, mediation services, and binding mediation-arbitration services. The Parties agree that AFGE may petition for additional attorneys' fees that may arise through proceedings concerning a breach of this Agreement. VA will issue payment via electronic deposit/check into:

AFGE Legal Rep Fund — $26,541.50
Amalgamated Bank
275 Seventh Avenue
New York, NY 10001
Accounting Number: 81019974
Routing Number: 026003379
Caging Code: 490Z5
Tax Identification Number: 53-0025740

Roberts Labor Law and Consulting, LLC — $28,571.40
PNC Bank
390 Main Street
Laurel, MD 20707
Acct. No. 5426102816

Bank Routing Transfer No. 054000030
Caging Code: 94CE9
Tax ID No. 85-201371

III. Withdrawal

A. National Grievance, NG-6/4/21, FMCS Case No. 210820-09371: Within seven (7) calendar days of the effective date of this Agreement, the Union shall withdraw and waive the claims associated with NG-6/4/21 concerning April 21, 2021 Request for Information, including the remaining compliance with the arbitration decision by Arbitrator John L. Woods.

B. National Grievance, NG-3/7/22: Within seven (7) calendar days of the effective date of this Agreement, the Union shall withdraw and waive the claims associated with NG-3/7/22 concerning January 31, 2022 Request for Information.

C. Unfair Labor Practice Charge, SF-CA-21-0240: Within seven (7) calendar days of the effective date of this Agreement, the Union shall withdraw or amend the ULP charge concerning compliance with the Ross Award to address only the category of employees who have appealed their adverse action and, as of April 21, 2022, their appeal was not final because the initial decision was then pending on a petition for review before the MSPB or the United States Court of Appeals for the Federal Circuit. The Union shall also withdraw its request for the remedy of notice posting signed by the Secretary of VA from the ULP charge.

IV. Stipulations

The Parties further stipulate and agree:

A. They have entered into this Agreement freely and voluntarily.

B. The Parties may mutually agree in writing to extend any time limits in this Agreement.

C. The Agreement constitutes a joint effort by the Parties and should not be construed against any party.

D. The Parties agree to fulfil their obligations under this Agreement in good faith.

E. This Agreement shall not serve as precedent or past practice for resolving any matter with the Agency.

F. The obligations of the Parties specified above constitute consideration sufficient to render this Agreement enforceable by either party. The Parties agree to fulfil their obligations under this Agreement in good faith.

G. This Agreement constitutes the entire understanding between the Parties regarding the resolution and settlement of this matter, and there are no other terms or commitments, verbal or written, regarding the settlement of this matter. No other promises or agreements shall be binding unless placed in writing and signed by the Parties. The Parties may submit this Agreement as evidence of eligibility, ineligibility, and withdrawal of the actions, claims, complaints, grievances, or appeals identified in this Agreement.

H. If a binding determination is made that any immaterial term(s) of this Agreement is/are unenforceable, such unenforceability shall not affect any other provisions of this Agreement, and the remaining terms of this Agreement shall, unless prohibited by law, remain enforceable.

I. All the time limits in this Agreement are in calendar days. If a time limit expires on a Saturday, Sunday, or a Federal Holiday, then the time limit shall expire on the next business day.

J. The "effective date" of this Agreement is the last date upon which this Agreement has been signed by either party as noted below.

K. Either party may bring a claim in the form of a grievance arising from the breach of any term of this Agreement.

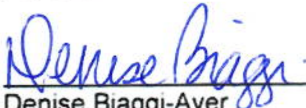
For AFGE/NVAC:

6-30.22

William Wetmore
Chair, Grievance & Arbitration Committee
AFGE/NVAC

Date

For VA:



7-5-22

Denise Biaggi-Ayer
Executive Director
Office of Labor-Management Relations
U.S. Department of Veterans Affairs

Date

Exhibit 1

Ross Award

In the Matter of the Arbitration	)	
	)	
Between	)	
	)	
AMERICAN FEDERATION OF GOVERNMENT	)	
EMPLOYEES, NATIONAL VETERANS	)	FMCS Case No. 181117-01691
AFFAIRS COUNCIL #53	)	Re: Elimination of Performance
	)	Improvement Plans
And	)	
	)	
U.S. DEPARTMENT OF VETERANS AFFAIRS	)	
	)	
	)	

Before: Jerome H. Ross, Arbitrator

Date of Hearing: April 26, 2018

Appearances

For the Union: Michael A. Gillman, Esq.
Ibidun Roberts, Esq.
Office of the General Counsel,
American Federation of Government
Employees, AFL-CIO

For the Agency: Aaron L. Robison, Esq.
Daenia Peart, Esq.
Office of the General Counsel
U.S. Dep't of Veterans Affairs

Statement of the Case

This arbitration between the National Veterans Affairs Council #53, American Federation of Government Employees (hereinafter "the Union"), and U.S. Department of Veterans Affairs (hereinafter "the Agency"), arose from the Agency's decision to replace the Parties' past practices and procedures concerning performance appraisal and improvement with new processes and procedures. In this connection, the Union represents 22,000 employees at the Veterans Benefits Administration, and claims a violation of the Parties' collective bargaining agreement (hereinafter their "Master Agreement"). On April 26, 2018, this matter was heard by the undersigned, after which the Parties submitted briefs.

Issue

The Parties did not agree to a joint submission of the issue for arbitration. After reviewing the transcript, Union's grievance, and arguments submitted by the Parties, the Arbitrator frames the issue as follows:

Whether the Department's decision to replace the performance appraisal and improvement process outlined by Article 27, Section 10 of the Parties' Master Agreement was consistent with applicable law. If not, what shall the remedy be?

Background Facts and Relevant Portions of the Grievance

On June 23, 2017, the President of the United States signed into law the "Veterans Affairs Accountability and Whistleblower Protection Act of 2017," 38 U.S. Code § 714 (hereinafter "VAA"), which provided a new procedure to "remove, demote, or suspend" certain employees working at the VA, "based on performance or misconduct," independent of the procedures under Chapter 43 of Title 5, United States Code. *See* VAA, 38 U.S.C. § 714.

On June 27, 2017, the Agency issued Human Resources Management Letter (hereinafter a "HRML") No. 05-17-06, which provided the Agency's procedures regarding implementation of the VAA. *See* UX-2. As relevant here, this HRML stated: "there is no requirement for a Covered Employee to serve a minimum of 90 calendar days under a performance appraisal plan, or be given an opportunity to improve (e.g., a performance improvement plan)[1] prior to a Removal or Demotion being imposed for performance-based deficiencies under the [VAA]." *Id.* at 7.

On August 3, 2017, the Agency's Office of Field Operations announced, "[s]tations are not to initiate any Performance Improvement Periods (PIPs) for any business lines at this time – further guidance will follow . . . " This announcement must be distributed to the Union. *See* UX-3. On August 24, 2017, the Agency issued a second HRML, which stated in pertinent part: "a Performance Improvement Plan (PIP) as described in Chapter 43 of Title 5 or VA Handbook 5013, part I, or required under a collective bargaining agreement will not be used to address the performance deficiencies of a Covered Employee under the Act or prior to imposing a performance-related Removal or Demotion under the Act." *See* UX-4.

On September 29, 2017, the Union filed a national-level grievance on behalf of "any employee adversely affected by" the Agency's distribution of letters to each Veterans Service Representative ("VSR")[2] employed by the Agency. These letters were issued in September 2017 at the instruction of the Agency's VBA Office of Field Operations (hereinafter "OFO Letters"). In particular, some employees who the Agency had

[1] The Arbitrator notes that a performance improvement plan is commonly referred to as a "PIP."
[2] VSRs investigate veterans' benefit claims and assist veterans with the development of the evidence to support their claims.

determined "[were] not meeting the Output performance expectations" received OFO Letters explaining that they "would be given two pay periods (beginning September 3, 2017 and ending on September 30, 2017) to meet the fully successful level or else be subject to adverse action up to and including termination of employment." *See* JX-2 (the Grievance) at 2.[3] The grievance asserted that these letters violated the procedures for PIPs established by Article 27, Section 10 of the Master Agreement.[4] As relevant here, the Union wrote:

> Under the Master Agreement, before a bargaining unit employee's performance may be rated as unacceptable and therefore subject to a performance based action, the Agency must comply with Article 27, Section 10 of the MCBA which governs performance improvement plans. This section requires that an employee be given a performance improvement plan (PIP) in accordance with the following requirements:
>
> > (1) the employee's supervisor must identify the specific, performance related problems
> > (2) the supervisor must develop the PIP in consultation with the employee and local union representative a written PIP that identifies the employee's specific performance deficiencies, the successful level of performance, the methods that will be employed to measure the improvement, and provisions for counseling, training or other appropriate assistance.
> > (3) the PIP must be tailored to the specific needs of the employee
> > [(4) is absent – Arb.]
> > (5) placing an employee on a 100% review alone does not constitute a PIP
> > (6) the PIP will afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problems
> > (7) the supervisor must meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period.

---

[3] An example of one of the OFO Letters, attached to JX-2, confirms that an employee determined to be performing at "less than fully successful" received a notice that allowed two pay periods to raise performance to the "fully successful" level, and that "[f]ailure to perform at expected levels may lead to adverse action up to and including termination of employment." *See also* Tr. at 34-35.

[4] Although the grievance also asserted that the OFO letters violated several sections of the Master Agreement in different ways, as well as an argument that the Agency violated the Federal Service Labor-Management Relations Statute by failing to bargain with the Union prior to implementing changes to the Master Agreement, the Union narrowed the issue to the claim that the Agency's decision to replace the procedures for PIPs violated Article 27, Section 10 of the Parties' Master Agreement. *See, e.g.*, Tr. at 30. Accordingly, here, the Arbitrator only recounts the sections of the grievance that concerned PIPs and Article 27, Section 10.

> The two-pay period trial period outlined in the OFO letters does not remotely resemble the process spelled out in the collective bargaining agreement. It does not meet the requirements of a PIP in accordance with the Master Agreement. Despite this fact, the letters themselves state that failure to perform at "expected levels" during this trial may lead to adverse action up to and including termination from employment. Implementing this trial period (a PIP of another name), rather than the contractually mandated PIP process, violates Article 27 of the Master Agreement.

JX-2 at 3-4. In terms of a remedy, the Union requested, as relevant here:

- Management will rescind the attached OFO letters sent to bargaining unit employees;
- Management will remove any documentation regarding any adverse action related to this matter from affected employees.
- Management will make whole any employee adversely affected by this action to include, but not limited to, back pay, restored leave, award pay outs, missed overtime, missed career ladder or merit promotions or within grade increases, attorneys' fees, etc.;
- Management will post an electronic notice to all affected employees that the Agency will not engage in this conduct in the future; and,
- Any other appropriate relief.

See JX-2 at 6.

On January 11, 2018, the Agency denied the Grievance.

<u>Relevant Portions of the Parties' Master Agreement, and Applicable Laws, Rules or Regulations</u>

MASTER AGREEMENT

ARTICLE 14 – DISCIPLINE AND ADVERSE ACTION

<u>Section 1 – General</u>

The Department and the Union recognize that the public interest requires the maintenance of high standards of conduct. No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service. Actions based upon substantively unacceptable performance should be taken in accordance with Title 5, Chapter 43 and will be covered in Article 27 – Performance Appraisal System.

ARTICLE 27 – PERFORMANCE APPRAISAL

. . . .

Section 2 – Definitions

. . . .

F. Performance

The accomplishment of work assignments or responsibilities.

G. Performance Plan

All written or otherwise recorded, performance elements that set forth expected performance. A plan must include all critical and non-critical elements and their performance standards.

. . . .

Section 4 – Performance Management Responsibilities
Performance management responsibilities:

A. Appropriate Department officials shall be responsible for:

1. Providing supervision and feedback to employees on an on-going basis with the goal of improving employee performance.

2. Nominating deserving employees for performance awards.

B. Employees are responsible for:

1. Performing the duties outlined in his/her position description and performance elements.

2. Promptly notifying supervisors about factors that interfere with his/her ability to perform his/her duties at the level of performance required by his/her performance elements.

. . . .

Section 10 – Performance Improvement Plan (PIP)

A. If the supervisor determines that the employee is not meeting the standards of his/her critical element(s), the supervisor shall identify the specific, performance-related problem(s). After this determination, the supervisor shall develop in consultation with the employee and local union representatives, a written PIP. The

PIP will identify the employee's specific performance deficiencies, the successful level of performance, the action(s) that must be taken by the employee to improve to the successful level of performance, the methods that will be employed to measure the improvement, and any provisions for counseling, training, or other appropriate assistance. In addition to a review of the employee's work products, the PIP will be tailored to the specific needs of the employee and may include additional instructions, counseling, assignment of a mentor, or other assistance as appropriate. For example, if the employee is unable to meet the critical element due to lack of organizational skills, the resulting PIP might include training on time management. If the performance deficiency is caused by circumstances beyond the employee's control, the supervisor should consider means of addressing the deficiency using other than a PIP. The parties agree that placing the employee on 100% review alone does not constitute a PIP.

B. The PIP will afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problem(s). The PIP period may be extended.

C. Ongoing communication between the supervisor and the employee during the PIP period is essential; accordingly, the supervisor shall meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period. The parties may agree to a different frequency of feedback. The feedback will be documented in writing, with a copy provided to the employee. If requested by the employee, local union representation shall be allowed at the weekly meeting.

D. The goal of this PIP is to return the employee to successful performance as soon as possible.

E. At any time during the PIP period, the supervisor may conclude that the employee's performance has improved to the Fully Successful level and the PIP can be terminated. In that event, the supervisor will notify the employee in writing, terminate the PIP, and evaluate the employee as Fully Successful or higher.

F. In accordance with 5 CFR 432.105(a)(2), if an employee has performed acceptably for one year from the beginning of an opportunity to demonstrate an acceptable performance (in the critical element(s) for which the employee was afforded an opportunity to demonstrate acceptable performance), and the employee's performance again becomes unacceptable, the Department shall afford the employee an additional opportunity to demonstrate acceptable performance before determining whether to propose a reduction in grade or removal.

Section 11 – Performance-Based Actions

A. Should all remedial action fail and the employee's performance is determined to be unacceptable, the supervisor will issue a rating of unacceptable performance to the employee. One of the following actions will be taken: reassignment, reduction to the next lower appropriate grade, or removal.

B. An employee who is reassigned or demoted to a position at a lower grade shall receive a determination of his/her standing after 90 calendar days in the new position.

C. A notice of reassignment for performance reasons shall contain an explanation of the reasons why training had been ineffective or inappropriate. When a reassignment is proposed in these instances, the following shall apply:

1. The reassignment shall be to an available position for which the employee has potential to achieve acceptable performance;

2. The employee shall receive appropriate training and assistance to enable the employee to achieve an acceptable level of performance in the position;

3. The reassignment shall be within the commuting area of the employee's current position; and

4. The reassignment shall be at the grade and step level equal to that of the position held by the employee prior to the reassignment.

D. An employee whose reduction in grade or removal is proposed for unacceptable performance is entitled to:

1. Thirty calendar days' advance written notice of the proposed action which identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based, and the critical element(s) of the employee's position involved in each instance of unacceptable performance;

2. A reasonable time, not to exceed 20 calendar days, to answer orally and in writing;

3. A reasonable amount of authorized time up to eight hours, to prepare an answer (additional time may be granted on a case-by-case basis);

4. The employee and/or his/her representative will be provided with a copy of the evidence file.

E. An official who sustains the proposed reasons against an employee in an action based on unacceptable performance will set forth his/her reasons for the decision in writing.

F. The employee will be given a written decision which:

1. Specifies the instances of unacceptable performance on which the decision is based; and

2. Specifies the effective date, the action to be taken, and the employee's right to appeal the decision.

G. The final decision in the case of a proposed action to either remove or downgrade an employee based on unacceptable performance shall be based on those instances which occurred during the 1-year period ending on the date of the notice proposing the performance-based action.

H. The decision shall inform the employee of their right to appeal to either the Merit Systems Protection Board (MSPB) in accordance with applicable laws or to file a grievance under the negotiated grievance procedure.

DEPARTMENT OF VETERANS AFFAIRS ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT OF 2017

38 U.S. Code § 714 – Employees: removal, demotion, or suspension based on performance or misconduct

(a) IN GENERAL.—

(1) The Secretary may remove, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines the performance or misconduct of the covered individual warrants such removal, demotion, or suspension.

(2) If the Secretary so removes, demotes, or suspends such a covered individual, the Secretary may –

(A) remove the covered individual from the civil service (as defined in section 2101 of title 5);

(B) demote the covered individual by means of a reduction in grade for which the covered individual is qualified, that the Secretary determines is appropriate, and that reduces the annual rate of pay of the covered individual; or

(C) suspend the covered individual..

(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.--

(1) Notwithstanding any other provision of law, any covered individual subject to a demotion under subsection (a)(2) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade.

(2)

(A) A covered individual so demoted may not be placed on administrative leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave.

(B) If a covered individual so demoted does not report for duty or receive approval to use accrued unused leave, such covered individual shall not receive pay or other benefits pursuant to subsection (d)(5).

(c) PROCEDURE.—

(1)

(A) The aggregate period for notice, response, and final decision in a removal, demotion, or suspension under this section may not exceed 15 business days.

(B) The period for the response of a covered individual to a notice of a proposed removal, demotion, or suspension under this section shall be 7 business days.

(C) Paragraph (3) of subsection (b) of section 7513 of title 5 shall apply with respect to a removal, demotion, or suspension under this section.

(D) The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.

(2) The Secretary shall issue a final decision with respect to a removal, demotion, or suspension under this section not later than 15 business days after the Secretary provides notice, including a file containing all the evidence in support of the proposed action, to the covered individual of the removal, demotion, or suspension. The decision shall be in writing and shall include the specific reasons therefor.

(3) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.

(4)

(A) Subject to subparagraph (B) and subsection (d), any removal or demotion under this section, and any suspension of more than 14 days under this section, may be appealed to the Merit Systems Protection Board, which shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5.

(B) An appeal under subparagraph (A) of a removal, demotion, or suspension may only be made if such appeal is made not later than 10 business days after the date of such removal, demotion, or suspension.

(d)EXPEDITED REVIEW.—

(1) Upon receipt of an appeal under subsection (c)(4)(A), the administrative judge shall expedite any such appeal under section 7701(b)(1) of title 5 and, in any such case, shall issue a final and complete decision not later than 180 days after the date of the appeal.

(2)

(A) Notwithstanding section 7701 (c)(1)(B) of title 5, the administrative judge shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

(B) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the administrative judge shall not mitigate the penalty prescribed by the Secretary.

(3)

(A) The decision of the administrative judge under paragraph (1) may be appealed to the Merit Systems Protection Board.

(B) Notwithstanding section 7701(c)(1)(B) of title 5, the Merit Systems Protection Board shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

(C) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the Merit Systems Protection Board shall not mitigate the penalty prescribed by the Secretary.

(4) In any case in which the administrative judge cannot issue a decision in accordance with the 180-day requirement under paragraph (1), the Merit Systems Protection Board shall, not later than 14 business days after the expiration of the 180-day period, submit to the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

(5)

(A) A decision of the Merit Systems Protection Board under paragraph (3) may be appealed to the United States Court of Appeals for the Federal Circuit pursuant to section 7703 of title 5 or to any court of appeals of competent jurisdiction pursuant to subsection (b)(1)(B) of such section.

(B) Any decision by such Court shall be in compliance with section 7462f(2) of this title..

(6) The Merit Systems Protection Board may not stay any removal or demotion under this section, except as provided in section 1214(b) of title 5.

(7) During the period beginning on the date on which a covered individual appeals a removal from the civil service under subsection (c) and ending on the date that the United States Court of Appeals for the Federal Circuit issues a final decision on such appeal, such covered individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits related to the employment of the individual by the Department.

(8) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

(9) If an employee prevails on appeal under this section, the employee shall be entitled to backpay (as provided in section 5596 of title 5).

(10) If an employee who is subject to a collective bargaining agreement chooses to grieve an action taken under this section through a grievance procedure provided under the collective bargaining agreement, the timelines and procedures set forth in subsection (c) and this subsection shall apply.

(e)WHISTLEBLOWER PROTECTION.—

(1) In the case of a covered individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in section 2302(b), the Secretary may not remove, demote, or suspend such covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(2) In the case of a covered individual who has made a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) until –

(A) in the case in which the Assistant Secretary determines to refer the whistleblower disclosure under section 323(c)(1)(D) of this title to an office or other investigative entity, a final decision with respect to the whistleblower disclosure has been made by such office or other investigative entity; or

(B) in the case in which the Assistant Secretary determines not to the refer the whistleblower disclosure under such section, the Assistant Secretary makes such determination.

(f) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—

(1) Notwithstanding any other provision of law, the Special Counsel (established by section 1211 of title 5) may terminate an investigation of a prohibited personnel practice alleged by an employee or former employee of the Department after the Special Counsel provides to the employee or former employee a written statement of the reasons for the termination of the investigation.

(2) Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

(g) VACANCIES.—

In the case of a covered individual who is removed or demoted under subsection (a), to the maximum extent feasible, the Secretary shall fill the vacancy arising as a result of such removal or demotion.

(h) DEFINITIONS.— In this section:

(1) The term "covered individual" means an individual occupying a position at the Department, but does not include—

(A) an individual occupying a senior executive position (as defined in section 713(d) of this title);

(B) an individual appointed pursuant to sections 7306, 7401(1), 7401 (4), or 7405 of this title;

(C) an individual who has not completed a probationary or trial period; or

(D) a political appointee.

(2) The term "suspend" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for a period in excess of 14 days.

(3) The term "grade" has the meaning given such term in section 7511(a) of title 5.

(4) The term "misconduct" includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(5) The term "political appointee" means an individual who is—

(A) employed in a position described under sections 5312 through 5316 of title 5 (relating to the Executive Schedule);

(B) a limited term appointee, limited emergency appointee, or noncareer appointee in the Senior Executive Service, as defined under paragraphs (5), (6), and (7), respectively, of section 3132(a) of title 5; or

(C) employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5, Code of Federal Regulations, or successor regulation.

(6) The term "whistleblower disclosure" has the meaning given such term in section 323(g) of this title.

TITLE 5 of the U.S. CODE

Section 4302 – Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

. . . .

(c) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable but only after an opportunity to demonstrate acceptable performance.

. . . .

Section 4303 – Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)

(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is—

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of chapter 75,

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,
(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less,
(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions, or
(4) any removal or demotion under section 714 of title 38...

TITLE 5 of the CODE of FEDERAL REGULATIONS

5 CFR § 432.104 – Addressing unacceptable performance.

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

5 CFR § 432.105 – Proposing and taking action based on unacceptable performance.

(a) ***Proposing action based on unacceptable performance.***

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in 1 or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

. . . .

Relevant Testimony

David Bump is an Authorization Quality Review Specialist at the Agency's regional office in Portland, Oregon, and is a National Representative of the Union and the Second Vice-President for Local 2157. Currently, he is on 100% official time. *See* Tr. at 110-11. Mr. Bump testified that, prior to September, 2017, an employee who failed to be fully successful at the at the end of a rating period would be put on a Performance Improvement Plan (PIP) in accordance with Article 27, Section 10 of the Union's collective bargaining agreement. He said the PIP would be put together by the employee's supervisor, with input from the Union and the employee, and usually involved training and mentoring related to the employee's job, and would usually last a minimum on 90 days. *See* Tr. at 56, 59-62. However, beginning on September 1, 2017, Mr. Bump testified that the Agency sent letters [OFO Letters] to Veteran Service Representatives which "advis[ed] the employee where they stood relative to the output element of their performance – whether they were exceeding it or whether they were fully successful, exceptional, less-than-fully successful[.]" *See* Tr. at 83, 84. For VSRs who failed to meet their performance standards, Mr. Bump testified that the letters gave them one of the two remaining pay periods of the fiscal year to raise their performance, rather than placing them on a PIP as required by the Master Agreement. *See* Tr. at 85-86. He said this new term was contrary to the Master Agreement because it was only up to 30 days, and there was no discussion of specific job-related problems, and there was no mention of training or mentoring. Tr. at 87. As a result, he said that the Union filed the instant national grievance, and also several local grievances were filed.

Mr. Bump testified that since September 1, 2017, the Agency has not issued PIPs as required by Article 27 of the Master Agreement. *See* Tr. at 108. He testified that under these new conditions, he is aware of one employee who has been proposed to be removed from employment for failure to perform, without having received the benefit of a PIP *See* Tr. at 105-107; UX-11 (letter of proposed removal to employee in Buffalo Regional Office, dated Apr, 2018).

Meghan Flanz works for the Agency as the Executive Director over the Draft Master Plan to Redevelop the West LA VA Campus. Prior to January 22, 2018, she was the Agency's Deputy General Counsel for Legal Operations. In that position, among other things, she interacted with Congressional Staff about the legislation for the VAA. *See* Tr. at 129-131. Ms. Flanz testified that, in her understanding, if a statute and a collective bargaining agreement provision are in conflict, the statute prevails. *See* Tr. at 144. She also testified that a HRML is Agency policy, and such letters "are the expeditious way that the Human Resources Office in VA issues policies." Tr. at 165.

Willie Clark is the Agency's Deputy Undersecretary for Field Operations. In that position, among other things, he supervises all of the Regional Office Directors, and sets policy and guidance concerning performance standards and discipline. *See* Tr. at 220, 223-24. Mr. Clark testified that in the last week of August, 2017, he signed the letters [OFO Letters] that went to all of the Agency's VSRs in the field. Tr. at 225. He testified that the purpose of the letters was to inform employees of where they stood in terms of

performance, including whether they exceeded standards, or met standards, or were not successful, or were not meeting standards. *See* Tr. at 227. For those employees who were not meeting standards, Mr. Clark testified that the letters informed them that they were given two additional pay periods in order to be successful through September 30, 2017. *See* Tr. at 228, 234. He said that there were 550 people who were not meeting standards on the "output element" at that time, which was "[m]aybe nine percent of the total population of VSRs." Tr. at 237. Mr. Clark testified that the Agency was not using PIPs at the time the OFO Letters were issued, based on "[t]he information that we got from or headquarters . . . that performance improvement plans were no longer to be used in VA." *See* Tr. at 239. He testified that he did not issue a PIP as part of the OFO Letters "because the Agency said not to use them." Tr. at 240.

Juliana Boor is the Director of the Agency's St. Petersburg Regional Office in St. Petersburg, Florida. *See* Tr. at 241-42. With respect to meaning of the OFO Letters issued by Mr. Willie Clark's office in September, 2017, Ms. Boor testified that if VSRs designated as "less than fully successful" did not improve their performance by the end of the fiscal year, "they could either be demoted or removed." *See* Tr. at 250. She testified that the guidance she received from the Agency was that "the Accountability Act does not require a performance improvement plan, and that, you know, we shouldn't be doing them." Tr. at 252. Ms. Boor testified that of the VSRs in her regional office who received OFO Letters stating that they were "unable to become fully successful," one employee received a notice of proposed removal, and was ultimately removed, without having received a PIP prior to removal. *See* Tr. at 253-61.

Union Position

According to the Union, the VAA "provided a new, alternative procedure for proposing and ultimately taking disciplinary actions against certain employees working at the VA," specifically: "an employee/union has seven business days to reply to proposed disciplinary actions" and "[m]anagement must then render a final decision on the proposal within 15 business days of the proposal date" and "the Agency's final decision need only be supported by 'substantial evidence' [in] contrast to the existing, alternative procedures which require[ ] conduct-based disciplinary actions to be supported by a preponderance of the evidence." U.Br. at 1-2. The Union rejects the Agency's position that procedures regarding performance management and PIPs are superseded by the VAA. Rather, the Union's position is that the VAA only supersedes the timelines for adverse actions contained in Chapter 43 of Title 5 of the U.S. Code. Moreover, the Union argues that the Master Agreement contains bargained-for provisions in Article 27, Section 10 that must be followed, independently and without reference to Chapter 43 or the VAA, as that provision of the Master Agreement pertains to "negotiated pre-proposal performance improvement requirements, an issue that is not addressed in the Accountability Act." *Id.* at 2.

The Union argues that "the performance improvement schemes implemented by the Agency since September 2017" violate the performance improvement plan provisions set

forth in Article 27, Section 10. U.Br. at 16. With respect to the meaning of Article 27, Section 10, the Union explains:

> The performance improvement plan process is commenced when an employee's supervisor determines that the employee has failed to successfully perform a critical element of his or her job. Next, the supervisor, the employee, and the local union get together to draft a written performance improvement plan that is specifically tailored to the individual employee and meets the following requirements:
>
> 1. identifies the specific performance deficiencies
> 2. articulates the successful level of performance required
> 3. the action(s) that must be taken by the employee to improve the successful level of performance;
> 4. the methods that will be employed to measure the improvement;
> 5. provisions for counseling, training, and other appropriate assistance
>
> In addition to these mandatory provisions, the performance improvement plan may also include additional instructions, counseling, training, assignment of a mentor, or other assistance as appropriate. The contract specifically provides that simply placing the employee "on 100% review" does **not** constitute a performance improvement plan under the Master Agreement. The *minimum* time period for a performance improvement plan under the Master Agreement is **90** days, but this period can be extended. However, the performance improvement plan can be terminated early if the employee demonstrates successful performance (under the terms of the plan) prior to the conclusion of the 90 days. The period may also be extended beyond the 90-day minimum.

Id. at 16-17 (internal citations omitted). In contrast, the Union states, "a performance-based action, which is governed by *Section 11* of Article 27 may be proposed only after the employee, the supervisor and the union have completed the performance improvement plan process. Should all remedial action fail and the employee's performance is determined to be unacceptable, the supervisor will issue a rating of unacceptable performance to the employee." *Id.* at 17-18 (internal citations omitted).

The Union asserts that, since November 2017, the Agency relied on the VAA as authority to eliminate the performance improvement processes and procedures contained in Article 27, Section 10, beginning with removal of PIPs for VSRs. Specifically, the Union argues that these "September 2017 OFO letters [ ] do not comply with the requirements of the Master Agreement," as VSRs were only allowed two pay periods to prove that they could meet their output targets. U.Br. at 18. In addition, the Union asserts that in February 2018, the VA "implemented a new performance improvement regime" that "was expanded to cover all VBA employees[.]" U.Br. at 5. The Union argues that substantial harm to employees has occurred as a result, as evidenced by two examples that were

brought to the Arbitrator's attention at the hearing, where two employees were terminated without a PIP as required by the Master Agreement. *See* U.Br. at 5-6, 31; also referencing UX-11 (letter of proposed removal to employee in Buffalo Regional Office, dated Apr, 2018)).

The Union argues that the Agency improperly relies on two particular sections of the VAA as authority for superseding Article 27, Section 10 : "(1) §714(c)(3), which provides that the *procedures* under Chapter 43 shall not apply to removal, demotion, or suspension under this section; and (2) §714(c)(1)(D), which provides that the *procedures* in §714 shall supersede any collective bargaining agreement to extent that such agreement is inconsistent with such procedures." U.Br. at 6. According to the Union, the procedures under the VAA "relate to the amount of time that an employee has to respond to *proposed* discipline"; "the amount of time that the Agency has to make a final decision"; "and the amount of time that an employee has to appeal the final decision." U.Br. at 20. In contrast, the Union points out that 5 U.S.C. § 4302 requires agencies to formulate performance appraisal systems that "'[assist] employees in improving unacceptable performance.'" *Id.* at 21 (quoting 5 U.S.C. § 4302(B)(5)). The Union elaborates on this analysis of the statutory text, arguing:

> If there are any lingering doubts as to the precise "procedures" that are superseded by the Accountability Act, one need look no further than the Accountability Act's conforming amendment. The Accountability Act *specifically* amends 5 U.S.C. § 4303(f) which as a result now reads, "this section [i.e. § 4303's "Actions based on unacceptable performance"] does not apply to ...(4) any removal or demotion under section 714 of title 38 [i.e. the Accountability Act]." *See* Accountability Act [ ] Section 202(b)(2). By contrast, no such amendment was made to 5 U.S.C. § 4302. The Agency would have the Arbitrator believe that Congress meant to supersede Section 4303 (relating to performance-based actions) *and* 4302 (governing performance appraisal systems and opportunities to improve), but actually only bothered to amend Section 4303. There is no reason to assume that Congress made such an egregious drafting error when all the other signs in the statute point to the same conclusion: the Accountability Act only changes the timelines for *notice, response, decision and appeal* and does not affect performance improvement plans in any way whatsoever.

Id. at 21.

Also, the Union argues, "[e]ven if, assuming *arguendo*, the Accountability Act can be interpreted to no longer require the statutory opportunity to improve, the contractual PIP requirement exists independent of Chapter 43 and does not conflict with" the Act. U.BR. at 24-25. The Union contends that if the Agency desires "more flexibility or different options for" allowing employees an opportunity to improve, "it needs to re-negotiate for that flexibility at the bargaining table." U.Br. at 25.

The Union rebuts several procedural arguments that it expects to be raised by the Agency in its post-hearing brief. First, the Union asserts the Arbitrator has jurisdiction to hear the grievance because the Union claims a breach of Article 27 of the Master Agreement. Second, the Union rejects the argument that the grievance is non-arbitrable because it covers the same ground as another of its grievances, # NG-8/1/17. In this regard, the Union explains that in # NG-8/1/17, the issue concerns the Agency's alleged failure to bargain over implementation of new procedures under the VAA, rather than a violation of the Master Agreement at issue here. In addition, the Union states, "[t]the Bargaining Grievance [# NG-8/1/17] mentions nothing about the elimination of performance improvement plans" and "[t]he Union did not become aware that the Agency planned to take disciplinary actions against employees for performance without giving them performance improvement plans until September 1, 2017, when the first round of OFO letters were distributed." U.Br. at 11. Moreover, the Union rejects the argument that its grievance is non-arbitrable because it covers the same ground as a subsequently-filed grievance, # NG-3-15-18, because "[a] subsequently-filed matter cannot serve to preclude the same earlier filed matter." *Id.* at 13. While the Union acknowledges that # NG-3-15-18 and the instant grievance share, in part, an issue – "whether the Agency is excused from providing performance improvement plans under the Master Agreement because of the passage of the Accountability Act" – "it is almost certain that the Arbitrator's decision in this case will control the resolution of the same issue [ ] in NG-3/15/18" and a convincing argument will be made that "Arbitrator Ross has already decided the issue." *Id.* Next, the Union argues that the instant grievance is timely because: (1) the Agency failed to raise lack of timeliness in its grievance decision, when Article 4, Section 4 of the Master Agreement "forbids the Agency from raising claims (for the first time) of non-grievability or non-arbitrability after rendering its final decision in a case"; (2) an argument on "untimeliness" is contrary to the Agency's position in its decision ("The grievance is premature"); and (3) the Agency "did not demonstrate that the Union was notified of its position on PIPs prior to the issuance of the OFO letters[,]" which were, according to the Union, notice of a violation of the Master Agreement. *Id.* at 14-16.

In sum, the Union argues that the performance improvement requirements of the Master Agreement "are entirely consistent with the provisions of the Accountability Act": "[i]f an employee exhibits deficient performance, he or she must be given a performance improvement plan under Article 27 Section 10"; and, "[i]f the employee can't demonstrate successful performance during the 90-day performance improvement period, then the Agency can initiate a proposed performance-based action under the Accountability Act." U.Br. at 30. The Union reiterates that "[e]ach time the Agency initiated a performance-based action *without* giving an employee a performance improvement plan under the contract, the Agency violated the Master Agreement." In terms of a remedy, the Union requests: that the Agency "cease and desist from taking performance-based actions against employees without first providing them with a performance-improvement plan that complies with Article 27 of the Master Agreement"; and that the Arbitrator "order the Agency to reinstate and make whole any employee who has been subject to a performance-based action without first receiving a performance improvement plan that complies with the provisions of Article 27, Section 10"; also, that the Arbitrator retain jurisdiction in order to hear a motion for attorney fees. *Id.* at 31.

Agency Position

As a preliminary matter, the Agency argues the grievance is non-arbitrable. The Agency points out that "[o]n August 1, 2017, the Union filed a grievance asserting that the Agency was required to bargain over implementation of the Accountability Act[,]" which has been assigned to a different arbitrator. *See* A.Br. at 8 (referencing grievance # NG-08/01/17). The Agency argues that "the application of the new procedures set forth by [the VAA] is already at issue" in NG-08/01/17, and "[t]he Union's attempt to simultaneously litigate the same underlying issue in two arbitrations presents an issue of procedural arbitrability." *Id.* at 13. On this point, the Agency asserts that its defense to "the Union's assertion regarding PIPs is the same defense as in NG-08/01/17" and if the Arbitrator here were to make a determination here, it would "create a potential for contradictory rulings." *Id.* at 14. The Agency points out that it raised the issue of arbitrability in its response to the instant grievance. In addition, the Agency points out that "[o]n March 15, 2018, the Union filed a National Grievance against the Agency [ ] related to the FY18 Performance Management Plan." *See* A.Br. 10 (referencing grievance # NG-3/15/18). The Agency asserts that NG-3/15/18 concerns FY18 general performance management, while the instant grievance concerns the status of employees' "FY17 performance, and specifically the output element of their standards[,]" which means evidence associated with NG-3/15/18 "has no bearing on the issuance of the OFO letters" in 2017. As a result, the Agency requests that the Arbitrator "sustain the Agency's repeated objections during the hearing concerning the Union's admission of evidence and exhibits related to the FY 2018 Management Guidance and NG-03/15/18." *Id.* at 16.

On the merits, the Agency argues that the Union engages in a "mischaracterization" of the OFO letters referenced in the grievance, as those letters "did not change the procedures related to performance-based actions[,]" had "no connection to PIPs[,]" and "did nothing beyond what is within the rights of management to carry out in providing supervision and feedback to employees on an on-going basis with the goal of improving performance." *Id.* at 5-7.[5] In this connection, the Agency contends that the OFO letters were consistent with its authority under Article 27, Section 4 of the Master Agreement, which "sets forth the responsibilities of both Agency management and employees with regard to performance appraisals." *Id.* at 19.

Alternatively, the Agency argues, "[i]n the event that the Arbitrator accepts the Union's proposed issue and finds that the OFO letters implicate the application of PIPs, the Agency asserts that the PIP is a procedural requirement to taking an adverse action based on performance, derived from Chapter 43, of title 5, of the United States Code." *Id.* at 21.

[5] The Agency argues that it "was under no obligation to bargain over the September 1, 2017 OFO letters." A.Br. at 18. The Arbitrator does not summarize the Agency's detailed arguments to that effect, as the issue accepted for arbitration concerns the Arbitrator's interpretation of the Parties' collective bargaining agreement and the Agency's compliance with that agreement, and not whether the Agency was required by Federal law to engage in impact and implementation bargaining over its decision to issue the OFO letters.

On this point, the Agency contends the VAA changed the Chapter 43 procedures, and therefore "the Agency is precluded from applying" PIPs any longer. *Id.* Furthermore, the Agency argues, "[b]ecause Article 27, Section 10 arises from chapter 43 and applies to chapter 43 actions, it is inconsistent with the Accountability Act's prohibition on chapter 43 procedures and is therefore, superseded." *Id.* The Agency asserts that "repudiation of a collective bargaining agreement provision will not be found unlawful when the provision is contrary to statute." *Id.* at 22. In support, among other cases, the Agency cites *FAA, Atlanta, Ga. and NATCA*, 60 FLRA 985 (2005).

The Agency points out that 5 U.S.C., Chapter 43, establishes an "opportunity to demonstrate acceptable performance" (commonly referred to as an "opportunity to improve" or "performance improvement plan") as a prerequisite to an adverse action based on performance." A.Br. at 22. The Agency also points out that, prior to the VAA, the Agency created policies incorporating PIPs "based on the chapter 43 requirement to provide employees with the opportunity to improve." *Id.* at 23-24. However, the Agency points out that the VAA, § 714(c)(3) states, "'[t]he procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.'" *Id.* at 24. With respect to the meaning of that statutory language, the Agency asserts, "the statute refers to the whole of chapter 43 in its non-applicability, including the chapter 43 procedural requirement that the employee be provided an opportunity to demonstrate acceptable performance prior to taking a performance-based action." *Id.* at 25.

The Agency argues that the VAA renders the procedures set forth in Article 27, Section 10 of the Master Agreement illegal, as demonstrated by the fact that Article 27 refers to OPM's regulations in Part 430 and 432 of the CFR, and "Article 14 of the [Master Agreement] explicitly states that actions based on performance, taken under Title 5, Chapter 43 are covered in Article 27 – Performance Appraisal." A.Br. at 27. The Agency reasons, because the VAA "clearly requires that its procedures supersede collective bargaining agreement provisions that are inconsistent with those procedures[,]" "it follows that [Article 27, Section 10] is inconsistent with [the VAA]." *Id.* at 28, *citing* VAA § 714(c)(1)(D)("The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures."). As such, the Agency requests that the Arbitrator deny the grievance.

Discussion

I. The Agency violated Article 10, Section 27 of the Master Agreement when it failed to provide PIPs to bargaining unit employees

Article 27, Section 10 ("Performance Improvement Plan (PIP)") of the Master Agreement requires the Agency to, among other things: identify the specific, performance-related problems exhibited by an employee who is not meeting performance standards; develop a written PIP in consultation with the employee and local union representative; provide counseling, training or other appropriate assistance in the effort to raise performance; afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problems; and arrange for the employee and

his/her supervisor to meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period.

The Agency violated these requirements when, in September 2017, it issued OFO Letters to VSRs informing them of their performance; but those who were not meeting "Output performance expectations" were notified that they "would be given two pay periods (beginning September 3, 2017 and ending on September 30, 2017) to meet the fully successful level or else be subject to adverse action up to and including termination of employment." The Letters did not inform employees who were not meeting expectations that they would receive a PIP, as had been the practice under Article 27, Section 10. In fact, the Arbitrator credits the testimony of David Bump that these employees did *not* receive a PIP, as required by the Master Agreement. In addition, the OFO Letters allowed under-performing employees less than 30 days to improve performance, while Article 27, Section 10 requires "at least 90 days to resolve the specific identified performance-related problem(s)." Accordingly, the Arbitrator finds that the Agency's actions violated Article 27, Section 10 in at least two ways: failure to provide a PIP, and failure to provide at least 90 days to improve. Of course, by failing to provide a PIP, the Agency failed to provide the other itemized requirements set forth by Article 27, Section 10, but here the Arbitrator has identified the two main omissions.

The fact that the Agency decided not to follow negotiated procedures for PIPs is further made clear by the HRML policy issued on August 24, 2017, which stated in part that PIPs required by the Master Agreement "will not be used to address the performance deficiencies" of Agency employees. On this point, the Arbitrator credits the testimonies of Meghan Flanz that HRMLs are Agency-wide policy, and also Willie Clark and Juliana Boor, who both said the Agency removed PIPs as a tool for improving employee performance. In sum, the evidence is clear and convincing that the Agency ceased to provide PIPs as required by Article 27, Section 10 the Master Agreement.

Moreover, the evidence shows that bargaining unit employees experienced tangible harm resulting from the Agency's decision: at the hearing, David Bump testified that he knew of one employee who was proposed to be removed for failure to perform without first receiving a PIP, and Juliana Boor knew of another who was removed for failure to perform without first receiving a PIP. At arbitration, demonstrable harm caused by a violation of a collective bargaining agreement requires a remedy, described below.

II. The VAA does not supersede Article 27, Section 10 of the Master Agreement

The first indication that the VAA does not act to supersede Article 27, Section 10 of the Parties' Master Agreement is the VAA's title: "Employees: removal, demotion, or suspension based on performance or misconduct." Absent from this language is any plain reference to procedures for evaluation of employees' performance or assisting them in improving performance. Instead, the only "procedures" described by the VAA are enumerated in § 714(c) ("PROCEDURE"), which pertain to time periods for notice, response, final decision, and appeal of "a removal, demotion, or suspension." There is no provision for what an agency may or should do *prior to* any decision to remove, demote,

or suspend an employee based on performance. Significantly, § 714(c)(3) states, "[t]he procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section." It follows from this language that the VAA removes from application on the Agency certain provisions of 5 U.S.C. § 4303 ("Actions based on unacceptable performance"), as that section also provides procedures for an agency's decision to reduce in grade or remove an employee. *See* 5 U.S.C. § 4303(a) ("Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance."). Also similar to the VAA, 5 U.S.C. § 4303 does not provide procedures for what an agency may do *prior to* any decision or proposed decision to reduce in grade or remove an employee for unacceptable performance. The lack of any plain reference to *pre-decision* procedures in the VAA or 5 U.S.C. § 4303 is important for interpreting the force and effect of the VAA because *other* provisions of law make unmistakable reference to procedures pertaining to evaluation of employee performance, which must take place *prior to* any decision on adverse action. Specifically, 5 U.S.C. § 4302 ("Establishment of performance appraisal systems") states, among other things, that federal agencies shall prescribe procedures for "evaluating each employee during the appraisal period" based on established performance standards; "assisting employees improving unacceptable performance"; and "reassigning, reducing in grade, or removing employees who continue to have unacceptable ***but only after an opportunity to demonstrate acceptable performance***." (emphasis added by Arbitrator). If the language of 5 U.S.C. § 4302 is not clear enough to distinguish pre-decision actions from adverse actions based on performance, the CFR provides additional guidance. In particular, 5 CFR § 432.104 ("Addressing unacceptable performance") states, in part, "For each critical element in which the employee's performance is unacceptable, ***the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance***. . ." (emphasis added by Arbitrator). Similarly, 5 CFR § 432.105 states, in part, "***Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance*** pursuant to 432.104, an agency may propose a reduction-in-grade or removal action . . ." (emphasis added by Arbitrator).

The Arbitrator concludes that the VAA did not remove VA employees' opportunity to demonstrate acceptable performance, as required by federal law. Consequently, the VAA also did not act to supersede any negotiated contractual provisions that provide bargaining unit employees the opportunity to demonstrate acceptable performance. Article 27, Section 10 of the Master Agreement falls under that category. Accordingly, the VAA did not authorize the Agency to disregard its obligations under that negotiated provision.

III. The grievance is arbitrable

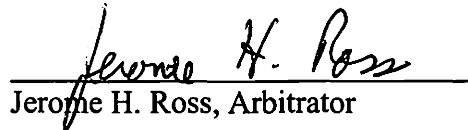
The Agency argues that the issue of application of the VAA is already raised in a prior grievance filed by the Union, and is being decided by another arbitrator. The Agency also points out that another grievance was filed after the instant one, concerning its FY 2018 Performance Management Plan. The Arbitrator rejects the Agency's contention that these other matters are reasonable cause to dismiss the instant grievance, as this case decision responds to the narrow issue of whether the Agency violated Article 27, Section

10 of the Master Agreement, while based on the arguments received this is not the only issue in either of the other matters. Also importantly, the evidence in this case revealed that adverse actions against at least two bargaining unit employees resulted from the Agency's violation of Article 27, Section 10. It would defeat the purpose of arbitration for the undersigned to ignore the need for a make-whole remedy when the Union specifically requested such relief in its grievance.

AWARD

The grievance is sustained. As a remedy, the Agency is ordered to (1) resume compliance with the requirements set forth in Article 27, Section 10 of the Master Agreement; (2) rescind any adverse action taken against bargaining unit employees for unacceptable performance who did not first receive a PIP complying with the provisions of Article 27, Section 10; (3) as a result, reinstate and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits. In addition, pursuant to the Back Pay Act, the Union is awarded attorney fees.

The arbitrator retains jurisdiction for 60 days in order to receive briefs on attorney fees, if necessary.



Jerome H. Ross, Arbitrator

August 23, 2018
McLean, Virginia

Exhibit 2

Employee Notifications

VA Letterhead

EMPLOYEE NOTIFICATION
(General)

Date:

SUBJ: Compliance with Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691

[Employee Name]

You have been identified as a current or former employee of the United States Department of Veterans Affairs (VA) and American Federation of Government Employees (AFGE) bargaining unit employee who received a performance-based adverse action under the authority of 38 U.S.C. 714, without receiving a Performance Improvement Plan (PIP) in accordance with the AFGE Master Collective Bargaining Agreement (MCBA).

NOTE: If you previously received a notice from VA concerning this case, please be advised that this Employee Notification supersedes the original notice, and you should complete the enclosed Remedy Election Form.

As a result of the arbitration award issued by Jerome H. Ross on August 23, 2018, in *AFGE, Nat'l Veterans Affairs Council #53, and Dep't of Veterans Affairs*, FMCS Case No. 181117-01691, VA was ordered to (1) resume compliance with Article 27, Section 10 of the MCBA; (2) rescind any adverse action taken against bargaining unit employees under the authority of 38 U.S.C. §714 for unacceptable performance who did not receive a PIP in compliance with Article 27, Section 10 of the MCBA; and (3) reinstate, and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits.

In compliance with the arbitration award, VA conducted a review of performance-based adverse actions. Upon review of your action, it was determined that you were [insert removed/demoted/suspended] from the position of [insert GS[occupational series]-[grade], [position title]] without first receiving a PIP as required by the MCBA. Consistent with the arbitration award, VA will rescind this performance-based adverse action. You are eligible for make whole relief, including reinstatement to your previous position of [insert GS[occupational series]-[grade], [position title]] if you were removed or demoted.

Please carefully review the attached Frequently Asked Questions before you make your election.

Response Instructions & Remedy Election Form

If you were suspended, no further action is required. VA will rescind the suspension and provide make whole relief.

If you were demoted or removed, please return the enclosed Remedy Election Form with your decision to be reinstated and made whole or made whole without reinstatement. Your response must be provided to VA no later than 150 calendar days from the above date of this Employee Notification. Otherwise, you are waiving your rights to any relief (including reinstatement, back pay, and other benefits) under the arbitration award.

Please respond to this Employee Notification as soon as possible to obtain relief. Back pay will only continue to accrue to the date you execute the Remedy Election Form or 90 calendar days from the date of the Employee Notification, whichever is earlier.

Once VA receives your Remedy Election Form, you will receive written instructions to provide necessary information in order to receive the make whole relief, and if you elect to be reinstated, you will also be provided with the procedures for reporting to duty.

You can submit your Remedy Election Form by email, mail, or facsimile using the information provided below:

- EMAIL: VA714PIPCompliance@va.gov
- MAIL: [Contact name] at (address)
- FACSIMILE: [Contact name] at (fax number)

Email is the preferred response method to ensure timely receipt of the Remedy Election Form. If email is not used, it may be difficult to demonstrate timely receipt.

Interest Rates Used for Computation of Back Pay

Information on the interest rates used for the computation of back pay is available at https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/interest-rates-used-for-computation-of-back-pay.

Back Pay Interest Calculator

A calculator that may be used to estimate the interest due on a back pay award is available at https://www.opm.gov/policy-data-oversight/pay-leave/back-pay-calculator. In order to complete the back pay calculations, you will be asked to submit all replacement earnings during the period of your removal, demotion, or suspension.

FAQs

Frequently asked questions related to this Employee Notification are separately attached to this Employee Notification.

[insert CHRO Name]
[insert VISN]

REMEDY ELECTION FORM

This form only needs to be completed if you were removed or demoted from your position at VA without first receiving a performance improvement plan in accordance with the AFGE Master Collective Bargaining Agreement.

As a reminder, this Remedy Election Form must be submitted (i.e., emailed, faxed, or mailed) no later than 150 calendar days from the date of this Employee Notification concerning the Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691.

Please note that back pay will stop accruing 90 calendar days after the date of this Employee Notification. Please respond to this Employee Notification as soon as possible to obtain relief.

[insert EMPLOYEE NAME]:
[insert VA FACILITY NAME]:

I elect to receive the following remedy: (check one and initial below)

☐ ______ (initial)

1. **Reinstated and made whole**. This means you are choosing to return to your previous position/grade at VA. You understand that VA may deduct replacement earnings from your back pay.

☐ ______ (initial)

2. **Made whole without reinstatement**. This means you are choosing not to return to VA or your previous position/grade. You understand that VA may deduct replacement earnings from your back pay.

You can submit this Remedy Election Form by mail, email, or facsimile using the contact information provided on this Employee Notification you received from VA.

Email is the preferred response method to ensure timely receipt of the Remedy Election Form. If email is not used, it may be difficult to demonstrate timely receipt.

For questions, please review the FAQs separately attached to this Employee Notification. You may also contact the VA point-of-contact identified in this Employee Notification, and/or email AFGE at 714actions@afge.org.

______________________________ ____________________
EMPLOYEE SIGNATURE DATE

____
EMPLOYEE PHONE NUMBER

VA Letterhead

EMPLOYEE NOTIFICATION
(Resigned in lieu of)

Date:

SUBJ: Compliance with Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691

[Employee Name]

You have been identified as a current or former employee of the United States Department of Veterans Affairs (VA) and American Federation of Government Employees (AFGE) bargaining unit employee who, on or after November 16, 2020, resigned in lieu of receiving a performance-based adverse action under the authority of 38 U.S.C. 714, without receiving a Performance Improvement Plan (PIP) in accordance with the AFGE Master Collective Bargaining Agreement (MCBA).

NOTE: If you previously received a notice from VA concerning this case, please be advised that this Employee Notification supersedes the original notice, and you should complete the enclosed Remedy Election Form.

As a result of the arbitration award issued by Jerome H. Ross on August 23, 2018, in *AFGE, Nat'l Veterans Affairs Council #53, and Dep't of Veterans Affairs*, FMCS Case No. 181117-01691, VA was ordered to (1) resume compliance with Article 27, Section 10 of the MCBA; (2) rescind any adverse action taken against bargaining unit employees under the authority of 38 U.S.C. §714 for unacceptable performance who did not receive a PIP in compliance with Article 27, Section 10 of the MCBA; and (3) reinstate, and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits.

In compliance with the arbitration award, VA conducted a review of performance-based adverse actions. Upon review of your action, it was determined that you resigned in lieu of receiving a [insert removed/demoted/suspended] from the position of [insert GS[occupational series]-[grade], [position title]] without first receiving a PIP as required by the MCBA. Consistent with a Settlement Agreement reached between VA and AFGE, you are eligible for make whole relief, including reinstatement to your previous position of [insert GS[occupational series]-[grade], [position title].

Please carefully review the attached Frequently Asked Questions before you make your election.

Response Instructions & Remedy Election Form

As an employee who resigned in lieu of receiving an adverse action, please return the enclosed Remedy Election Form with your decision to be reinstated and made whole or

made whole without reinstatement. Your response must be provided to VA no later than 150 calendar days from the above date of this Employee Notification. Otherwise, you are waiving your rights to any relief (including reinstatement, back pay, and other benefits) under the arbitration award.

Please respond to this Employee Notification as soon as possible to obtain relief. Back pay will only continue to accrue to the date you execute the Remedy Election Form or 90 calendar days from the date of the Employee Notification, whichever is earlier.

Once VA receives your Remedy Election Form, you will receive written instructions to provide necessary information in order to receive the make whole relief, and if you elect to be reinstated, you will also be provided with the procedures for reporting to duty.

You can submit your Remedy Election Form by email, mail, or facsimile using the information provided below:

- EMAIL: VA714PIPCompliance@va.gov
- MAIL: [Contact name] at (address)
- FACSIMILE: [Contact name] at (fax number)

Email is the preferred response method to ensure timely receipt of the Remedy Election Form. If email is not used, it may be difficult to demonstrate timely receipt.

Interest Rates Used for Computation of Back Pay

Information on the interest rates used for the computation of back pay is available at https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/interest-rates-used-for-computation-of-back-pay.

Back Pay Interest Calculator

A calculator that may be used to estimate the interest due on a back pay award is available at https://www.opm.gov/policy-data-oversight/pay-leave/back-pay-calculator. In order to complete the back pay calculations, you will be asked to submit all replacement earnings during the period between your resignation and the date of your election.

FAQs

Frequently asked questions related to this Employee Notification are separately attached to this Employee Notification.

[insert CHRO Name]
[insert VISN]

REMEDY ELECTION FORM

This Remedy Election Form must be submitted (i.e., emailed, faxed, or mailed) no later than 150 calendar days from the date of this Employee Notification concerning the Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691.

[insert EMPLOYEE NAME]:
[insert VA FACILITY NAME]:

I elect to receive the following remedy: (check one and initial below)

☐ 1. **Reinstated and made whole**. This means you are choosing to return to your previous position/grade at VA. You understand that VA may deduct replacement earnings from your back pay.

______
(initial)

☐ 2. **Made whole without reinstatement**. This means you are choosing not to return to VA or your previous position/grade. You understand that VA may deduct replacement earnings from your back pay.

______
(initial)

You can submit this Remedy Election Form by mail, email, or facsimile using the contact information provided on this Employee Notification you received from VA.

Email is the preferred response method to ensure timely receipt of the Remedy Election Form. If email is not used, it may be difficult to demonstrate timely receipt.

For questions, please review the FAQs separately attached to this Employee Notification. You may also contact the VA point-of-contact identified in this Employee Notification, and/or email AFGE at 714actions@afge.org.

____________________________ ____________________
EMPLOYEE SIGNATURE DATE

____
EMPLOYEE PHONE NUMBER

VA Letterhead

EMPLOYEE NOTIFICATION
(Settlement Agreement)

Date:

SUBJ: Compliance with Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691

[Employee Name]

You have been identified as a current or former employee of the United States Department of Veterans Affairs (VA) and an American Federation of Government Employees (AFGE) bargaining unit employee who, on or after November 16, 2020, executed a Settlement Agreement with VA after receiving a performance-based adverse action under the authority of 38 U.S.C. §714, without receiving a Performance Improvement Plan (PIP) in accordance with the AFGE Master Collective Bargaining Agreement (MCBA).

NOTE: If you previously received a notice from VA concerning this case, please be advised that this Employee Notification supersedes the original notice, and you should complete the enclosed Remedy Election Form.

As a result of the arbitration award issued by Jerome H. Ross on August 23, 2018, in *AFGE, Nat'l Veterans Affairs Council #53, and Dep't of Veterans Affairs*, FMCS Case No. 181117-01691, VA was ordered to (1) resume compliance with Article 27, Section 10 of the MCBA; (2) rescind any adverse action taken against bargaining unit employees under the authority of 38 U.S.C. §714 for unacceptable performance who did not receive a PIP in compliance with Article 27, Section 10 of the MCBA; and (3) reinstate, and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits.

In compliance with the arbitration award, VA conducted a review of performance-based adverse actions. Upon review of your action, it was determined that you were [insert removed/demoted/suspended] from the position of [insert GS[occupational series]-[grade], [position title]] without first receiving a PIP as required by the MCBA. However, our review indicated that you subsequently executed a Settlement Agreement with VA concerning this matter on or after November 16, 2020. You are receiving this Employee Notification because you have the option to elect an alternative remedy if you choose to do so. On the enclosed Remedy Election Form, you may indicate if you prefer to maintain your Settlement Agreement or elect an alternative remedy, such as reinstatement to your previous position. Consistent with a Settlement Agreement reached between VA and AFGE, VA will rescind this performance-based adverse action. You are eligible for make whole relief, including reinstatement to your previous position of [insert GS[occupational series]-[grade], [position title]] if you were removed or demoted.

Please carefully review the attached Frequently Asked Questions before you make your election.

Response Instructions & Remedy Election Form

As an employee who previously executed a Settlement Agreement with VA, you may elect to maintain your Settlement Agreement or rescind your Settlement Agreement.

- If you elect to maintain your Settlement Agreement, no further action is required. You may return the enclosed Remedy Election Form, so that we do not send additional notifications.

- If you elect to rescind your Settlement Agreement, you will be required to return any compensation paid to you under the terms of that agreement. You will be required to return the compensation through the VA's debt collection process. You must also elect to be reinstated and made whole or made whole without reinstatement.

Please return the enclosed Remedy Election Form with your decision(s). Your response must be provided to VA no later than 150 calendar days from the above date of this Employee Notification. Otherwise, you will maintain your Settlement Agreement and are waiving your rights to any alternative relief (including reinstatement, back pay, and other benefits) under the arbitration award.

Please respond to this Employee Notification as soon as possible to obtain relief. Back pay will only continue to accrue to the date you execute the Remedy Election Form or 90 calendar days from the date of the Employee Notification, whichever is earlier.

Once VA receives your Remedy Election Form, you will receive written instructions to provide necessary information in order to receive the make whole relief, if applicable, and if you elect to be reinstated, you will also be provided with the procedures for reporting to duty.

You can submit your Remedy Election Form by email, mail, or facsimile using the information provided below:

- EMAIL: VA714PIPCompliance@va.gov
- MAIL: [Contact name] at (address)
- FACSIMILE: [Contact name] at (fax number)

Email is the preferred response method to ensure timely receipt of the Remedy Election Form. If email is not used, it may be difficult to demonstrate timely receipt.

Interest Rates Used for Computation of Back Pay

Information on the interest rates used for the computation of back pay is available at https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/interest-rates-used-for-computation-of-back-pay.

Back Pay Interest Calculator

A calculator that may be used to estimate the interest due on a back pay award is available at https://www.opm.gov/policy-data-oversight/pay-leave/back-pay-calculator. In order to complete the back pay calculations, you will be asked to submit all replacement earnings during the period of your removal, demotion, or suspension.

FAQs

Frequently asked questions related to this Employee Notification are separately attached to this Employee Notification.

[insert CHRO Name]
[insert VISN]

REMEDY ELECTION FORM

This Remedy Election Form must be submitted (i.e., emailed, faxed, or mailed) no later than 150 calendar days from the date of this Employee Notification concerning the Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691.

[insert EMPLOYEE NAME]:
[insert VA FACILITY NAME]:

Question 1: I executed a Settlement Agreement and elect the following (check one and initial below):

☐ ______ (initial)

1. **Maintain the Settlement Agreement.** This means you are choosing to keep the agreement previously reached with VA, including any compensation and other relief provided to you. You understand that this decision is final. You do not need to elect a remedy below in Question 2.

☐ ______ (initial)

2. **Rescind the Settlement Agreement.** This means you are choosing to undo the agreement previously reached with VA. You understand that you are required to return any compensation provided to you under that agreement. In lieu of your previous agreement, you must also elect a remedy below in Question 2.

Question 2: In lieu of the Settlement Agreement, I elect to receive the following remedy (check one and initial below):

☐ ______ (initial)

1. **Reinstated and made whole.** This means you are choosing to return to your previous position/grade at VA. You understand that VA may deduct replacement earnings from your back pay.

☐ ______ (initial)

2. **Made whole without reinstatement.** This means you are choosing not to return to VA or your previous position/grade. You understand that VA may deduct replacement earnings from your back pay.

You can submit this Remedy Election Form by mail, email, or facsimile using the contact information provided on the Employee Notification you received from VA.

Email is the preferred response method to ensure timely receipt of the Remedy Election Form. If email is not used, it may be difficult to demonstrate timely receipt.

For questions, please review the FAQs separately attached to this Employee Notification. You may also contact the VA point-of-contact identified in this Employee Notification, and/or email AFGE at 714actions@afge.org.

______________________________ EMPLOYEE SIGNATURE

______________________________ DATE

______________________________ EMPLOYEE PHONE NUMBER

VA Letterhead

EMPLOYEE NOTIFICATION
(Retired in lieu of)

Date:

SUBJ: Compliance with Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691

[Employee Name]

You have been identified as a current or former employee of the United States Department of Veterans Affairs (VA) and American Federation of Government Employees (AFGE) bargaining unit employee who retired in lieu of receiving a performance-based adverse action under the authority of 38 U.S.C. 714, without receiving a Performance Improvement Plan (PIP) in accordance with the AFGE Master Collective Bargaining Agreement (MCBA).

NOTE: If you previously received a notice from VA concerning this case, please be advised that this Employee Notification supersedes the original notice, and you should complete the enclosed Remedy Election Form.

As a result of the arbitration award issued by Jerome H. Ross on August 23, 2018, in *AFGE, Nat'l Veterans Affairs Council #53, and Dep't of Veterans Affairs*, FMCS Case No. 181117-01691, VA was ordered to (1) resume compliance with Article 27, Section 10 of the MCBA; (2) rescind any adverse action taken against bargaining unit employees under the authority of 38 U.S.C. §714 for unacceptable performance who did not receive a PIP in compliance with Article 27, Section 10 of the MCBA; and (3) reinstate, and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits.

In compliance with the arbitration award, VA conducted a review of performance-based adverse actions. Upon review of your action, it was determined that you retired in lieu of receiving an adverse action under the authority of 38 U.S.C. §714 from the position of [insert GS[occupational series]-[grade], [position title]] without first receiving a PIP as required by the MCBA. Consistent with a Settlement Agreement reached between VA and AFGE, and because you did not receive a performance-based adverse action under the authority of 38 U.S.C. §714, you are eligible for a lump sum payment equivalent to twenty percent (20%) of your gross annual salary as of the date of your retirement. This one-time, lump sum payment will not adjust your retirement benefit, if any.

Response Instructions & Address Verification Form

To receive your one-time, lump sum payment, you must complete and return the attached Address Verification Form to VA. Once received, VA will transmit your payment by check using the information on your Address Verification Form.

Your response must be provided to VA no later than 150 calendar days from the above date of this Employee Notification. Otherwise, you are waiving your rights to this payment.

You can submit your Address Verification Form by email, mail, or facsimile using the information provided below:

- EMAIL: VA714PIPCompliance@va.gov
- MAIL: [Contact name] at (address)
- FACSIMILE: [Contact name] at (fax number)

Email is the preferred response method to ensure timely receipt of the Address Verification Form. If email is not used, it may be difficult to demonstrate timely receipt.

FAQs

Frequently asked questions related to this Employee Notification are separately attached to this Employee Notification.

[insert CHRO Name]
[insert VISN]

ADDRESS VERIFICATION FORM

Former Employee Address Verification

Current Name: (Last, First Middle Initial) ____
Full Social Security Number: _________________________________
Select One Option below:

- ÿ The address is correct as listed on the letter
- ÿ The address is not correct. My correct mailing address is:

  ____
  ____
  ____

- ÿ I am the addressee, but not a former VA employee
- ÿ The employee to whom this letter is addressed is deceased **(see reverse side)**

Contact Information:
Name (if different from addressee): ____
Phone number: ____
Email address (optional): ____

____ _____________________
Signature Date

Return this form and required documentation to:

Department of Veterans Affairs
Financial Services Center, Payroll Services
Attention: Saturday Premium Pay
PO Box 149975
Austin, Texas 78714

If you have questions, please contact VAFSCPayrollSpecialActionsTeam@va.gov or use the above address. **Do not send Personally Identifiable Information such as SSNs to this email address.**

Deceased Former Employee and Beneficiary Information

Deceased Employee Name (Last, First Middle Initial):
____
Full Social Security Number (**required**): ____

Contact Information (required):
Name of person completing this document: _______________________________________
Relationship to deceased: ____
Phone Number: ____
Email address if available: ____
Provide beneficiary information below and see page 3 for a list of required documents. You must return this completed form along with ALL REQUIRED documents within 45 calendar days to receive payment.

Name (First, Middle initial, Last name)	Full Social Security Number	Relationship to deceased	Current address, including Zip code **(required)**

Use additional sheets if needed.
Return this form and required documentation to:

Department of Veterans Affairs
Financial Services Center, Payroll Services
Attention: Saturday Premium Pay
PO Box 149975
Austin, Texas 78714

VAFSCPayrollSpecialActionsTeam@va.gov
Do not send Personally Identifiable Information such as SSNs to this email address
Below are the required documents (in order of precedence) for beneficiaries of deceased former employees to receive payment:

Type of Beneficiary	Required Documents
SF 1152 (Designation of Beneficiary Form) If the deceased former employee had an SF1152 on file at the time of death, those beneficiaries specified are entitled to compensation. If there was no SF1152 on file at the time of death, the below precedence will be followed.	• Attachment from Notification letter, page 2 • SF1152 (original or eOPF and watermark) • Death Certificate of former employee • Parts A, B, and G of SF1153 (attached)
Spouse (If there is no surviving spouse, the deceased employee's children are entitled.)	• Attachment from Notification letter, page 2 • Parts A, B, C and G of SF1153 (attached) • Death Certificate of former employee • Marriage Certificate
Children (If there are no surviving children, the deceased employee's parents are entitled.)	• Attachment from Notification letter, page 2 • SF1152 – Designation of Beneficiary if available • Death Certificate of former employee • Death Certificate of deceased spouse, if applicable • Parts A, D & G of SF1153 for each sibling

	• Child's birth certificate (all siblings) • Divorce Decree of deceased (if applicable) • Marriage Certificate – showing maiden name of beneficiary if applicable • Adoption papers, if applicable • Guardianship papers, if applicable • Medical documents for disabled, if applicable
Parent (If there are no surviving parents, a court Administrator/Executor of the Estate)	· Attachment from Notification letter, page 2 · Death Certificate · Birth Certificate of deceased showing both parents' names · Parts A, D and G of SF1153 · Death Certificate of parents if one parent is deceased · Divorce Decree of Deceased if applicable
Administrator/Executor of Estate (If there is no Administrator/Executor, the deceased employee's next of kin (brother, sister, etc.) is entitled.	· Death Certificate · Parts A, E and G of SF1153 · Court Order Appointed Letter · EIN from IRS on IRS letterhead · Birth Certificate of Deceased · Divorce Decree if applicable · Parents' Death Certificates
Next of Kin in Domicile	· Attachment from Notification letter, page 2 · Death Certificate · Parts A, D and G of SF1153 · Birth Certificate of deceased · Birth Certificate of deceased's siblings if applicable · Marriage Certificate showing Maiden Name if applicable · Divorce Decree if applicable · Death Certificate of parent · Adoption papers if applicable · Guardianship papers if applicable

VA Letterhead

EMPLOYEE NOTIFICATION
(Last Chance Agreement)

Date:

SUBJ: Compliance with Arbitration Award – Performance Improvement Plans, *AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs*, FMCS Case No. 181117-01691

[Employee Name]

You have been identified as a current or former employee of the United States Department of Veterans Affairs (VA) and American Federation of Government Employees (AFGE) bargaining unit employee who executed a Last Chance Agreement in lieu of receiving a performance-based adverse action under the authority of 38 U.S.C. 714, without receiving a Performance Improvement Plan (PIP) in accordance with the AFGE Master Collective Bargaining Agreement (MCBA). You were then removed based on the Last Chance Agreement.

NOTE: If you previously received a notice from VA concerning this case, please be advised that this Employee Notification supersedes the original notice, and you should complete the enclosed Remedy Election Form.

As a result of the arbitration award issued by Jerome H. Ross on August 23, 2018, in *AFGE, Nat'l Veterans Affairs Council #53, and Dep't of Veterans Affairs*, FMCS Case No. 181117-01691, VA was ordered to (1) resume compliance with Article 27, Section 10 of the MCBA; (2) rescind any adverse action taken against bargaining unit employees under the authority of 38 U.S.C. §714 for unacceptable performance who did not receive a PIP in compliance with Article 27, Section 10 of the MCBA; and (3) reinstate, and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits.

In compliance with the arbitration award, VA conducted a review of performance-based adverse actions. Upon review of your action, it was determined that you were removed for violating a Last Chance Agreement which you executed in lieu of receiving an adverse action under the authority of 38 U.S.C. §714 from the position of [insert GS[occupational series]-[grade], [position title]] without first receiving a PIP as required by the MCBA. Consistent with a Settlement Agreement reached between VA and AFGE, and because you did not receive a performance-based adverse action under the authority of 38 U.S.C. 714, you are eligible for a lump sum payment equivalent to fifteen percent (15%) of your gross annual salary as of the date of your removal. This one-time, lump sum payment will not adjust your retirement benefit, if any.

Response Instructions & Address Verification Form

To receive your one-time, lump sum payment, you must complete and return the attached Address Verification Form to VA. Once received, VA will transmit your payment by check using the information on your Address Verification Form.

Your response must be provided to VA no later than 150 calendar days from the above date of this Employee Notification. Otherwise, you are waiving your rights to this payment.

You can submit your Address Verification Form by email, mail, or facsimile using the information provided below:

- EMAIL: VA714PIPCompliance@va.gov
- MAIL: [Contact name] at (address)
- FACSIMILE: [Contact name] at (fax number)

Email is the preferred response method to ensure timely receipt of the Address Verification Form. If email is not used, it may be difficult to demonstrate timely receipt.

FAQs

Frequently asked questions related to this Employee Notification are separately attached to this Employee Notification.

[insert CHRO Name]
[insert VISN]

ADDRESS VERIFICATION FORM

Former Employee Address Verification

Current Name: (Last, First Middle Initial) ____
Full Social Security Number: ____________________________________
Select One Option below:

- ÿ The address is correct as listed on the letter
- ÿ The address is not correct. My correct mailing address is:

  ____
  ____
  ____

- ÿ I am the addressee, but not a former VA employee
- ÿ The employee to whom this letter is addressed is deceased **(see reverse side)**

Contact Information:
Name (if different from addressee): ____
Phone number: ____
Email address (optional): ____

____ ______________________
Signature Date

Return this form and required documentation to:

Department of Veterans Affairs
Financial Services Center, Payroll Services
Attention: Saturday Premium Pay
PO Box 149975
Austin, Texas 78714

If you have questions, please contact VAFSCPayrollSpecialActionsTeam@va.gov or use the above address. **Do not send Personally Identifiable Information such as SSNs to this email address.**

Deceased Former Employee and Beneficiary Information

Deceased Employee Name (Last, First Middle Initial):
____
Full Social Security Number (**required**): ____

Contact Information (required):
Name of person completing this document: ____
Relationship to deceased: ____
Phone Number: ____
Email address if available: ____
Provide beneficiary information below and see page 3 for a list of required documents. You must return this completed form along with ALL REQUIRED documents within 45 calendar days to receive payment.

Name (First, Middle initial, Last name)	Full Social Security Number	Relationship to deceased	Current address, including Zip code **(required)**

Use additional sheets if needed.
Return this form and required documentation to:

Department of Veterans Affairs
Financial Services Center, Payroll Services
Attention: Saturday Premium Pay
PO Box 149975
Austin, Texas 78714

VAFSCPayrollSpecialActionsTeam@va.gov
Do not send Personally Identifiable Information such as SSNs to this email address
Below are the required documents (in order of precedence) for beneficiaries of deceased former employees to receive payment:

Type of Beneficiary	Required Documents
SF 1152 (Designation of Beneficiary Form) If the deceased former employee had an SF1152 on file at the time of death, those beneficiaries specified are entitled to compensation. If there was no SF1152 on file at the time of death, the below precedence will be followed.	• Attachment from Notification letter, page 2 • SF1152 (original or eOPF and watermark) • Death Certificate of former employee • Parts A, B, and G of SF1153 (attached)
Spouse (If there is no surviving spouse, the deceased employee's children are entitled.)	• Attachment from Notification letter, page 2 • Parts A, B, C and G of SF1153 (attached) • Death Certificate of former employee • Marriage Certificate
Children (If there are no surviving children, the deceased employee's parents are entitled.)	• Attachment from Notification letter, page 2 • SF1152 – Designation of Beneficiary if available • Death Certificate of former employee • Death Certificate of deceased spouse, if applicable

	• Parts A, D & G of SF1153 for each sibling • Child's birth certificate (all siblings) • Divorce Decree of deceased (if applicable) • Marriage Certificate – showing maiden name of beneficiary if applicable • Adoption papers, if applicable • Guardianship papers, if applicable • Medical documents for disabled, if applicable
Parent (If there are no surviving parents, a court Administrator/Executor of the Estate)	▪ Attachment from Notification letter, page 2 ▪ Death Certificate ▪ Birth Certificate of deceased showing both parents' names ▪ Parts A, D and G of SF1153 ▪ Death Certificate of parents if one parent is deceased ▪ Divorce Decree of Deceased if applicable
Administrator/Executor of Estate (If there is no Administrator/Executor, the deceased employee's next of kin (brother, sister, etc.) is entitled.	▪ Death Certificate ▪ Parts A, E and G of SF1153 ▪ Court Order Appointed Letter ▪ EIN from IRS on IRS letterhead ▪ Birth Certificate of Deceased ▪ Divorce Decree if applicable ▪ Parents' Death Certificates
Next of Kin in Domicile	▪ Attachment from Notification letter, page 2 ▪ Death Certificate ▪ Parts A, D and G of SF1153 ▪ Birth Certificate of deceased ▪ Birth Certificate of deceased's siblings if applicable ▪ Marriage Certificate showing Maiden Name if applicable ▪ Divorce Decree if applicable ▪ Death Certificate of parent ▪ Adoption papers if applicable ▪ Guardianship papers if applicable

Exhibit 3

Frequently Asked Questions

FREQUENTLY ASKED QUESTIONS

ARBITRATION AWARD CONCERNING PERFORMANCE IMPROVEMENT PLANS

AFGE, Nat'l Veterans Affairs Council #53, and Department of Veterans Affairs,
FMCS Case No. 181117-01691

NOTE: These FAQs only apply to employees who received an Employee Notification from the Department of Veterans Affairs.

Q1: I received a notice from the Department of Veterans Affairs (VA), what is this about?

A: When VA implemented the VA Accountability and Whistleblower Protection Act of 2017, it interpreted the Act to supersede its contractual requirement to provide performance improvement plans (PIPs) before taking adverse actions against AFGE bargaining unit employees. The collective bargaining agreement between VA and AFGE (2011 Master Agreement) requires VA to provide PIPs before taking performance-based adverse actions. AFGE filed a national grievance (National Grievance) over the violation and an arbitrator and the Federal Labor Relations Authority (FLRA) ruled in favor of AFGE. You received the Employee Notification because the Arbitrator required VA to rescind any adverse action taken against AFGE bargaining unit employees in violation of the collective bargaining agreement and to reinstate, and/or make whole any such employee.

Q2: What is an AFGE bargaining unit employee?

A: An AFGE bargaining unit employee is an employee serving at VA in a job position covered by AFGE's nationwide bargaining unit. For more information, visit www.afge.org.

Q3: What are "adverse actions" for the purposes of this case?

A: For the purposes of this case, adverse actions are performance-based removals/terminations, demotions, and suspensions over 14 days.

Q4: Who is receiving this Employee Notification?

A: This Employee Notification is only for AFGE bargaining unit employees who were subject to an adverse action based on performance without first receiving a PIP in accordance with Article 27, Section 10 of the 2011 Master Agreement.

- If you received a PIP in accordance with Article 27, Section 10 of the 2011 Master Agreement, then you are not entitled to relief under the arbitration award.
- If you were not in the AFGE bargaining unit at the time of the adverse action, then you are not entitled to relief under the arbitration award.
- If you did not receive a notice of proposed performance-based adverse action, then you are not entitled to relief under the arbitration award.

Q5: Why am I receiving this now?

A: AFGE filed the National Grievance on September 27, 2017. On August 23, 2018, the Arbitrator issued his award granting the National Grievance; however, VA filed an appeal to the award with the FLRA. An arbitration award is not final and binding while an appeal is pending with the FLRA. On November 16, 2020, the FLRA denied VA's appeal, making the Arbitrator's award final. VA then requested the FLRA reconsider its decision, and the FLRA denied VA's request on December 8, 2020. You are receiving this Employee Notification as part of VA's compliance with

the award and a Settlement Agreement executed by VA and AFGE, which you can access at www.afge.org/VAPIPsettlement.

Q6: What does "make whole" mean?

A: The purpose of make-whole relief is to place individuals who have been adversely affected by an improper action in the situation where they would have been if the improper action had not occurred. Make-whole relief includes back pay and may include other forms of relief, such as restoration of leave, retirement and insurance benefit contributions, step and grade increases, and payment for missed opportunities for overtime depending on the specific circumstances of the affected employee.

Q7: What does "back pay" mean?

A: For this matter, back pay is the amount of pay, allowances, or differentials you would have received if VA had not taken an adverse action against you. You are deemed to have performed service for VA during the period covered by the Arbitrator's award. Back pay includes pay, benefits, crediting of leave that would have been earned, and interest.

Q8: What offsets and deductions from my back pay are required?

A: Pursuant to 5 C.F.R. § 550.805(e), a federal agency must make the following offsets and deductions from the gross back pay award:

1. any earnings that replaced your previous VA employment ("replacement earnings"). This does not include earnings from employment you may have had while working for VA, e.g., "moonlighting."
2. any erroneous payment received because of the unjustified adverse action you received, e.g., lump sum payment for annual leave, retirement annuity payments, etc.
3. deductions that would have been made from your pay had VA not taken the unjustified adverse action you received. This includes retirement contributions, social security taxes and Medicare taxes, health benefits premiums (if coverage continued during a period of erroneous retirement or employee elects to retroactively reinstate it), life insurance premiums, federal tax withholdings, and dues deductions when the employee has previously elected to pay such dues.

Q9: What about unemployment compensation paid to me?

A. Some states have laws that require VA to either notify the responsible state agency of the back payment to an employee OR offset the back payment and remit that to the responsible state agency. If you reside in one of these states, VA will need information and documentation about your unemployment compensation to comply with these state laws. You will be provided a form to provide this information and documentation by the Defense Finance and Accounting Service (DFAS) on behalf of VA. Failure to provide the requested information and documentation may result in a debt owed to VA that may be recouped from you.

Q10: If the lump sum payment of annual leave is deducted from my back pay, will I get the annual leave back?

A: Yes, if you received a lump sum payment at the time of your removal, that amount is required to be deducted from your back pay amount. The annual leave associated with the lump sum payment will be credited back to you. As part of the backpay, you will also be credited with the annual leave you would have received had the VA not taken the adverse action against you. There are circumstances where the backpay may result in some employees exceeding the carryover amount of annual leave. In that case, Human Resources will instruct the employee on how the leave will be credited and the time limit for its use.

Q11: What happens if I have a pending grievance/appeal at the local level concerning my performance-based adverse action under Section 714?

A: You are prohibited from obtaining duplicate relief/payment under both the Settlement Agreement executed by AFGE and VA AND any subsequent proceeding for your individual or local grievance/appeal. Please contact your AFGE Local President to further discuss your individual or local grievance/appeal.

Q12: What happens if I do not want to come back to my previous position at VA?

A: You can identify on the Remedy Election Form that you elect to be made whole without reinstatement. If you choose not to return to work in your previous position at VA, you will still receive the make whole relief for the period from the effective date of the adverse action to the date your election is received by VA. In no case will back pay continue to accrue beyond the 90th calendar day following the date of your Employee Notification.

Q13: I do want to come back to my previous position at VA, but I am currently employed at a higher rate of pay than what I earned while working in my previous position at VA. What does that mean for me?

A: You can identify on the Remedy Election Form that you elect to be made whole with reinstatement. You will receive a return to duty date and the make whole relief for the period from the effective date of the adverse action to the date you return to work. Keep in mind that your replacement earnings will be deducted from your back pay amount. If you received higher pay during your period of removal, the deduction would likely result in little to no back pay. In no case will back pay continue to accrue beyond the 90th calendar day following the date of your Employee Notification.

Q14: How will back pay impact my taxes?

A: Neither AFGE nor VA can provide information or guidance on the taxability of any payments and/or relevant withholdings. Please contact a tax professional to discuss these matters.

Q15: Will the adverse action be removed from my personnel file?

A: Yes, regardless of whether you elect make whole with reinstatement or make whole without reinstatement, the adverse action will be rescinded and removed from your personnel file.

Q16: What if I want to be reinstated to my previous position at VA, but my previous position no longer exists at VA?

A: There may be instances in which the previous position you held is no longer available for various reasons. VA is still required to reinstate you to your previous position or a position that is substantially similar to your previous position, and at the same pay and grade level. If neither your previous position nor a substantially similar position is available, VA will use its best efforts to identify and provide you with a list of available positions at the same grade with the same work shift, geographic location, and bargaining unit. If your previous position is no longer available, please contact AFGE at 714actions@afge.org.

Q17: What can I do if I elect to be reinstated, but VA does not provide me with any back pay?

A: Please email AFGE at 714actions@afge.org. If you are unable to email, please contact your Local Union representative so that they may email AFGE on your behalf.

Q18: What do I do if I disagree with the back pay amount VA pays me?

A: You should contact AFGE at 714actions@afge.org. If you are unable to email, please contact your Local Union representative so that they may email AFGE on your behalf.

Q19: I was not removed from VA, so what am I supposed to do?

A: If you were demoted, you still need to complete the Remedy Election Form to be returned to your previous position/grade. You can also elect to remain in your current position/grade and only receive the make whole relief.

If you were suspended, you do not need to complete the Remedy Election Form. No action is necessary for you to receive the make whole relief.

Q20: Why must I submit the Remedy Election Form?

A: VA needs the Remedy Election Form to know how you want to be covered by the award. Please review the Remedy Election Form for important deadlines and information concerning processing of your Remedy Election Form.

Q21: When must I submit the Remedy Election Form?

A: You must submit the Remedy Election Form within 150 calendar days of the date of your Employee Notification in order to be eligible for relief. Please note, back pay will stop accruing as of the 90th day following the date of your Employee Notification. Please review the Remedy Election Form for important deadlines and information concerning processing of your Remedy Election Form.

Q22: What happens if I do not return the Remedy Election Form?

A: If your Remedy Election Form requires you to return it to VA, and you fail to return the form within 150 days from the date of your Employee Notification, you will not be entitled to relief under the award.

FEDERAL MEDIATION & CONCILIATION SERVICE

In the Matter of the Arbitration

- between –

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL VA COUNCIL,

OPINION & AWARD

Union,

FMCS Case #230127-02959
Settlement Agreement Grievance

-- and --

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Agency.

ARBITRATOR: James M. Darby, Esq.

APPEARANCES:

For the Union:
Ibidun Roberts, Esq.
Roberts Labor Law and Consulting, L.L.C.

For the Agency:
Robert Vega, Esq.
Linda Weeden-Harris, Esq.
Office of the General Counsel

This dispute arose on October 17, 2022, when the American Federation of Government Employees, AFL-CIO, National VA Council ("the Union") filed a National Grievance alleging that the United States Department of Veterans Affairs ("the Agency") violated the parties' July 5, 2022 Settlement Agreement ("the Settlement Agreement"). The Settlement Agreement resolved certain disputes over the Agency's failure to provide performance improvement plans to employees being dismissed for unacceptable

performance. The parties were unable to resolve the National Grievance and on December 21, 2022, the Union notified the Agency of its intent to invoke arbitration.

On February 6, 2023, the Federal Mediation and Conciliation Service notified the undersigned of his appointment to hear and resolve the dispute. Hearings were held on September 6 and September 7, 2023, in Washington D.C., and on September 26, 2023 (virtually). Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties submitted post-hearing briefs and the record was closed. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in preparation and issuance of this Opinion and Award.

QUESTIONS TO BE RESOLVED

At the hearing the parties were unable to stipulate to the issues to be resolved by this Arbitrator. The parties submitted their own statements of the issues and agreed that I would identify the issues to be decided as part of this Opinion & Award. Having reviewed the entire record and the parties' submissions, I conclude that the questions to be decided herein are as follows:

1. Did the Department violate the July 5, 2022 Settlement Agreement and commit an unfair labor practice by failing to provide eligible bargaining unit members with reinstatement and/or make-whole relief in a timely manner? If so, what shall the remedy be?

2. Did the Department violate the July 5, 2022 Settlement Agreement and Rehabilitation Act, and commit an unfair labor practice, by refusing to provide relief to employees who accepted a disability retirement? If so, what shall the remedy be?

APPLICABLE CONTRACT PROVISIONS

JULY 22, 2022
SETTLEMENT AGREEMENT BETWEEN DEPARTMENT OF VETERANS AFFAIRS & NATIONAL VETERANS AFFAIRS COUNCIL, AMERICAN FEDERATION OF GOVERNMENTAL EMPLOYEES, AFL-CIO

* * *

II. Terms of Agreement

By execution of this Agreement, the Parties agree to the following:

A. Eligible AFGE BUEs: The Parties agree that the following categories of AFGE BUEs are eligible for relief under this Agreement as stated below ("Eligible AFGE BUEs").

- **i.** **No Individual Appeal Filed**: This category includes employees who received performance-based adverse actions under Section 714 between June 23, 2017 and the effective date of this Agreement and who did not appeal that action.
- **ii.** **Individual Appeal Filed**: This category includes employees who received performance-based adverse actions under Section 714 between June 23, 2017 and the effective date of this Agreement and who did appeal that action, regardless of the result. However, this category does not include AFGE BUEs identified in Section II(D).
- **iii.** **Resignation In Lieu Of**: This category includes employees who received a proposed performance-based adverse action under Section 714 and who resigned from federal service prior to VA issuing a final decision under Section 714 between November 16, 2020 and the effective date of this Agreement.
- **iv.** **Individual Settlement Agreement**: This category includes employees who received a performance-based adverse action under Section 714 and who later executed an individual settlement agreement with VA between November 16, 2020 and the effective date of this Agreement.

* * *

- **vi.** **Retirement In Lieu Of**: This category includes employees who received a proposed performance-based adverse action under Section 714 and who retired from federal service prior to VA issuing a final decision under Section 714 between November 16, 2020 and the effective date of this Agreement.
- **vii.** **Last Chance Agreement**: This category includes employees who received a proposed performance-based adverse action under Section 714 but who executed an intervening Last Chance Agreement and were later removed for violating that Last Chance

Agreement between November 16, 2020 and the effective date of this Agreement.

B. Relief for Eligible AFGE BUEs: The Parties agree that VA will provide the following relief to each category of Eligible AFGE BUEs.

- **i. No Individual Appeal Filed**: Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.
- **ii. Individual Appeal Filed**: Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.
- **iii. Resignation In Lieu Of**: Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.
- **vi. Retirement In Lieu Of**: Eligible AFGE BUEs in this category are entitled to a one-time, lump sum payment equivalent to twenty percent (20%) of their gross annual salary as of the date of their retirement from VA.
- **vii. Last Chance Agreement**: Eligible AFGE BUEs in this category are entitled to a one-time, lump sum payment equivalent to fifteen percent (15%) of their gross annual salary as of the date of their removal from VA.

C. Ineligible AFGE BUEs: The Parties agree that the following categories of AFGE BUEs are ineligible for relief under this Agreement.

- **i. Non-AFGE BUEs**: Employees who did not encumber a position included in the AFGE bargaining unit are ineligible for relief under this Agreement.
- **ii. Non-Section 714 Adverse Actions**: Employees who received adverse actions under legal authorities other than Section 714 are ineligible for relief under this Agreement.
- **iii. Employee Received PIP**: Employees who received a PIP consistent with Article 27, Section 10 of the 2011 Master Agreement prior to VA issuing a proposed performance-based adverse action under Section 714 are ineligible for relief under this Agreement.
- **iv. Employee Previously Made Whole**: Employees who, prior to the effective date of this Agreement, were previously made whole by VA are ineligible for relief under this Agreement. This includes, for example, employees who successfully appealed their adverse action and were later reinstated with make-whole relief. The Parties agree that no employee is entitled to duplicate relief/payment under this Agreement.
- **v. Resignations/Retirements In Lieu Of, Individual Settlement Agreement, and Last Chance Agreement Before November 16, 2020**: Employees who, before November 16, 2020, resigned or

> retired in lieu of receiving a Section 714 adverse action, executed an individual settlement agreement after receiving a Section 714 adverse action, or were removed for violating a Last Chance Agreement executed in lieu of receiving a Section 714 adverse action are ineligible for relief under this Agreement.

D. Category of AFGE BUEs Not Covered by this Agreement. The Parties agree that this Agreement does not cover AFGE BUEs who appealed their performance-based adverse action(s) under Section 714 to the Merit Systems Protection Board ("MSPB") unsuccessfully and, as of April 21, 2022, had filed a Petition for Review ("PFR") pending before the MSPB or the United States Court of Appeals for the Federal Circuit. This category includes only the following AFGE BUEs.

> Espindola, Belinda, DA-0714-19-0552-I-1
> Shannon-Bailey, Laurie, PH-0714-21-0012-I-1

* * *

II.F. Reinstatement and/or Make-Whole Relief: The Parties agree that Eligible AFGE BUEs identified in Sections II(A)(i), (ii), (iii), (iv), and (v) of this Agreement are entitled to reinstatement and/or make-whole relief as set forth below. This means that an Eligible AFGE BUE may elect to either (1) return to their previous position/grade at VA and receive the make-whole relief (i.e., reinstatement with make-whole relief), or (2) not return to their previous position/grade at VA and instead receive only the make-whole relief (i.e., make-whole relief without reinstatement). For purposes of this Agreement, reinstatement and make-whole relief are defined as follows.

* * *

F. iii. Make-Whole Relief: Make-whole relief will be calculated and provided consistent with the Back Pay Act, 5 U.S.C. §5596, applicable government-wide regulations, 5 C.F.R. §550.801, et seq, and the 2011 Master Agreement. . . .

(Joint Exhibit 8.)

REMEDY REQUESTED

Because the Department has committed an unfair labor practice, the Arbitrator should issue a cease and desist order, order the Department to comply with the Settlement Agreement and the Ross Award, and order other traditional remedies he finds appropriate.

(Union Brief p. 21.)

FACTS

1. Background

Article 27, Section 10 of the parties' Master Agreement, entitled "Performance Improvement Plan (PIP)," provides that before the Agency reassigns, demotes, or removes an individual for unacceptable performance, it must provide the employee a PIP meeting certain requirements. One such requirement is that "[t]he PIP will afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problem(s)." (Joint Exhibit 1, p. 134.)

On June 23, 2017, the President of the United States signed into law the "Veterans Affairs Accountability and Whistleblower Protection Act of 2017," 38 U.S. Code § 714 ("Section 714"), which provided a new procedure to "remove, demote, or suspend" certain employees working at the Agency, "based on performance or misconduct." Based on this new law, on June 27, 2017, the Agency promulgated a new policy that "there is no requirement for a Covered Employee to serve a minimum of 90 calendar days under a performance appraisal plan, or be given an opportunity to improve (e.g., a performance improvement plan) prior to a Removal or Demotion being imposed for performance based deficiencies."

On September 27, 2017, the Union filed a grievance challenging this new policy as being inconsistent with Article 27, Section 10 of the parties' Master Agreement. The grievance was unresolved by the parties. On April 26, 2018, Arbitrator Jerome Ross conducted a hearing to resolve the dispute. (Joint Exhibit 2.) On August 23, 2018, Arbitrator Ross issued his decision ("the Ross Award"), sustaining the grievance filed by the Union. Specifically, he found that:

> [T]he [Section 714] did not remove VA employees' opportunity to demonstrate acceptable performance, as required by federal law. Consequently, the [Section 714] also did not act to supersede any negotiated contractual provisions that provide bargaining unit employees the opportunity to demonstrate acceptable performance. Article 27, Section 10 of the Master Agreement falls under that category. Accordingly, the [Section 714] also did not authorize the Agency to disregard its obligations under that negotiated provision.

(Joint Exhibit 8, p. 34.)

Arbitrator Ross ordered the Agency to "(1) resume compliance with the requirements set forth in Article 27, Section 10 of the Master Agreement; (2) rescind any adverse action taken against bargaining unit employees for unacceptable performance who did not first receive a PIP complying with the provisions of Article 27, Section 10; (3) as a result, reinstate and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits." (Joint Exhibit 8, p. 35).

On September 24, 2018, the Agency filed exceptions to the Ross Award to the Federal Labor Relations Authority ("FLRA"), asserting that (1) the award decision was contrary to the law; (2) Arbitrator Ross exceeded his authority in making this award; and (3) the award was not derived from the essence of the parties' Collective Bargaining Agreement. On November 16, 2020, the FLRA denied the Agency's exemptions, making the Ross Award final.

On November 27, 2020, the Agency filed a request with the FLRA asking for the decision to be reconsidered. On December 8, 2020, the Agency filed a request with the FLRA asking for a stay on the implementation of the Ross Award. On February 22, 2021, the Agency' issued a bulletin instructing the Department to resume the use of PIPs in cases where an employee has not been meeting performance expectations. On

May 17, 2021, the Union filed an unfair labor practice charge ("ULP") against the Department, alleging that it had failed to timely comply with the Ross Award.

On June 25, 2021, the FLRA denied the Department's requests for reconsideration and for a stay. In or about September 2021, following the FLRA's denial, the Agency began informing employees that had been impacted by the change in policy that they were entitled to reinstatement and make whole compensation.

On July 5, 2022, the parties entered into a Settlement Agreement resolving the Union's ULP. It provided a process for bargaining unit employees to elect and receive reinstatement and backpay or only backpay and determined that the sole method to challenge the Agency's actions under the Award was to file a grievance alleging a breach of the Settlement Agreement. (Joint Exhibit 8, pp. 1-10).

On October 17, 2022, the Union filed a National Grievance against the Agency alleging a violation of the Settlement Agreement for, among other things, failing to provide relief to eligible individuals in a timely manner. On October 31, 2022, the Union amended the grievance, alleging the Department had withheld requested information from the Union and refused to make whole individuals who accepted disability retirements. (Joint Exhibits 2-3.) On December 21, 2022, the Union invoked arbitration in response to the alleged violation of the Settlement Agreement (Joint Exhibit 5). On January 24, 2023, the Department responded to the Union's National Grievance (Joint Exhibit 6).

On or about May 16, 2023, the parties entered into an Addendum to the Settlement Agreement to address two bargaining unit employees who had filed unsuccessful appeals of their performance-based adverse actions under Section 714

and had filed petitions for review after their respective adverse initial decisions (Joint Exhibit 9).

The Department's Financial Policy provides that "VA will comply with valid back pay orders and settlement agreements resolving personnel conflicts, disputes, or errors." Further, it states that DFAS ["the Defense Finance and Accounting Service"] will process salary transactions as stipulated in back pay determinations and settlement agreements." (Union Exhibit 14, p. 15.) The policy does not contain any difference in procedure for processing back pay orders or settlement agreements resulting from decisions of the MSPB, EEOC, or arbitrators.

2. Relevant Testimony

Mary Anne Gillespie testified that the Agency removed her from her position as a contract specialist in 2017, and she did not receive a PIP before her removal. She was reinstated on March 14, 2022, but did not receive her back pay until July of 2023. While waiting for her back pay, Gillespie repeatedly contacted Human Resources to check on the status of her pay. She had debts that became due once she was reinstated, and she was unable to pay her father back for loans before he passed away in December 2022. Gillespie's performance has been good since she returned to the Department.

Joshua Knighten testified that he was removed from the Agency as a Rater on September 14, 2020. He was not given a PIP prior to his removal, and he was only six points away from meeting his performance requirements. Knighten attributed his decline in performance to his father's passing. He was reinstated on April 25, 2022, but as of the date of the arbitration hearing he had not received his back pay. According to

Knighten, he withdrew money from his retirement savings account after his removal, which put him in a higher tax bracket and which he is still repaying.

Gabrielle Allen testified that the Agency dismissed her from her position as a Veteran Service Representative on July 9, 2019, pursuant to the Section 714. She was not provided a PIP before her removal. Allen was reinstated on April 25, 2022, but as of the date of the arbitration hearing she had not received her back pay. She averred further that she still has medical bills from her period of unemployment, which she is still paying. According to Allen, her performance since she has been reinstated has been exceptional.

Keisha Jackson testified that she was dismissed by the Agency as a Vocational Rehabilitation Counselor in March of 2019 pursuant to the Section 714. She was not given a performance improvement plan prior to her removal. Jackson was reinstated on March 27, 2022, and received her back pay on July 11, 2023. According to Jackson, she contacted several people at the Agency about the delay in receiving her back pay, and was initially told that she was receiving an annuity. Then she was told that the delay was caused by DFAS. Jackson paid her rent late every month until she received her back pay. She has since resigned from the Agency.

Anthony Darosett testified that the Agency removed him from his position as a Veterans Service Representative in December 2019 pursuant to the Section 714. He received a PIP, but not the 90-day PIP required by the Master Agreement. Darosett stated that the Agency attempted to coerce him out of accepting the relief due him under the Settlement Agreement. He was reinstated in April 2022 but as of the date of the arbitration hearing, he had not received his back pay. According to Darosett, since his reinstatement his performance has been very good.

Carlos Valenzuela-Durr testified that he was removed from the Agency as an IT Specialist in October 2018. Since 2008 he had been working under a reasonable accommodation due to a disability he incurred while serving in the military. Valenzuela-Durr was not given a PIP prior to his removal. He filed for disability retirement at the beginning of 2019, which was approved and became effective October 2018. Valenzuela-Durr stated that the income he received on disability retirement was significantly less than he was receiving as an IT Specialist. His income went from $10,000 per month to $2400 per month.

Valenzuela-Durr subsequently received a letter from VA offering him reinstatement or make whole without reinstatement. Valenzuela-Durr elected to be made whole without reinstatement, but was told that he was "ineligible for relief because the settlement agreement does not provide relief to any individuals collecting disability retirement." He testified that he is barely surviving on the disability retirement pay, and would have no issue paying back his disability retirement benefits if permitted to be reinstated and made whole.

Agency National Labor Relations Specialist Ian Bruce Oliver testified that he was assigned to handle the instant National Grievance. He stated that back pay is provided for both those who elect reinstatement and those who just choose to be made whole without reinstatement. Oliver also averred that employees must provide interim earnings statements so the Agency can determine whether any offsets must be made. He described the difficulty surrounding calculating the back pay owed to each impacted employee, given the differences in pay, leave balances and pension contributions. Once completed, those calculations must then be forwarded to DFAS, the Agency's payroll processor.

According to Oliver, there are a total of 198 employees who are entitled to backpay relief. Forty of these cases are being reviewed at the Agency's Financial Services Center (FSC), after which they will be sent to DFAS. There are 90 cases pending with DFAS, and DFAS has paid out relief to eligible employees in 68 cases. Oliver testified he does not directly communicate with DFAS. He has never reviewed the Agency's financial policy. Oliver also stated that he did not know the time limits for when remedy tickets expire, or whether the process he outlined for determining back pay also applied to back pay determinations made by the Merit Systems Protection Board or the EEOC.

Oliver testified that pursuant to the Settlement Agreement a disability retirement is different than a retirement in lieu of removal. He also stated that disability retirees are not included on the list of ineligible employees in the Settlement Agreement. Oliver confirmed that all eligible employees entitled to back pay are receiving interest on the amounts owed.

PARTIES' POSITIONS

The parties' positions can be briefly summarized.

The Union maintains the Agency violated the Settlement Agreement by disqualifying any employee who had taken a disability retirement. Disability retirees are not listed in the express exclusions contained in Section II.C. of the Settlement Agreement. The Union rejects any claim that the parties needed to execute an Addendum to the Settlement Agreement to include disability retirees, since such employees were explicitly awarded relief by the Ross Award for having received performance-based actions under the Section 714. Additionally, the Union argues that the Agency violated the Settlement Agreement by failing to provide the ordered make

whole relief within a reasonable time. The Ross Award became final on November 16, 2020, and the Agency "had no basis to wait until Eligible AFGE BUEs made an election on reinstatement to begin the process of determining the back pay amount."

The Union also insists that the Agency's inactions here also constituted two independent violations of the Federal Sector Labor Management Relations Statute ("FSLMRS"). In this regard, it is a violation of Section 7116(a)(1), (5), and (8) of the FSLMRS when a party refuses to honor unambiguous terms of a grievance settlement. *DODDS and Overseas Educ. Ass'n*, 50 FLRA 424, 426-27 (1995). The Union urges that the Agency's failure to provide the Settlement Agreement remedies to individuals who retired on disability constitutes such a violation. Additionally, an agency that fails to comply with an arbitration award in a timely manner violates section 7116(a)(1), (5), and (8) of the Statute. *See, U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida,* 37 FLRA 603 (1990).

The Union asks the undersigned to reject the Agency's plea that since the Settlement Agreement contains no time limit for compliance there can be no unfair labor practice here. It submits that "when there is no explicit timeframe in the arbitration award, FLRA case law imposes a 'reasonable' time frame on agencies to comply and the compliance is with the arbitration award." *See, Dep't of the Air Force, Kirtland Air Force Base, N.M. and AFGE, Local 2263,* 123 LRP 31749, DE-CA-22-0204 (2023) (ALJ Decision). Here, the Union received a back pay award, filed an unfair labor practice charge for non-compliance, then settled the unfair labor practice charge, and the Agency has still not fully complied after three years. The Union rejects the claim that such delay is excusable since the calculations are too complex, and cites to MSPB and EEOC cases ordering relief within 60 days where the calculations were also complicated. Also,

the Agency's attempt to blame DFS for the delay was not supported by any reliable evidence, and "DFAS is able to comply with 60-day timelines when the Department is ordered to do so by the MSPB and the EEOC."

The Union also submits the grievance must be sustained because the Agency violated the Rehabilitation Act, 29 U.S.C. § 791(g), by its decision to exclude disability retirees from the terms of the Settlement Agreement. The Agency treated individuals who accepted disability retirements differently than other employees who did not retire on disability, but who received performance-based adverse actions pursuant to the Section 714. Therefore, the Union insists it has established a *prima facie* case of disability discrimination. The Union also maintains the Agency has failed to present any evidence of a legitimate, non-discriminatory reason for excluding disability retirees from the benefits of the Settlement Agreement. It rejects the Agency's claim that since the Settlement Agreement does not mention disability retirees, they are not entitled to relief pursuant to the Settlement Agreement. The Settlement Agreement includes anyone who received a performance-based adverse action pursuant to the Section 714. This includes disability retirees.

Finally, the Union submits that since the Agency has committed an unfair labor practice, the Arbitrator stands in the place of the FLRA with the authority to order the same remedies. *NTEU and FDIC,* 48 F.L.R.A. 566 (1993). Accordingly, "a cease and desist order, notice posting, and order to comply within 60 days will promote the good faith bargaining requirements of the Statute."

The Agency argues that the Union has not met its burden of demonstrating that the Agency's actions violated the parties' Settlement Agreement. First, all the Union witnesses who were removed from service pursuant to the Section 714 all made their

elections of remedies before the Settlement Agreement was entered into, and all of them have been offered reinstatement. These witnesses all elected reinstatement and backpay "based on the Department's notice sent September 21, 2021. Moreover, the … witnesses were reinstated between March and April 2022." Thus, according to the Agency, those employees who made their elections of remedies before the Settlement Agreement went into effect on July 5, 2022, cannot be heard to complain that their delayed remedies breached the Settlement Agreement.

As explained by the Agency:

> While these testimonies do point to personal hardships experienced by each employee, and they may support a claimed delay in reinstatement and/or backpay following issuance of the Ross Award, the testimony provided does not support a delay in payment of backpay on the part of the Department in violation of the Parties' Settlement Agreement dated July 5, 2022. The grievance submitted by the Union alleges a violation of the Settlement Agreement, not a violation of the Award, which was settled.

(Agency Post-Hearing Brief p. 17.)

Next, the Agency insists that the evidence presented by the Union establishes that the delays in providing back pay to impacted employees have been reasonable. It insists it has made a good faith effort to provide relief to eligible employees and that any delays have been due to circumstances out of its control. According to the Agency, there are many employees eligible for relief and each back pay award has to be calculated individually, which is time-consuming. As Mr. Oliver testified, the Agency is not responsible for the final distribution of back pay. The Agency also notes that several of the employees who testified for the Union acknowledged that they failed to provide the Agency with financial information in a timely manner, resulting in a delay in their receipt of back pay.

Furthermore, the Agency asserts that DFAS is the agency responsible for making the back pay payments. It is entirely independent from the Department and responsible for the final step of the backpay process, and it has been processing payments "incredibly slowly" due to its responsibility for handling settlements from different agencies. Nothing in the record indicates that the Department has engaged in "any deliberate delay or gross neglect in effectuating the award." *DHHS, SSA, and AFGE*, 22 F.L.R.A. 270 (1986).

Next, the Agency maintains that it had no obligation under the Settlement Agreement to include disability retirees. It insists that at no time during the negotiations for the Settlement Agreement, nor anywhere in the Agreement itself did the parties ever agree to include disability retirees in the categories of employees eligible for relief under the Agreement. "[T]he Union had ample time with which to raise the issue of disability retirements and ensure they receive relief under the Settlement Agreement. Despite this, the Union signed and agreed to a Settlement of the Ross Award and ULP that did not include a disability retirement category of AFGE BUEs." According to the Agency, the fact that disability retirees are not included in the list of excluded individuals does not mean they are entitled to relief. "Notably, Section II(B) of the Settlement Agreement does not outline a form of relief that disability retirees would be entitled to." Nor can the absence of relief for disability retirees in the Settlement Agreement be considered the result of a "mutual mistake" by the parties. *Grant v. Department of the Army*, EEOC Appeal No. 01931896, 93 FEOR (LRP) 20174 (June 18, 1993).

Furthermore, the Agency argues the parties had a procedure in Section IV.G. of the Settlement Agreement for adding new categories of employees entitled to relief under the Agreement. They used this procedure for adding a specific class of individuals who

had appeals pending before the MSPB. The Agency avers that "just as the Parties were able to agree to provide a remedy to categories of AFGE BUEs not covered by the Agreement, the Parties have a process for the Union to attempt to reach a similar addendum in regard to disability retirees," but they never did so.

The Agency also contends the Union's proposed remedy violates the Settlement Agreement and provides a windfall to disability retirees. Nothing in the Settlement Agreement provides that all eligible BUEs must receive backpay pursuant to the Back Pay Act; indeed, the Agreement's handling of employees who chose to retire in lieu of removal demonstrates the parties' intent to treat retirees in no such fashion (such individuals only receive "a one-time, lump sum payment equivalent to twenty percent of their gross annual salary as of the date of their retirement from VA"). The Agency points out the inconsistency in treating employees as both disabled and entitled to back pay for the same period of time. This results in "double payment and therefore unjust enrichment." *Grabis v. Office of Pers. Mgmt.*, 424 F.3d 1265, 1268. (Fed. Cir. 2005).

Finally, the Agency submits that since the Union and the Agency did not agree in the Settlement Agreement to include disability retirees in the categories of eligible employees, the Union cannot now claim this determination violates the Rehabilitation Act, since it "would require the Union to agree to the same degree of fault." According to the Agency, "[s]ettlement agreements are contracts between the complainant and the agency, and it is the intent of the parties as expressed in the contract, and not some unexpressed intention, that controls the contract's construction." *Eggleston v. Dep't of Veterans Affairs.,* 1990 EEOPUB LEXIS 927, 4 (E.E.O.C. August 23, 1990).

DISCUSSION

First, I will address whether the Agency violated the Settlement Agreement by failing to provide eligible employees with the ordered relief in a timely manner. The record shows that the Settlement Agreement became effective July 5, 2022. As of the last date of the instant hearings (September 26, 2023), three of the Union's five witnesses who the Agency deemed eligible for back pay had yet to receive their back pay. And the two who did receive payment did not receive it until a year after the Settlement Agreement was reached. Most troubling is the evidence establishing that as of September 2023, only 68 out of a total of 198 cases had been paid out -- that's almost three years after the Ross Award became final.

The Settlement Agreement does not specify a time limit when eligible employees are to be reinstated and/or provided back pay. However, this does not mean the Agency had no obligation to make employees whole in a timely manner. There is well-settled arbitral precedent holding that when parties fail to place a specific time limit on the other's obligation to perform, neutrals will impose a reasonable time requirement. The length of time will generally depend on all the facts and circumstances involved, including whatever practice and customs govern the parties. *See also, U.S. Department of Veterans Affairs Medical Center, Allen Park, Michigan,* 49 FLRA 405, 424 (1994) (compliance must be accomplished "promptly in light of all the facts and circumstances.")

I conclude that based on all the facts and circumstances present, the Union has established that the Agency has not complied with the Settlement Agreement's remedy provisions within a reasonable time. It cannot be overlooked that as of September 2023, 65% of those employees entitled to back pay relief had not received payment. This is 14

months after the Settlement Agreement promised such relief and ***almost three years*** after the Ross Award became final and binding on the Agency.

The Agency's hyper technical attempt to compartmentalize its delays into separate time periods, to minimize the protracted length of the wait, cannot succeed. The fact that an employee elected his or her relief prior to the execution of the Settlement Agreement is immaterial if that same employee is still without his or her backpay almost three years after the Ross Award became final. The Settlement Agreement was intended to resolve the Union's ULP charge that the Agency failed to comply with the Ross Award within a reasonable time. It was not intended to provide the Agency with another opportunity to delay complying with that Award, which is essentially what occurred here.

The fact that the computations were complicated, given variances in employees' interim earnings, leave balances, pension contributions, etc. is understood. However, the Agency has not shown how or why the computations in *this case* are any more time-consuming or difficult than other situations where it has been required to pay back pay to multiple individuals -- in some cases within 60 days. Any make whole relief always requires an analysis of offsets, leave balances, pension credits, etc. The Agency did not point to any other comparable examples of where it has confronted similar "complexities" that took years to sort out like this case. Nor does it contend that this matter is the first of its kind.

Additionally, the Agency's effort to blame DFS for the delay falls flat. First, the record shows that as of the date of the hearing 90 of the cases were still with FSC, the Agency's own processing center. Furthermore, the Agency made no effort to present anyone from DFS to support the claim that DFS's delay was reasonable under the facts

of this case. Regardless, for the employee whose bills have gone unpaid, credit rating has dropped or mortgage has gone unpaid, the distinction between the Agency and DFS is a fiction. These employees have waited almost three years after the Ross Award became final to be paid due to a delay caused by "the Government." As between the Agency that has taken almost three years to comply with an order directing it to make employees whole, and the employees who were impermissibly removed from service by the Agency who are now faced with financial hardship, who should bear the burden of DFS's protracted handling?[1]

Accordingly, I conclude the Agency violated the Settlement Agreement by failing to provide full make whole relief to eligible employees within a reasonable time after such Agreement was reached.

Turning to the Agency's refusal to provide make whole relief to employees who accepted disability retirements, it is necessary to apply basic rules of contract construction to the Settlement Agreement. When confronted with disputes over contractual interpretation, neutrals serve as "the readers of the contract." In so doing, they must decide initially whether the language in dispute is clear on its face, or ambiguous. It is well-established that if the contract language is found to be clear and unambiguous, the arbitrator, in most instances, concludes that the plain meaning of the words themselves is the best evidence of what was intended when the language was incorporated into the parties' collective bargaining agreement. If, on the other hand, the express contract language lends itself to more than one plausible interpretation, the

[1] Without question, any eligible employee whose own inactions or delays substantially contributed to the Agency's inability to effectuate compliance the Settlement Agreement cannot be heard to complain about the delays herein. However, under the facts and circumstances herein, for any employee to have "substantially contributed" to the overall delay, I find there must be a showing that such employees waited 120 days or longer to comply with the Agency's written request for information.

arbitrator must look beyond the words themselves (i.e., bargaining history or past practice) to ascertain their meaning and the intent of the parties.

The pertinent language of the Settlement Agreement relied upon by the Union to demonstrate that individuals such as Carlos Valenzuela-Durr who applied for disability retirement are entitled to relief is as follows:

> **II. Terms of Agreement**
>
> By execution of this Agreement, the Parties agree to the following:
>
> A. Eligible AFGE BUEs: The Parties agree that the following categories of AFGE BUEs are eligible for relief under this Agreement as stated below ("Eligible AFGE BUEs").
>
> i. No Individual Appeal Filed: ***This category includes employees who received performance-based adverse actions under Section 714 between June 23, 2017 and the effective date of this Agreement*** and who did not appeal that action. (Emphasis added.)
>
> * * *
>
> B. Relief for Eligible AFGE BUEs: The Parties agree that VA will provide the following relief to each category of Eligible AFGE BUEs.
>
> i. No Individual Appeal Filed: ***Eligible AFGE BUEs in this category are entitled to reinstatement and/or make-whole relief as defined in Section II(F) of this Agreement.*** (Emphasis added.)
>
> * * *
>
> F. Reinstatement and/or Make-Whole Relief: ***The Parties agree that Eligible AFGE BUEs identified in Sections II(A)(i), (ii), (iii), (iv), and (v) of this Agreement are entitled to reinstatement and/or make-whole relief as set forth below.*** This means that an Eligible AFGE BUE may elect to either (1) return to their previous position/grade at VA and receive the make-whole relief (i.e., reinstatement with make-whole relief), or (2) not return to their previous position/grade at VA and instead receive only the make-whole relief (i.e., make-whole relief without reinstatement). For purposes of this Agreement, reinstatement and make-whole relief are defined as follows. (Emphasis added.)

It is undisputed that Valenzuela-Durr "received performance-based adverse actions under Section 714 between June 23, 2017 and the effective date of [the Settlement Agreement]" and otherwise satisfied the requirements for receiving a make whole remedy under the Settlement Agreement. In denying him a remedy under the Settlement Agreement, the Agency explained to Valenzuela-Durr that he was "ineligible for relief because the settlement agreement does not provide relief to any individuals collecting disability retirement." Nothing within the four corners of the Settlement Agreement supports this statement.

Indeed, the Settlement Agreement does provide special treatment for individuals who retired in lieu of removal – one provision for those who did so prior to November 16, 2021 and another for those retiring after November 16, 2021. Valenzuela-Durr fits neither of these categories. Moreover, the Settlement Agreement at Section II C. and D. expressly provides a list of employee categories that are *excluded* from receiving relief under the Agreement. Individuals taking disability retirements are not mentioned or in any way addressed in these provisions.

The Agency's claim that for disability retirees to have been included in the Settlement Agreement the Union was required to negotiate for their express inclusion (whether in Section II A. or via the Addendum process) cannot be sustained. Once the parties established the broad category of including all employees "who received performance-based adverse actions under Section 714 between June 23, 2017 and the effective date of this Agreement" it was not up to the Union to specifically include other categories of employees who already met this broad definition. It was up to the Agency to seek the exclusion of employees it did not believe should be included in the Settlement Agreement. The parties clearly knew how to do this, as evinced by their expressly

excluding various categories of individuals. They did not include disability retirees in these exclusions.

Accordingly, I conclude that the Settlement Agreement clearly and unambiguously includes disability retirees such as Mr. Valenzuela-Durr who otherwise meet the eligibility requirements contained in the Settlement Agreement.[2]

Based on these determinations, I also conclude that the Agency violated the FSLMRS by failing to timely comply with the Settlement Agreement's make whole relief requirements. An agency that fails to comply with an arbitration award and/or a grievance settlement agreement in a timely manner violates Section 7116(a)(1), (5), and (8) of the Statute. See e.g., DODDS and Overseas Educ. Ass'n, 50 FLRA 424, 426-27 (1995); Dep't of the Air Force, Kirtland Air Force Base, N.M. and AFGE, Local 2263, 123 LRP 31749, DE-CA-22-0204 (2023) (ALJ Decision). Again, the Agency takes no issue with the legality or legitimacy of the Ross Award in this proceeding. Indeed, it exhausted all its avenues for challenging that Award. Cf., Kirtland Air Force Base, 123 LRP 31749.

The instant Settlement Agreement became necessary because of the Agency's delay in complying with the Ross Award, and to resolve the Union's ULP filed to enforce the Award. I find the Agency's use of the Settlement Agreement to simply buy more time to delay compliance constituted an unlawful attempt to interfere, restrain and coerce employees in the exercise of their collective bargaining rights. It also represented a failure to negotiate in good faith by failing to live up to the terms of the Settlement

[2] I cannot conclude the Agency's actions violated the Rehabilitation Act. The record before me demonstrates that its determination to deny disability retirees benefits under the Settlement Agreement was based exclusively on its good faith belief that the Agreement did not provide remedies for such individuals. There is absolutely no evidence to suggest that the Agency was motivated by a desire to treat disability retirees differently because of their being members of a protected class.

Agreement, including its refusal to provide make whole relief to disability retiree Carlos Valenzuela-Durr.

Based on the foregoing, the grievance is sustained in part and denied in part. The Agency violated the July 5, 2022 Settlement Agreement and committed an unfair labor practice by failing to provide eligible bargaining unit members with make-whole relief in a timely manner and refusing to provide relief to Carlos Valenzuela-Durr due to his accepting a disability retirement.[3]

As a remedy, the Agency shall:

1) Cease and desist from failing to comply with the July 5, 2022 Settlement Agreement in a reasonable amount of time and refusing to provide make whole relief to disability retirees.
2) Post an electronic notice (approved by the undersigned and the Union and sent electronically to all bargaining unit employees) signed by the Secretary of the Department of Veterans Affairs.
3) Provide back pay plus interest (consistent with the Back Pay Act, 5 U.S.C. §5596) within 60 days to all remaining eligible individuals who have not been made whole as of the date of this award. In the event the Agency determines it has insufficient information from individual employees to comply with this Award, the Agency shall promptly notify those employees and the Union and the 60 days shall commence upon receipt of such information.
4) Provide back pay and interest within 60 days to Carlos Valenzuela-Durr, to be offset by the disability retirement compensation he earned, and otherwise grant him the relief and options provided in the July 5, 2022, Settlement Agreement. The Agency shall also immediately provide the Union with the names and addresses of other similarly situated bargaining unit employees.
5) In the event the Agency fails to comply with any of the foregoing provisions the undersigned will consider an application with supporting documentation for an award of compensatory damages for individuals who have still not been made whole.

The undersigned will retain jurisdiction for the purpose of resolving any remaining remedial issues.

[3] Based on these conclusions, it is unnecessary to resolve whether the Agency's actions violated the parties' 2011 Master Agreement.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

AWARD

The Union's grievance is sustained in part and denied in part.

The Agency violated the July 5, 2022 Settlement Agreement and committed an unfair labor practice by failing to provide eligible bargaining unit members with make-whole relief in a timely manner. The Agency violated the July 5, 2022 Settlement Agreement and committed an unfair labor practice by refusing to provide make whole relief to Carlos Valenzuela-Durr due to his accepting a disability retirement.

As a remedy, the Agency shall:

1) Cease and desist from failing to comply with the July 5, 2022 Settlement Agreement in a reasonable amount of time and refusing to provide make whole relief to disability retirees.
2) Post an electronic notice (approved by the undersigned and the Union and sent electronically to all bargaining unit employees) signed by the Secretary of the Department of Veterans Affairs.
3) Provide back pay plus interest (consistent with the Back Pay Act, 5 U.S.C. §5596) within 60 days to all remaining eligible individuals who have not been made whole as of the date of this award. In the event the Agency determines it has insufficient information from individual employees to comply with this Award, the Agency shall promptly notify those employees and the Union and the 60 days shall commence upon receipt of such information.
4) Provide back pay and interest within 60 days to Carlos Valenzuela-Durr, to be offset by the disability retirement compensation he earned, and otherwise grant him the relief and options provided in the July 5, 2022, Settlement Agreement. The Agency shall also immediately provide the Union with the names and addresses of other similarly situated bargaining unit employees.
5) In the event the Agency fails to comply with any of the foregoing provisions the undersigned will accept an application with supporting documentation for an award of compensatory damages for individuals who have still not been made whole.

The undersigned will retain jurisdiction for the purpose of resolving any remaining remedial issues.

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
May 15, 2024

From: Jm.darbitrator@verizon.net
To: Ibidun Roberts
Cc: "Weeden-Harris, Linda (OGC)"; Robert.Vega@va.gov
Subject: RE: AFGE, NVAC and VA, FMCS Case No. 230127-02959: Request for Clarification
Date: Friday, July 5, 2024 1:22:53 PM
Attachments: image001.png

External (jm.darbitrator@verizon.net)

Report This Email FAQ GoDaddy Advanced Email Security, Powered by INKY

Good Afternoon: I have received and reviewed the Request for Clarification submitted by Ms. Roberts on behalf of the Union. In it, the Union requests that I clarify whether I intended in my recent Award to provide the same relief that I provided Mr.Valenzuela-Durr to other similarly situated individuals identified by the Agency. I did not receive any reply/comments from the Agency regarding the Union's Request.

As information, I did not explicitly order the same relief to other similarly situated individuals because the record was devoid of evidence that any such individuals existed. The absence of such evidence is the reason I ordered the Agency to provide the names of those individuals, if indeed there were any. I took it as a given that *if* there were others identified that were similarly situated to Mr. Valensuela-Durr they would be treated similarly, given my clear resolution of his situation. I am unable to conceive of any good faith basis for the Agency to do otherwise and it has not presented one here.

I trust this clarifies the question raised by the Union. Please contact me if you have any questions.

Thank you,
Jim Darby

James M. Darby, Esq.
Arbitrator & Mediator, NAA
Chairman, Pennsylvania Labor Relations Board
1060 N. Charlotte St., Suite #122
Lancaster, PA 17603

522 Shore Rd., Apt. 5F
Long Beach, NY 11561
717-413-5547
Jm.darbitrator@verizon.net

From: Ibidun Roberts <iroberts@robertslaborlaw.com>
Sent: Tuesday, June 18, 2024 10:02 AM
To: Jm.darbitrator@verizon.net
Cc: Weeden-Harris, Linda (OGC) <Linda.Weeden-Harris@va.gov>; Robert.Vega@va.gov
Subject: AFGE, NVAC and VA, FMCS Case No. 230127-02959: Request for Clarification

Good morning, Arbitrator Darby.

Please find attached the Union's request for Clarification of the Award.

Best,
Ibidun

Ibidun Roberts, Attorney (She/Her/Hers)
Roberts Labor Law and Consulting, L.L.C.,

(202) 235-5026
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FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL #53
(Union)

and

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS
(Agency)

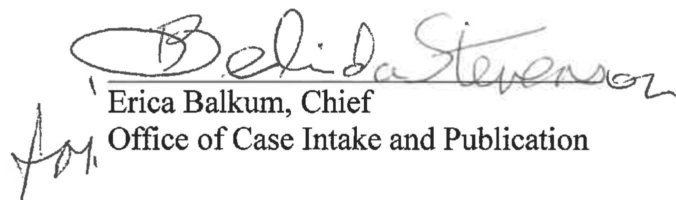
0-AR-5971

ORDER

December 30, 2024

The Union has filed the attached request to withdraw its exceptions in the instant case. Accordingly, the Authority grants the Union's request to withdraw its exceptions. The Authority will not take any further action in this case.

For the Authority:



Erica Balkum, Chief
Office of Case Intake and Publication

December 20, 2024

Erica Balkum, Chief
Case Intake and Publication Office
Federal Labor Relations Authority
1400 K St. NW
Washington DC 20424
Fax **(202) 800-2996**

RE: Withdrawal notice concerning
FLRA Case No. 0-AR-5971

Dear Ms. Balkum:

The undersigned Union hereby withdraws its exceptions in the above-referenced case.

Respectfully submitted,

(signature)

Ibidun Roberts, Union Representative
(print name & title)

For the Union

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL #53
(Union)

and

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-AR-5971

STATEMENT OF SERVICE

I hereby certify that copies of the Order of the Federal Labor Relations Authority in the subject proceeding have this day been served to the following:

EMAIL:
Ibidun Roberts – Attorney @ Law
Roberts Labor Law and Consulting, LLC
9520 Berger Road, Suite 212
Columbia, MD 21046
iroberts@robertslaborlaw.com

FIRST CLASS MAIL
Robert Vega, Attorney
Linda Weeden-Harris, Attorney
Department of Veterans Affairs
Office of General Counsel - PLG
810 Vermont Avenue, NW
Washington, DC 20420

James M. Darby
Arbitrator
1060 N. Charlotte St., Suite 122
Lancaster, PA 17603

Dated: December 30, 2024
WASHINGTON, D.C.

Belinda Stevenson
Belinda Stevenson
Legal Assistant

Employee Name	Address
Bartelt,Tr	
Blair, P	
Boyd, Daniel	
Burgh, K	
Cotney,J	
Cox,Pa	
Daponte, M	
Fisher, T	
Garner II, H	
Gee, T	
Henry, P	
Hernandez Jr,J	
Jackson,Ma	
Manning,G	
Manora,A	
McNeill,J	
Olton,N	
Pendleton,C	
Powers, A	
Scafe,V	
Simmons,A	
Valenzuela-Durr,C	
Wells,A	
Wroblewski, M	