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

MAY 04 2010

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Dear Ms. Perdergrass:

This is the Agency's response to the Union's February 11, 2010 National Grievance, alleging "unilateral implementation of higher weighted case production standards for Veterans Benefits Administration (VBA) employees enrolled in the Flexiwork (sic) Program (telework) in violation of the various agreements, statutes, regulations, and past practice/customs." The Agency received an extension to file its response until May 5, 2010.

The grievance is untimely under Article 42, Section 11, of the VA/AFGE contract. Section 11 of Article 42 requires a national level grievance, such as this grievance, to be filed "[w]ithin thirty (30) calendar days of the act or occurrence or within thirty (30) days of the date the party became aware or should have become aware of the act or occurrence or at any time if the act or occurrence is continuing." The grievance clearly alleges that the violations began "since the execution of the MOU in [June 29,] 2007." Thus the grievance was not filed within 30 calendar days of the alleged violative conduct. Moreover, this is not a continuing violation since the alleged violative conduct was the discernable and specific act of requiring a different performance standard for telework. To hold otherwise, would be to misread the timeliness provision out of the contract. In other words, if the Agency commits an act and then acts consistently with that act, each act does not trigger a new 30 day time period. To hold as such would be to read the 30 day time period provision of the contract out of context, an interpretation that is inconsistent with basic statutory construction where all contract terms should be given meaning. Accordingly, the grievance is denied as being untimely.

There is no law or government wide regulation that requires an employee's performance standards to be the same when working on site as when working on telework. The OPM guidance cited by the Union does not prohibit different standards depending on where work is accomplished and based on management's assessment of the other duties to be accomplished at the work site. Moreover, the OPM Guidance is not a government-wide regulation binding on the Agency. The OPM Guidance is not an official declaration of policy; does not apply to the general workforce as a whole; and is not binding on heads of executive agencies to whom they apply. It is merely guidance, not a regulation,

unlike e.g. the OPM reduction in force regulations. The Federal Labor Relations Authority (FLRA) has made it very clear that OPM guidance is not a government wide regulation, but rather is merely guidance. *See NTEU and U.S Dep't of the Treasury, U.S. Customs Service*, 21 FLRA 6, 9 at n. 3 (1986) , *aff'd sub nom Dep't of the Treasury v. FLRA*, 836 F.2d 1381 (1988) (the Authority noted that OPM guidance is merely that, guidance, and is not binding on the various federal agencies.) *See National Treasury Employees Union v. Devine*, 587 F. Supp. 960, 963 (D.D.C. 1984); see also *Federal/Postal/Retiree Coalition v. Devine*, 751 F.2d 1424 (D.C. Cir. 1985).

Management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Federal Service Labor-Management Relations Statute (the Statute) encompass the authority to establish performance standards. See e.*g., AFGE Council 238*, 62 FLRA 350, 351-52 (2008) and *AFGE Local 1916*, 64 FLRA 532, 534 (2010). Simply put, the Agency has a statutory right that cannot be waived by conduct or agreement, to establish whatever performance standards that it deems best. Thus, even if a third party, such as an arbitrator, determines that management has somehow either waived its right to decide performance standards for work performed on telework, or decides that the Agency simply cannot have a different performance standard for telework work, that holding would be unenforceable and would be reversed by the FLRA. See *IRS v. FLRA*, 494 U.S. 922 (1990) (the Supreme Court has held that "nothing" in the Statute trumps the section 7106(a) reserved management rights; the only limitations are section 7106(b)(2) and (3) appropriate arrangements and procedures and "applicable laws".) Thus, neither a VA handbook or directive, nor OPM guidance, nor even a negotiated MOU can contradict the reserved management right to establish performance standards; and management has the reserved section 7106(a) right to establish a different performance standard for telework.

It is irrelevant whether the telework MOU addresses performance standards for telework since the establishment of performance standards is a reserved management right. Thus, even if the Agency somehow waived its right to establish a different standard for telework, such waiver would not be enforceable.

Management has determined that employees on telework will not be performing certain tasks of their job duties while on telework. By working at home, employees have the benefit of limited distractions and are not in the office to receive ad hoc or urgent work assignments. Rating Veterans Service Representative (RVSRs) working in the office are typically required to consult with Veterans Service Officers, attend hearings, develop cases to include scheduling exams requiring complex medical opinions, mentor, train and perform outreach and other administrative duties. By agreeing to the FlexiPlace Program Work Assignment, employees demonstrate understanding that the reduction in office distractions allows them to contribute additional work on those days in which telework occurs. Thus, management has determined that the performance

standards should be modified to reflect the extra time that employees in telework will have to dedicate to certain duties. It is irrelevant if the Union or an arbitrator disagrees. Management has that reserved and non-waiveable right under the Statute.

The Agency thus denies the grievance, since the Agency has not violated:

Article 19, Sections 3, 4 and 5 of the parties' contract;
Article 16, Section 1 of the parties' contract;
Article 26 of the parties' contract;
Any other article of the parties' contract;
The June 29, 2007, National Flexiplace Program MOU;
An unfair labor practice under 5 USC section 7116(a)(5),(7) and (8);
Section 7117(a)(1) and (2) of 5 USC sections 7101 et seq.;
The VA Handbook 5013 and VA Directive 5013;
The VA Handbook 5011/5 (9/22/2005) Part II. Chapter 4 et seq. including section 3 –, paragraph d, Page II-42;
OPM Guidance VI-I-1: A Guide to Telework in the Federal Government (2010); and, Any other relevant "articles, laws, regulations, customs and past practices."

Moreover, the Union's grievance is inconsistent on its face. It alleges on the one hand that management cannot have a different standard for telework, and then alleges that the standard was implemented unilaterally without national level bargaining and seeks a bargaining order.

As noted above, it is the Agency's position that management retains the reserved and non-waiveable management right to establish performance standards for telework, even if different from standards for work on site. Whether a third party agrees or disagrees with that determination, it remains a reserved management right. Even if a third party is of the view that it is inequitable to have a different standard for telework, that would not trump the statutory management right to establish standards. Any arbitration award that held that the telework standard could not be implemented would be reversed by the FLRA and found unenforceable since it would impermissibly interfere with management's reserved non-waiveable right.

Moreover, there was no duty to bargain nationally over local telework standards. First, the union never requested to bargain over local telework standards even though the union was aware of the local telework standards "since the execution of the MOU in [June 29,] 2007." Second, the Agency has followed the June 29, 2007, MOU in setting telework/flexiplace performance standards, thus complying with its contractual obligations. In other words, there was no bargaining obligation at the national level since the Agency had already bargained at the national level. The MOU clearly provides at the third clause under number 2 that: "Management at the local level will communicate local Flexiplace performance expectations in writing to Bargaining Unit Employees who wish to participate in Flexiplace." The fourth clause then states that: "After

management has communicated the Flexiplace performance standards, employees who desire to participate in the Flexiplace Program must submit a Flexiplace Program Work Assignment Request." This language clearly establishes that the Agency always intended to have different performance standards for telework/flexitime. This language clearly shows that management at the local level will communicate flexiplace performance standards which would be different from the other performance standards, otherwise there would be no need for this negotiated language. Even though such negotiated language is not required, as discussed above, for management to exercise its reserved management right to set telework/flexiplace performance standards, this negotiated language makes it abundantly clear that management raised the issue during negotiations and this language cemented that management right in writing. The union does not allege and there is no evidence that management has not done exactly what the MOU requires. When management exercises its reserved management right and decides on a different standard for flexiplace, that standard pursuant to the MOU is communicated in writing to the employee, who then decides if he/she wishes to participate. The Agency thus has not only properly exercised its management right, but it also has exercised that right as contemplated by and consistent with the MOU. Accordingly, there is no national level duty to bargain almost three years after the local telework standards have been in place. Since the grievance alleges only a national level duty to bargain, that allegation is also denied.

In sum, there are no laws or government wide regulations that prohibit management from deciding upon a different performance standard for work done on telework.

Management has exercised its non-waiveable management right to establish a performance standard for telework. Moreover, the MOU contemplates "local Flexiplace performance expectations," and management has complied with the MOU by communicating "local Flexiplace performance expectations" to employees over the past three years. Thus, there also is no national level duty to bargain. Management merely has acted consistent with its reserved management rights and with its negotiated MOU. Thus, the national level grievance is denied.

Please contact Denise Biaggi-Ayer at 202-461-4129 and/or Denise.Biaggi-Ayer@va.gov if you have any questions.

Sincerely yours,

Leslie B. Wiggins
Deputy Assistant Secretary for Labor-Management Relations