Exhibit 1

Ross Award

In the Matter of the Arbitration	)	
	)	
Between	)	
	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL VETERANS AFFAIRS COUNCIL #53	)	FMCS Case No. 181117-01691
	)	Re: Elimination of Performance Improvement Plans
And	)	
	)	
U.S. DEPARTMENT OF VETERANS AFFAIRS	)	
	)	
	)	

Before: Jerome H. Ross, Arbitrator

Date of Hearing: April 26, 2018

Appearances

For the Union:
Michael A. Gillman, Esq.
Ibidun Roberts, Esq.
Office of the General Counsel,
American Federation of Government
Employees, AFL-CIO

For the Agency:
Aaron L. Robison, Esq.
Daenia Peart, Esq.
Office of the General Counsel
U.S. Dep't of Veterans Affairs

Statement of the Case

This arbitration between the National Veterans Affairs Council #53, American Federation of Government Employees (hereinafter "the Union"), and U.S. Department of Veterans Affairs (hereinafter "the Agency"), arose from the Agency's decision to replace the Parties' past practices and procedures concerning performance appraisal and improvement with new processes and procedures. In this connection, the Union represents 22,000 employees at the Veterans Benefits Administration, and claims a violation of the Parties' collective bargaining agreement (hereinafter their "Master Agreement"). On April 26, 2018, this matter was heard by the undersigned, after which the Parties submitted briefs.

Issue

The Parties did not agree to a joint submission of the issue for arbitration. After reviewing the transcript, Union's grievance, and arguments submitted by the Parties, the Arbitrator frames the issue as follows:

Whether the Department's decision to replace the performance appraisal and improvement process outlined by Article 27, Section 10 of the Parties' Master Agreement was consistent with applicable law. If not, what shall the remedy be?

Background Facts and Relevant Portions of the Grievance

On June 23, 2017, the President of the United States signed into law the "Veterans Affairs Accountability and Whistleblower Protection Act of 2017," 38 U.S. Code § 714 (hereinafter "VAA"), which provided a new procedure to "remove, demote, or suspend" certain employees working at the VA, "based on performance or misconduct," independent of the procedures under Chapter 43 of Title 5, United States Code. *See* VAA, 38 U.S.C. § 714.

On June 27, 2017, the Agency issued Human Resources Management Letter (hereinafter a "HRML") No. 05-17-06, which provided the Agency's procedures regarding implementation of the VAA. *See* UX-2. As relevant here, this HRML stated: "there is no requirement for a Covered Employee to serve a minimum of 90 calendar days under a performance appraisal plan, or be given an opportunity to improve (e.g., a performance improvement plan)[1] prior to a Removal or Demotion being imposed for performance-based deficiencies under the [VAA]." *Id.* at 7.

On August 3, 2017, the Agency's Office of Field Operations announced, "[s]tations are not to initiate any Performance Improvement Periods (PIPs) for any business lines at this time – further guidance will follow . . . " This announcement must be distributed to the Union. *See* UX-3. On August 24, 2017, the Agency issued a second HRML, which stated in pertinent part: "a Performance Improvement Plan (PIP) as described in Chapter 43 of Title 5 or VA Handbook 5013, part I, or required under a collective bargaining agreement will not be used to address the performance deficiencies of a Covered Employee under the Act or prior to imposing a performance-related Removal or Demotion under the Act." *See* UX-4.

On September 29, 2017, the Union filed a national-level grievance on behalf of "any employee adversely affected by" the Agency's distribution of letters to each Veterans Service Representative ("VSR")[2] employed by the Agency. These letters were issued in September 2017 at the instruction of the Agency's VBA Office of Field Operations (hereinafter "OFO Letters"). In particular, some employees who the Agency had

[1] The Arbitrator notes that a performance improvement plan is commonly referred to as a "PIP."
[2] VSRs investigate veterans' benefit claims and assist veterans with the development of the evidence to support their claims.

determined "[were] not meeting the Output performance expectations" received OFO Letters explaining that they "would be given two pay periods (beginning September 3, 2017 and ending on September 30, 2017) to meet the fully successful level or else be subject to adverse action up to and including termination of employment." *See* JX-2 (the Grievance) at 2.[3] The grievance asserted that these letters violated the procedures for PIPs established by Article 27, Section 10 of the Master Agreement.[4] As relevant here, the Union wrote:

> Under the Master Agreement, before a bargaining unit employee's performance may be rated as unacceptable and therefore subject to a performance based action, the Agency must comply with Article 27, Section 10 of the MCBA which governs performance improvement plans. This section requires that an employee be given a performance improvement plan (PIP) in accordance with the following requirements:
>
> > (1) the employee's supervisor must identify the specific, performance related problems
> > (2) the supervisor must develop the PIP in consultation with the employee and local union representative a written PIP that identifies the employee's specific performance deficiencies, the successful level of performance, the methods that will be employed to measure the improvement, and provisions for counseling, training or other appropriate assistance.
> > (3) the PIP must be tailored to the specific needs of the employee
> > [(4) is absent – Arb.]
> > (5) placing an employee on a 100% review alone does not constitute a PIP
> > (6) the PIP will afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problems
> > (7) the supervisor must meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period.

[3] An example of one of the OFO Letters, attached to JX-2, confirms that an employee determined to be performing at "less than fully successful" received a notice that allowed two pay periods to raise performance to the "fully successful" level, and that "[f]ailure to perform at expected levels may lead to adverse action up to and including termination of employment." *See also* Tr. at 34-35.

[4] Although the grievance also asserted that the OFO letters violated several sections of the Master Agreement in different ways, as well as an argument that the Agency violated the Federal Service Labor-Management Relations Statute by failing to bargain with the Union prior to implementing changes to the Master Agreement, the Union narrowed the issue to the claim that the Agency's decision to replace the procedures for PIPs violated Article 27, Section 10 of the Parties' Master Agreement. *See, e.g.*, Tr. at 30. Accordingly, here, the Arbitrator only recounts the sections of the grievance that concerned PIPs and Article 27, Section 10.

> The two-pay period trial period outlined in the OFO letters does not remotely resemble the process spelled out in the collective bargaining agreement. It does not meet the requirements of a PIP in accordance with the Master Agreement. Despite this fact, the letters themselves state that failure to perform at "expected levels" during this trial may lead to adverse action up to and including termination from employment. Implementing this trial period (a PIP of another name), rather than the contractually mandated PIP process, violates Article 27 of the Master Agreement.

JX-2 at 3-4. In terms of a remedy, the Union requested, as relevant here:

- Management will rescind the attached OFO letters sent to bargaining unit employees;
- Management will remove any documentation regarding any adverse action related to this matter from affected employees.
- Management will make whole any employee adversely affected by this action to include, but not limited to, back pay, restored leave, award pay outs, missed overtime, missed career ladder or merit promotions or within grade increases, attorneys' fees, etc.;
- Management will post an electronic notice to all affected employees that the Agency will not engage in this conduct in the future; and,
- Any other appropriate relief.

See JX-2 at 6.

On January 11, 2018, the Agency denied the Grievance.

Relevant Portions of the Parties' Master Agreement, and Applicable Laws, Rules or Regulations

MASTER AGREEMENT

ARTICLE 14 – DISCIPLINE AND ADVERSE ACTION

Section 1 – General

The Department and the Union recognize that the public interest requires the maintenance of high standards of conduct. No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service. Actions based upon substantively unacceptable performance should be taken in accordance with Title 5, Chapter 43 and will be covered in Article 27 – Performance Appraisal System.

ARTICLE 27 – PERFORMANCE APPRAISAL

. . . .

Section 2 – Definitions

. . . .

F. Performance

The accomplishment of work assignments or responsibilities.

G. Performance Plan

All written or otherwise recorded, performance elements that set forth expected performance. A plan must include all critical and non-critical elements and their performance standards.

. . . .

Section 4 – Performance Management Responsibilities
Performance management responsibilities:

A. Appropriate Department officials shall be responsible for:

1. Providing supervision and feedback to employees on an on-going basis with the goal of improving employee performance.

2. Nominating deserving employees for performance awards.

B. Employees are responsible for:

1. Performing the duties outlined in his/her position description and performance elements.

2. Promptly notifying supervisors about factors that interfere with his/her ability to perform his/her duties at the level of performance required by his/her performance elements.

. . . .

Section 10 – Performance Improvement Plan (PIP)

A. If the supervisor determines that the employee is not meeting the standards of his/her critical element(s), the supervisor shall identify the specific, performance-related problem(s). After this determination, the supervisor shall develop in consultation with the employee and local union representatives, a written PIP. The

PIP will identify the employee's specific performance deficiencies, the successful level of performance, the action(s) that must be taken by the employee to improve to the successful level of performance, the methods that will be employed to measure the improvement, and any provisions for counseling, training, or other appropriate assistance. In addition to a review of the employee's work products, the PIP will be tailored to the specific needs of the employee and may include additional instructions, counseling, assignment of a mentor, or other assistance as appropriate. For example, if the employee is unable to meet the critical element due to lack of organizational skills, the resulting PIP might include training on time management. If the performance deficiency is caused by circumstances beyond the employee's control, the supervisor should consider means of addressing the deficiency using other than a PIP. The parties agree that placing the employee on 100% review alone does not constitute a PIP.

B. The PIP will afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problem(s). The PIP period may be extended.

C. Ongoing communication between the supervisor and the employee during the PIP period is essential; accordingly, the supervisor shall meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period. The parties may agree to a different frequency of feedback. The feedback will be documented in writing, with a copy provided to the employee. If requested by the employee, local union representation shall be allowed at the weekly meeting.

D. The goal of this PIP is to return the employee to successful performance as soon as possible.

E. At any time during the PIP period, the supervisor may conclude that the employee's performance has improved to the Fully Successful level and the PIP can be terminated. In that event, the supervisor will notify the employee in writing, terminate the PIP, and evaluate the employee as Fully Successful or higher.

F. In accordance with 5 CFR 432.105(a)(2), if an employee has performed acceptably for one year from the beginning of an opportunity to demonstrate an acceptable performance (in the critical element(s) for which the employee was afforded an opportunity to demonstrate acceptable performance), and the employee's performance again becomes unacceptable, the Department shall afford the employee an additional opportunity to demonstrate acceptable performance before determining whether to propose a reduction in grade or removal.

Section 11 – Performance-Based Actions

A. Should all remedial action fail and the employee's performance is determined to be unacceptable, the supervisor will issue a rating of unacceptable performance to the employee. One of the following actions will be taken: reassignment, reduction to the next lower appropriate grade, or removal.

B. An employee who is reassigned or demoted to a position at a lower grade shall receive a determination of his/her standing after 90 calendar days in the new position.

C. A notice of reassignment for performance reasons shall contain an explanation of the reasons why training had been ineffective or inappropriate. When a reassignment is proposed in these instances, the following shall apply:

1. The reassignment shall be to an available position for which the employee has potential to achieve acceptable performance;

2. The employee shall receive appropriate training and assistance to enable the employee to achieve an acceptable level of performance in the position;

3. The reassignment shall be within the commuting area of the employee's current position; and

4. The reassignment shall be at the grade and step level equal to that of the position held by the employee prior to the reassignment.

D. An employee whose reduction in grade or removal is proposed for unacceptable performance is entitled to:

1. Thirty calendar days' advance written notice of the proposed action which identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based, and the critical element(s) of the employee's position involved in each instance of unacceptable performance;

2. A reasonable time, not to exceed 20 calendar days, to answer orally and in writing;

3. A reasonable amount of authorized time up to eight hours, to prepare an answer (additional time may be granted on a case-by-case basis);

4. The employee and/or his/her representative will be provided with a copy of the evidence file.

E. An official who sustains the proposed reasons against an employee in an action based on unacceptable performance will set forth his/her reasons for the decision in writing.

F. The employee will be given a written decision which:

1. Specifies the instances of unacceptable performance on which the decision is based; and

2. Specifies the effective date, the action to be taken, and the employee's right to appeal the decision.

G. The final decision in the case of a proposed action to either remove or downgrade an employee based on unacceptable performance shall be based on those instances which occurred during the 1-year period ending on the date of the notice proposing the performance-based action.

H. The decision shall inform the employee of their right to appeal to either the Merit Systems Protection Board (MSPB) in accordance with applicable laws or to file a grievance under the negotiated grievance procedure.

DEPARTMENT OF VETERANS AFFAIRS ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT OF 2017

38 U.S. Code § 714 – Employees: removal, demotion, or suspension based on performance or misconduct

(a) IN GENERAL.—

(1) The Secretary may remove, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines the performance or misconduct of the covered individual warrants such removal, demotion, or suspension.

(2) If the Secretary so removes, demotes, or suspends such a covered individual, the Secretary may –

(A) remove the covered individual from the civil service (as defined in section 2101 of title 5);

(B) demote the covered individual by means of a reduction in grade for which the covered individual is qualified, that the Secretary determines is appropriate, and that reduces the annual rate of pay of the covered individual; or

(C) suspend the covered individual..

(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.--

(1) Notwithstanding any other provision of law, any covered individual subject to a demotion under subsection (a)(2) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade.

(2)

(A) A covered individual so demoted may not be placed on administrative leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave.

(B) If a covered individual so demoted does not report for duty or receive approval to use accrued unused leave, such covered individual shall not receive pay or other benefits pursuant to subsection (d)(5).

(c) PROCEDURE.—

(1)

(A) The aggregate period for notice, response, and final decision in a removal, demotion, or suspension under this section may not exceed 15 business days.

(B) The period for the response of a covered individual to a notice of a proposed removal, demotion, or suspension under this section shall be 7 business days.

(C) Paragraph (3) of subsection (b) of section 7513 of title 5 shall apply with respect to a removal, demotion, or suspension under this section.

(D) The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.

(2) The Secretary shall issue a final decision with respect to a removal, demotion, or suspension under this section not later than 15 business days after the Secretary provides notice, including a file containing all the evidence in support of the proposed action, to the covered individual of the removal, demotion, or suspension. The decision shall be in writing and shall include the specific reasons therefor.

(3) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.

(4)

(A) Subject to subparagraph (B) and subsection (d), any removal or demotion under this section, and any suspension of more than 14 days under this section, may be appealed to the Merit Systems Protection Board, which shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5.

(B) An appeal under subparagraph (A) of a removal, demotion, or suspension may only be made if such appeal is made not later than 10 business days after the date of such removal, demotion, or suspension.

(d)EXPEDITED REVIEW.—

(1) Upon receipt of an appeal under subsection (c)(4)(A), the administrative judge shall expedite any such appeal under section 7701(b)(1) of title 5 and, in any such case, shall issue a final and complete decision not later than 180 days after the date of the appeal.

(2)

(A) Notwithstanding section 7701 (c)(1)(B) of title 5, the administrative judge shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

(B) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the administrative judge shall not mitigate the penalty prescribed by the Secretary.

(3)

(A) The decision of the administrative judge under paragraph (1) may be appealed to the Merit Systems Protection Board.

(B) Notwithstanding section 7701(c)(1)(B) of title 5, the Merit Systems Protection Board shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

(C) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the Merit Systems Protection Board shall not mitigate the penalty prescribed by the Secretary.

(4) In any case in which the administrative judge cannot issue a decision in accordance with the 180-day requirement under paragraph (1), the Merit Systems Protection Board shall, not later than 14 business days after the expiration of the 180-day period, submit to the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

(5)

(A) A decision of the Merit Systems Protection Board under paragraph (3) may be appealed to the United States Court of Appeals for the Federal Circuit pursuant to section 7703 of title 5 or to any court of appeals of competent jurisdiction pursuant to subsection (b)(1)(B) of such section.

(B) Any decision by such Court shall be in compliance with section 7462f(2) of this title..

(6) The Merit Systems Protection Board may not stay any removal or demotion under this section, except as provided in section 1214(b) of title 5.

(7) During the period beginning on the date on which a covered individual appeals a removal from the civil service under subsection (c) and ending on the date that the United States Court of Appeals for the Federal Circuit issues a final decision on such appeal, such covered individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits related to the employment of the individual by the Department.

(8) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

(9) If an employee prevails on appeal under this section, the employee shall be entitled to backpay (as provided in section 5596 of title 5).

(10) If an employee who is subject to a collective bargaining agreement chooses to grieve an action taken under this section through a grievance procedure provided under the collective bargaining agreement, the timelines and procedures set forth in subsection (c) and this subsection shall apply.

(e)WHISTLEBLOWER PROTECTION.—

(1) In the case of a covered individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in section 2302(b), the Secretary may not remove, demote, or suspend such covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(2) In the case of a covered individual who has made a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) until –

(A) in the case in which the Assistant Secretary determines to refer the whistleblower disclosure under section 323(c)(1)(D) of this title to an office or other investigative entity, a final decision with respect to the whistleblower disclosure has been made by such office or other investigative entity; or

(B) in the case in which the Assistant Secretary determines not to the refer the whistleblower disclosure under such section, the Assistant Secretary makes such determination.

(f) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—

(1) Notwithstanding any other provision of law, the Special Counsel (established by section 1211 of title 5) may terminate an investigation of a prohibited personnel practice alleged by an employee or former employee of the Department after the Special Counsel provides to the employee or former employee a written statement of the reasons for the termination of the investigation.

(2) Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

(g) VACANCIES.—

In the case of a covered individual who is removed or demoted under subsection (a), to the maximum extent feasible, the Secretary shall fill the vacancy arising as a result of such removal or demotion.

(h) DEFINITIONS.-- In this section:

(1) The term "covered individual" means an individual occupying a position at the Department, but does not include—

(A) an individual occupying a senior executive position (as defined in section 713(d) of this title);

(B) an individual appointed pursuant to sections 7306, 7401(1), 7401 (4), or 7405 of this title;

(C) an individual who has not completed a probationary or trial period; or

(D) a political appointee.

(2) The term "suspend" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for a period in excess of 14 days.

(3) The term "grade" has the meaning given such term in section 7511(a) of title 5.

(4) The term "misconduct" includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(5)The term "political appointee" means an individual who is—

(A) employed in a position described under sections 5312 through 5316 of title 5 (relating to the Executive Schedule);

(B) a limited term appointee, limited emergency appointee, or noncareer appointee in the Senior Executive Service, as defined under paragraphs (5), (6), and (7), respectively, of section 3132(a) of title 5; or

(C) employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5, Code of Federal Regulations, or successor regulation.

(6) The term "whistleblower disclosure" has the meaning given such term in section 323(g) of this title.

TITLE 5 of the U.S. CODE

Section 4302 – Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

. . . .

(c) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable but only after an opportunity to demonstrate acceptable performance.

. . . .

Section 4303 – Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)

(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is—

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of chapter 75,

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less,

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions, or

(4) any removal or demotion under section 714 of title 38...

TITLE 5 of the CODE of FEDERAL REGULATIONS

5 CFR § 432.104 – Addressing unacceptable performance.

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

5 CFR § 432.105 – Proposing and taking action based on unacceptable performance.

(a) ***Proposing action based on unacceptable performance.***

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in 1 or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

....

Relevant Testimony

David Bump is an Authorization Quality Review Specialist at the Agency's regional office in Portland, Oregon, and is a National Representative of the Union and the Second Vice-President for Local 2157. Currently, he is on 100% official time. *See* Tr. at 110-11. Mr. Bump testified that, prior to September, 2017, an employee who failed to be fully successful at the at the end of a rating period would be put on a Performance Improvement Plan (PIP) in accordance with Article 27, Section 10 of the Union's collective bargaining agreement. He said the PIP would be put together by the employee's supervisor, with input from the Union and the employee, and usually involved training and mentoring related to the employee's job, and would usually last a minimum on 90 days. *See* Tr. at 56, 59-62. However, beginning on September 1, 2017, Mr. Bump testified that the Agency sent letters [OFO Letters] to Veteran Service Representatives which "advis[ed] the employee where they stood relative to the output element of their performance – whether they were exceeding it or whether they were fully successful, exceptional, less-than-fully successful[.]" *See* Tr. at 83, 84. For VSRs who failed to meet their performance standards, Mr. Bump testified that the letters gave them one of the two remaining pay periods of the fiscal year to raise their performance, rather than placing them on a PIP as required by the Master Agreement. *See* Tr. at 85-86. He said this new term was contrary to the Master Agreement because it was only up to 30 days, and there was no discussion of specific job-related problems, and there was no mention of training or mentoring. Tr. at 87. As a result, he said that the Union filed the instant national grievance, and also several local grievances were filed.

Mr. Bump testified that since September 1, 2017, the Agency has not issued PIPs as required by Article 27 of the Master Agreement. *See* Tr. at 108. He testified that under these new conditions, he is aware of one employee who has been proposed to be removed from employment for failure to perform, without having received the benefit of a PIP *See* Tr. at 105-107; UX-11 (letter of proposed removal to employee in Buffalo Regional Office, dated Apr, 2018).

Meghan Flanz works for the Agency as the Executive Director over the Draft Master Plan to Redevelop the West LA VA Campus. Prior to January 22, 2018, she was the Agency's Deputy General Counsel for Legal Operations. In that position, among other things, she interacted with Congressional Staff about the legislation for the VAA. *See* Tr. at 129-131. Ms. Flanz testified that, in her understanding, if a statute and a collective bargaining agreement provision are in conflict, the statute prevails. *See* Tr. at 144. She also testified that a HRML is Agency policy, and such letters "are the expeditious way that the Human Resources Office in VA issues policies." Tr. at 165.

Willie Clark is the Agency's Deputy Undersecretary for Field Operations. In that position, among other things, he supervises all of the Regional Office Directors, and sets policy and guidance concerning performance standards and discipline. *See* Tr. at 220, 223-24. Mr. Clark testified that in the last week of August, 2017, he signed the letters [OFO Letters] that went to all of the Agency's VSRs in the field. Tr. at 225. He testified that the purpose of the letters was to inform employees of where they stood in terms of

performance, including whether they exceeded standards, or met standards, or were not successful, or were not meeting standards. *See* Tr. at 227. For those employees who were not meeting standards, Mr. Clark testified that the letters informed them that they were given two additional pay periods in order to be successful through September 30, 2017. *See* Tr. at 228, 234. He said that there were 550 people who were not meeting standards on the "output element" at that time, which was "[m]aybe nine percent of the total population of VSRs." Tr. at 237. Mr. Clark testified that the Agency was not using PIPs at the time the OFO Letters were issued, based on "[t]he information that we got from or headquarters . . . that performance improvement plans were no longer to be used in VA." *See* Tr. at 239. He testified that he did not issue a PIP as part of the OFO Letters "because the Agency said not to use them." Tr. at 240.

Juliana Boor is the Director of the Agency's St. Petersburg Regional Office in St. Petersburg, Florida. *See* Tr. at 241-42. With respect to meaning of the OFO Letters issued by Mr. Willie Clark's office in September, 2017, Ms. Boor testified that if VSRs designated as "less than fully successful" did not improve their performance by the end of the fiscal year, "they could either be demoted or removed." *See* Tr. at 250. She testified that the guidance she received from the Agency was that "the Accountability Act does not require a performance improvement plan, and that, you know, we shouldn't be doing them." Tr. at 252. Ms. Boor testified that of the VSRs in her regional office who received OFO Letters stating that they were "unable to become fully successful," one employee received a notice of proposed removal, and was ultimately removed, without having received a PIP prior to removal. *See* Tr. at 253-61.

Union Position

According to the Union, the VAA "provided a new, alternative procedure for proposing and ultimately taking disciplinary actions against certain employees working at the VA," specifically: "an employee/union has seven business days to reply to proposed disciplinary actions" and "[m]anagement must then render a final decision on the proposal within 15 business days of the proposal date" and "the Agency's final decision need only be supported by 'substantial evidence' [in] contrast to the existing, alternative procedures which require[ ] conduct-based disciplinary actions to be supported by a preponderance of the evidence." U.Br. at 1-2. The Union rejects the Agency's position that procedures regarding performance management and PIPs are superseded by the VAA. Rather, the Union's position is that the VAA only supersedes the timelines for adverse actions contained in Chapter 43 of Title 5 of the U.S. Code. Moreover, the Union argues that the Master Agreement contains bargained-for provisions in Article 27, Section 10 that must be followed, independently and without reference to Chapter 43 or the VAA, as that provision of the Master Agreement pertains to "negotiated pre-proposal performance improvement requirements, an issue that is not addressed in the Accountability Act." *Id.* at 2.

The Union argues that "the performance improvement schemes implemented by the Agency since September 2017" violate the performance improvement plan provisions set

forth in Article 27, Section 10. U.Br. at 16. With respect to the meaning of Article 27, Section 10, the Union explains:

> The performance improvement plan process is commenced when an employee's supervisor determines that the employee has failed to successfully perform a critical element of his or her job. Next, the supervisor, the employee, and the local union get together to draft a written performance improvement plan that is specifically tailored to the individual employee and meets the following requirements:
>
> 1. identifies the specific performance deficiencies
> 2. articulates the successful level of performance required
> 3. the action(s) that must be taken by the employee to improve the successful level of performance;
> 4. the methods that will be employed to measure the improvement;
> 5. provisions for counseling, training, and other appropriate assistance
>
> In addition to these mandatory provisions, the performance improvement plan may also include additional instructions, counseling, training, assignment of a mentor, or other assistance as appropriate. The contract specifically provides that simply placing the employee "on 100% review" does **not** constitute a performance improvement plan under the Master Agreement. The *minimum* time period for a performance improvement plan under the Master Agreement is **90** days, but this period can be extended. However, the performance improvement plan can be terminated early if the employee demonstrates successful performance (under the terms of the plan) prior to the conclusion of the 90 days. The period may also be extended beyond the 90-day minimum.

Id. at 16-17 (internal citations omitted). In contrast, the Union states, "a performance-based action, which is governed by *Section 11* of Article 27 may be proposed only after the employee, the supervisor and the union have completed the performance improvement plan process. Should all remedial action fail and the employee's performance is determined to be unacceptable, the supervisor will issue a rating of unacceptable performance to the employee." *Id.* at 17-18 (internal citations omitted).

The Union asserts that, since November 2017, the Agency relied on the VAA as authority to eliminate the performance improvement processes and procedures contained in Article 27, Section 10, beginning with removal of PIPs for VSRs. Specifically, the Union argues that these "September 2017 OFO letters [ ] do not comply with the requirements of the Master Agreement," as VSRs were only allowed two pay periods to prove that they could meet their output targets. U.Br. at 18. In addition, the Union asserts that in February 2018, the VA "implemented a new performance improvement regime" that "was expanded to cover all VBA employees[.]" U.Br. at 5. The Union argues that substantial harm to employees has occurred as a result, as evidenced by two examples that were

brought to the Arbitrator's attention at the hearing, where two employees were terminated without a PIP as required by the Master Agreement. *See* U.Br. at 5-6, 31; also referencing UX-11 (letter of proposed removal to employee in Buffalo Regional Office, dated Apr, 2018)).

The Union argues that the Agency improperly relies on two particular sections of the VAA as authority for superseding Article 27, Section 10 : "(1) §714(c)(3), which provides that the *procedures* under Chapter 43 shall not apply to removal, demotion, or suspension under this section; and (2) §714(c)(1)(D), which provides that the *procedures* in §714 shall supersede any collective bargaining agreement to extent that such agreement is inconsistent with such procedures." U.Br. at 6. According to the Union, the procedures under the VAA "relate to the amount of time that an employee has to respond to *proposed* discipline"; "the amount of time that the Agency has to make a final decision"; "and the amount of time that an employee has to appeal the final decision." U.Br. at 20. In contrast, the Union points out that 5 U.S.C. § 4302 requires agencies to formulate performance appraisal systems that "'[assist] employees in improving unacceptable performance.'" *Id.* at 21 (quoting 5 U.S.C. § 4302(B)(5)). The Union elaborates on this analysis of the statutory text, arguing:

> If there are any lingering doubts as to the precise "procedures" that are superseded by the Accountability Act, one need look no further than the Accountability Act's conforming amendment. The Accountability Act *specifically* amends 5 U.S.C. § 4303(f) which as a result now reads, "this section [i.e. § 4303's "Actions based on unacceptable performance"] does not apply to ...(4) any removal or demotion under section 714 of title 38 [i.e. the Accountability Act]." *See* Accountability Act [ ] Section 202(b)(2). By contrast, no such amendment was made to 5 U.S.C. § 4302. The Agency would have the Arbitrator believe that Congress meant to supersede Section 4303 (relating to performance-based actions) *and* 4302 (governing performance appraisal systems and opportunities to improve), but actually only bothered to amend Section 4303. There is no reason to assume that Congress made such an egregious drafting error when all the other signs in the statute point to the same conclusion: the Accountability Act only changes the timelines for *notice, response, decision and appeal* and does not affect performance improvement plans in any way whatsoever.

Id. at 21.

Also, the Union argues, "[e]ven if, assuming *arguendo*, the Accountability Act can be interpreted to no longer require the statutory opportunity to improve, the contractual PIP requirement exists independent of Chapter 43 and does not conflict with" the Act. U.BR. at 24-25. The Union contends that if the Agency desires "more flexibility or different options for" allowing employees an opportunity to improve, "it needs to re-negotiate for that flexibility at the bargaining table." U.Br. at 25.

The Union rebuts several procedural arguments that it expects to be raised by the Agency in its post-hearing brief. First, the Union asserts the Arbitrator has jurisdiction to hear the grievance because the Union claims a breach of Article 27 of the Master Agreement. Second, the Union rejects the argument that the grievance is non-arbitrable because it covers the same ground as another of its grievances, # NG-8/1/17. In this regard, the Union explains that in # NG-8/1/17, the issue concerns the Agency's alleged failure to bargain over implementation of new procedures under the VAA, rather than a violation of the Master Agreement at issue here. In addition, the Union states, "[t]the Bargaining Grievance [# NG-8/1/17] mentions nothing about the elimination of performance improvement plans" and "[t]he Union did not become aware that the Agency planned to take disciplinary actions against employees for performance without giving them performance improvement plans until September 1, 2017, when the first round of OFO letters were distributed." U.Br. at 11. Moreover, the Union rejects the argument that its grievance is non-arbitrable because it covers the same ground as a subsequently-filed grievance, # NG-3-15-18, because "[a] subsequently-filed matter cannot serve to preclude the same earlier filed matter." *Id.* at 13. While the Union acknowledges that # NG-3-15-18 and the instant grievance share, in part, an issue – "whether the Agency is excused from providing performance improvement plans under the Master Agreement because of the passage of the Accountability Act" – "it is almost certain that the Arbitrator's decision in this case will control the resolution of the same issue [ ] in NG-3/15/18" and a convincing argument will be made that "Arbitrator Ross has already decided the issue." *Id.* Next, the Union argues that the instant grievance is timely because: (1) the Agency failed to raise lack of timeliness in its grievance decision, when Article 4, Section 4 of the Master Agreement "forbids the Agency from raising claims (for the first time) of non-grievability or non-arbitrability after rendering its final decision in a case"; (2) an argument on "untimeliness" is contrary to the Agency's position in its decision ("The grievance is premature"); and (3) the Agency "did not demonstrate that the Union was notified of its position on PIPs prior to the issuance of the OFO letters[,]" which were, according to the Union, notice of a violation of the Master Agreement. *Id.* at 14-16.

In sum, the Union argues that the performance improvement requirements of the Master Agreement "are entirely consistent with the provisions of the Accountability Act": "[i]f an employee exhibits deficient performance, he or she must be given a performance improvement plan under Article 27 Section 10"; and, "[i]f the employee can't demonstrate successful performance during the 90-day performance improvement period, then the Agency can initiate a proposed performance-based action under the Accountability Act." U.Br. at 30. The Union reiterates that "[e]ach time the Agency initiated a performance-based action *without* giving an employee a performance improvement plan under the contract, the Agency violated the Master Agreement." In terms of a remedy, the Union requests: that the Agency "cease and desist from taking performance-based actions against employees without first providing them with a performance-improvement plan that complies with Article 27 of the Master Agreement"; and that the Arbitrator "order the Agency to reinstate and make whole any employee who has been subject to a performance-based action without first receiving a performance improvement plan that complies with the provisions of Article 27, Section 10"; also, that the Arbitrator retain jurisdiction in order to hear a motion for attorney fees. *Id.* at 31.

Agency Position

As a preliminary matter, the Agency argues the grievance is non-arbitrable. The Agency points out that "[o]n August 1, 2017, the Union filed a grievance asserting that the Agency was required to bargain over implementation of the Accountability Act[,]" which has been assigned to a different arbitrator. *See* A.Br. at 8 (referencing grievance # NG-08/01/17). The Agency argues that "the application of the new procedures set forth by [the VAA] is already at issue" in NG-08/01/17, and "[t]he Union's attempt to simultaneously litigate the same underlying issue in two arbitrations presents an issue of procedural arbitrability." *Id.* at 13. On this point, the Agency asserts that its defense to "the Union's assertion regarding PIPs is the same defense as in NG-08/01/17" and if the Arbitrator here were to make a determination here, it would "create a potential for contradictory rulings." *Id.* at 14. The Agency points out that it raised the issue of arbitrability in its response to the instant grievance. In addition, the Agency points out that "[o]n March 15, 2018, the Union filed a National Grievance against the Agency [ ] related to the FY18 Performance Management Plan." *See* A.Br. 10 (referencing grievance # NG-3/15/18). The Agency asserts that NG-3/15/18 concerns FY18 general performance management, while the instant grievance concerns the status of employees' "FY17 performance, and specifically the output element of their standards[,]" which means evidence associated with NG-3/15/18 "has no bearing on the issuance of the OFO letters" in 2017. As a result, the Agency requests that the Arbitrator "sustain the Agency's repeated objections during the hearing concerning the Union's admission of evidence and exhibits related to the FY 2018 Management Guidance and NG-03/15/18." *Id.* at 16.

On the merits, the Agency argues that the Union engages in a "mischaracterization" of the OFO letters referenced in the grievance, as those letters "did not change the procedures related to performance-based actions[,]" had "no connection to PIPs[,]" and "did nothing beyond what is within the rights of management to carry out in providing supervision and feedback to employees on an on-going basis with the goal of improving performance." *Id.* at 5-7.[5] In this connection, the Agency contends that the OFO letters were consistent with its authority under Article 27, Section 4 of the Master Agreement, which "sets forth the responsibilities of both Agency management and employees with regard to performance appraisals." *Id.* at 19.

Alternatively, the Agency argues, "[i]n the event that the Arbitrator accepts the Union's proposed issue and finds that the OFO letters implicate the application of PIPs, the Agency asserts that the PIP is a procedural requirement to taking an adverse action based on performance, derived from Chapter 43, of title 5, of the United States Code." *Id.* at 21.

[5] The Agency argues that it "was under no obligation to bargain over the September 1, 2017 OFO letters." A.Br. at 18. The Arbitrator does not summarize the Agency's detailed arguments to that effect, as the issue accepted for arbitration concerns the Arbitrator's interpretation of the Parties' collective bargaining agreement and the Agency's compliance with that agreement, and not whether the Agency was required by Federal law to engage in impact and implementation bargaining over its decision to issue the OFO letters.

On this point, the Agency contends the VAA changed the Chapter 43 procedures, and therefore "the Agency is precluded from applying" PIPs any longer. *Id.* Furthermore, the Agency argues, "[b]ecause Article 27, Section 10 arises from chapter 43 and applies to chapter 43 actions, it is inconsistent with the Accountability Act's prohibition on chapter 43 procedures and is therefore, superseded." *Id.* The Agency asserts that "repudiation of a collective bargaining agreement provision will not be found unlawful when the provision is contrary to statute." *Id.* at 22. In support, among other cases, the Agency cites *FAA, Atlanta, Ga. and NATCA*, 60 FLRA 985 (2005).

The Agency points out that 5 U.S.C., Chapter 43, establishes an "opportunity to demonstrate acceptable performance" (commonly referred to as an "opportunity to improve" or "performance improvement plan") as a prerequisite to an adverse action based on performance." A.Br. at 22. The Agency also points out that, prior to the VAA, the Agency created policies incorporating PIPs "based on the chapter 43 requirement to provide employees with the opportunity to improve." *Id.* at 23-24. However, the Agency points out that the VAA, § 714(c)(3) states, "'[t]he procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.'" *Id.* at 24. With respect to the meaning of that statutory language, the Agency asserts, "the statute refers to the whole of chapter 43 in its non-applicability, including the chapter 43 procedural requirement that the employee be provided an opportunity to demonstrate acceptable performance prior to taking a performance-based action." *Id.* at 25.

The Agency argues that the VAA renders the procedures set forth in Article 27, Section 10 of the Master Agreement illegal, as demonstrated by the fact that Article 27 refers to OPM's regulations in Part 430 and 432 of the CFR, and "Article 14 of the [Master Agreement] explicitly states that actions based on performance, taken under Title 5, Chapter 43 are covered in Article 27 – Performance Appraisal." A.Br. at 27. The Agency reasons, because the VAA "clearly requires that its procedures supersede collective bargaining agreement provisions that are inconsistent with those procedures[,]" "it follows that [Article 27, Section 10] is inconsistent with [the VAA]." *Id.* at 28, *citing* VAA § 714(c)(1)(D)("The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures."). As such, the Agency requests that the Arbitrator deny the grievance.

Discussion

I. The Agency violated Article 10, Section 27 of the Master Agreement when it failed to provide PIPs to bargaining unit employees

Article 27, Section 10 ("Performance Improvement Plan (PIP)") of the Master Agreement requires the Agency to, among other things: identify the specific, performance-related problems exhibited by an employee who is not meeting performance standards; develop a written PIP in consultation with the employee and local union representative; provide counseling, training or other appropriate assistance in the effort to raise performance; afford the employee a reasonable opportunity of at least 90 calendar days to resolve the specific identified performance-related problems; and arrange for the employee and

his/her supervisor to meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period.

The Agency violated these requirements when, in September 2017, it issued OFO Letters to VSRs informing them of their performance; but those who were not meeting "Output performance expectations" were notified that they "would be given two pay periods (beginning September 3, 2017 and ending on September 30, 2017) to meet the fully successful level or else be subject to adverse action up to and including termination of employment." The Letters did not inform employees who were not meeting expectations that they would receive a PIP, as had been the practice under Article 27, Section 10. In fact, the Arbitrator credits the testimony of David Bump that these employees did *not* receive a PIP, as required by the Master Agreement. In addition, the OFO Letters allowed under-performing employees less than 30 days to improve performance, while Article 27, Section 10 requires "at least 90 days to resolve the specific identified performance-related problem(s)." Accordingly, the Arbitrator finds that the Agency's actions violated Article 27, Section 10 in at least two ways: failure to provide a PIP, and failure to provide at least 90 days to improve. Of course, by failing to provide a PIP, the Agency failed to provide the other itemized requirements set forth by Article 27, Section 10, but here the Arbitrator has identified the two main omissions.

The fact that the Agency decided not to follow negotiated procedures for PIPs is further made clear by the HRML policy issued on August 24, 2017, which stated in part that PIPs required by the Master Agreement "will not be used to address the performance deficiencies" of Agency employees. On this point, the Arbitrator credits the testimonies of Meghan Flanz that HRMLs are Agency-wide policy, and also Willie Clark and Juliana Boor, who both said the Agency removed PIPs as a tool for improving employee performance. In sum, the evidence is clear and convincing that the Agency ceased to provide PIPs as required by Article 27, Section 10 the Master Agreement.

Moreover, the evidence shows that bargaining unit employees experienced tangible harm resulting from the Agency's decision: at the hearing, David Bump testified that he knew of one employee who was proposed to be removed for failure to perform without first receiving a PIP, and Juliana Boor knew of another who was removed for failure to perform without first receiving a PIP. At arbitration, demonstrable harm caused by a violation of a collective bargaining agreement requires a remedy, described below.

II. The VAA does not supersede Article 27, Section 10 of the Master Agreement

The first indication that the VAA does not act to supersede Article 27, Section 10 of the Parties' Master Agreement is the VAA's title: "Employees: removal, demotion, or suspension based on performance or misconduct." Absent from this language is any plain reference to procedures for evaluation of employees' performance or assisting them in improving performance. Instead, the only "procedures" described by the VAA are enumerated in § 714(c) ("PROCEDURE"), which pertain to time periods for notice, response, final decision, and appeal of "a removal, demotion, or suspension." There is no provision for what an agency may or should do *prior to* any decision to remove, demote,

or suspend an employee based on performance. Significantly, § 714(c)(3) states, "[t]he procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section." It follows from this language that the VAA removes from application on the Agency certain provisions of 5 U.S.C. § 4303 ("Actions based on unacceptable performance"), as that section also provides procedures for an agency's decision to reduce in grade or remove an employee. *See* 5 U.S.C. § 4303(a) ("Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance."). Also similar to the VAA, 5 U.S.C. § 4303 does not provide procedures for what an agency may do *prior to* any decision or proposed decision to reduce in grade or remove an employee for unacceptable performance. The lack of any plain reference to *pre-decision* procedures in the VAA or 5 U.S.C. § 4303 is important for interpreting the force and effect of the VAA because *other* provisions of law make unmistakable reference to procedures pertaining to evaluation of employee performance, which must take place *prior to* any decision on adverse action. Specifically, 5 U.S.C. § 4302 ("Establishment of performance appraisal systems") states, among other things, that federal agencies shall prescribe procedures for "evaluating each employee during the appraisal period" based on established performance standards; "assisting employees improving unacceptable performance"; and "reassigning, reducing in grade, or removing employees who continue to have unacceptable ***but only after an opportunity to demonstrate acceptable performance.***" (emphasis added by Arbitrator). If the language of 5 U.S.C. § 4302 is not clear enough to distinguish pre-decision actions from adverse actions based on performance, the CFR provides additional guidance. In particular, 5 CFR § 432.104 ("Addressing unacceptable performance") states, in part, "For each critical element in which the employee's performance is unacceptable, ***the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance.***. ." (emphasis added by Arbitrator). Similarly, 5 CFR § 432.105 states, in part, "***Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance*** pursuant to 432.104, an agency may propose a reduction-in-grade or removal action . . ." (emphasis added by Arbitrator).

The Arbitrator concludes that the VAA did not remove VA employees' opportunity to demonstrate acceptable performance, as required by federal law. Consequently, the VAA also did not act to supersede any negotiated contractual provisions that provide bargaining unit employees the opportunity to demonstrate acceptable performance. Article 27, Section 10 of the Master Agreement falls under that category. Accordingly, the VAA did not authorize the Agency to disregard its obligations under that negotiated provision.

III. The grievance is arbitrable

The Agency argues that the issue of application of the VAA is already raised in a prior grievance filed by the Union, and is being decided by another arbitrator. The Agency also points out that another grievance was filed after the instant one, concerning its FY 2018 Performance Management Plan. The Arbitrator rejects the Agency's contention that these other matters are reasonable cause to dismiss the instant grievance, as this case decision responds to the narrow issue of whether the Agency violated Article 27, Section

10 of the Master Agreement, while based on the arguments received this is not the only issue in either of the other matters. Also importantly, the evidence in this case revealed that adverse actions against at least two bargaining unit employees resulted from the Agency's violation of Article 27, Section 10. It would defeat the purpose of arbitration for the undersigned to ignore the need for a make-whole remedy when the Union specifically requested such relief in its grievance.

AWARD

The grievance is sustained. As a remedy, the Agency is ordered to (1) resume compliance with the requirements set forth in Article 27, Section 10 of the Master Agreement; (2) rescind any adverse action taken against bargaining unit employees for unacceptable performance who did not first receive a PIP complying with the provisions of Article 27, Section 10; (3) as a result, reinstate and/or make whole any such bargaining unit employee, including but not limited to back pay, restored leave, and other benefits. In addition, pursuant to the Back Pay Act, the Union is awarded attorney fees.

The arbitrator retains jurisdiction for 60 days in order to receive briefs on attorney fees, if necessary.

Jerome H. Ross

Jerome H. Ross, Arbitrator

August 23, 2018
McLean, Virginia