

## NATIONAL GRIEVANCE

Date: June 27, 2009

To: Scott Holliday, Acting Deputy Assistant Secretary for Labor-Management Relations,  
Department of Veterans Affairs (VA)

Re: the matter of the interpretation of Article 20 - Hours of Work and Overtime Section  
3 - Tour of Duty/Scheduling, paragraph K.

From: Bill Wetmore, Chair, Grievance and Arbitration Committee, National Veterans  
Affairs Council (#53) (NVAC), American Federation of Government Employees  
(AFGE), AFL-CIO *Wetmore*

1. This is filed under the provisions Article 42, Section 11 of the Master Agreement between VA and AFGE, signed March 21, 1997 (MCBA).
2. It came to the attention of the Grievance and Arbitration Committee of the NVAC on May 28, 2009 that Bonnie Kerber, writing to advise a local facility of her interpretation, improperly ascribed the section cited above to be in violation of law. She further advised that local facility to not follow that provision of the MCBA.
3. Kerber's guidance may be considered as centering on two texts. The first is found at 5 CFR 551.412(b) which she believes applies to the subject MCBA provision. She finds that employees are barred from receiving compensation under this regulation for "preliminary" and "postliminary" activity. She points out that this is based on the activity being optional and in the employees own interests. She seems to ignore the possible interpretation of the subject provision that says that it is at the beginning and end of the tour, not that it precedes the tour. She also ignores the fact that the subject provision talks about when it is required, not merely when it is optional for the employee. Finally, she ignores that VA has often directed employees to change at work and to do so before the tour starts.
4. It is noteworthy that Kerber also does not cite the effective date of this current OPM regulation.
5. The second text Kerber directs attention to is found in VA handbook 5011, Part II, Chapter 2.10. In her discussion of this, she does not state that this was in effect prior to the MCBA. Her analysis causes problems in so far as she relies on the assumption that VA does not require some employees to change their clothes. Further, it falls short in considering the question of whether employees may legally change their clothes once their tour has started and before it ends, as provided for in the subject provision.

6. More concerns could be elucidated but this is believed enough to start an appropriate dialogue as to the resolution of this conflict.
7. Her actions represent a violation of a provision negotiated and in effect since 1997. We particularly note that Kerber's position was one of national responsibility for advising Human Resources personnel across the Veterans Health Administration in VA. In light of that fact, we find that the National Grievance is in order.
8. The remedies sought are: a retraction and an interpretation that all VA management representatives will adhere to of allowing for VA employees who are required or permitted to change their uniform to do so as provided for in the cited provision and a general announcement to all HR personnel who usually are sent general announcements (or those who have been sent the attached electronic mail from Kerber) affirming agreement to adhere to the subject provision as written (such statement to be reviewed for clarity by the NVAC before it is sent).

**From:** Kerber, Bonnie M  
**Sent:** Tuesday, May 19, 2009 9:30 AM  
**To:** VHA HR Managers; VHA National HRM Specialists; VHA SHRAC; VHA National LR/ER Specialists  
**Cc:** VACO LMR; Perkins, Kimberly D. (OGC)  
**Subject:**

We have been asked to send clear guidance in relation to whether the provisions in Article 20, section 3K of the AFGE Master Agreement is illegal.

The sections state the following:

"When a change of uniform is required or permitted, the Department will provide ten (10) minutes at the beginning and ending of the tour for the employees to change clothes."

**OPM's regulations, specifically 5 CFR § 551.412(b), excludes time spent in preliminary and postliminary activities from hours of work and from compensation.** Preliminary and postliminary activities are those activities spent predominantly in the employees' own interests and are undertaken for employees' own convenience, not being required by employer and not being necessary for the performance of their duties. Further, in barring compensation for preliminary and postliminary activities, as described in § 551.412(b), OPM exercised its authority to rule out bargaining over contract terms that provide payment for these activities. See Dept. of the Air Force v. FLRA, 952 F.2d 446 (D.C. Cir. 1991); see also Dept. of Veterans Affairs and AFGE Local 2344, 56 FLRA 990 (Dec. 2000).

VA's policy, as found in VA Handbook 5011, Part II, Chapter 2.10 (attached) provides, in pertinent part, that "field facility heads may (1) permit employees to wear uniforms to and from work or (2) require that uniforms be changed at the facility. . ." To the extent that facility management permits the employees to wear their uniforms to and from work, this activity would be considered a preliminary/postliminary activity that is not compensable. **The FLRA has held that where employees are not required to change clothes at their place of work, that activity is preliminary/postliminary and is not compensable as a matter of law. DVA, Medical Center, Huntington, WV and AFGE, Local 2344, 56 FLRA No. 170 (2000).** As such, there can be no binding practice that requires the performance of an unlawful or illegal act. Once the unlawful act is discovered, management may terminate the past practice without delay and it need not bargain over the decision to terminate the practice. Management cannot have established a practice contrary to government-wide regulations. See Dept. of Justice v. FLRA, 727 F.2d 481, 489-90 (5<sup>th</sup> Cir. 1984). There is nevertheless an obligation to give notice of the change and, upon request, bargain concerning the impact of the required change, and if possible concerning its implementation.

**Please note that if local management requires the employee to change at the facility, the employee can be provided ten minutes at the beginning and end of the tour to change clothes. An employee cannot leave early if changing out of his/her uniform takes only a couple of minutes.**

If the employee is permitted to change at home and/or the facility, the employee will not be allowed ten minutes at the beginning and end of the tour. This is consistent with law and VA policy, VA Handbook 5011, Part II, Chapter 2.10b.

Bonnie Kerber

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