

Out of Many/ **One Union**
AFGE NVAC/AFL-CIO

**NATIONAL VETERANS
AFFAIRS COUNCIL**
American Federation of Government Employees
AFFILIATED WITH THE AFL-CIO

October 28, 2011

SENT VIA ELECTRONIC AND U.S. MAIL

Department of Veterans Affairs
ATT: Leslie Wiggins,
Deputy Assistant Secretary,
Labor – Management Relations
810 Vermont Avenue, NW
Washington, DC 20420

*Received LMR
OCT 27, 2011
LMM*

RE: National Grievance 10/28/2011 Downgrade

Dear Ms. Wiggins,

Please find attached the National Grievance 10/28/2011 concerning nationwide downgrade issues.

If you have any additional questions or concerns, please contact me at (202) 306-3664.

Sincerely,

Ami M. Pendergrass for

Ami M. Pendergrass
Staff Attorney
AFGE/NVAC

Cc: Alma Lee, William Wetmore



NATIONAL GRIEVANCE
NG-10/28/2011

Date: October 28, 2011

To: Leslie Wiggins
Deputy Assistant Secretary,
Labor – Management Relations
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

From: Ami Pendergrass, Attorney, National Veterans Affairs Council (#53) (NVAC), American Federation of Government Employees (AFGE), AFL-CIO

Subject: National Grievance in the matter of the Department of Veterans Affairs (VA) concerning the continued failure to address and remedy multiple downgrades issues nationwide.

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), American Federation of Government Employees/National Veterans Affairs Council (Union) is filing this national grievance against you and all other associated Department of Veterans Affairs (“VA”) officials and/or individuals acting as agents on behalf of the VA for violations as it relates to its failure to address and remedy multiple downgrade issues nationwide.

Specifically, on or about September 29, 2011 and on an ongoing and continuous basis, the VA, by and through its representatives and/or agents, has:

- (1) Failed and continues to fail to provide substantive pre-decisional involvement on the development of the hybrid positions for the GS303 and GS679 series (“MSA/PSA” positions) in a timely manner;
- (2) Failed and continues to fail to provide a timely review and remedy of those GS303 and GS679 positions downgraded in violation of the VA’s order to cease and desist all downgrades while a national review took place;
- (3) Failed and continues to fail to address and properly remedy the classifications in VISN 17 affected by the VA’s administrative error which resulted in an accretion of duties promotion;

In doing so, the VA has violated the following provisions:

- (1) Articles 9 and 23 of the MCBA; and
- (2) Any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

STATEMENT OF THE CASE:

I. Background

Series 301/303/679

Starting in approximately 2008, the VA received notice of several OPM consistency reviews for series 301/303/679 involving medical support assistants and physician support assistants (“MSA/PSA”). According to VA Representative Adam Garcia, the VA started the review of these positions as early as 2009. Notification was sent to the Union on or around March 2010. As a result of meetings between AFGE President John Gage, NVAC President Alma Lee and Assistant Secretary John Sepulveda, the parties reached an agreed understanding that the VA would convert the MSA/PSA positions to a hybrid position to avoid review and reclassification. The VA, through its representative, Tonya Deanes, issued a memorandum in June 2010, asking all stations in the field to maintain the status quo. When facilities continued to proceed with downgrades, a second communication, released after another meeting with the parties in April 2011, ordered stations to cease and desist any activities involving these series.

The parties met on May 20, 2011 in Assistant Secretary Sepulveda’s office to discuss the downgrade issues involving 1) MSA/PSA positions (GS Series 301, 303, and 679); 2) police officers; and 3) multiple positions in Texas, including VISN 17. The parties agreed that the VA would involve the Union pre-decisionally on the review and creation of qualification standards for the MSA/PSA positions (GS Series 301, 303, and 679) to be converted to Hybrid status and agreed to work collaboratively on the creation of a career ladder for these positions. The VA also acknowledged that facilities were notified twice to cease downgrades in these positions while the matter was addressed nationally. The Union provided the VA with a list of facilities that may have proceeded with downgrades, despite the cease and desist notification. The VA advised that a review would be conducted and that downgrades at those facilities would be addressed.

On June 30, 2011, the Union received the first draft of the Hybrid Qualification Standards for Medical Support Assistants (GS 679), which did not contain substantive information concerning the required qualifications. The Union provided an initial response on July 25, 2011, notifying the VA that it would withhold further comment until the VA provided substantive data concerning the MSA’s qualification standards.

When no further communication was received, the Union sent a letter on September 1, 2011 to Assistant Secretary Sepulveda concerning the lack of progress. In addition, on September 16, 2011, Ms. Lee sent a letter to President Obama concerning the continued downgrades despite the

Union's efforts to suspend the downgrades. A conference call with the parties was held on September 22, 2011 to discuss the status letter. Concerning the 303/679 issue, the VA stated that they were working continuously on the creating a substantive qualification standard but could not provide any further information or timeline. The VA also mentioned that the list of occupations for hybrid consideration was "growing" but would not provide any further detail. Furthermore, the VA stated that despite the work being performed nationally, classification was still a decentralized function, meaning that the local facilities had ultimate control over who got downgraded. No further information was provided as to whether facilities that downgraded despite the cease and desist were addressed or whether those wrongfully downgraded were restored pending the hybrid process.

On September 28, 2011, the matter was raised with Assistant Secretary Sepulveda and again on September 29, 2011 with Under Secretary Robert Petzel. The VA maintained its position that no timelines could be provided for pre-decisional involvement nor was it in the VA's control to stop the downgrades.

VISN 17 Administrative Error

On or around April 2011, the NVAC was notified by Local 2109 President Clementine Ray and Local 1822 President Fredna White of the downgrade of 142 positions in VISN 17, specifically in the Temple, Waco and Austin facilities. VA Representative Adam Garcia and NVAC Attorney Ami Pendergrass reviewed the 142 cases identified for downgrade.

A variety of reasons were identified concerning the downgrades, ranging from reorganization to several additional OPM consistency reviews. However, the major source of downgrades was triggered by an oversight committee review of "accretion of duties" promotions, which was a result of an administrative error committed by a now-retired Human Resources associate at VISN 17. According to the VA, an oversight committee review was triggered when it was noticed that the facilities in question had a high number of non-merit promotions by "accretion of duties" performed at the Central Texas stations. In order for a non-merit promotion to occur by accretion of duties, the VA must show in the employee's record that 1) the employee is performing additional duties and responsibilities that justify a higher grade (meaning that the work is typically work associated with a higher grade of pay, such as technical or management responsibilities) and 2) that the new duties are not a result of a planned management action. The committee found that all cases were performed at the Central Texas stations approximately two to three years ago by a now retired VA HR employee. The conclusion of the review found that the promotions were not handled properly by this employee and were not supported by documented proof that there was an accretion of duties for the positions in question.

As a result of the review, VISN 17 ordered desk audits of all the positions and asked for all evidence and documents associated with each promotion. According to Mr. Garcia, the VA did find that a portion of the positions were actually not from accretion of duties but were competitively posted and filled. In those cases, VA HR would gather the paperwork to support the competitive promotion and change the coding, which would result in no downgrade for those employees. In the remainder of the cases, the desk audits would be used to determine whether there is evidence that the employee is actually performing new duties to justify the promotion. If

the employee is, then the position would stay the same. However, if there is not enough evidence that there is additional duties to justify the promotion, the VA would take the following action:

- 1) The VA would have to reverse the incorrect promotion and post the position to be filled competitively. This would mean that the employee, who is currently in the job, would have to reapply for the position he or she has currently been filling. It would also require that the person's SF50s be changed to reverse the promotion and that all wages paid to the employee at the higher grade would have to be reimbursed to the VA; or
- 2) The VA would downgrade the employee to his or her former position. The employee would retain pay and grade for a period of time equal to the time the person held the promotion in error. In this case, the employees would hold pay and grade retention for a period of roughly two years. At the end of that period, either the downgrade would go through or the employee would be realigned into another position that would allow him or her to keep the pay/grade.

The parties discussed this matter at the May 20th meeting and agreed to draft and send notice letters to individuals affected by the downgrades, especially in VISN 17, to educate them concerning why their position is under review and what steps would be taken next. The parties also discussed the adverse impact of the administrative error and discussed working together concerning how to resolve the matter without further impact on the employees. As a result, the parties exchanged a draft letter on June 18, 2011 and the letter was forwarded to the Human Resources. As of September 1st, the Union has not received final input on the letter or confirmation that the notice has been distributed, nor any further updates or had additional discussions concerning the status of or the adverse impact of the review.

The matter was further discussed at the September 22, 2011 conference call. Mr. Garcia confirmed that the notice letter to be sent to VISN 17 was still on hold; that the letter was with the recently appointed head of Human Resources for VHA, where it had been completely re-written, negating joint involvement. No time line could be provided for its release. Mr. Garcia agreed to provide an update for the employees under review in VISN 17 for downgrades and at the end of September, the letter to the field was finally released.

An analysis of the positions in VISN 17 shows that since May 17, 2011, the vast majority of positions are still under review. However, several of the positions are marked for reapplication by the incumbent candidate and several more positions are now downgraded. Furthermore, in the comment section of those positions under review, a vast majority are marked for either reapplication upon completion of review or for downgrade.

II. Violation

The Union asserts that a significant amount of time has passed since the beginning of talks concerning these matters and no substantive progress has been presented to the Union as evidence of a good effort to include the Union pre-decisionally on these matters. This stands in

marked contrast to what we believe had been agreed to. Furthermore, based on the position of VA leadership on both September 28th and 29th, the Union has not received reassurance that the matter will be addressed in a timely and sufficient manner. This unwarranted delay, accompanied by changes to the process we believed had been agreed to, leads to the conclusion that the VA has constructively denied the Union pre-decisional involvement as promised.

In addition, concerning the outcome of the review of those affected employees in VISN 17 who are affected by the administrative error, the Union argues the VA has specifically violated Article 9 Section 1F for failure to meet and confer with the NVAC, as the representative for the Locals involved, concerning the on-going downgrade issue. The Union argues that the VA has also violated Article 23, Section 7 concerning those employees asked to reapply or that have received downgrades as a result of the error. Article 23, Section 7 specifically provides that the VA may provide promotions non-competitively to those incumbents in positions without significant change in duties or responsibilities on the basis of a result of the correction of an original classification error. The Union has repeatedly held that those affected by the VA's administrative error should be afforded all opportunities to maintain the status quo.

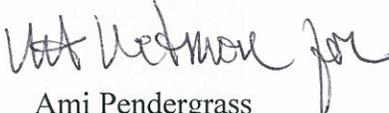
III. Remedy Requested

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

- (1) To agree to meet and confer with the Union on all matters concerning the downgrades referenced herein and as discussed otherwise as well as review the above matters in a timely and sufficient manner, as arranged by mutual agreement between the parties;
- (2) To agree to promptly review and remedy all those MSA/PSA positions downgraded in contradiction to the VA's notice to cease and desist ;
- (3) To immediately recognize and apply the provisions in Article 23, specifically Section 7 concerning noncompetitive promotions to those employees adversely affected by the administrative error committed in VISN 17; and
- (4) To agree to any and all other remedies as may become apparent and agreed to during the above requested meetings and as appropriate in this matter.

IV. Time Frame and Contact

This is a National Grievance and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please feel free to contact me at (202) 306-3664.


Ami Pendergrass
Attorney

AFGE/NVAC

Cc: Alma L. Lee, President, AFGE/NVAC
William Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC