

In the Matter of the  
Arbitration Between

JOHN J. PERSHING  
VETERANS' ADMINISTRATIVE  
CENTER, Poplar Bluff, MO

and

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 2338, Poplar Bluff, MO

FMCSNo. 210429-06296  
Failure to Follow Grievance  
Procedure

For the Agency: Dane R. Roper  
Agency Counsel  
Department of Veterans Affairs  
Office of General Counsel-Midwest Dist.  
1 Jefferson Barracks, 2<sup>nd</sup> Floor  
St. Louis, MO 63125

For the Union: Kevin Ellis, President  
Jacob Jordan, Union Representative  
AFGE, AFL-CIO Local 2338  
1550 West Wood Blvd.  
Poplar Bluff, MO 63901

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force since March 15, 2011, providing for final and binding arbitration (Jt. Exh. 1)<sup>1</sup>. The Arbitrator was selected by the parties from a panel submitted to them by the Federal Mediation and Conciliation Service. On July 13 and 14, 2022, a virtual remote arbitration hearing was conducted on the matter in Milwaukee, Wisconsin and Poplar Bluff, Missouri. A transcript of the hearing was made.

The parties stipulated that the Agency's Grievance, dated February 26, 2021, is properly before me as sole Arbitrator for the issuance of an award subject to the rights of the Agency or Union to appeal to the Federal Mediation and Conciliation Service. At the hearing, the parties were given full opportunity to present evidence, testimony, and arguments as deemed relevant.

The parties agreed to submit briefs and exhibits to the undersigned to determine, based on the briefs and exhibits, whether the Agency's Grievance, dated February 26, 2021 (Ag. Exh. 2) is arbitrable as a prerequisite to determining the merits of the Agency's Grievance. The Agency's Grievance alleges that the Union's Grievance, dated January 29, 2021 (Ag. Exh. 14), violated Article 43 of the Master Agreement by inappropriately skipping steps 1 or 2 of the negotiated grievance procedure.

The Briefs and Exhibits were received by November 14, 2022, at which time the matters became ready for the issuance of a final and binding award, subject to the appeal through the Federal Labor Relations Authority.

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<sup>1</sup> Citations in this Award will be as follows: "Jt. Exh. \_\_\_" to indicate a Joint Exhibit; "Ag. Exh. \_\_\_" to indicate an Agency Exhibit; and "Un. Exh. \_\_\_" to indicate a Union Exhibit.

## II. ISSUES

Was the Agency's Grievance untimely filed, therefore, not subject to arbitration?

Did the Union fail to follow the Master Agreement Grievance Procedure as outlined in Article 43, Sections 6 and 7? If so, what is the appropriate remedy?

## III. PERTINENT CONTRACT PROVISIONS

### **Section - 2**

This Department and the Union agree that a constructive and cooperative working relationship between labor and management is essential to achieving the Department's mission and to ensuring a quality work environment for all employees. The parties recognize that this relationship must be built on a solid foundation of trust, mutual respect, and a shared responsibility for organizational success. Therefore, the parties agree to work together using partnership principles, Labor-Management Forums, and the Master Agreement to identify problems and craft solutions, enhance productivity, and deliver the best quality of service to the nation's veterans.

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## **ARTICLE 43 – GRIEVANCE PROCEDURE**

### **Section 1 - Purpose**

The purpose of this article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for Title 5, Title 38 Hybrids and Title 38 bargaining unit employees in resolving grievances that are within its scope, except as provided in Sections 2 and 3.

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### **Section 4 - Jurisdiction**

If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim or non-grievability of non-arbitrability no later than the Step 3 decision.

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### **Section 6 – Informal Resolutions**

Most grievances arise from misunderstandings or disputes, which can be settled promptly and satisfactorily on an informal basis. The use of ADR is encouraged. The parties agree that every effort will be made to settle grievances at the lowest possible level. Inasmuch as dissatisfactions and disagreements arise occasionally among people in any work situation, the filing of a grievance shall not be construed as reflecting unfavorably on an employee's good standing, performance, loyalty, or desirability to the Department. Reasonable time during work hours will be allowed for employees and Union representatives to discuss, prepare for, and present grievances including attendance at meetings with management officials concerning the grievances, consistent with Article 48 – Official Time and local supplemental agreements.

### **Section 7 – Procedure**

- A. Grievance meetings under this procedure will be face-to-face at the location of the grievant. By mutual agreement, the parties to the grievance may agree to teleconference the grievance meeting. The Union is entitled to have an equal number of representatives at all steps of the grievance procedure as the Department.
- B. Employees and/or their representatives are encouraged to informally discuss issues of concern to them with their supervisors at any time. Employees and/or their representatives may request to talk with other appropriate officials about items of concern without filing a formal grievance if they choose. In the event of a formal filing of a grievance, the following steps will be followed.

#### **Step 1.**

An employee and/or the Union shall present the grievance to the immediate or acting supervisor, in writing, within 30 calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature. The immediate or acting supervisor will make every effort to resolve the grievance immediately but must meet with the employee/representative and provide a written answer within 14 calendar days of receipt of the grievance. If there is to be more than one Department official involved in the grievance meeting, the Union will be so notified in advance.

#### **Step 2.**

If the grievance is not satisfactorily resolved at Step 1, it shall be presented to the Service/Division Chief, or other equivalent Department official or designee within seven calendar days of the Step 1 supervisor's written decision letter. The recipient of the grievance shall sign and date the grievance. The Step 2 grievance must state, in

detail, the basis for the grievance and the corrective action desired. If there is to be more than one Department official involved in the grievance meeting, the Union will be so notified in advance. The Step 2 official will provide the Step 2 answer within 10 calendar days from receipt of the grievance.

Step 3.

If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved party or the Union shall submit the grievance to the Director within seven calendar days of receipt of the decision of Step 2. The recipient of the grievance shall date and sign the grievance. The Step 3 grievance must state, in detail, the basis for the grievance and the corrective action desired. The Director or designee shall meet with the aggrieved employee(s) and their Union representative(s) within seven calendar days from receipt of the Step 3 grievance to discuss the grievance. The Director or designee will render a written decision letter to the aggrieved employee(s) and the Union within 10 calendar days after the meeting.

Step 4.

If the grievance is not satisfactorily resolved in Step 3, the grievance may be referred to arbitration as provided in Article 44 – Arbitration. Only the Union or the Department can refer a grievance to arbitration.

Note 1: For Veterans Canteen Service (VCS) employees, Step 2 will be eliminated at those facilities where two levels of supervision are not present. In Step 3, the VCS Regional Manager, or his/her designee, will be the deciding official. The meeting will be at the duty station of the aggrieved employee and with an official higher than the Canteen Chief. By mutual agreement, the parties to the grievance may agree to teleconference the grievance meeting.

Note 2: For National Cemetery Administration (NCA) employees, where there are two levels of supervision, Step 1 will be the immediate supervisor. Step 2 will be an Assistant Cemetery Director where one exists and Step 3 will be the Cemetery Director. Where there is only one level of supervision, Step 1 will be the Cemetery Director and Step 1 time limits will apply; Step 2 will be eliminated and Step 3 will be the MSN Director or designee.

Note 3: For VA Headquarters unit employees, the officials listed below will replace those mentioned in the respective steps. If the local union requests, the Department shall advise the local union of the proper recipient of the grievance at each step.

Step 1 – Immediate supervisor

Step 2 – Service Director (or equivalent), or designee

Step 3 – Administration or Staff Office Head, or designee.

Note 4: At any step of the negotiated grievance procedure, when any management deciding official designates someone to act on his/her behalf, that designee will have the complete authority to render a decision at that step and will render the decision. The designee will never be someone who decided the issue at any previous step.

Note 5: It is agreed that grievances should normally be resolved at the lowest level possible. However, there will be times when a grievance may be more appropriately initiated at the second or third step of the procedure, for example, when a disciplinary action is taken by a Service Chief or higher level, when the supervisor at the lower level clearly has no authority to resolve the issue, or when the Union grieves an action of a management official other than a Step 1 supervisor. When a grievance is initiated at a higher step, the time limits of Step 1 will apply.

Note 6: Grievances over actions taken by VA Headquarters officials against field station employees may be grieved directly to arbitration in accordance with Article 44 – Arbitration. The request for arbitration in such cases should be made by the local union President or designee to the facility Director, clearly setting forth the basis for the grievance and the corrective action being requested. The parties may coordinate an effort for informal resolution prior to the actual arbitration.

Note 7: Local management-initiated grievances shall be filed with the local union president or designee and shall constitute Step 3 of the negotiated grievance procedure. Such grievance must be filed within 30 calendar days of the act or occurrence or when the Department became aware of, or should have become aware of, the act or occurrence. The time limits for the meeting and response will be 14 calendar days.

Note 8: The Union shall be provided a copy of all employee-filed grievances at all steps and all responses to those grievances. Copies of such grievances must be provided to the Union as soon as practicable, no later than two workdays after receipt. Copies of grievance responses must be provided to the Union when they are issued. When a grievance has been filed, the Department shall not discuss the grievance with the grievant unless the Union is given notice and an opportunity to be present. Any resolution of a grievance must be consistent with and not conflict with the terms of a collective bargaining agreement.

#### IV. STATEMENT OF FACTS

The John J. Pershing VA Medical Center provides physical and mental health care, including outpatient clinics throughout Missouri and Arkansas. The Union represents approximately 950 professional and non-professional full-time and part-time employees. The Union President, Kevin Ellis, has been employed by Pershing for approximately 20 years. Although Mr. Ellis's job title is Voluntary Services Specialist, he has served as a full-time Union representative since at least 2011 (Tr. 219-229; Jt. Exh. 1).

The basic issue, as stated in the Agency's Grievance (Ag. Ex. 2), is that the Union refused to follow the procedure set out in Article 43 of the Master Agreement by filing its grievance (Un. Exh. 14) at the third step of the Grievance Procedure, rather than at Step 1. Therefore, this Decision must originate from an analysis of Article 43 in regard to the Union's particular grievance.

In its grievance, dated January 29, 2021, the Union asserts that the Agency committed unfair labor practices by interfering with Mr. Ellis's ability, as Union President, to represent employees. The Grievance also charges the Agency with EEOC violations.

#### V. POSITIONS OF THE PARTIES

##### The Agency

The Agency argues that the Union interprets Article 43 of the Grievance Procedure to allow it full freedom to decide at which steps to initiate a grievance. This does not represent a plausible interpretation of the Master Agreement. Article 43, Section 6 of the Agreement states that "every effort will be made to settle grievances at the lowest possible level."

The Union's Grievance should have been filed at Step 1 of the Grievance Procedure. According to the Agency, first line supervisors are empowered to resolve a wide range of issues that are topics of grievances. This includes shifts, pay issues, harassment, workload, promotions, and hiring. There are seemingly few grievances aside from employment removals and certain rare grievances that can only be heard at the Step 3 level. Article 43, Section 7, Note 5 specifically states when a Step 1 grievance filing is not appropriate, but Step 2 or 3 grievance filing would be. This includes when discipline originates from a Service Chief or higher. When a Service Chief issues discipline, short of removal, a Step 2 grievance would be appropriate.

The Agency maintains that the Union's insistence that they are not required to abide by the plain meaning of Article 43 shows contempt for the contract itself. Filing grievances at Step 3, rather than the lowest appropriate step required by the Agreement, results in the misuse of the Director's time by necessitating the need to inquire into the minutiae of every service's hiring and leave practices.

As a remedy, the Agency requests, in writing, that the Union agrees to follow the direct meaning of the Master Agreement's Article 43 Grievance Procedure, which includes filing grievances at the lowest level, unless that supervisor clearly has no authority to resolve the issue. The Agency requests the Arbitrator to order the Union to agree, in writing, to follow the negotiated Grievance Procedure found in Article 43 and publicize that agreement to all bargaining unit employees and current facility leadership.

#### The Union

At the arbitration hearing, the Union charged that the Agency's Grievance was not subject to arbitration. It claimed that the Agency's Grievance, dated February 26, 2021, was



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✓ filing of the Agency's Grievance to be filed 31 days, not the required 30 days under Article 43, Section 7, Part D, Note 7. Therefore, the Agency's Grievance was time barred and not procedurally arbitrable. The Union also says that the Agency's Grievance is time barred due to noncompliance with the time limits stated for selection of choosing arbitrators set forth in Article 44. and

As to the merits of the Agency's Grievance, the Union maintains that for at least 20 years it has been the ongoing, uncontested practice of filing grievances straight to Step 3. According to the Union, a clear definition of past practice is as follows: "For a practice to develop into an established past practice, it must be followed with such consistency over a period of time that the employees may rely on and reasonably expect such practice to be continued as a permanent working condition, even though this condition is not specifically enunciated in the collective bargaining agreement." See *Beamis Co., Inc.*, 80 LA 1108, 1110 (Epstein, 1983).

The Union urges that it has proved by a preponderance of evidence that the Master Agreement language allows for grievances to be filed directly to Step 3, in accordance with Note 5, and does not mandate that every grievance be filed at Step 1, 2, and then 3. In conclusion it requests that the Agency's Grievance be either dismissed or denied.

## VI. DISCUSSION

The threshold question, a condition precedent to determining the merits of the Agency's Grievance, is whether the Grievance is arbitrable. Discussion on this point begins with an overview of the issues raised by the Union Grievance dated January 29, 2021 (Ag. Exh. 4) and the Agency Step 3 Grievance, dated February 26, 2021 (Ag. Exh. 2). The Union

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not received, because of an email error, until March 31, 2021. The email error caused the filing of the Agency's Grievance to be filed in 31 days, not the required 30 days under Article 43, Section 7, Part D, Note 7. Therefore, the Agency's Grievance was time barred and not procedurally arbitrable. The Union also argued that the Agency's Grievance was time barred due to noncompliance with the time limits stated for selection and choosing of arbitrators set forth in Article 44.

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## VI. DISCUSSION

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Exh. 14) and the Agency Step 3 Grievance, dated February 26, 2021 (Ag. Exh. 2). The Union argues that, because of an email error, it did not receive notice of the Agency's Grievance until March 1, 2021, which would be 31 days after the Union's Grievance was filed. Article 43, Note 7 provides that local management-initiated grievances "must be filed within 30 calendar days of the act or occurrence or when the Department became aware of, or should have become aware of, the act or occurrence." The evidence introduced at the hearing shows that the Union's Grievance was not received until January 30, 2021 (Ag. Exh.2). Therefore, the Agency filed its Grievance, dated February 26, 2021, in a timely manner, within 30 calendar days of when the Agency became aware of the Union's Grievance. Accordingly, the Agency's Grievance is timely and does not present a procedural bar to arbitrability.

In addition, Article 43, Section 4 – Jurisdiction lends credence to the premise that all issues of non-arbitrability should be raised during the Grievance Procedure or be considered waived. This is a unique situation of dueling grievances. Section 4 reads as follows:

*If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision.*

Consequently, it was incumbent on the Union to raise the issue of non-arbitrability no later than the third step decision.

On November 15, 2023, after the briefs were due, the Union objected to additional evidence in the form of affidavits submitted by the Agency. At the same time, the Union submitted additional evidence, allegedly showing that the Agency was in noncompliance with the time limits set out in Article 44 – Arbitration. I ruled in the Union's favor.

Generally, new evidence submitted by one or both parties after a hearing has been closed

should be ignored or stricken from the record. See Hill and Sinicropi, Evidence in Arbitration (BNA Books, 1980) p. 114. The same rule applies to both parties. As a result, I will not consider any evidence submitted after the close of the hearing, including noncompliance with Article 44.

At issue are the merits of the Agency's Grievance alleging that the Union's Grievance skipped Steps 1 and 2 and filed its Grievance improperly at the third step. Although Article 43 does not mandate that all grievances must be filed at the first step, it states that grievances "should normally be resolved at the lowest possible level." The plain interpretation of the word "normally" means "as a general rule"; hence, the applicability of filing a grievance at Step 1 should first be considered. However, there are exceptions listed in Note 5 where filing at a higher step level would be appropriate, such as:

*...when the supervisor at the lower level clearly has no authority to resolve the issue, or when the Union grieves an action of a management official other than a Step 1 supervisor.*

The Union contends it has the right to file grievances at any step, which, in its judgment, it feels appropriate. Article 44 provides specific steps for the processing of grievances, and Note 5 lists the exceptions. It reasons that the Agency had been aware of the Union's filing grievances straight from Step 3 for many years without objection, resulting in the creation of a past practice. I have reviewed all of the Agency's exhibits and the Union's exhibits in regard to the subject matter of the grievances and awards. There is no clear thread that runs through the exhibits that establishes a past practice as to which step constitutes an appropriate filing. Each grievance must be judged on its specific allegations as to whether it has been filed at the appropriate step. The evidence failed entirely to establish an existing

past practice. Furthermore, it is a generally accepted arbitration principle, needing no citation, that past practice refuses to imply meaning to the terms of a collective bargaining agreement which is either ambiguous or silent on various subjects. Here, Note 5 identifies the exceptions for filing grievances at an advanced step.

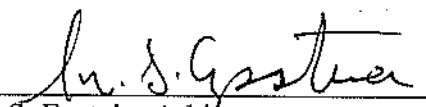
My decision is based on the specific allegations found in the Union's Grievance (Ag. Exh. 14). It is beyond the scope of my authority provided by the Master Agreement to define the subjects and corresponding steps at which grievances should be filed. I am also without authority to comment on the parties' collective bargaining relationship.

The Union's Grievance alleges an unfair labor practice, an EEO complaint and discrimination against Union President Ellis, based on Union activity. These are the type of assertions, if true, which would affect the entire bargaining unit. These are issues, by their nature, which are not capable of being settled at the preliminary stages of the procedure and must be resolved at a higher level of management such as the District Director. Accordingly, I find that this specific grievance (Ag. Exh. 14) was properly filed by the Union at the third step.

## VII. AWARD

Having considered all the evidence and arguments submitted in this matter, it is the Arbitrator's conclusion that the Union did not violate Article 43 of the Master Agreement by filing its Grievance at the third step of the Grievance Procedure.

Dated this 11<sup>th</sup> day of December, 2023.

  
Ira S. Epstein, Arbitrator