



NATIONAL VETERANS AFFAIRS COUNCIL

American Federation of Government Employees, Affiliated with the AFL-CIO

NATIONAL GRIEVANCE

NG-8/16/19

Date: August 16, 2019

To: Tracy Schulberg
Acting Executive Director
Office of Labor-Management Relations
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
tracy.schulberg@va.gov
Sent via electronic mail only

From: Thomas Dargon, Jr., Staff Counsel, National Veterans Affairs Council (#53) (“NVAC”),
American Federation of Government Employees, AFL-CIO (“AFGE”)

RE: National Grievance against the Department of Veterans Affairs for its repudiation of contract and unlawful implementation of VHA Directive 1085.01

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011), (“MCBA”), the American Federation of Government Employees/National Veterans Affairs Council (“the Union”) is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Agency for repudiating an existing agreement and unlawfully implementing VHA Directive 1085.01.

Specifically, the VA violated Articles 2, 3, 47, and 49 of the MCBA, the Parties’ July 2008 Memorandum of Understanding, 5 U.S.C. §7116(a), and any and all relevant articles, laws, regulations, and past practices not herein specified.

STATEMENT OF THE CASE

On July 30, 2008, the Parties executed a Memorandum of Understanding securing the rights of AFGE bargaining unit employees (“the 2008 MOU”). It states the following:

1. The national parties agree that bargaining unit employees will continue to be provided with reasonably accessible designated smoking areas.
2. Whenever practicable, smoking areas should not be within 35 feet of an entrance to a VA health care building or office building that is routinely used by patients, residents, employees or staff.

3. Where an established smoking area has been located within 35 feet of an entrance due to space constraints or other logistical limitations, such smoking area need not be relocated to comply with this provision of the subject Directive.
4. Bargaining unit employees will be permitted to smoke outside on the grounds so long as they avoid smoking around routinely used building entrances.
5. Appropriate signage will be installed to clarify where smoking is not permitted.
6. The appropriate management official shall provide the local Union President with a copy of this MOU upon receipt.

The 2008 MOU is an existing agreement that has remained in full force and effect since July 30, 2008. It contains neither a sunset or reopener clause. The VA Office of Labor-Management Relations (“VA-LMR”) repeatedly acknowledged the validity of the 2008 MOU, in writing, at multiple times in recent months. In its April 11, 2019 response to a prior National Grievance filed on February 27, 2019, Tracy Schulberg, Acting Executive Director of VA-LMR, stated, “the 2008 MOU [is] still a valid document and the provisions must be adhered to.”¹ In the months following, Mike Clements, VA-LMR Labor Relations Specialist, provided further confirmation to AFGE/NVAC representatives that the 2008 MOU was valid and in effect.²

Therefore, the right of AFGE bargaining unit employees to smoke on VA property, as well as the responsibilities of the Agency to provide designated smoking areas, are subjects explicitly covered by an existing agreement. Subjects covered by existing agreements are permissive subjects of bargaining. AFGE Local 3937 and SSA Baltimore, M.D., 64 FLRA 17, 21 (2009). No party is required to negotiate on a permissive subject. U.S. Dep’t of Treasury, IRS, Wash., D.C. and NTEU Chapter 27, 37 FLRA 1423, 1431 (1990). As a subject covered by an existing agreement, the Agency can only implement a change to the 2008 MOU in two ways. One, the Agency can obtain the Union’s consent to renegotiate a covered-by, permissive subject during mid-term bargaining. Or two, alternatively, the Agency can address the matter in term bargaining.

As for addressing the matter in mid-term bargaining, the Agency notified the Union of its desire to implement VHA Directive 1085.01 (Smoke-Free Policy for Employees At VA Health Care Facilities) in January 2019 and March 2019. By its terms, that directive required that “all VHA health care facilities will be smoke-free for employees effective October 1, 2019.” However, in response, the Union declined to reopen and renegotiate the 2008 MOU in mid-term bargaining and instructed the Agency, on April 12, 2019, that the matter must then be addressed in term bargaining. Therefore, the Agency could only alter the 2008 MOU in term bargaining.

The Agency initiated term bargaining in December 2017, with the Ground Rules being signed on April 2, 2019. The Ground Rules contain two provisions that are particularly relevant to this dispute. Section VII(D) states, “Each Party will submit a complete set of electronic proposals in Microsoft Word format, no later than thirty (30) calendar days following the date ground rules are signed or ordered. No additional articles may be proposed after this date.” Also, Section IX(A) states, “By mutual agreement, the Master Negotiating Team Chief Negotiators may determine that matters subject to national level midterm bargaining will be completed during the term bargaining for the new Master Agreement.” In its May 2, 2019 submission, which was

¹ See Exhibit A.

² See Exhibit B.

required to include any and all proposals, the Agency failed to include any proposal limiting the smoking rights of bargaining unit employees. While the Union notified the Agency on April 12, 2019 that the matter needed to be addressed in term bargaining, the Agency failed to propose any contract terms that would alter the 2008 MOU. Likewise, the Union's Chief Negotiator declined to agree to address the matter—then being considered in mid-term—during term bargaining. Therefore, the Agency cannot alter the terms of the 2008 MOU in term bargaining.

In short, the subject is covered by an existing agreement, and the Agency cannot alter the terms of that agreement in mid-term bargaining, since the Union did not agree to renegotiate a permissive subject, or in term bargaining, since the Agency did not include the subject in its proposals on May 2, 2019 and the Chief Negotiators did not agree to address the issue at the table. Despite these facts, and even though the Union has made its position clear to the Agency over the past several months, the Agency unilaterally published VHA Directive 1085.01 on August 8, 2019. In doing so, the Agency repudiated the 2008 MOU and violated law and contract.

Further, in an August 8, 2019 email to Agency officials announcing the implementation of VHA Directive 1085.01, Mike Clements made several inaccurate statements. Mr. Clements represented that the Agency “completed its bargaining obligations with the National Unions.” For the reasons set forth above, and as it applies to AFGE/NVAC, that is untrue. Mr. Clements also stated that the Agency provided the Union with “four separate opportunities to bargain VHA Directive 1085.01 through the mid-term process” but that the Union “rejected each of these opportunities without merit.” That is also untrue. The Union explicitly rejected the Agency's request to reopen an existing agreement in mid-term bargaining. That position is well-supported by Authority precedent and is not, as Mr. Clements remarked, “without merit.”

Article 2 of the MCBA requires that the Agency comply with applicable federal statutes in the administration of matters covered by the MCBA. Therefore, in violating 5 U.S.C. §7116(a), as set forth above, the Agency also failed to comply with Article 2. Additionally, Article 3 encourages the Parties to maintain a cooperative labor-management relationship that is based on mutual respect, open communication, consideration of each other's views, and minimizing collective bargaining disputes. In repudiating the 2008 MOU and unlawfully implementing VHA Directive 1085.01, the Agency renounced its commitments and necessitated further disputes. Lastly, the Agency has violated Articles 47 and 49 of the MCBA, which set forth agreed-upon procedures for mid-term bargaining and require the Agency to complete bargaining obligations before implementing changes to conditions of employment.

Violation

By failing to fulfill its obligations, the VA violated, and continues to violate, the following:

- The 2008 MOU: requiring the Agency to, for example, provide AFGE bargaining unit employees with “reasonably accessible designated smoking areas”;
- Article 2 of the MCBA: requiring the Agency to comply with federal law and regulations;
- Article 3 of the MCBA: requiring the Agency to maintain an effective, cooperative labor-management relationship with the Union;

- Articles 47 and 49 of the MCBA: requiring the Agency to comply with set forth agreed-upon procedures for mid-term bargaining and to complete bargaining obligations before implementing changes to conditions of employment;
- 5 U.S.C. §7116(a)(1) and (a)(5): requiring the Agency to consult and negotiate in good faith with the Union;
- Any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

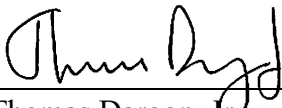
Remedy Requested

The Union asks that, to remedy the above situation, the VA do the following:

- To rescind VHA Directive 1085.01 as it applies to AFGE bargaining unit employees;
- To return to the *status quo ante*;
- To fully comply with its contractual obligations under the 2008 MOU and Articles 2, 3, 47, and 49 of the MCBA, as well as its statutory obligations under 5 U.S.C. §7116(a);
- To distribute an electronic notice posting to all bargaining unit employees concerning the Agency's unfair labor practices;
- To agree to any and all other remedies appropriate in this matter.

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, please contact the undersigned at AFGE Office of the General Counsel. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance.



Thomas Dargon, Jr.
 Staff Counsel, National VA Council
 Office of the General Counsel
 AFGE, AFL-CIO
 80 F Street, NW
 Washington, DC 20001
 Tel: 202-639-6424
 Fax: 202-379-2928
thomas.dargon@afge.org

cc: Alma L. Lee, President, AFGE/NVAC
 Mary-Jean Burke, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
 Ibidun Roberts, Supervisory Attorney, AFGE/NVAC



DEPARTMENT OF VETERANS AFFAIRS

Office of Labor-Management Relations

Washington DC 20420

April 11, 2019

Michael Gillman
Staff Counsel, National VA Council
American Federation of Government Employees
80 F Street NW
Washington, DC 20001

Sent electronically: Michael.Gillman@afge.org

Re: Agency Response to National Grievance – **NG-02/27/19**

Dear Mr. Gillman:

I am responding to the above-captioned national grievance filed on February 27, 2019, by the American Federation of Government Employees, National VA Council (herein "NVAC").

The issue, as stated in the grievance, is whether the Department failed to comply with its contractual and statutory obligations to bargain over changes in conditions of employment by unilaterally implementing Agency Smoking Policy changes that violate a 2008 MOU between the Department of Veterans Affairs (the Agency) and the American Federation of Government Employees/National Veterans Affairs Council (the Union).

The remedy sought by the Union is as follows: Cease and desist the further implementation smoke-free policies; return to the *status quo ante* until the Agency has met its bargaining obligations; fully comply with contractual and statutory obligations under Articles 2, 47, and 49 of the MCBA and its statutory obligations under 5 U.S.C. §7116(a); make-whole any BUE adversely affected by the integration (including reimbursement for any fines levied); distribute an electronic notice to all bargaining unit employees identifying the Agency's violations and reaffirming its obligations under the MCBA and federal law; and to agree to all other remedies appropriate in this matter.

Allegation:

The Department, despite the 2008 MOU, has implemented changes to smoking policies that violate the terms of the MOU. Under these new "smoke-free" policies, smoking is restricted exclusively to pre-approved shelters in violation of Section 4 of the MOU, or flatly prohibited anywhere on the grounds of the facilities. The Union alleges that such policies have been implemented at the

Roseburg (OR) VA Health Care System, the Chillicothe (OH) VA Medical Center, and the Milwaukee VA Medical Center. The Union has not agreed to these changes to conditions of employment and bargaining over such changes has not been completed.

The Union supports the grievance by making the assertion that *"To date the Agency continues to violate the 2008 MOU, Articles 2, 47, and 49 of the MCBA and 5 U.S.C. §7116(a)(1) and (5), requiring the Agency to negotiate in good faith"*. The Union's allegations are not completely accurate as the Agency's response and supporting exhibits (attached) provided with this grievance response will clearly show.

Agency response:

In February 2017, the Agency entered into negotiations with the Union in reference to VHA Directive 1085 Smoke-Free Policy for VA Health Care Facilities dated February 8, 2017. To date, neither an agreement nor a bona fide impasse has been reached in this negotiation. Whenever it was brought to the attention of the Agency that a facility was implementing "Smoke Free Policies," or was not adhering to the 2008 MOU, the facility was contacted and asked to cease and desist any implementation of smoke free policies and that the 2008 MOU was still a valid document and the provisions must be adhered to.

Most recently, on January 23, 2019, the office of the Deputy Under Secretary for Health for Operations and Management (DUSHOM) sent an e-mail to all VISN Directors asking them to discontinue any implementation of smoke free policies. (Exhibit 1)

Again, on March 6, 2019, the Office of the DUSHOM Communications sent all VISN Directors another notification reminding them of the prior 1/23/2019 e-mail regarding the current efforts to make VHA facilities smoke free. It was also requested that if VISNs were currently implementing smoke free policies, to discontinue efforts until further notice. The DUSHOM also requested that all VHA facilities do the following:

- Cease and desist any implementation of smoke-free policies, and
- Return to the previous status quo ante and adhere to the provision of the 2008 National Memorandum of Understanding (MOU) between the VA and AFGE reference Smoke Free Policy for VA Health Care Facilities (Exhibit 2)

As to the alleged continued implementation of "Smoke Free Policies" by Roseburg (OR) VA Health Care System, the Chillicothe (OH) VA Medical Center, and the Milwaukee VA Medical Center, the Agency did an inquiry on March 5th, and received the following information.

Roseburg VA Health Care System: The facility has not banned smoking for their employees or Veterans. They have decreased the number of smoking areas. No employees have ever received a citation for smoking while on campus. (Exhibit 3)

Chillicothe VA Medical Center: The facility has not banned smoking for their employees or Veterans. Only one employee has received a written warning, there have been several verbal warnings, but no employees have been fined or disciplined. Chillicothe did have a smoke-free policy, which they have ceased enforcement. (Exhibit 4)

Milwaukee VA Medical Center: Employees were banned from smoking before the facility received the DUSHOM's e-mail dated 01/23/2019. After receiving the DUSHOM's email, the facility changed its local policy and now employees can smoke. No employees have received a citation for smoking while on campus. (Exhibit 5)

Remedies Sought:

Cease and desist the further implementation smoke-free policies.

All VISNS have ceased further implementation of smoke-free policies impacting AFGE Bargaining Unit Employees.

Return to the status quo ante until bargaining obligations are met.

All VISNS have returned to status quo ante and the provisions of the 2008 MOU are being adhered to.

Fully comply with its contractual obligations under Articles 2, 47, and 49 of the MCBA and its statutory obligations under 5 U.S.C. §7116(a).

The Agency's intent is to always comply with their bargaining obligations as it relates to the AFGE MCBA and all applicable federal laws, rules, and regulations. The Agency's response and supporting exhibits offered in this grievance response clearly indicate the Agency is acting in good faith under both the contract and statute.

Make-whole any bargaining unit employee adversely affected by the integration (including reimbursement for any fines levied).

No AFGE Bargaining Unit Employees have been adversely affected by the integration by discipline or citations issued, no fines levied.

Distribute an electronic notice to all bargaining unit employees identifying the Agency's violations and reaffirming its obligations under the MCBA and federal law.

The Agency's intent is to always comply with their bargaining obligations as it relates to the AFGE MCBA and all applicable federal laws, rules, and regulations. There is no need for a notice posting as the DUSHOM sent two electronic notices to cease and desist any smoke-free policy implementation. The Agency's response and supporting exhibits offered in this grievance response clearly indicate the Agency is acting in good faith under both the contract and statute.

Agree to all other remedies appropriate in this matter.

No other remedies noted.

Conclusion:

After careful evaluation of the grievance and the information available for review, it is the Department's determination that there has been no adverse impact to AFGE Bargaining Unit Employees. The Department considers this grievance resolved.

Sincerely,

for Ray L. Ferguson
Tracy L. Schulberg
Executive Director
Office of Labor Management Relations
Department of Veterans Affairs

Thomas Dargon

From: Clements, Michael J. <Michael.Clements@va.gov>
Sent: Tuesday, June 11, 2019 12:01 PM
To: Michael Gillman
Cc: Pace, Damon A. (OGC); Zeveski, James (WMC); Merolla, Kyle M.; Monte, Robert J; Paxton, Douglas V,
Subject: RE: managers posting this message to employees
Attachments: 3388.jpeg

Good morning Michael,

I reached out to Raymond A. Bruss, the VISN Human Resources Officer to find out what was happening at the Roseburg facility and why there was the posting of the sign. He stated that the facility was providing employees with designated smoking areas to smoke so they thought they were in compliance with the agreement between the Agency and AFGE. I explained that Proposal #4 in the MOU allows AFGE BUEs to smoke anywhere on the grounds as long as it is not near entrances, which means they may smoke in the parking lot or in their cars and by not allowing employees to do so they were in violation of the MOU. He said that he would have the Service Chief erase the message on the board, he would have a meeting with the Tetrad and the Network HROs and make sure that they comply with all the provisions of the 2008 AFGE MOU. I did provide a copy of the MOU to Mr. Bruss. This matter should be resolved. Again, thank you for bringing this to our attention.

Mike Clements

Department of Veterans Affairs

VA Central Office of Labor Management Relations

Phone: (512) 745-7701

Email: michael.clements@va.gov

Integrity, Commitment, Advocacy, Respect, Excellence ("I CARE")

From: Michael Gillman <Michael.Gillman@afge.org>
Sent: Monday, June 10, 2019 10:03 AM
To: Clements, Michael J. <Michael.Clements@va.gov>
Cc: Pace, Damon A. (OGC) <Damon.Pace@va.gov>; Zeveski, James (WMC) <James.Zeveski2@va.gov>; Merolla, Kyle M. <Kyle.Merolla@va.gov>; Monte, Robert J <Robert.Monte@va.gov>; Paxton, Douglas V, <Douglas.Paxton@va.gov>
Subject: [EXTERNAL] RE: managers posting this message to employees

Thanks Mike,

I'm checking in with my contact to see if they know who it was.

-Michael

Michael Gillman
Staff Counsel, National VA Council
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From: Clements, Michael J. <Michael.Clements@va.gov>
Sent: Monday, June 10, 2019 10:41 AM
To: Michael Gillman <Michael.Gillman@afge.org>
Cc: Pace, Damon A. (OGC) <Damon.Pace@va.gov>; Zeveski, James (WMC) <James.Zeveski2@va.gov>; Merolla, Kyle M. <Kyle.Merolla@va.gov>; Monte, Robert J <Robert.Monte@va.gov>; Paxton, Douglas V, <Douglas.Paxton@va.gov>
Subject: RE: managers posting this message to employees

Good morning Michael,

Thank you for bringing this to my attention. Like I mentioned on the call last week it is going to take a partnership between the two parties to help VHA stay on top of this and make sure that facilities in the field are complying with the MOU. Can you by chance provide me with the manger's name, this will help me to run this down quicker and make sure the facility understands that full compliance with the 2008 MOU is required. I have included the VHA Smoke Free team that I spoke about during our discussion to make them aware of what is still happening in the field. I will update you as soon as I can.

Thanks Michael,

Mike Clements

Department of Veterans Affairs

VA Central Office of Labor Management Relations

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Email: michael.clements@va.gov

Integrity, Commitment, Advocacy, Respect, Excellence ("I CARE")

From: Michael Gillman <Michael.Gillman@afge.org>
Sent: Friday, June 07, 2019 11:14 AM
To: Clements, Michael J. <Michael.Clements@va.gov>
Cc: Pace, Damon A. (OGC) <Damon.Pace@va.gov>
Subject: [EXTERNAL] FW: managers posting this message to employees

Mike,

This is an example of what I was trying to get at on our call the other day. I think our problem is one of communication. I understand the facilities have been instructed that the MOU is still in effect for AFGE BUEs but its seems the message isn't getting all the way through. This was a "reminder" left by a manager at the Roseburg (OR) VA. I don't think that instruction accurately describes the situation under the 2008 MOU.

-Michael

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