

NATIONAL GRIEVANCE

NG-02/03/10

Date: February 11, 2010

To: Leslie Wiggins
Deputy Assistant Secretary,
Labor – Management Relations
Department of Veterans Affairs
1575 I Street, NW, Suite 250
Washington, D.C. 20420

From: Ami Pendergrass, Attorney, National Veterans Affairs Council (#53) (NVAC), American Federation of Government Employees (AFGE), AFL-CIO.

Subject: National Grievance in the matter of the Department of Veterans Affairs (VA) nationwide, unilateral implementation of higher weighted case production standards for Veterans Benefits Administration (VBA) employees enrolled in the Flexiwork Program (telework) in violation of the various agreements, statutes, regulations, and past practice/customs, as set forth below.

STATEMENT OF CHARGES

Pursuant to the provisions of Article 42, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (1997) (MCBA), AFGE/NVAC (Union) is filing this national grievance against you and all other associated officials and/or individuals acting as agents on behalf of the VA for violations as it relates to the National Flexiplace Program (telework). Specifically, on an on-going basis, the VA, by and through its representatives and/or agents, has:

- (1) Improperly and punitively imposed higher weighted case production standards for RVSRs who participate in the telework program;
- (2) Improperly and unilaterally implemented a new policy that utilizes the Flexiplace program to implement new production standards to circumvent the procedures outlined in Article 26 of the MCBA; VA Handbook 5013, and the National Memorandum of Understanding and other applicable Federal personnel laws, without providing the Union notice and an opportunity to bargain.

In doing so, the VBA has violated the following provisions:

- (1) Article 19 of the MCBA *et. al.*, specifically Art. 19 §§3, 4 and 5;
- (2) Article 16 of the MCBA *et. al.*, specifically Art. 16 §1;
- (3) Article 26 of the MCBA *et. al.*;
- (4) Memorandum of Understanding: National Flexiplace Program, June 29, 2007;

- (5) Title 5, Chapter 71, specifically 5 U.S.C. §§7116 (a),(5),(7), and (8); 7117(a)(1) and (2).
- (6) VA Handbook 5013 and VA Directive 5013
- (7) VA Handbook 5011/5 (9/22/2005), Part II, Chapter 4 *et. al*, specifically Section 3 – Responsibilities, Paragraph d, Page II-42;
- (8) OPM Guideline VI-I-1: A Guide to Telework in the Federal Government (2010);
- (9) Any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

STATEMENT OF THE CASE:

I. Background

Article 19 of the MCBA reflects an agreed upon policy between the VA and the Union regarding the importance, establishment, and maintenance of a Flexiplace or telework program. Both parties recognize the important mutual benefits of such a program and establish that the development of such program would “be governed by applicable law, government-wide rules and regulations, and this Article.” (MCBA, 1997, Art. 19, Section 1). The Article puts forth criteria for, among other things, eligibility, assignment requirements, and removal of an employee from such a program. An established telework program would be voluntary in nature and would allow for an employee, whose work is “portable [and] may be performed away from the official worksite either in whole or part” the option of working at an alternative work station, either his or her home or an established VBA satellite office. (Id. at Section 5 (b)(1) and (2)). Telework programs, such as these, have become a major initiative of the Federal Government, culminating in Public Law 106-346 (2000) which requires every executive agency to establish a policy “under which eligible employees of an agency may participate in telecommuting to the maximum extent possible without diminished employee performance.” (Office of Professional Management, A Guide to Telework in the Federal Government, OPM-VI-I-1 (last modified January 2010), www.opm.gov/pandemic/agency2a-guide.pdf).

On June 29, 2007, the VA and the Union signed a Memorandum of Understanding (MOU), clarifying and standardizing the national procedures for implementing the telework program. As part of the MOU, the Flexiplace Program Package was created to be used by all Regional Offices for employees who were participating in the program. The MOU also provided for a duty to bargain, stating: “prior to instituting a Flexiplace program, Management and the Union at the local level will review existing local agreements and negotiate as appropriate to ensure consistency with the attached National Flexiplace Program Package and [the] Memorandum of Understanding”; and that nothing in the MOU precluded “local impact and implementation bargaining.” (MOU, June 29, 2007, page 1).

The subject of performance standards was directly addressed by VA during negotiations for the MOU. However, VA abandoned any specific reference to performance standards in the final MOU. Standards for both official duty and telework employees had historically been the same. This understanding was in line with VA Handbook 5011/5, Chapter 4, which set forth procedures for VA management personnel to follow in implementation of the telework program. Under Chapter 4, Section 3, “Responsibilities”, supervisors are responsible for:

Determining position and employee suitability for telework arrangement and coordinating the completion of the User's Remote Computing Security Agreement with the employee . . . They must also ensure adequate coverage during public business hours, that operations continue to be carried out in an efficient and economical manner, and *that participating and non-participating employees are treated equitably*.

((emphasis added), VA, Hours of Duty and Leave: VA Handbook 5011, September 22, 2005, Chp. 4, §3(d) at II-42). Employees, who participate, are required to maintain productivity and to fulfill their "obligation to account for a full day's work." (Id. at §3(e)).

In regards to pay, location, time and attendance, and performance standards, the VA required that telework employees' be evaluated and paid based on the "official duty station for an employee's position of record as indicated on the most recent notification of personnel action." (Id. at §5(d)). The use of the official duty station as the point of record was also adopted by the parties in the MOU. (MOU, Flexiplace Package, pgs 5-6).

The VA's use of the official duty station as the point of reference is also applied in evaluating an employee's performance. The Handbook specifically required that in regard to performance evaluations:

The performance of an employee on a telework arrangement should be evaluated based on the *applicable performance standards for his or her position* or for that portion of the overall performance plan which applies.

((emphasis added), VA, Hours of Duty and Leave, at §6(h) at II-48). Performance standards are part of the performance appraisal system which follows the specific criteria set forth in Article 26 of the MCBA, VA Handbook 5013, VA Directive 5013, and applicable federal personnel laws and regulations. (MCBA at Art. 26 §1).

If it became necessary to modify or terminate a telework arrangement affecting employees, the VA Handbook provided that "prior to initiating, modifying or terminating a telework arrangement that affects employees in a collective bargaining unit, appropriate labor relations obligations must be fulfilled." (VA, Hours of Duty and Leave, at §2(e) at II-41). A duty for the VA to consult the Union is also emphasized in both the MOU and Article 19 of the MCBA.

In regards to the subject of whether equitable treatment should be afforded to both official duty station and telework employees, the MOU and VA Handbook were in line with the prevailing OPM guidance at the time, provided in the document *A Guide to Telework in the Federal Government* (OPM-II-A-1 (2007) now OPM-VI-I-1 (2009)). The OPM recognized that "telework is often implemented piecemeal, rather than strategically, as individuals request arrangements. This reactive approach carries the risk of raising fairness issues." (OPM, A Guide to Telework at OPM-VI-I-4). Therefore, to counteract such issues, the OPM stated that good performance management practices were a must. To ensure that work was being performed at home, the OPM stated that management should expect that "performance standards for off-site employees are the same as performance standards for on-site employees" and to remain fair with off-site employees, managers "should avoid distributing work based on

‘availability’ as measured by physical presence, and avoid the pitfall of assuming someone who is present and looks busy is actually accomplishing more work than someone who is not on-site.” (Id. at OPM-VI-I-5 and 6).

II. Violation

Since the execution of the MOU in 2007, the VBA, through its Regional Offices, has progressively assigned larger numbers of weighted cases to those RVSRs who volunteer in the telework program. This disparity has resulted in telework employees having a range of five to eight weighted cases a day as compared with the mandated national minimum of 3.5 weighted cases required by the performance standards set for RVSRs who are at official duty stations. The work assignments, pay rate, time and attendance requirements are identical between these employees. The only factor differentiating the two groups is location.

It is the Union’s position that the assignment of the higher weighted case performance standard is punitive in nature and is designed to discourage employees from volunteering for the telework program. As stated above, it is clear from the language of the MOU, the VA Handbook, and the overarching OPM guidelines, that telework employees are to be treated the same as official duty station employees and that the official duty station is to be the point of record for determinations as to how to pay, account for, and evaluate each employee, regardless of his or her location. It runs afoul of the very policies set forth in the OPM guidelines, which is clear in its directive that all employees be treated equally. This directive is even embedded in the VBA’s own polices, demonstrating that the VBA is aware of the OPM guidelines and is, therefore, acting in contradiction to its own policies and procedures.

Implementation of this higher weighted case performance standard is also a material change to the performance appraisal process for all RVSRs and the use of the processes of the National Flexiplace Program to circumvent the performance appraisal procedure amounts to a unilateral implementation of a new policy: the policy that the VBA may utilize the National Flexiplace Program to create new performance standards outside the confines of Article 26 of the MCBA; the VBA’s own Handbook and Directive; and the various federal personnel laws, regulations, and policies governing the process of creating a performance expectation in the federal workplace. Nowhere in any documentation concerning the telework program is there the tacit or implicit authorization for the VBA to utilize the National Flexiplace Program to create disparate standards.

This unilateral change was implemented without affording the Union notice and the opportunity to bargain as required by the MOU, VA Handbook 5011/5, and as supported by the OPM Guidelines for Telework. It is explicitly clear from reviewing these various documents that the VBA has a duty to bargain and its failure to afford the Union an opportunity to do so is in bad faith and therefore, in violation of 5 U.S.C. §§ 7116 (a)(5), (7), (8) and 7116 (a)(1) and (2).

III. Remedy Requested

The Union asks that to remedy the above situation, the VBA agrees to the following:

- (1) To cease and desist immediately the practice of requiring telework employees to abide by a higher weighted case performance standard and restore the status quo prior to implementation;
- (2) To cease and desist immediately the unilateral implementation of the policy whereby the VBA can create performance standards through the Flexiplace Program and restore the status quo prior to implementation;
- (3) To agree to afford the Union notice and the opportunity to bargain over the Flexiplace program, including but not limited to the implementation of disparate performance standards and the use of the Flexiplace Program to create such standards.
- (4) To review any and all telework agreements between telework employees and the VBA which reflect the requirement of these higher standards and to correct and execute new forms reflecting that telework employees will have identical performance standards as held by official duty station employees;
- (5) To post a jointly drafted notice for all employees, in the appropriate conspicuous place, outlining the violations noted above, the steps that the VBA will take to remedy its actions and a statement verifying that no employee will be retaliated against by loss of his or her telework position as a result of this settlement. Employees may still, however, lose their privileges to telework through violation of the contractual requirements as set forth in Article 19 and the MOU.

IV. Time Frame and Contact

This is a National Grievance and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please feel free to contact me at (202) 306-3664.



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Cc: Alma L. Lee, President, AFGE/NVAC
William Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC