



American Federation of
Government Employees

Memorandum

Step 3 Grievance for unilaterally changing a critical element in the performance plan for Attorney-Advisors without notice to the Union

Dated: January 6, 2025

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

Re: Unilaterally changing conditions of employment without notice to the Union

From: Douglas E. Massey, Esq., President, American Federation of Government Employees (AFGE), Local 17, AFL-CIO

I. Statement of the Grievance

The Board has committed an unfair labor practice (ULP) by unilaterally altering the critical element of "Productivity" in the performance plan for over 1,000 bargaining unit attorneys without providing the required notice to the Union. This action violates several provisions of the Master Agreement, the Federal Service Labor-Management Relations Statute (hereinafter "the Statute"), and the Department's own core values.¹ To rectify these violations, the Union demands a *status quo ante* remedy until the Board fulfills all its notice and bargaining obligations. Additionally, a posting acknowledging the

¹ The 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"). It is being initiated at Step 3 because the requested relief and corrective action are beyond the authority of any step 1 or step 2 deciding official. [VA-AFGE-2023-Master-Agreement.pdf](#)

violation is warranted, especially considering the Board’s prior breaches related to this same critical element.

A. Legal Authority

The Statute mandates that the Board notify the Union of any changes to conditions of employment, including performance standards, prior to implementation. This notice requirement applies even when management exercises its rights to change performance standards.² If the Union elects to bargain, the parties are obligated to engage in good faith negotiations, demonstrating a genuine intent to reach an agreement and convening at reasonable and convenient times as necessary.³

Similarly, the Master Agreement imposes stringent notice requirements before changing conditions of employment, including performance standards. It mandates that management provide the local Union with reasonable advance written notice – no less than 15 calendar days – before modifying, adding, or establishing new performance elements or standards.⁴ Article 49 explicitly incorporates the statutory bargaining obligations under 5 U.S.C. Chapter 71 and reinforces the requirement for written notifications to the appropriate Union official. In this instance, the designated Union official is Mr. Massey, as stipulated in the parties’ agreement.⁵

B. Productivity Element: a reoccurring issue

The attorney performance plan includes the critical element of “Productivity,” requiring attorneys to produce either 156 signed decisions or decisions encompassing at least 491 issues annually to achieve a fully successful rating. This standard, in place since October 2020, has already been the subject of two separate arbitrations, both of which determined that the Board violated the Master Agreement and the Statute by unilaterally changing the Productivity standard without fulfilling its bargaining obligations, thereby committing ULPs.

In May 2023, Arbitrator Elliot Shaller upheld a Union’s grievance, finding that the Board unilaterally required attorneys to prepare prehearing briefs without bargaining in good faith.⁶ Although the Board initially provided notice to the Union, it later withdrew its proposal only to covertly implement the change, bypassing required negotiations.

A year later, in April 2024, Arbitrator James Bilik sustained another Union grievance, determining that the Board’s use of “on pace” performance metrics to delay or deny promotions, waive promotion considerations, and place attorneys on Performance

² See 5 U.S.C. § 7106(b), and AFGE Local 17, 68 F.L.R.A. at 173.

³ See 5 U.S.C. § 7114(b)(1), (b)(3).

⁴ See Master Agreement, Article 27, Section 5.E.

⁵ . See Master Agreement, Article 47, Section 4.B (“Proposed changes in personnel policies, practices, or working conditions affecting the interests of one local union shall require notice to the President of that local”).

⁶ *U.S. Department of Veterans Affairs and AFGE Local 17*, FMCS Case No. 220104-02289 (Shaller, May 2023).

Improvement Plans (PIPs) constituted a change in conditions of employment with more than a *de minimis* effect.⁷ The arbitrator ordered a *status quo ante* remedy, along with back pay, interest, and the rescission of improperly issued PIPs.

C. New Unfair Labor Practice

Despite prior rulings sustaining the Union's grievances, the Board has once again violated the Master Agreement and the Statute by unilaterally changing the Productivity standard without providing notice to or bargaining with the Union. The latest change requires all attorneys to meet their *pro rata* goal by April 5, 2025, as part of their mid-year reviews, eliminating the flexibility that was previously allowed concerning the timing of mid-year reviews.

During an October 30, 2024, town hall, Senior DVC Chris Santoro announced this new requirement, explaining that attorneys must be no more than one case or three issues behind their *pro rata* goal by April 5 to maintain a "fully successful" rating for the Productivity element. However, this is not a true buffer of one case or three issues because the performance year did not begin on a Monday, creating a slight misalignment between *pro rata* calculations and the actual workweek schedule.

This policy constitutes a clear and significant change to the Productivity element of the performance standard. Under the prior policy, as presented during the 2024 arbitration, Veterans Law Judges (VLJs) were permitted to conduct mid-year reviews flexibly, ensuring that minor delays did not result in unnecessary PIPs. VLJs would wait until the attorney was "on pace" to complete the mid-year review, allowing attorneys who might have been slightly behind at a given moment to catch up within a few pay periods before the review was conducted.⁸ This approach prevented premature assessments based on temporary dips in productivity. The new rigid deadline of April 5 eliminates this safeguard and constitutes a more than *de minimis* change in conditions of employment.

By implementing this change without the required 15-day written advance notice to the Union, the Board has once again violated its statutory and contractual bargaining obligations.⁹

D. I-CARE principles

In addition to breaching the Master Agreement and the Statute, the Board has also disregarded the Department's core values of Integrity, Commitment, Advocacy, Respect, and Excellence (I-CARE), as defined in 38 CFR § 0.601. The Board's repeated unlawful actions have unnecessarily cost the Union and the Board expense and time. The Board's

⁷ U.S. Department of Veterans Affairs and AFGE Local 17, FMCS Case No. 230214-03419 (Bilik, April 2024); Supplemental Award (Bilik, July 2024).

⁸ Article 27, Section 9.

⁹ Article 27, Section 5.E., requiring that the Department meet all bargaining obligations before changing performance standards, including reasonable written advance notice (no less than 15 calendar days) when changing, adding to, or establishing new elements

repeated bad-faith actions have wasted thousands of hours in litigation, and cost both the Union and the Board hundreds of thousands of taxpayer dollars. By failing to learn from its previous violations, the Board continues to undermine the Department's core values and public trust

II. Statement of the Violation

By changing the Productivity element for attorneys without notice to the Union, the Department violated and continues to violate, the following:

- 5 U.S.C. § 7106(a)(5), stating that it shall be an unfair labor practice for an agency to refuse to consult or negotiate in good faith with a labor organization;
- 5 U.S.C. § 7114, which states that the Union is the exclusive representatives of employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit;
- Article 2 of the Master Agreement due to the Department's failure to comply with applicable federal statutes and regulations in the administrative matters covered by the Master Agreement, to include 5 U.S.C. § 7106(a);
- Article 49 of the Agreement: requiring the Department bargain with the Union prior to making changes in conditions of employment;
- Article 27, Section 5.E., requiring that the Department meet all bargaining obligations before changing performance standards, including reasonable written advance notice (no less than 15 calendar days) when changing, adding to, or establishing new elements;
- U.S. Department of Veterans Affairs and AFGE Local 17, FMCS Case No. 230214-03419 (Bilik, April 2024); Supplemental Award (Bilik, July 2024);
- 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 other relevant articles, laws, regulations, customs, and past practices not herein specified.

III. Statement of the Remedy

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

- Return to the *status quo ante*;
- Fully comply with its contractual obligations under Articles 2, 3, 27, 47, and 49 of the Master Agreement, as well as its statutory obligations under 5 U.S.C. §7116(a);
- Distribute an electronic notice posting to all bargaining unit employees at VA Central Office concerning the Department's failure to satisfy its bargaining obligations with the Union prior to implementing changes in conditions of employment;

- Make-whole any bargaining unit employee adversely affected by the Department's improper implementation of the changes, including back pay with interest and attorneys' fees;
- Agree to comply with any other relevant articles, laws, regulations, customs, and past practices not herein specified.
- Any other remedy deemed appropriate.

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 the undersigned. The Union asserts the right to amend this Grievance if violations of any other applicable sections of the contract, laws, or regulations are discovered.

Douglas Massey 1/6/2025

Douglas E. Massey, Esq.