



American Federation of
Government Employees

Memorandum

Step 3 Grievance on Behalf of Attorney-Advisors at the Board of Veterans' Appeals

Dated: May 28, 2024

To: Christopher Santoro, Senior Deputy Vice Chairman (SDVC), Board of Veterans' Appeals (Board), Department of Veterans Affairs (VA or Agency)

Re: Failure to provide Board Attorney-Advisors (Attorneys) proration and/or overtime pay for time spent completing the background reinvestigation requirement

From: Calanit Kedem, Esq., First Vice President, American Federation of Government Employees (AFGE), Local 17, AFL-CIO.

This step 3 grievance is filed under the provisions of Article 43, Section 7 of the *Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2023)* ("Master Agreement"). This grievance is initiated at step 3 because it cannot be resolved at either step 1 or step 2. See Article 43, Section 7B Note 5.

1. Statement of Grievance:

In April 2024, Attorneys began receiving notice on a rolling basis requiring them to undergo new background investigations. The email explained that a VA-wide Personnel Security Office audit determined that previous background investigations were not commensurate with the risk level entailed in the Attorney position. Consequently, Attorneys were informed that they were due for a reinvestigation or an updated background investigation. The Board Attorney-Advisor position now constitutes a Moderate Risk (MR) Public Trust designation, characterized by one of the following:

- Policy and/or program responsibility (to include regulation and policy making/advising)
- Investigation, oversight, and audits of government personnel, programs, and activities

- Protection of government funds
- Protection of government information technology systems
- Protection of personal, private, controlled unclassified, or proprietary information.

The notice instructed Attorneys to complete Form OF 306 (Declaration of Federal Employment) and the SF-85P questionnaire from the National Background Investigation Service (NBIS). Some Attorneys were also instructed to report for fingerprinting, while others were interviewed, with all being warned of potential follow-up interviews after submission of the NBIS questionnaire.

The NBIS questionnaire is extensive, requiring several hours to complete. Individual circumstances can render the NBIS questionnaire more burdensome. For example, a history of job changes or frequent relocations necessitates providing additional information. Those with larger families must list and supply information on more people, and those living with “co-habitants” face additional burdens. Military service members and Veterans are particularly inconvenienced due to the itinerant nature of service.

Completing the paperwork, submitting to in-person interviews, and getting fingerprinted are tasks that must be completed during duty time or on the employee’s own time. Some Attorneys might face even more interviews if listed as a reference for a colleague. No Attorney has been paid overtime for investigation-related work done off duty, and no Attorney has received proration for investigation-related tasks performed during duty time.

Attorneys have an annual case quota, and time away from Board-related work detracts from the time available to meet the quota. Failing to meet the annual case quota can lead to undesirable consequences such as performance improvement plans, subsequent demotions, or removal from federal service. Lack of proration could affect whether an Attorney receives a Fully Successful or Outstanding annual rating, which impacts eligibility for awards and bonuses.

The enhanced background checks are a job requirement. As such, compliance is not discretionary and is beyond the control of bargaining unit Attorneys. Under these circumstances, the Board ought to prorate the annual quota, but they refuse. For instance, on or about April 18, 2024, Veterans Law Judge (VLJ) Eric Leboff wrote, “[t]he official word, at least for now, is that proration won’t be offered for matters related to the background checks...” On or about April 22, 2024, Supervisory Senior Counsel Adrian Ody-Weis emailed Board Attorney-Advisors indicating that proration was not authorized “to complete the [background investigation] questionnaire.” On or about April 25, 2024, VLJ Jonathan Hagar advised the Attorney-Advisors under his supervision that the Board would not grant proration for background checks.

During a town hall on May 22, 2024, SDVC Santoro explained that proration was unavailable because the Union filed a Demand to Bargain. This is incorrect. SDVC Santoro fully understands that the Union’s Demand to Bargain does not prohibit the Board from offering proration. Ironically, though, it absolutely does preclude the Board from continuing the new investigation requirements until the parties have met all bargaining obligations. Of note, the National VA Council

(NVAC) withdrew its demand to bargain well before the May 22, 2024 town hall. Facts matter.

It should come as no surprise that the Board was recently ranked 444 out of 459 in a 2023 survey of subcomponents within federal agencies.¹ The effectiveness of senior leaders was even more abysmal, 447 out of 458 sub agencies. Board senior leadership's refusal to provide proration or overtime pay run counter to VA's Core Values of Integrity, Commitment, Advocacy, Respect, and Excellence. These values are encapsulated by the acronym "I-CARE," as outlined in 38 CFR § 0.601.

2. Statement of Violation:

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

- Master Agreement, Article 27, Section 8E: prohibiting the Agency from holding employees accountable for matters beyond their control in evaluating performance;
- Paragraph 13 of the September 28, 2020, Memorandum of Understanding between the Agency and AFGE Local 17 regarding the performance plan for Board Attorney-Advisors: indicating that the production goals of Board Attorney-Advisors may be prorated for "any good cause as determined by management";
- 38 CFR § 0.601: VA's Core Values are Integrity, Commitment, Advocacy, Respect, and Excellence. Together, the first letters of the Core Values spell "I CARE"; and
- Any and all other relevant agreements and Master Agreement provisions not herein specified.

3. Statement of Remedy:

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

- Provide proration for all time expended by Attorneys during duty time to complete forms and questionnaires, comply with fingerprinting requirements, attend interviews, and comply with all other demands from VA or NBIS in furtherance of background checks;
- Provide overtime pay for all time expended by Board Attorney-Advisors outside of duty time to complete forms and questionnaires, comply with fingerprinting requirements, attend interviews, and comply with all other demands from VA or NBIS in furtherance of background checks; and
- Grant any and all relief deemed appropriate.

¹ See Partnership for Public Service, 2023 Best Places to Work in the Federal Government, [Board of Veterans Appeals | Best Places to Work in the Federal Government](#)

The time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this Grievance, please contact me at calanit.kedem@va.gov.