UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C. 20424

OALJ 25-4

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, D.C.
Respondent

And

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL VA COUNCIL
Charging Party

DE-CA-21-0538

Whitney McOwen
For the General Counsel

W. Iris Barber
For the Respondent

Thomas Dargon, Jr.
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

After the Agency in this case revised its personnel handbook so as to change employees' leave accrual rate from "days" to "hours," officials learned that this had the unintended consequence of short-changing a large number of medical professionals who frequently work longer than eight-hour tours of duty. These employees had previously accrued annual and other types of leave at rates of ten or twelve hours per pay period, but under the new system they were accruing only eight hours, and their previously-earned leave was similarly reduced. An arbitrator ordered the Agency to correct this error and make employees whole, and subsequently the Union and the Agency negotiated a settlement agreement that explained the Agency's obligations more specifically.

That settlement agreement was executed in April of 2021, but it has not yet been fully implemented by the Agency. The Union allowed the Agency additional time to make the necessary calculations and pay the affected employees, but months stretched into years, and the Agency is still trying to reconcile "inconsistencies" in its leave records and calculations; it has not yet completed the calculations for those employees still working for the VA, and it has not even begun to undertake the task for the many employees who have left the Agency. The Union now asserts that the Agency has repudiated the settlement agreement and seeks the assistance of the FLRA to enforce it. I will try to do so.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or the Authority), 5 C.F.R. part 2423.

On September 7, 2021, the American Federation of Government Employees, AFL-CIO, National VA Council (the Union or Charging Party) filed a ULP charge in this case against the U.S. Department of Veterans Affairs, Washington, D.C. (the Agency, Respondent or VA). After investigating the charge, the Regional Director of the Denver Region of the FLRA issued a Complaint and Notice of Hearing, on behalf of the FLRA's General Counsel (GC), against the Respondent on June 23, 2023, alleging that by failing to comply with several of the terms of a settlement agreement, the Respondent had repudiated the agreement in violation of § 7116(a)(1) and (5) of the Statute. On July 13, 2023, Respondent filed its Answer to the Complaint, admitting some of the factual allegations but denying that it had violated the Statute.

On November 7, 2023, the GC filed a Motion for Summary Judgment (MSJ), along with a number of exhibits, asserting that the material facts of the case had either been admitted by the Respondent or were established by the exhibits of record, and that the record demonstrates that the Respondent violated the Statute. MSJ at 3-5. Respondent did not file any opposition to the MSJ, and at a conference call with the parties, the Respondent indicated that it did not intend to file an opposition. Accordingly, I issued an Order Indefinitely Postponing Hearing on December 5, 2023.

DISCUSSION OF MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in the U.S. District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of the Navy, Naval Ordnance Station, Louisville, Ky.*, 33 FLRA 3, 4 (1988). Rule 56 provides that such motions may be accompanied by supporting documents such as affidavits, and that a motion should be granted if the pleadings and supporting documents show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* As explained by the Authority in *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995), "a party opposing a motion for summary judgment cannot rely on its pleading alone, but must show by affidavits or otherwise that there is a genuine issue of material fact."

In our case, the Complaint alleges that the Respondent has failed to perform the actions required by the parties' settlement agreement and has thereby repudiated it; the Respondent's Answer denies these allegations and asserts instead that it has "consistently worked to fully comply" with the settlement. Answer at ¶¶ 8, 9. This suggests that there is a dispute regarding these material facts, but the Respondent failed to offer any documents or other evidence to support its general denial. The General Counsel supported its motion with a series of documents, including emails between officials of the Respondent and the Union, and between the Respondent and the GC, showing that while Respondent had complied with some portions of the settlement agreement, it conceded that – as late as sixteen months after it was required to have fully complied – it had not complied (and in some respects had not even begun to comply) with other provisions of the settlement. The supporting exhibits offered by the GC detail precisely what portions of the settlement have, and have not, been fulfilled. For its part, the only evidence offered by the Respondent was sixteen virtually identical letters from division managers of the Agency to their employees, confirming that employees affected by the settlement agreement had been notified regarding the settlement and given an "update" on its implementation. Answer, Agency Ex. 1.

The documents offered by the Respondent do not support the assertion in its Answer that it has "consistently worked to fully comply" with the settlement agreement. Rather, they show that Respondent has simply notified affected employees of the settlement and updated them on how it was being implemented. Such an "update" was actually a concession that Respondent had not fully complied with its terms. The documents offered by the GC provide a much fuller picture of where the Respondent's compliance has occurred and both where and when it has not. Respondent's exhibits do not rebut the GC's, nor do they contradict any of the factual assertions made by the GC, either in the Complaint or in the MSJ.

What we are left with, therefore, is not a factual dispute but a legal one. The evidence establishes that the Respondent has failed to comply with several provisions of the settlement agreement and has complied with others. Respondent does not dispute any of that; it disputes, instead, whether its failure – for over a year beyond its deadline – to comply with some provisions constitutes a repudiation of the settlement. I will address that legal issue more fully in the Analysis and Conclusion of this decision. But on the threshold question of whether there is a genuine dispute concerning any facts material to this case, it is clear to me that there is no such dispute, and that a hearing is not necessary to resolve any legal issues.

Therefore it is appropriate to decide this case on the General Counsel's Motion for Summary Judgment, and I hereby cancel the hearing. I will now summarize the material facts that are not in dispute, and I will then make conclusions of law and recommendations.

FINDINGS OF FACT

The Department of Veterans Affairs, Washington, D.C., is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO, National VA Council, is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a unit of employees of the Respondent. The Union and the Respondent are parties to a collective bargaining agreement (CBA) covering employees in this unit.

Pursuant to the grievance procedure of the CBA, the parties engaged in an arbitration hearing on August 7, 2020, relating to a grievance filed by the Union on October 9, 2019. Arbitrator's Award at 2, 3, GC Ex. 5 of MSJ.[1] The Union's grievance protested the Agency's implementation on September 15, 2019, of VA Handbook 5011/32 (Hours of Duty and Leave), which changed the rate at which employees accrued leave from "days" to "hours." Arbitrator Steven C. Kasarda issued his award on December 30, 2020; the Award found in favor of the Union that the change in leave accrual rate adversely affected a variety of medical professionals who frequently worked 10-hour or 12-hour days, arbitrarily reducing their accrued leave in many cases by as much as one-third. Award at 15-17.

Of the approximately 270,000 VA employees represented nationwide by the Union, roughly 18,000 work in the positions of physician, dentist, podiatrist, chiropractor, and optometrist (collectively referred to as "physicians"), many of whom regularly work shifts of ten or twelve hours without receiving overtime or premium pay. *Id.* at 4. For decades, they had accrued annual leave at a rate of one day, and sick leave at one-half day, per pay period; those "days" were consistent with the physicians' tours of duty -- i.e., eight, ten, or twelve hours. *Id.* at 6, 15. Pursuant to the new VA Handbook, as of September 15, 2019, all employees, including physicians, had their accrued leave balances converted from days to hours, with each day counting as eight hours. *Id.* at 5. After the Agency was informed of how this would significantly reduce the accrued leave balances of many physicians, the Agency agreed to make "a one-time modification" to the physicians' leave conversion rates, but it never actually implemented this modification. *Id.*

Based on the Agency's actions, the Arbitrator found that it had violated the CBA as well as Section 7116(a)(1) and (5) of the Statute, and that the physicians were entitled to back pay to make them whole for the Agency's unwarranted personnel action. *Id.* at 17-19. He ordered the Agency to identify all physicians whose accrued leave had been improperly reduced; to pay them back pay for those hours, and to send a remedial notice to all bargaining unit employees, within sixty days. *Id.* at 19. The Award did not specify a particular formula or methodology for calculating the amounts owed to the affected physicians, but it left this to the parties to work out voluntarily. *Id.* at 18.

After a few months of negotiations, the Union and the Agency reached a settlement, executed on April 27, 2021, that sought (among other things) to specify precisely how the physicians would be made whole for the change in the leave accrual policy. GC Ex. 2. Section II ("Terms of Agreement") lists five actions the Agency is to perform. Section II.A. ("Make-Whole Relief") provides a formula for supplementing the annual and sick leave balances of every physician as of September 15, 2019, by a "conversion rate" that is based on that employee's most common tour of duty. *Id.* at 1-2. The Agreement also covers retired and separated employees, who will be paid a lump sum for their accumulated balance. *Id.* at 2. In Section II.B. ("Information to AFGE"), the Agency promises to provide the Union with an electronic listing of employees covered by the Agreement (current and separated), along with each employee's leave balances and other pertinent information. In Section II.C. ("Attorney's Fees"), the Agency agrees to pay the Union $27,277.70. In Section II.D. ("Remedial Notice

[1] Hereafter, the Arbitrator's Award will simply be referred to as "the Award." All of the General Counsel's exhibits were attached to its MSJ and will simply be referred to as "GC Ex. __."

Posting"), it agreed to email every employee a copy of a notice advising them that the Agency violated the CBA and the Statute and that it would comply with Arbitrator Kasarda's Award. In Section II.E. ("Completion Date"), the Agency promised to "complete its obligations" under the Agreement within 45 days (which in this case was June 11, 2021). *Id.*

After the Settlement Agreement was executed, the Union followed up periodically with Agency officials to monitor compliance. On July 23, 2021 – six weeks after the June 11 compliance deadline -- Agency attorney Tokay Hackett advised Union attorney Thomas Dargon that the Agency had paid the Union's attorney's fees, pursuant to Section II.C. of the Agreement, but that other provisions had not yet been fulfilled. GC Ex. 6. In September of 2021, the Union filed its ULP charge, at which time attorneys from the FLRA Denver Regional Office of General Counsel began communicating with the Agency as well. On October 28, 2021, Daniel Borichevsky, a member of the Agency's labor relations staff, advised the GC that the Agency was "currently implementing the required 'make-whole' relief by identifying the most common regularly scheduled daily tours and recalculating accrued leave balances for physicians on compressed work schedules." GC Ex. 7 at 1. The Agency explained that this process was "taking longer than anticipated," as it required performing individual leave audits of just under 3,000 employees. *Id.* at 1-2. This letter was sent six months after the arbitrator's Award, four and one-half months after the Award's compliance deadline.

After further prodding from the GC, Agency attorney Iris Barber updated the GC on January 6, 2022. She indicated that pursuant to Section II.B. of the Agreement, the Agency had compiled the necessary leave balance information for about 75% of the active employees affected. GC Ex. 8 at 1. With regard to Section II.D. of the Agreement, she reported that the Agency had distributed the required Notice to Employees back in June of 2021, but she had recently learned that not all employees had received it; accordingly, the Agency had started redistributing the notices and expected to complete that task within a month. *Id.*

The final communication between the Agency, the Union, and the GC regarding compliance with the Settlement Agreement occurred in an email from Ms. Barber dated October 20, 2022 (almost exactly one year after Mr. Hackett's email assuring the Union that it was "currently implementing the required 'make-whole' relief"). Ms. Barber indicated that of the Agency's 20,706 eligible physicians, "less than 3000 physicians would have their leave impacted." GC Ex. 9 at 1. But the Agency had "discovered an inconsistency between how [two divisions of the Agency] were defining the 'most common tour of duty.'" *Id.* Therefore, "additional physician records needed to be reviewed for possible corrections." *Id.* Another 350 physicians had separated from the Agency since 2019, and she said the Agency would not even begin to audit their leave records until it had completed the calculations for active employees. *Id.* She offered to furnish a full list of the affected employees, with the appropriate leave balance information, pursuant to Section II.B. of the Agreement, once the process was completed. Finally, she advised the parties that all Agency facilities had posted the remedial notice to employees, as required by Section II.D. *Id.*

As of December 5, 2023, when the Respondent indicated that it would not oppose the GC's Motion for Summary Judgment and the record was closed, no additional evidence had been offered regarding further compliance with the Settlement Agreement.

POSITIONS OF THE PARTIES

General Counsel

In arguing that the Respondent has repudiated the Settlement Agreement, the GC makes two main points: that the Agency committed a clear and patent breach of the Agreement, and that the breach goes to the heart of the Agreement. MSJ at 7; *see Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 861-62 (1996) (*Scott AFB*). The GC notes that Section II.E. of the Agreement set a deadline of June 11, 2021, for the Agency to comply with the terms, and that the Agency had not complied with any of the terms by that date. MSJ at 8. The Agency complied with Section II.C. on July 23, six weeks late, when it paid the Union's attorney's fees, and it complied with Section II.D. in early 2022, when it sent a series of remedial notices to employees. But it still has not complied with Sections II.A. and II.B., as the Respondent conceded in late 2022 that it was still trying to identify all the physicians who are entitled to make-whole relief and had not even begun to calculate the leave balances of any of the separated employees (much less paid them).

Accordingly, the GC insists that both prongs of the repudiation test have been met. The terms of the Agreement are clear, in that it set a specific compliance deadline and required specific actions to occur by that date. Since none of those actions had occurred by June 11, 2021, the Agency's breach of the Agreement was clear and patent. *Id.* at 8. Furthermore, since the Settlement Agreement dealt only with the subject of correcting the leave balances for physicians, the Agency's failure to make any of those corrections goes to the heart of the Agreement. *Id.*

The GC addresses what it perceives to be the Respondent's only defense to the Complaint – that it diligently continues to attempt to comply with the terms of the Settlement Agreement – by noting the absence of any explanation by the Respondent for the inordinate delays in performing the required tasks. The GC recognizes that the Authority takes a more lenient approach to compliance when factors outside of an agency's control delay or prevent it from performing the required actions, and it cites *U.S. Penitentiary Florence, Colo.*, 54 FLRA 30 (1998) (*USP Florence*) as such an example. MSJ at 8-9. But in our case, the Respondent has not offered any evidence that would establish that its compliance delays were due to factors beyond its control. Rather, the letters from Agency officials simply point to mistakes and confusion within the Agency's bureaucracy in making the necessary leave calculations and in notifying employees and the Union of what it was doing. *Id.* Therefore, the GC submits that the ongoing failure of the Agency to comply with the Agreement constitute a repudiation. *Id.* at 9.

Respondent

The Respondent has not made much of an effort to contest the allegations of the Complaint. It stated in its Answer that the Agency "has consistently worked to fully comply with the settlement agreement," but the only evidence it offered in support of that theory was the notification letters it sent to physicians regarding the Settlement. Those letters show that the Agency complied with Section II.D. of the agreement in late 2021 and early 2022, several months late. Evidence produced by the GC also shows that the Respondent paid the Union's

attorney's fees in July 2021, several weeks late, and that Agency officials were at least attempting – through the remainder of 2021 and most of 2022 -- to make the leave balance calculations that were required to comply with other portions of the Settlement. Respondent does not actually formulate a legal argument, or cite any precedent in case law, to establish that these efforts were sufficient to rebut the alleged repudiation, nor has it offered evidence showing how its staff went about making the necessary leave balance calculations, or what obstacles the staff encountered that delayed the process for at least sixteen months. It did not file any written response to the Motion for Summary Judgment. Yet it still asserts that it has been working to comply with the Settlement Agreement.

ANALYSIS AND CONCLUSIONS

Despite the absence of any real effort on the Respondent's part to contest the GC's allegations, the resolution of this case is not as clear as it might initially seem. It is quite clear that the Respondent has violated the Settlement Agreement; it concedes as much. Sixteen months after it was required to fully comply with terms that it had agreed upon,[2] it had not calculated the proper leave balances for the approximately 3,000 active physicians who had had their leave reduced improperly; it was still trying to identify how many of these physicians there were; and it had not even begun to identify (much less pay) the retired and separated physicians who were entitled to lump sum payments under Section II.A.iv. of the Agreement. The crucial question for me, however, is not whether the Agency violated the Agreement, but whether it repudiated it.

In *Dep't of Defense, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1218-19 (1991), the Authority stated the basic premise that not every breach of contract constitutes a repudiation of the contract; rather, the nature and scope of the breach must be considered to determine whether it amounts to a repudiation of the obligation imposed by the contract. In *Scott AFB*, the Authority articulated the two-pronged test that has endured for evaluating these cases: was the breach clear and patent, and does it go to the heart of the parties' agreement? 51 FLRA at 862.

There is no doubt that in our case, the Agency's multiple failures to comply with the Settlement Agreement are clear and patent. The terms of the Agreement are explicit and not subject to reasonably differing interpretations: the Agency had a firm deadline of June 11, 2021, to calculate and restore the sick and annual leave balances of all physicians, and to make lump sum payments of the leave balances to those physicians who had separated from employment. The Respondent has not articulated any aspect in which the terms are ambiguous.

[2] It is worth noting here that the Agency has known that it was required to make its physicians whole for their improperly-reduced sick and annual leave at least since Arbitrator Kasarda issued his Award on December 30, 2020. While the Agency and the Union debated in the ensuing months how to implement that Award, until they executed their Settlement Agreement in April 2021 and delayed the Agency's obligation to comply until June 2021, the Agency could, and should, have been using those six months to undertake the administrative task of calculating the leave balances of thousands of employees. Thus, for purposes of the Complaint in this case, while the Agency was not officially obligated to complete its leave calculations and pay the physicians until June 11, 2021, my sympathy for the difficulty of its task is limited by the additional months that it seems to have wasted. My sympathy is further diluted by the fact that the physicians in question have had their sick and annual leave balances reduced since September 15, 2019, and are still awaiting restitution.

As of June 11, 2021, the Agency had not complied with any of the terms in Section II of the Agreement. It paid the required attorney's fees in July 2021, and it sent out the required notices to employees between late 2021 and early 2022; while it might be argued that its late compliance with these terms does not go to the heart of the Agreement, it is undisputable that it was a clear and patent breach. More importantly, however, as of the date the record closed on December 5, 2023, the Agency had still not completed its calculations of the physicians' leave balances, nor had it restored those balances for active employees or paid the separated employees for what they lost.

The entire dispute between the Agency and the Union – dating back to the Agency's unilateral change in leave policy in September 2019, which led to the Union's grievance the following month, the Arbitrator's Award in 2020, and the parties' Settlement Agreement in 2021 – has revolved around calculating how much leave the physicians were entitled to, when their leave balance was changed from "days" to "hours." The Agency recognized in November of 2019 that it needed to "modify" the physicians' leave balances to correct this mistake. *See* Award at 5. Arbitrator Kasarda affirmed that obligation in his Award, and the Settlement Agreement translated that obligation into a tangible formula for calculating how much, if anything, a physician was owed. Although the requirements of paying attorney's fees and sending notices to employees and the Union were meaningful aspects of the Settlement Agreement, the true "heart" of the Agreement is the requirement to restore the physicians' lost leave and to make lump sum payments to those physicians who have left the Agency. And while the Respondent appears to have made sporadic efforts since April of 2021 to calculate what it owes, it was still in the process of making these calculations in October 2022, and there is no evidence that it has completed the process in the two years since then. It is clear to me, therefore, that the Agency's failure to comply with Sections II.A. and II.B. of the Settlement Agreement is a clear and patent breach that goes to the heart of the entire agreement.

The one obstacle in making this conclusion is the fact that the Respondent has not renounced its intention to fulfill its obligations; rather, it says it is working on making all of the calculations necessary to restore lost leave to active employees and to pay lump sums to separated employees. Mr. Hackett said this in his letter to the Union in October of 2021 (GC Ex. 7 at 1), and Ms. Barber advised the General Counsel and the Union in her letters of January and October of 2022 (GC Exs. 8 and 9) that the Agency was making progress in completing those calculations. But its actions speak louder than its words. A taxpayer may insist that he intends to pay his 2023 income taxes, and he may even start compiling a list of his income and expenses, but when April 2024 spills over to October, and when his October 2024 extension spills over to 2025, his clear and patent breach of his obligation may require affirmative steps by the government to collect what it is due. In the minds of Mr. Hackett, Ms. Barber, and the Agency's personnel officials, they may still intend to make the VA physicians whole for the leave they have lost, but the lack of tangible progress for such a long time renders the distinction between "delay" and "repudiation" meaningless.

The Respondent's case is further undermined by its failure to offer any meaningful explanation for its delay. Mr. Hackett's July 23, 2021 email indicated that the Agency had paid the attorney fees but offered no information about the leave calculations. GC Ex. 6 at 1. Mr. Borichevsky's October 28, 2021 letter indicated that the Agency was "currently . . . identifying the most common regularly scheduled daily tours and recalculating accrued

leave balances" for just under 3,000 physicians; it stated simply that "the process . . . is taking longer than anticipated" due to the number of affected employees. GC Ex. 7 at 1-2. In her January 6, 2022 email, Ms. Barber advised that about 75% of the necessary leave calculations for active employees had been made, but when she reported again on October 20, 2022, she could provide no further details as to how many of the remaining 25% of the calculations had been performed. Instead, she reported that officials had discovered a discrepancy in the methods being used to calculate leave balances, which had resulted in the number of affected physicians rising from the earlier figure of just under 3,000. GC Ex. 9. Meanwhile, the recalculation process had not even begun for nearly 350 separated physicians. *Id.* This was less a "progress report" than a "getting-worse report." Between the active physicians whose leave still had not been calculated in October 2022 and the separated physicians, the "process" referred to by Mr. Borichevsky a year earlier had still yielded no useful information for over 1,000 physicians after sixteen months.

Admittedly, making leave calculations for 3,000 employees is a time-consuming task. Performing so many calculations would indeed have been daunting in 1975, but the computerization of personnel data has made this sort of work much less difficult. The formula for adjusting a physician's accrued leave is a simple arithmetic step, multiplying the employee's accrued leave by the "conversion rate" defined in Section II.A.i. of the Settlement Agreement. This may require a human to manually enter a few pieces of personnel information into a computer 3,000 times, but that still does not reasonably justify taking sixteen months or more. Thus, while Agency officials advised the Union that the process was "taking longer than anticipated" and that they needed to correct an "inconsistency" in the methodology, they failed to give any acceptable explanation for why the process should take so long.

The Authority has noted that "[w]here . . . [a] party has not disavowed its obligation under the contract and has failed to comply because of factors beyond its control, the Judge may properly find that there is not a clear and patent breach of the contract." *USP Florence*, 54 FLRA at 31. Indeed, the Respondent in our case has not disavowed the Settlement Agreement, but its failure to comply cannot be blamed on factors beyond its control. Between the date the parties received Arbitrator Kasarda's December 30, 2020 Award – in which he ordered the Agency to make employees whole for the leave they had lost -- and the date they executed their Settlement Agreement, the Agency and the Union negotiated the process for calculating the amount of lost leave to be restored and a formula for doing so. In establishing this formula and process, the Agency recognized the task before them, and it agreed to complete that task in forty-five days. It may well be that such a timeline was unrealistic, but it was not a factor beyond its control, in the way that the agency's failures in *USP Florence* were beyond its control. The agency in *USP Florence* provided a detailed explanation of a variety of incidents that disrupted its normal operations and delayed performance of its contractual obligations, as well as a government-wide funding lapse that prevented it from making purchases necessary to comply. *Id.* at 48-50.

Furthermore, while the record contains no specific explanations for the Respondent's delays in making the necessary leave balance calculations and adjustments required by the Settlement Agreement, the emails from Agency officials suggest that those delays were partly the result of inconsistent definitions of the term "most common tour of duty" in the Agreement, and partly due to the sheer number of calculations that needed to be performed. The first factor

points simply to administrative mistakes made by Agency personnel in performing the leave balance calculations, which might reasonably explain a delay of a month or two, but not sixteen months. The second factor is something that the Agency was aware of from the start, and hardly justifies its failure to comply. The Agency has known since September of 2019 that many hundreds of its physicians had lost leave because of the Agency's policy change; the numbers of affected physicians were further quantified in the Arbitrator's decision; so the Respondent certainly understood the extent of its obligation when it signed off on the Settlement Agreement in April 2021. The real explanation, in my view, is simply a failure to assign the necessary number of employees for the necessary length of time to get the job done. In other words, the Respondent failed to devote the resources necessary to perform the leave balance calculations, and when the process took "longer than anticipated," it failed to assign additional resources to speed the process. If the responsible officials didn't realize in April 2021 what it was agreeing to, it has had plenty of time in the ensuing three years to reassign additional employees and computer resources to speed up the process. Therefore, I can only conclude that the Respondent has, for all intents and purposes, repudiated its obligations under the Agreement.

Finally, I repeat my earlier observation that between the date of the Agency's most recent status report to the Union on October 20, 2022, and the date the record in this case was closed on December 5, 2023, there is no evidence that the Respondent made any further progress in complying with Sections II.A. and II.B. of the Agreement. In its Motion for Summary Judgment, the GC submitted evidence regarding the Respondent's noncompliance up to that date; the Respondent had the opportunity to offer evidence showing it had complied, but it demurred. Thus, the record shows not only that the Agency had failed to correct the leave balances of at least 1,000 physicians in the sixteen months between June 2021 and October 2022, but that it had not made any further progress in the thirteen subsequent months until the record closed.

An order from me, or from the Authority, to fully comply with the Settlement Agreement, is not going to magically clear the roadblocks that have prevented the Agency from making the leave calculations, records corrections, and back pay payments that it insists it has been trying to perform. What this order hopefully will do, however, is send a signal to the proper authorities within the Veterans Administration that the status quo is not acceptable; that the methods it has thus far used to perform the many recordkeeping calculations have not worked; and that additional administrative resources need to be allocated to accomplish these tasks. Good luck.

Therefore, the General Counsel's Motion for Summary Judgment is Granted. I conclude that the Respondent has violated § 7116(a)(1) and (5) of the Statute, and I recommend that the Authority issue the following Order:

ORDER

Pursuant to § 2423.41(c)of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Veterans Affairs, Washington, DC (the Respondent) shall:

1. Cease and desist from:

   (a) Failing or refusing to comply with Sections II.A. and II.B. of the April 2021 Settlement Agreement between the Department of Veterans Affairs and the National Veterans Affairs Council, American Federation of Government Employees, AFL-CIO, Re: National Grievance filed on October 9, 2019, NG-10/9/19, FMCS Case No. 200207-03752.

   (b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured under the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

   (a) Comply with Sections II.A. and II.B. of the April 2021 Settlement Agreement between the Department of Veterans Affairs and the National Veterans Affairs Council, American Federation of Government Employees, AFL-CIO, Re: National Grievance filed on October 9, 2019, NG-10/9/19, FMCS Case No. 200207-03752.

   (b) Post the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Under Secretary of Health, U.S. Department of Veterans Affairs, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

   (c) In addition to the physical posting of paper notices, disseminate a copy of the Notice electronically, on the same day as the physical posting, through the Respondent's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees. The message of the email transmitted with the Notice shall state, "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number DE-CA-21-0538."

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., December 31, 2024

Richard A. Pearson Digitally signed by Richard A. Pearson
Date: 2024.12.31 12:24:28 -05'00'

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Veterans Affairs, Washington, DC, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply with Sections II.A. and II.B. of the April 2021 Settlement Agreement between the Department of Veterans Affairs and the National Veterans Affairs Council, American Federation of Government Employees, AFL-CIO, Re: National Grievance filed on October 9, 2019, NG-10/9/19, FMCS Case No. 200207- 03752.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured under the Statute.

WE WILL comply with Sections II.A. and II.B. of the April 2021 Settlement Agreement between the Department of Veterans Affairs and the National Veterans Affairs Council, American Federation of Government Employees, AFL-CIO, Re: National Grievance filed on October 9, 2019, NG-10/9/19, FMCS Case No. 200207-03752.

_____

(Agency/Activity)

Date: _____ By: _____

(Signature) Under Secretary of Health

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80204, and whose telephone number is: (303) 225-0340.