DEPARTMENT OF VETERANS AFFAIRS
OFFICE LABOR-MANAGEMENT RELATIONS
WASHINGTON DC 20420

NOV 0 3 2011

Robert E. Redding
President, NFFE-IAM DVA Council
1902 13th Avenue North
Moorhead, MN 56560

Dear Mr. Redding:

This is the Department of Veterans Affairs, Veterans Benefit Administration's (Agency or Management) response to the National Federation of Federal Employees' (NFFE or Union) national grievance, dated October 1, 2011, received via Fed Ex on October 5, 2011. The national grievance essentially alleges that Management violated the 1997 VA/NFFE national contract and the Federal Service Labor Management Relations Statute (Statute) when it failed to bargain over new national performance standards for Vocational Rehabilitation Counselors (VRCs) and Counseling Psychologists(CPs).

NFFE's grievance is denied since it is untimely. The national grievance also is denied because the topic of performance standards is outside the statutory duty to bargain based on the Federal Labor Relations Authority's covered by doctrine. That is, the parties bargained extensively over performance standards in their national contract and thus there is no requirement to bargain again over the same subject matter. The national grievance also is denied since it is clear that the Union takes issue with content of the performance standards when the content of such standards themselves are outside the duty to bargain, and the standards are consistent with the national contract.

The Grievance is Untimely

The Union was notified by email on April 5, 2011 that the Agency would not negotiate the standards since the topic of performance standards was covered by the national contract. The national contract provides 30 days to file a national grievance from the date of the alleged violation. Article 6 (Grievance Procedure), Section 6A provides: "The Step One grievance will be initiated in writing if not settled informally, with the Service/Division Chief or equivalent within 30 calendar days of the incident that gave rise to the grievance, unless the grievant could not reasonably be expected to be aware of the incident by such time. In that case, the grievance must be initiated within 30 calendar days of the date that the grievant became aware of the incident. A grievance concerning a continuing practice or condition may be initiated at any time." However, the Union waited until October, 2011 to file its untimely grievance. Indeed, the Union readily admits in its grievance that: "On April 5, 2011, the Agency broke off all bargaining declaring the matter to be covered by Article 15 of the Parties'

Agreement." Thus, the Union was on notice, clear and explicit notice, as of April 5th that the Agency would not bargain the performance standards. Yet, the Union waited until October to file its national grievance. The purpose of a time limit in a grievance procedure is to ensure that matters are resolved expeditiously and that one party does not act on the inaction of another party. Almost 6 months have elapsed since the Union was put on notice. Management, not faced with any grievance or unfair labor practice charge, has implemented the standards at issue. If time limits are to be given any recognition, the grievance must be determined to be untimely.

The Union was on notice on April 5, 2011, that the Agency decided that it would not bargain over the standards. This is not a continuing violation, but a one-time event where the Agency is either correct or incorrect in its determination A continuing violation is one that is repeated, such as the failure to pay overtime worked. Each time there is a failure to pay it would be a new offense. Here, the one-time event was Management's decision not to bargain. The Union had notice, but waited over five months to file a grievance. To find this event to be a continuing violation would be to render the 30-day negotiated time frame meaningless. Thus, Management also hereby determines this is not a continuing violation and thus the grievance is untimely and denied.

The Subject Matter of the Grievance is Covered By the National Contract

Consistent with past correspondence, after again carefully reviewing NFFE's proposals and Article 15 (Performance Appraisal System) of the national contract, the Agency has determined that the subject matter of new performance standards is outside the duty to bargain because the subject matter is covered by Article 15. Since the parties have already bargained extensively over performance appraisals, there is no duty to bargain once again. The Federal Labor Relations Authority's covered by doctrine clearly applies. Therefore, the Agency will follow the procedures and appropriate arrangements contained in Article 15.

The national contract addresses a multitude of issues encompassing performance management. For example, in Article 15, entitled "Performance Appraisal System," Section 1 sets forth the purpose of the Article. There are references to 5 U.S.C. § 4301 et seq. and 5 CFR Part 430 as amended and a reference to the VA Performance Appraisal Program outlined in VA Handbook 5430.1, as supplemented by the national contract, but there is no reference to any midcontract (i.e., midterm) obligation to bargain over the subject matter performance standards despite being covered by the national contract. Indeed, not just performance standards but also changes in performance standards are

covered by the national contract. Section 2 describes the two levels of performance and the relationship between the appraisal system and reductions in force.

Section 3, entitled "Performance Plan", discusses the performance plan in great detail. Pursuant to Section 3, NFFE employees and their Union representatives are to be involved in the development of performance plans, including establishment and **changes** in performance standards and elements. Thus, the parties already have bargained over changes to performance standards and elements. Section 3 also establishes a procedure for the establishing new performance standards; it states that any **newly established standards and critical elements** must be established and communicated to the employee within 90 days of the implementation of the new two tier system.
Accordingly, Section 3 sets forth an elaborate mechanism, specifically negotiated the parties, by which new performance standards will be issued. Although there is to be communication with employees in the development of performance plans, there is no duty to bargain over the development of or changes to performance standards. Further, the parties in Section 3 recognized that "performance standards may be modified during the appraisal cycle" and sets forth a process for such modification. Again, the parties had already bargained over changes in performance standards. Further, Section 4 is specifically entitled "Performance Standards" and contains contractual requirements for such standards. Specifically, Section 4 provides that "[t]o the extent feasible, each employee's standard will permit the accurate evaluation of job performance on the basis of objective criteria related to the employee's job. Performance standards will be defined at the successful (pass) level for each critical element to be used in the summary rating of each employee. Additional elements may be included in performance plans but may not be included in the summary rating...." Section 5 of Article 15 provides a detailed process on performance rating procedures.

Therefore, not only have the parties bargained extensively over their performance appraisal system, but such bargaining is also specifically covered by the national contract, which sets forth a specific process for changing performance plans. Accordingly, there is no statutory duty to bargain over proposed national performance standards for VRCs and CPs at stations where NFFE is the exclusive representative.

Article 8 (Negotiations), Section 2 of the national contract duplicates the duty to bargain under the Federal Service Labor Management Relations Statute. Since there is no statutory duty to bargain, there likewise is no contractual duty to bargain under Article 8, Section 2. The grievance is thus denied.

Robert Redding

The Union Takes Issue With the Content of the Performance Standards, a Nonnegotiable Subject; and the Standards Comply With the National Contract

The national grievance also is denied since it is clear that the Union takes issue with content of the performance standards when the content of such standards themselves are outside the duty to bargain. Even when there is a duty to bargain over the impact and implementation of performance standards, there is no duty to bargain with the Union over the content of those standards. Yet, it is clear from the Union's grievance that that is exactly what the Union desires to bargain about – the standards themselves. Specifically, the Union alleges that the performance standards are not "objective" because supervisors have complete authority to determine the validity of a complaint. In fact, a valid complaint or incident is one where a review by the supervisor, after considering both sides of the issue, reveals that the complaint/incident should have been handled more prudently and was not unduly aggravated by the complainant. Disagreeing, per se, does not constitute "discourtesy". Valid complaints or incidents are determined by the supervisor and discussed with the employee. The Union also makes allegations regarding the sufficiency of Element 4 and Element 2. Yet, even if there was a bargaining obligation, those concerns would be nonnegotiable. Nonetheless, as noted below, the Agency has attempted to meet the Union's interests in the substance of the standards, consistent with Article 15. The national grievance is denied because it focuses on the nonnegotiable substance of the standards.

The Union also argues that the standards violate Article 15 since they represent "a backwards performance standard ...." The Agency has reviewed the performance standards and has determined that the standards are consistent with Article 15. Moreover, a grievance cannot challenge the validity of a standard but only the manner in which a standard is implemented. It is clear that the Union is attacking the validity of the standards and not their implementation. Indeed, the national grievance seeks a remedy of rewriting the standards. As such, the national grievance is denied also on this ground.

Management Has Attempted to Meet the Union's Concerns Although There is No Statutory Duty To Do So

The Union and affected employees were involved in the establishment of new employee performance standards and offered an opportunity to comment on the proposed changes to the performance standards. Despite there being no statutory or contractual duty to bargain, on March 13, 2009, representatives from

the Union were invited to discuss potential changes to the national VRC/CP performance standards with the VRC/CP Performance Standards Workgroup and the Union was given the opportunity to address any questions or concerns it had before the performance standards were released.[1] On November 16, 2009, the VRC/CP Performance Standards Workgroup submitted the final work product to VR&E Service for review, comment, and concurrence. On December 3, 2009, VR&E Service approved the revised standards and the concurrence process was initiated. Before releasing the new performance standards, Management conducted a conference call with the Union and provided the Union with data to show how management had derived certain numbers. In fact, prior to any making changes to the national VRC/CP performance standards, the comments or concerns received from the Union were addressed and some of the Union's suggestions were incorporated into the new performance standards. Specifically, at the March 13, 2009 meeting, the Union expressed concerns with how accuracy would be measured, the consistency among managers in their ratings of employees, and how to ensure that a sufficient number of case reviews were selected. Following the meeting with the Union, Management considered the Union's concerns, and as a result, Management increased the number of required case reviews from 3 per quarter to 3 in each quality category per quarter. This increases the total case review number from 3 per quarter to 9 per quarter (there are 3 quality categories). Management also determined that the method of measuring accuracy is more effectively communicated through training, versus including the detailed calculations in the standards themselves. And finally, Management determined that training will be provided to managers regarding these standards, to ensure consistency in the rating process. Again, these are all nonnegotiable Management determinations under section 7106(a) of the Federal Service Labor-Management Relations Statute. Accordingly, the Agency has satisfied its contractual and statutory duties at both the local and national level regarding the performance standards.

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[1] Although such a meeting was not required by the national contract since there was no duty to bargain over the standards, the Agency invited the Union to the meeting in an effort to satisfy the Union's nonnegotiable interests in the content of the performance standards.

In sum, the national grievance is untimely. There is no duty to bargain over the performance standards due to the covered by doctrine. The Agency has complied with Article 15 of the national contract in implementing these standards. Moreover, the union's grievance takes issue with the standards themselves, which is outside the duty to bargain.
Sincerely yours,

Leslie B. Wiggins
Deputy Assistant Secretary