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NATIONAL GRIEVANCE (NG)

Date: December 4, 2008

To: Meghan Flanz, Deputy Assistant Secretary  
For Labor Management Relations (LMR),  
Department of Veterans Affairs (VA)

Subject: National Grievance of the denial of a union representative's right to participate in a Professional Standards Board (PSB) and right to be the recipient of a performance award

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

1. This NG is filed under the provisions of Article 42, Section 11 of the Master Agreement between VA and AFGE, signed March 21, 1997 (MCBA).
2. We note that an employee has the right to form, joint, or assist a labor organization without fear of penalty or reprisal. The denial of a benefit because an employee represents a labor organization is a violation of 5 USC 7116 (a) (1) (2) and (4). It also is a violation of provisions found at Article 2, Article 16, Article 26 and Article 46 of the MCBA. This National Grievance is being filed specifically as a result of a volunteer union steward in Beckley, West Virginia (WV) who was automatically terminated as a potential Professional Standard Board (PSB) member as result of his status of "union activity" and "union membership" for his local. This grievance is also being extended, as a result of recently discovered guidance (September, 2008) to the field from OHRM/LR about the role of union officials in PSB proceedings without clarifying guidance of the intent of non-discrimination under 7102 for all union officials.
3. On or about November 24, 2008, in an electronic mail (email) correspondence from [redacted] (Chief of Human Resources (HR) in Beckley, WV) to [redacted] (Director of Beckley) an e-mail discussion ensued in regarding the issue of non-selection of [redacted] Physician's Assistant, secondary to his status in the local union as described by the local president as a "volunteer local union steward". The HR chief cited VA Handbook 5005 Part II Chapter 3 Paragraph 2d and noted that termination of Board Membership is to occur as a result; "of an election or appointment as a union official."
4. In addition, an informational paper was circulated with the electronic properties listed as September 24, 2008 created from [redacted] OHRM/LR and found randomly by NVAC First Executive Vice President (EVP), [redacted] and down loaded on or about November 04, 2008, on the Veterans Health Administration (VHA) intranet. This VHA guidance provided clarification to the field, in regards to the status of union officials and union activity assumingly to VHA facilities. The subject matter covered included the eligibility of union officials (100% and less than 100%) for membership on DAB (Disciplinary Appeal Boards) and/or PSB (Professional Standard Boards), Performance

Awards/Performance Ratings for union official of less than 100% and 100%, denial of eligibility of certain union officials in Title 38, under 7453 for overtime/shift differential if they are 100%.

5. **In regards to Professional standard boards:** The VHA OHRM/LR notes: *"Union officials, regardless of the amount of official time they are authorized, have an inherent conflict of interest that may preclude their service on DABs and PSBs."* It goes on to say; *"This is because DAB and PSB members represent management, while union officials represent the interest of bargaining members."..Even where a board is reviewing the case of a non-bargaining unit employee, the potential for conflict remains because the interests and training of union officials are focused on being an advocate for employees as opposed to being an impartial decision maker."*
6. In accordance to the Master Agreement, this is a violation of Article 2, Article 16, Article 26 and Article 46. Included in the this citation, is an additional violation for failure to notify the union nationally of the change of working conditions under Article 46, which now is being interpreted by management to mean those union officials who are less than 100% union capacity and in any capacity representing employees.
7. Evidence from the discrimination or deterrence for union membership is found in VHA policy itself. (VA Handbook Part II Chapter 3, dated June 15, 2006) as related to who management is to chose as members. d. Eligibility of Professional Standard Boards: *Persons selected to serve on boards will be chosen from the most capable, experienced and responsible personnel. [Board members must be at a grade and level that is equal to or higher than that of the candidate being considered. Board membership should also be sufficiently broad to cover the range of practice within an occupation and where possible include all grades and levels within an occupation.]* Another excerpt notes: *"All employees will have the opportunity to participate in the peer review process for their occupation. Approval and Selecting officials are encouraged to consider and select from all interested, available, and qualified employees, whenever possible."*
8. In light of the foregoing, discrimination against a union representative is explicit. If one is a union official and denied eligibility to participate on a PSB, solely because of this union activity as interpreted under the guises of VA's own policy, that one is an employee that is not among the most capable, experience and responsible personnel, simply because of the degree, or amount of union activity. That union affiliation prevents one from being found to be interested, available or even qualified.
9. Furthermore, VA policy establishes that board members must act as agents on the Undersecretary as a recommending body to the approving official. VA policy notes: *"Professional Standards Boards for occupations listed in 38 U.S.C. 7401(3) act for, are responsible to, and are agencies of the Under Secretary for Health in matters concerning appointments and*

*advancements of individuals [in all hybrid occupations.] It goes on to say; "Members of boards serve in a dual capacity. They [ ] deal with matters in which they must divest themselves of their identity with the particular facility at which they are employed and must become representatives of and primarily concerned with the needs and problems of the entire VHA"*

10. However, two issues within the guidance provided by Mr. [ ] are mistakenly interpreted and felt to be contractual violations. The first is the automatic assumption that being any type of union (employee) representative, in any capacity, creates a nonrebuttable presumption by virtue of the employee's union status that one cannot divest oneself or be concerned with the needs and problems of the entire VHA. Meaning the "conflict of interest" is constantly and consistently present solely by virtue of the degree of individual's "union status". This assumption, per management interpretation, of a "union representation and opinion", is in apparent consistent and direct opposition of that of the Undersecretary and the needs and problems of the entire VHA, no matter what. In the words of the guidance, the union involvement being productive of a conflict of interest is "absolute". *(It is not clear why being a management representative doesn't act to produce the same conflict of interest when participating on a board.)*
11. The second misinterpretation by management within this guidance is in regard to the issue that board members are agents of management. The context of the statement, within the guidance, infers that board members have the authority powers of 5 USC 7106(a). In reality, board members are recommending peers. For example, PSB members by VHA policy do not have any authority under 5 USC 7106(a) specifically to actually hire or take discipline. The approving official, by VA policy is the management official with this authority. Chapter 71 of 5 USC defines "management official" as; *"an individual employed by an agency in a position the duties and responsibilities of which require or authorized the individual to formulate, determine or influence the policies of the agency."* Board members are not formulating or recommending matters of policies.
12. It is reckless, to say the least, to post this information on the VHA intranet while ignoring management's responsibility not to discriminate because of union status under the provisions of 5 USC 7102.
13. **Overtime pay and performance awards:** AFGE has seen the following language in undesignated guidance (guidance understood to have been issued from [ ]): *"Because union officials on 100% official time do not perform VA duties, they may not be considered for any awards based in whole or in part on performance, such as annual performance awards, special advancement for performance, special advancement for achievement and special contribution awards. While 100% union officials may be eligible for group goal-sharing or gain-sharing awards under Chapters 45 or 54 of Title 5, they are not*

*eligible for performance awards under Chapter 43 of Title 5. Ratings for union officials who are allocated less than 100% official time should be handled on a case-by-case basis. If these officials perform sufficient regular VA duties over a sufficient portion of the performance period to be rated, they are eligible for a rating based strictly on those duties, without regard to any union work performed while on official time. Likewise, they could be considered for performance awards based solely on their VA duties.”*

14. In regards to union officials Performance Appraisals/Awards it notes; “...ratings for union officials who are allocated less than 100% official time should be handled on a case-by case basis”. Likewise they could be considered for performance awards based solely on their VA duties.
15. This statement is a violation of multiple provisions of the MCBA, including Article 2, Article 16, Article 26 and Article 46.
16. Furthermore, it is important to state, regardless of the degree of official time allocated (which has been negotiated by the parties), all government employees are required to abide by Standards of Ethical conduct for employees of the Executive Branch, which is set by law. This in part notes the following; *“Each employee has responsibility to the United States Government and its citizens to place loyalty to the Constitution, and laws and ethical principles above private gain. “* It says nothing to the affect that in a union official status, we can ignore a government –wide regulation or this basic premise of the law that govern all federal agencies. The suggestion that union officials are less cognizant of their ethical responsibilities is abhorrent. Official time has been unchanged since 1997 in the MCBA and has undergone no changes since the Ground Rules for Renegotiation of the MCBA were signed in July 2003. Thus, it is hard to understand why VA has seen fit to issue this confusing guidance which violates several provisions of law and the MCBA.
17. In regards to Pay: Title 38 RNs on 100% official time are not eligible for overtime pay or shift differential pay under 38 USC 7453 because such pay requires that the employee perform management-ordered and approved service during the qualifying period.
18. VHA healthcare providers, whether they are union officials or not, are still required by the Department to maintain active and current licensures and complete mandated education requirements as related to the occupation and position that they hold. To provide guidance or regulation to a different effect is a violation of the MCBA, including Article 2, Article 16 Article 26, and Article 46.
19. **Pay:** VA guidance is to the effect that if one is on 100% official time, one is not eligible for overtime. If a RN is directed or would liked to be considered for overtime (OT) as part of an equitable rotation among other employees, the fact that they are a 100% union official should have no bearing in itself on whether they are directed to or capable to perform overtime (unless there is a local agreement to that effect). The only consideration in this regard should be if the management official deems

the 100% union official qualified and competent for the "assignment of work".

20. If the 100% union official is deemed incompetent for overtime purposes, for the overtime work assignment, the employee should be allowed to request the rationale in writing, and afforded remedial training as provided for in Article 10.
21. **Remedy:** Please send [redacted] and the Director of the Beckley VAMC for training specifically in the 7102 and 7116 provisions. This can be provided by a Federal Labor Relations Authority official. Please solicit and allow re-submission of Mr. [redacted] name for re-consideration as PSB member. Please provide a notice at the Beckley VAMC from a management official that they will not further discourage his or any other employees' right to freely join a union, without fear of penalty/reprisal in connection any other possible a condition of employment and specifically with their right to participate in a PSB. Please post a nationwide notice for medical facilities, to be jointly agreed to between AFGE and VA, as to the proper interpretation of the application of Chapter 71 of 5 USC, Article 26, Article 20, and guidance as to PSB membership. Specifically, our interest is that employees are free to join and participate in a union without losing the right to participate in a PSB, to receive overtime or to be awarded for performance for VA duties. Please provide to [redacted], specifically, a notice that any personnel that aided in the formulation of this guidance will be trained in the provisions 5 USC 7102. Please provide corrections to the field as related to perceptions of violations of employee rights under 7102, under this guidance by a nationwide posting with specific errors in judgment as related to guidance, in the area of PSB determination, performance appraisals/awards of employees who are less than 100%, and eligibility of overtime for any employee, including Title 38 employees. Any and all other remedies that would effect the correction of the errors discussed herein should be rectified. Furthermore, all union officials who were denied awards or overtime, by virtue of the union affiliation, shall be made whole.