



NATIONAL VETERANS AFFAIRS COUNCIL

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

NATIONAL GRIEVANCE NG-2/12/2021

Date: February 12, 2021

To: Ophelia Ann Vicks
Acting Executive Director
Office of Labor Management Relations
U.S. Department of Veterans affairs
ophelia.vicks@va.gov
Sent via electronic mail only

From: Ibidun Roberts, Roberts Labor Law and Consulting, L.L.C., on behalf of the National Veterans Affairs Council (#53) (“NVAC”), American Federation of Government Employees, AFL-CIO (“AFGE”)

RE: National Grievance against the Department of Veterans Affairs for: 1) failing to bargain in good faith following the failed ratification (presented under protest) of the successor term agreement and 2) for violating the Parties’ Ground Rules.

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 (“NVAC” or the “Union”) is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Department of Veterans for 1) failing to bargain in good faith following the failed ratification (presented under protest) of the successor term agreement and 2) for violating the Parties’ Ground Rules.

Specifically, the VA violated Article 2 and 49 of the MCBA; II. Procedures B. and XIII. Ratification of the Ground Rules; 5 U.S.C. 7116(a)(1) and (5); and, any and all other relevant articles, laws, regulations, customs, and past practices not herein specified.

STATEMENT OF THE CASE

Background

Legislative History

In its first statutory scheme governing federal sector labor relations, Title VII of the Civil Service Reform Act of 1978 (“CSRA” or the “Statute”). Congress identified the goals to be achieved through collective bargaining. Congress explicitly found that “the public interest demands the highest standards of employee performance and the continued development and



implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.” 5 U.S.C. 7101(a)(2).

The U.S. Court of Appeals for the District of Columbia Circuit has shed additional light on the Statute’s legislative history. “Congress sought at least in part to strengthen the authority of federal management to hire and to discipline employees . . . But the Reform Act was also aimed to strengthen the position of employee unions in the federal service.” DOD, AAFES v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981). The Court further stated:

There was no suggestion that employee unions might not seek procedural protections against arbitrary or mistaken employee discharges. On the contrary, Representative Udall stressed that he intended his amendment “to meet some of the legitimate concerns of the Federal employee unions as an integral part of what is basically a bill to give management the power to manage and the flexibility it needs.” Other members articulated nearly identical sentiments during the floor debate. Endorsing the Udall amendment, Representative Ford agrees that “while considering the increased powers for management, we always had in mind that we would put together a totality here . . . that we hoped would represent a fair package of balanced authority for management, balanced with a fair protection for at least the existing rights the employees have.”

Id.

Notice of Failed Ratification

Following the Federal Service Impasses Panel Decision and Order, issued on November 4, 2020, the Union sent correspondence to Michael Picerno, Acting Executive Director of the Office of Labor-Management Relations and “Alternate Chief Negotiator” (the Union has not been provided with a written delegation of his authority, although the Union requested it and it is required (Attachment A)). The letter outlined the status of the agreement – that nine (9) Articles are outstanding because the Department removed them from negotiations by issuing a determination pursuant to 38 USC §7422(d). Because those articles are pending review in court, the Union could not submit a partial agreement to its members for ratification. Mr. Picerno responded insisting that the Parties’ tentative agreements be submitted for ratification. The Union filed an unfair labor practice for the Department’s illegal insistence on piecemeal bargaining and submitted the tentative agreements to its membership under protest.

Pursuant to the Ground Rules, on January 4, 2021, the Union notified the Department of its membership’s overwhelming vote to not ratify the piecemeal tentative agreements. On January 6, 2021, the Union notified the Federal Mediation and Conciliation Service of its need for a Commissioner and copied officials of the Department because Mr. Picerno retired in December 2020. On January 13, 2021, Thomas Nagy sent an email to the assigned Commissioner, copying the Union, that he had been named the Agency’s Chief Negotiator. (Attachment B.) On January 14, 2021, the Union requested a copy of the delegation of authority. That same day Mr. Nagy responded attaching to his email a copy of his designation signed by Christopher D. Syrek. (Attachment C.) However, Mr. Syrek is not authorized to delegate Mr. Nagy with authority. Either

the Secretary or the designated Chief Negotiator, William Hervey, must redesignate the authority. (Attachment A.)

Table Negotiations

The Parties' Chief Negotiators agreed to begin negotiations on January 21, 2021 and meet each workday from 8am until 4:30pm. The Department was represented by Thomas Nagy, Charles Arrington, Charles Moore, Richard Watkins, James Watts, Terri Beer, Storm Morgan, Angela Denietolis, Brenda Jaynes, and Sam Olson.

The Union opened negotiations with a discussion of the timeline due to the Department's failure to have a designated Chief Negotiator. Mr. Nagy stated that he would not extend the timeline and would follow the Ground Rules. Charles Arrington then stated that "We are here because the Union failed ratification. The Agency already reached agreement, so the Agency will not provide counters." The Union confronted Mr. Arrington with the absurdity of his assertion and Mr. Nagy walked back the statement.

Pursuant to the Ground Rules' requirement that the Parties alternate three articles for discussion, the Union presented its proposals concerning the Preamble, Article 6 (Alternative Dispute Resolution), and Article 8 (Child Care). The Department went into caucus from 8:42am-10:17am. When the Department returned, Mr. Nagy stated, "We are here because of failed ratification, so we are here to see all of the Union's counters. The Union did not present any changes to Article 8, so the Agency rejects the Union's proposal."

The Union attempted to explain why it had not made changes to Article 8, notably that the team was unaware of improvements that could be made in the article. The Union informed the Agency that it will propose changes for each of the remaining articles. The Union also objected to providing all of its proposals in violation of the Ground Rules and explained what a failed ratification meant – that there was no agreement on the Articles. The Union had to explain the meaning of a failed ratification no less than three (3) times.

On January 25, 2021, the Department decided to have others on their team speak, so James Watts, Charles Moore, and Terri Beer each asked exactly one question for the three articles the Union presented. The Department then caucused for 4 hours and for another half hour on January 26, 2021 to return with language removing all of the Union's proposals in Articles 15 and 17.

For the first time during negotiations, on February 2, 2021, the Department explained its proposals. Charles Moore explained Article 34 and the Parties discussed their differences. This normal back-and-forth ended after lunch on the same day and did not resurface.

Throughout the twelve days of meeting, the Department would respond to the Union's questions with stark silence. Charles Arrington, a ER/LR representative on the VA's team, asserted that the Union's resort to questions was a "union tactic," instead of a requirement of good faith bargaining.

On the twelfth day, February 5, 2021, Mr. Nagy ended negotiations, stating, “We are done today based on the Ground Rules.” The Department did not appear for mediation on February 8, 2021, despite the Parties not reaching a single agreement on any article.

Department’s Proposals

Once the Department decided that it would present proposals, the Department’s proposals demonstrated contempt for the Union and the bargaining unit employees it represents. The Department also engaged in a pattern of conduct demonstrating bad faith bargaining, such as the following:

1. On January 21, 2021, the Agency removed “National Steering Committee” from Article 6 solely because the Union sought to define it.
2. On January 29, 2021, the Agency presented Article 28 (Reductions in Force) with a total strike falsely claiming that all of the language was contained in law and regulation.
3. On January 29, 2021, the Agency presented Article 32 (Occupational Health) mostly stricken. Importantly, the Agency struck the “Pandemic” section of the Article and instead added language that employees should not use insulting language or engage in boorish behavior. When the Union asked how the Department’s addition was relevant to Occupational Health, Charles Arrington responded that “insulting language does not create a healthy environment.”
4. On February 1, 2021, the Union asked the Department to sign off on Article 8 because neither Party had changes. To avoid any agreement, the Department suddenly stated that it would present changes on Article 8.
5. On February 3, 2021, the Department asserted that child care is burdensome on the Department and the Department may “discontinue childcare if there are funding issues” to justify its changes to Article 8 (Child Care).
6. On February 3, 2021, the Department presented a counter to Article 41 (Workers’ Compensation), striking it in its entirety, falsely asserting that the entirety of the article is “owned by DOL.”
7. On February 3, 2021, Charles Moore presented Article 41 (Affiliations) with a full strike asserting that he didn’t know what affiliates were.
8. On February 4, 2021, the Department stated that it will finally answer the Union’s question concerning the Department’s intent with striking the Union’s proposed “shall” and replacing it with “will.” Charles Moore gave a long speech where he stated that the Department did not agree that “shall” and “will” would have the same meaning in the Master Agreement. He went on to state that “shall” and “will” mean “may,” and only the word “must” is a word of obligation. While the Union and the Statute disagrees with the Department’s interpretation (the word “shall” is used throughout 5 U.S.C. 7101, *et. seq.* as a word of obligation), it did not explain why the Department repeatedly struck the word “shall,” when based on the Department’s own interpretation, means the same as “will.”
9. On February 5, 2021, the Department then removed the word “must” and changed it to “will,” but did not strike the word “shall” consistently in its last, best and final offer on Article 38 (Uniforms). The Department removed the word “will” and replaced it with “may” in its last, best and final offer on Article 65 (Wage Surveys).

Executive Order 14003

On January 22, 2021, President Biden issued Executive Order 14003, “Protecting the Federal Workforce.” The EO instructed agencies to “identify existing agency actions related to or arising from [EOs 13836, 13837, and 13839] . . . and “as soon as practicable, suspend, revise, or rescind []” the actions identified.

On January 25, 2021, the Union asked the Department representatives how they wanted to handle the requirements of the EO since the Department and FSIP both relied on the now revoked EOs in the November 4, 2020 Decision and Order. Mr. Nagy responded that the Department would have to a caucus. The Department caucused at 11:30am and did not return for the rest of the day. On January 27, 2021, the Union sought to obtain the Department’s position and asked again how the Department sought to address the EO. Mr. Nagy responded that the VA was “here to bargain.”

On January 28, 2021, the Union presented proposals on Articles 51 (Use of Official Facilities), 48 (Official Time), and 27 (Performance Appraisal) as directly related to the EO’s instruction. The Department went into caucus at 10:07am and did not return for the remainder of the day.

On January 29, 2021, after opening with a Department caucus from 8:04am-9:45am, Charles Arrington stated, “We are here in concentrated mediation due to failed ratification. The Agency will not be negotiating over those three articles.” Mr. Arrington implied that the VA team did not have authority to discuss the conditions of employment implicated by EO 14003. The Union pointed out the explicit instruction in the EO and that renegotiating those matters are appropriate while the successor agreement negotiations remained open. The Department team stared blankly.

The Union continued to present Articles implicated by EO 14003. Although the Department did not object to the Union presenting the proposals, nor object to receiving them, the Department did not submit counters to any of the Articles.

Violations

The Departments unwillingness to bargain, lack of preparation, lack of proper authority, and insistence on a sterile discussion of the Parties’ differences demonstrates surface or sham bargaining. The Department imposed an arbitrary time limit on negotiations and left the Union without any notice of the status of the proposals as none of them have reached tentative agreement. Instead, the VA approached negotiations to simply go through the motions of negotiations with a clear strategy to evade bargaining. The Department’s elimination of proposals because they sparked discussion at the table constitutes regressive bargaining.

By failing to fulfill its contractual and statutory obligations, the Agency violated, and continues to violate, the following:

- Article 2 of the MCBA: requiring compliance with all federal statutes and governmentwide regulations;
- Article 49 of the MCBA: which requires that the parties have due regard for the obligations imposed by 5 U.S.C. Chapter 71;
- II. Procedures B) of the Ground Rules: which requires that each Chief Negotiator come to the table with full authority to make decisions and bind their respective Party;
- XIII. Ratification of the Ground Rules: which requires that the Parties will have 30 calendar days of concentrated mediation following a failed ratification;
- 5 U.S.C. §7114(b)(2): which requires the parties to send duly authorized representatives to the bargaining table who are fully authorized to negotiate on any condition of employment and to reach agreement thereon;
- 5 U.S.C. §7116(a)(1) and (5): requiring the Agency to consult and negotiate in good faith with the Union; and,
- Any other law, rule, regulation, or Master Agreement provision not herein specified.

Remedies Requested

The Union asks that, to remedy the above situation, the Department agree to the following:

- To order that the Union's proposals concerning Articles presented during concentrated mediation constitute the final language for the successor collective bargaining agreement of the Parties.
- In the alternative, to return to the table for 30 days concentrated mediation anew;
- To post a notice in all VA locations where bargaining unit employees are present that the VA will refrain from further violations of the Master Agreement and law;
- To make whole the Union and any employee affected by the Department's violations;
- 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. Ibidun Roberts of Roberts Labor Law and Consulting, L.L.C., is the designated representative for this National Grievance. If you have any questions regarding this National Grievance, please contact her at (202) 235-5026 or iroberts@robertslaborlaw.com.

Submitted by,



Ibidun Roberts, Esq.
Roberts Labor Law and Consulting, L.L.C.
9520 Berger Rd.
Suite 212
Columbia, MD 21046
(202) 235-5026
(202) 217-3369 (fax)

cc: Alma L. Lee, President, AFGE/NVAC
Bill Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC
Thomas Dargon, Staff Counsel, AFGE/NVAC
Thomas Nagy, Chief Negotiator, VA

ATTACHMENT A



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

March 28, 2019

**MEMORANDUM FOR THE DEPARTMENT OF VETERANS AFFAIRS (VA) CHIEF
NEGOTIATOR, VA-AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
(AFGE) MASTER AGREEMENT**

SUBJECT: Delegation of Authority to Represent, Negotiate for, and Bind VA During
Negotiations with AFGE Regarding a Master Agreement

1. **DELEGATION.** This memorandum delegates to the VA Chief Negotiator the authority to represent, negotiate for, and bind VA during all negotiations with AFGE regarding a master agreement, including negotiations on ground rules.
2. **AUTHORITY.** 38 U.S.C. § 512(a); VA Directive 0000.
3. **RESTRICTIONS.** This delegation does not supersede the authority retained by the Secretary under law, including the authority under 5 U.S.C. § 7114(c). This delegation cancels and supersedes all previous delegations of authority.
4. **REDELEGATION.** The VA Chief Negotiator may delegate to other VA employees, in writing, the authority to represent and negotiate for VA during all negotiations with AFGE regarding a master agreement. Prior to issuing such a delegation, the VA Chief Negotiator should consult with the Office of the Secretary, the Office of General Counsel, and the Office of Human Resources and Administration.
5. **EFFECTIVE DATE.** This delegation of authority is effective on December 11, 2018, and will expire once an agreement has been executed by the parties, and I have approved such an agreement under 5 U.S.C. § 7114(c), or I have terminated this delegation, whichever occurs first. I waive the 2-year expiration of this delegation prescribed in VA Directive 0000.

A handwritten signature in blue ink, reading "Robert L. Wilkie", is positioned above the printed name.

Robert L. Wilkie

**Department of
Veterans Affairs**

Memorandum

Date:

MAR 28 2019

From: Secretary (00)

Subj: Designation as the Department of Veterans Affairs (VA) Chief Negotiator During Master Agreement Negotiations Between VA and the American Federation of Government Employees (AFGE)

To: William Hervey, M.D., Veterans Health Administration (10)

1. You are designated the VA Chief Negotiator during all negotiations with AFGE regarding a master agreement, including negotiations on ground rules.
2. In exercising your functions as a Chief Negotiator, you are to coordinate closely with the Office of the Secretary, the Office of Human Resources and Administration's Office of Labor-Management Relations, and the Office of General Counsel's Personnel Law Group.
3. This memorandum supersedes any prior documents designating a chief negotiator for such a master agreement.



Robert L. Wilkie

ATTACHMENT B

From: Nagy, Thomas J. (V09)
Sent: Thursday, January 14, 2021 10:32 AM
To: David Cann; Alma Lee; Ibidun Roberts; nvacpresidentlee@gmail.com; Mayhew Randall J.
Subject: RE: Designation of VA AFGE Team Chief Negotiator

Good Morning Mr. Cann,

Please consider this a response. We will be keeping with the agreed to and signed ground rules and their allotted timeframes. The continual filings by AFGE has made it very clear that they want both parties to adhere strictly to agreements that we have made, as such we will ensure we continue to do so here. It should also be noted that if AFGE had a concern for expediting processes they could have just as easily expedited the ratification, which was taken all the way up to the very last day before being declared. A copy of my delegation authority is attached above for your records.

Respectfully,

Thomas J. Nagy Jr., MLER
Supervisory HR Specialist (Employee and Labor Relations)
Shared Service Unit (SSU)
VA Midsouth Healthcare Network (VISN 9)
Veterans Health Administration
US Department of Veterans Affairs
Office Phone: (718) 909-1687

How was my service today? We value your feedback – please click on the link to take the HR Quick Card Survey: [HR Quick Card Survey](#)

From: David Cann <CannD@afge.org>
Sent: Thursday, January 14, 2021 10:03 AM
To: Nagy, Thomas J. (V09) <Thomas.Nagy2@va.gov>; Alma Lee <PresidentLee@afgenvac.org>; iroberts@robertslaborlaw.com; nvacpresidentlee@gmail.com; Mayhew Randall J. <rmayhew@fmcs.gov>
Subject: [EXTERNAL] RE: Designation of VA AFGE Team Chief Negotiator

Hello Mr. Nagy-

I am copying FMCS Commissioner Randy Mayhew, who, along with the union, has been awaiting a response from the Department regarding meeting dates.
The union wrote to the Agency on the 11th, with the following (also no response to date):

“As you may be aware, the ground rules allow for a pretty short amount of time to return to (and complete) negotiations. I propose we toll that time period, going back to the union notified the agency of the failed ratification until the agency is equipped to move forward with a negotiation team. Where the agency doesn’t have a negotiator, it seems like a natural accommodation.

I would also suggest that we revisit the limited timetable we’ve left ourselves with in the ground rules. Again, it seems prudent given that the agency will be introducing a new chief to the mix.”

We eagerly await your response. We also request a formal delegation of bargaining authority, pursuant to the ground rules. Thanks in advance.

Dave

From: Nagy, Thomas J. (V09) <Thomas.Nagy2@va.gov>
Sent: Wednesday, January 13, 2021 4:29 PM
To: Alma Lee <PresidentLee@afgenvac.org>; iroberts@robertslaborlaw.com; David Cann <CannD@afge.org>; nvacpresidentlee@gmail.com
Subject: Designation of VA AFGE Team Chief Negotiator

Good Evening All,

On the behalf of the VA AFGE team I would like to inform you that Mr. Michael Picerno has retired after 40 plus years of service. I have been designated as the Agency’s Chief Negotiator and respectful ask that any further communications be directed to my attention.

Respectfully,

Thomas J. Nagy Jr., MLER
Supervisory HR Specialist (Employee and Labor Relations)
Shared Service Unit (SSU)
VA Midsouth Healthcare Network (VISN 9)
Veterans Health Administration
US Department of Veterans Affairs
Office Phone: (718) 909-1687

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ATTACHMENT C

**Department of
Veterans Affairs**

Memorandum

Date: January 12, 2021

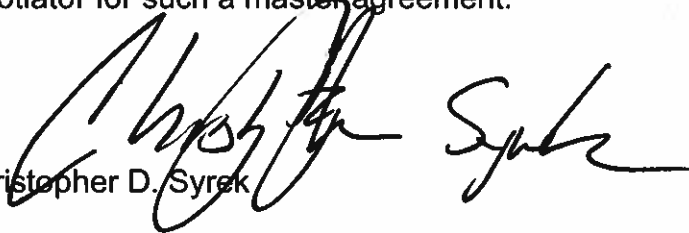
From: Deputy Chief of Staff, Office of the Secretary (00A1)

Subj: Designation as the Department of Veterans Affairs (VA) Chief Negotiator During Master Agreement Negotiations Between VA and the American Federation of Government Employees (AFGE)

To: Thomas Nagy Jr., Veterans Health Administration (10)

1. You are designated the VA Chief Negotiator during all negotiations with AFGE regarding a master agreement, including negotiations on ground rules.
2. In exercising your functions as a Chief Negotiator, you are to coordinate closely with the Office of the Secretary, the Office of Human Resources and Administration/Operations, Security and Preparedness, Office of the Chief Human Capital Officer, Labor Management Relations and the Office of General Counsel's Personnel Law Group.
3. This memorandum supersedes any prior documents designating a chief negotiator for such a master agreement.

Christopher D. Syrek

A handwritten signature in black ink, appearing to read "Chris D. Syrek", is written over the printed name.