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

DEC 2 2 2011

Ami Pendergrass, Esq.
American Federation of Government Employees
P.O. Box 320430
Alexandria, VA 22320

Dear Ms. Pendergrass:

This is in response to the National Grievance filed on October 28, 2011, alleging the VA is not providing "substantive pre-decisional involvement on development of hybrid positions" for Medical Support Assistants (MSA) and Physician Support Assistants (PSA); that the VA has not provided a "timely review and remedy" to employees in those positions who have been downgraded; that the VA has failed to properly remedy classification in VISN 17; and, violations to Article 9, Classification and Article 23, Merit Promotion of the VA/AFGE Master Agreement. We deny any such violations and deny this grievance.

We will address each of your allegations separately:

MSA/PSAs:

In your grievance, you provide information on a number of meetings and exchanges of information regarding the MSA positions. Your narrative provides enough information to evidence that the Agency, in good faith, has continued to provide information to AFGE and has certainly included the union pre-decisionally in the process of converting this position. Your narrative is somewhat accurate but below please find additional meetings and information provided by management to the union on this very important issue:

On July 7, 2010, the parties met to discuss VA's plan to convert the MSA position from a title 5 to a Hybrid title 38 position.

On October 29, 2010, Mr. John Sepulveda, Assistant Secretary for Human Resources and Administration, responded to AFGE's letter, dated July 29, 2010, providing additional information, including a FAQ on the MSA conversion process.

On April 27, 2011, the parties held a conference call to discuss issues related to position downgrades, to include the MSA position.

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On May 4, 2011, Denise Biaggi-Ayer, Staff Director in the Office of Labor Management Relations, and Adam Garcia, Classification, contacted Ami Pendergrass to discuss the specific concerns of AFGE.

On May 6, 2011, the parties held a conference call to discuss AFGE's concerns with downgrades.

Ami Pendergrass and Adam Garcia subsequently discussed the downgrades via conference calls and exchanged relevant information.

On May 20, 2011, the parties held another face to face meeting to discuss the downgrades with additional details.

On June 30, 2011, the Agency provided the first draft of the MSA qualification standards to the unions for comments.

On September 22, 2011, the parties held a conference call to further discuss the issues.

On October 18, 2011, the unions received formal notice that the MSA position had been approved for conversion from title 5 to title 38 Hybrid.

On November 18, 2011, the unions were invited to a project planning meeting for the implementation of the MSA conversion. The meeting was held on December 14-15, 2011. The invitation provided the following information:

"This will be an un-precedented meeting of representatives from the Office of Human Resources Management's Compensation and Classification Service and Recruitment and Placement Policy Service and various representatives from the Veterans Health Administration. The purpose of the meeting will be pre-decisional planning only of the upcoming conversion. The major issues/topics to be discussed include how to identify current employees performing Medical Support Assistant (MSA) duties for conversion to hybrid status, and how to ensure consistency in the Professional Standard Boarding process so that the one- time boarding determinations are fair and equitable across VA.

No policies will be developed during this meeting. In addition, this will not address the content of the proposed VA Medical Support Assistant qualification standard, which will be submitted to you for collaboration at a later date.

In the spirit of pre-decisional involvement in this historic and important matter, it is hoped that you or a representative will be able to attend."

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During the meeting, the parties discussed and completed the following tasks:

- Identify Subject Matter Experts for the Professional Standards Boards (PSBs). Identify their role, and location of the boards (facilities, VISN/Regional, National);
- Establish and/or identify a consistent boarding process – GOAL - PSBs are fair and equitable across VA. How is this communicated to responsible PSB's? Identify Oversight;
- Identify the responsible staff and mechanism to track the one-time boarding process;
- Identify trainers and creators for the PSB members training;
- Identify the communication strategy for implementing and communicating the PSB Policy, procedures and changes. (who, what, where, when, how)? Time for completion?; and
- Identify how long the field will be given to conduct the correction of individuals currently in other occupational series who should be converted and conduct the initial one-time boarding?

As clearly stated above, the Agency has provided many opportunities for pre-decisional involvement and continues to be committed to work in collaboration with the unions to make the MSA conversion a success. Furthermore, the parties' pre-decisional involvement is prescribed by Executive Order (EO) 13522.[1] Section 5(e) of the EO specifically provides that, "[t]his order is intended only to improve the internal management of the executive branch and is **not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit, substantive or procedural, enforceable at law** or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." (emphasis added). Therefore the union's allegation that the Agency has failed to provide "substantive pre-decisonal involvement" is non-grievable and clearly inaccurate.

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[1] EO 13522, Sec 3 (a):" (ii) allow employees and their union representatives to have pre-decisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 U.S.C. 7106; provide adequate information on such matters expeditiously to union representatives where not prohibited by law; and make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 U.S.C. 7106(b)(1), through discussions in its labor-management forums."

In order to address the the allegation that the Agency has not responded to the issues of MSA employees already downgraded, we will provide the same explanation provided in many of our meetings. There are two issues we need to address, grade and pay retention. Individuals who experienced a downgrade without cause to their positions may initially receive grade retention for two years. Such individuals may also, at the very least, receive full pay retention from which they were downgraded for the time they remain in the downgraded position. The references are in accordance to 5 CFR part 536. Specifically, if the position description was classified at the higher level for at least one year, the employee would be entitled to grade retention for two years and would later be considered for pay retention at the end of the two years of grade retention. If the PD was at the higher grade for less than a year the employee would be entitled to pay retention. There should be no loss in pay to the downgraded employees unless their pay exceeded 150 percent of step 10 of the new lower grade.

VISN 17:

We have been in close contact with Veterans Integrated Service Network (VISN) 17 about the downgrade actions. A notification letter was sent on November 7, 2011, electronically (with a copy to Alma Lee) to each affected employee. The need for this notification letter resulted, as you may recall, from discussions between VA and AFGE which determined such notification, although drafted initially with AFGE, would be sent only by VA—not as a joint notification letter.

You claim that the Agency violated Article 9, section 1F, by not meeting with NVAC concerning the on-going downgrade issue. We deny that claim. First, section 1F states that the Department will meet and confer with the local union, not NVAC. The Department has met the requirements of section 1F with the local unions. The local unions have been involved in the desk audits and, on an almost monthly basis, labor/management meetings. Furthermore, there have been two town hall meetings (one in Temple and one in Waco) to discuss the VA Central Office Human Resources Management's site audit review. Second, if there was an obligation to meet with NVAC, the parties have clearly met that requirement by discussing this issue in many of the meetings held on downgrades. That is evidenced in your narrative discussing the many times the issue has been discussed (May 20, 2011, and September 22, 2011, to name two instances).

In your grievance you allege that the VA has violated Article 23, section 7. We presume that you are referring to Article 23, Section 7A.2., which reads:

"The following promotions may be taken on a noncompetitive basis unless otherwise provided: . . .

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Promotion of an incumbent or an individual entitled to re-employment rights to a position that is reclassified to a higher grade without significant change in duties or responsibilities either on the basis of a new classification standard or as the result of correction of an original classification error (When the incumbent of the upgraded position meets the legal requirements and qualification standards for promotion to the higher grade, the incumbent will be promoted.)"

Your argument that the Agency violated Article 23, Section 7 is incorrect for three reasons. First, Section 7A does not require the Agency to do anything, as the prefatory language in Section 7A ("The following promotions may be taken. . .") is clearly permissive. Second, Section 7A.2 does not apply to the situation at hand, as that section only applies to situations in which a position has been "reclassified to a higher grade." On the contrary, the positions at issue have been downgraded. Third, although the promotion of an incumbent in a position that is reclassified at a higher grade due to the accretion of additional duties and responsibilities and not as the result of a planned management action is permissible under Article 23, Section 7, 5 CFR part 335 allows for noncompetitive actions in situations resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error and grants agencies the discretion to except actions from competitive procedures in the case of a promotion resulting from an employee's position being classified at a higher grade because of additional duties and responsibilities.

For the reasons stated above, we deny your grievance and the requested remedies. If you have any questions or would like to discuss, please contact Denise Biaggi-Ayer at (202) 461-4129 or denise.biaggi-ayer@va.gov.

Sincerely,

for Denise Biaggi

Leslie B. Wiggins
Deputy Assistant Secretary