

BEFORE ARBITRATOR PATRICK L. DUNN

)	
IN THE MATTER OF ARBITRATION)	
BETWEEN:)	
)	
AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES, LOCAL 906,)	
Union,)	
)	FMCS No. 200424-06178
and)	
)	
DEPARTMENT OF VETERANS AFFAIRS)	
KANSAS CITY VETERANS AFFAIRS)	
MEDICAL CENTER (KCVA),)	
Agency.)	March 16, 2022
)	

DEPARTMENT OF VETERANS AFFAIRS POST-HEARING BRIEF

American Federation of Government Employees Local 910 (Union) filed a grievance (FMCS No. 200424-06178) on behalf of the entire Local 910 bargaining unit, not receiving the additional 20% retention incentive pay during the COVID-19 pandemic, at the Kansas City Veterans Affairs Medical Center (KCVA), in Kansas City, Missouri. On December 7, 2021, Arbitrator Dunn presided over an arbitration hearing during which the parties presented witness testimony and evidence. Following the hearing, the parties agreed to submit post-hearing briefs by March 15, 2022. By request of the Union, with no objection from the Agency, this date was extended to March 18, 2022. Accordingly, the Agency timely submits its post-hearing brief in this matter.

I. INTRODUCTION

On May 5, 2020, the Union filed a step 3 grievance alleging that the Agency violated the Master, Collective Bargaining, Agreement (“CBA”), specifically articles 16 and 17, by not providing all Local 910 bargaining unit employee retention incentives during the COVID-19

Pandemic. *See* Joint Exhibit 2. On May 12, 2020, the Agency denied the step 3 grievance. *See* Joint Exhibit 3.

II. STATEMENT OF THE ISSUES¹

1. Are retention incentives an award, as the term award is described in the CBA?
2. If retention incentives are an award, did management violate the CBA in its administration of them during the time period of March 2020 – current?
3. If retention incentives are not an award, did management apply them in accordance with VA policy, Office of the Chief Human Capital Officer (OCHCO) guidelines and Federal Code of Regulations?
4. If the arbitrator answers either issue 2 or 3 in the affirmative, what is the remedy?

III. SUMMARY OF THE AGENCY’S ARGUMENT

The hearing testimony and other evidence adduced at the hearing established that retention incentives are not awards, as the term is defined in the CBA, and that the Agency appropriately approved retention incentives for groups of employees in accordance with Agency policy, OCHCO guidelines and Federal Code of Regulations, during the COVID-19 pandemic (March 2020 – current).

IV. SUMMARY OF FACTS

In early 2020, COVID-19 was declared a global pandemic. In March of 2020, KCVA began to utilize retention incentives for certain positions due to the need to retain those positions during the pandemic response. *See* Agency Exhibits 4-22. Retention incentives are a tool that is used by the medical center to retain employees that are in a position that is key to the operation of a medical center or if there is an expectation that the employee or group of employees will

¹ The parties did not agree as to the issue(s) in this case.

leave federal service. *See* Hearing Transcript (HT), p. 144, lines 5-12. *See also*, Agency Exhibits 1, 2, 23-24. Positions that were approved for retention incentives at KCVA, related to the need to retain these employees during the COVID-19 pandemic, include:

- 1) Licensed Practical Nurse. *See* Agency Exhibit 4.
- 2) Nursing Assistant. *See* Agency Exhibit 5.
- 3) Medical Support Assistant. *See* Agency Exhibit 6.
- 4) Police Officer. *See* Agency Exhibit 7.
- 5) Security Assistant. *See* Agency Exhibit 8.
- 6) Security Clerk. *See* Agency Exhibit 9.
- 7) Security Officer. *See* Agency Exhibit 10.
- 8) Housekeeping Aid. *See* Agency Exhibit 11.
- 9) Registered Respiratory Therapist. *See* Agency Exhibit 12.
- 10) Certified Respiratory Therapist. *See* Agency Exhibit 13.
- 11) Medical Instrument Technician (Polysomn). *See* Agency Exhibit 14.
- 12) Medical Instrument Technician (EEG). *See* Agency Exhibit 15.
- 13) Health Technician. *See* Agency Exhibit 16.
- 14) Hospital Housekeeping Officer. *See* Agency Exhibit 17.
- 15) Medical Technician. *See* Agency Exhibit 18.
- 16) Pharmacist. *See* Agency Exhibit 19.
- 17) Medical Supply Technician. *See* Agency Exhibit 20.
- 18) Maintenance Mechanic. *See* Agency Exhibit 21.
- 19) OIT Employees. *See* Agency Exhibit 22.

Agency Exhibits 4-22, expressly state the nine factors that were used for each position to determine essential needs to retain. More specifically, each form addresses the position in question, regarding, the employment trends and labor-market factors, recent recruitment efforts, special unique competencies required for the position, efforts to use non-pay authorities, desirability of the duties, work or organizational environmental, or geographic location of the position, affect on the department if employee is not retained, salaries typically paid outside of the federal service, the quality and availability of potential sources of employees identified in the organization's succession plan, likelihood of leaving federal service and other supporting factors. *See* Agency Exhibits 4-22.

Additionally, Daniel Karr, Human Resources Officer for VISN 15, supplemented the paper evidence contained in Agency Exhibits 4-22 regarding why certain positions received a retention incentive and certain positions did not. First, positions in the emergency room were looked at due to emergency operations needing to be maintained. *See* HT, p. 149, lines 2-5. Second, positions in the inpatient units were looked at because the facility was receiving patients who were critically ill. *Id.* at lines 5-7. Third, the facility looked at critical care units due to their highly specialized need. *Id.* at lines 8-11. Lastly, the facility looked at some operational needs of the facility. *Id.* at lines 12-13. Daniel Karr testified as to the reason the Agency took the actions that it did for the following retention incentives that it provided, supplementing Agency Exhibits 4-22:

- 1) Licensed Practical Nurse. *See* Agency Exhibit 4.

During the pandemic, advertising for critical care nurses came to a head whereby they were being offered thousands and thousands of dollars a week to pull these employees

away from the Agency which is why Licensed Practical Nurses were offered a retention incentive at KCVA. *See* HT, p. 151, lines 10-23.

2) Nursing Assistant. *See* Agency Exhibit 5.

Not all Nursing Assistants at KCVA received a retention incentive, only those who worked in inpatient units, critical care units, and emergency department units. This position was selected because those areas were operating on a continual basis and the facility could not afford to lose those employees as they were not easily replaceable. *See* HT, p. 155, lines 1-20.

3) Medical Support Assistant. *See* Agency Exhibit 6.

Not all Medical Support Assistant's at KCVA received a retention incentive. The facility focused on Medical Support Assistant's that were providing services that were critical at that time for the Agency to provide continuity of care. *See* HT, p. 160, lines 15-17; p 161, lines 6-9.

4) Police Officer. *See* Agency Exhibit 7.

Police Officer's provide security and assistance to the Agency's clinical staff which requires very specific VA training. Police Officer's are required to attend a specific academy in Little Rock, Arkansas before they can work as an Agency Police Officer. When the pandemic started, the academy closed and was shut down for about a year. Without training and the academy open, the Agency could not get any new officers trained such that if the Agency lost someone, they may be irreplaceable. Police Officers are critical to the mission of the VA. *See* HT, p. 163, lines 1-25; p. 164, lines 1-5.

5) Security Assistant. *See* Agency Exhibit 8.

This employee does the PIV badging for employees and assists HR with background investigations. The only employee who received this incentive was a bargaining unit employee. *See* HT, p. 167, lines, 16-21; p. 168, lines 1-16.

6) Security Clerk. *See* Agency Exhibit 9.

Security clerks are police dispatchers. They also monitor patient monitoring systems, fire alarms, carbon monoxide detectors, and monitor security cameras. Without security clerks, Agency police officers would be very limited in services they can provide. The facility has had a hard time keeping the unit staffed during COVID-19. Most of the employees who received this retention incentive were bargaining unit employees. *See* HT, p. 169, lines 4-25; p. 170, lines 1-22.

7) Security Officer. *See* Agency Exhibit 10.

The Security Officers are the Chief of Police and Deputy Chief of Police at KCVA. A retention incentive was necessary for them, the same as Police Officers, but compounded even more than that – in addition to the training and law enforcement experience they have at the VA, they are also the leadership of the department. They are responsible for interfacing with VA central office, the Agency’s VISN chief of police, and ensures that everything is followed to keep employees safe. *See* HT, p. 171, lines 20-22; p. 172, lines 10-22; p. 173, lines 1-14.

8) Housekeeping Aid. *See* Agency Exhibit 11.

This retention incentive is for housekeeping aides, housekeeping aid leader, and housekeeping supervisors. These individuals are responsible for a wide variety of sanitation type duties at the facility. These employees were chosen for retention

incentives because they provided very critical support to the clinical staff including heightened cleaning protocols due to COVID-19. These employees were being sought outside of the Agency whereby they were being offered more money. They are vital to the operation of the facility. Most of the employees in this group were bargaining unit employees. *See* HT, p. 174, lines 10-23; p. 176, lines 11-25; p. 177, lines 1-25.

9) Registered Respiratory Therapist. *See* Agency Exhibit 12.

Registered Respiratory Therapists provide respiratory treatment to Veterans. COVID-19 caused a lot of respiratory-type symptoms which made these employees indispensable to the Agency. This position was being heavily recruited outside of the VA. Most of the individuals in this group who received an incentive were bargaining unit employees. *See* HT, p. 178, lines 17-22; p. 179, lines 3-22.

10) Certified Respiratory Therapist. *See* Agency Exhibit 13.

Registered Respiratory Therapists and Certified Respiratory Therapists do essentially the same job. The Agency now dictates that Respiratory Therapists must be registered not certified, but those who were hired before this change were grandfathered in. The reason for the approval in this group is the same reason for the approval as to Registered Respiratory Therapists. The one employee in this group is a bargaining unit member. *See* HT, p. 180, lines 24-25; p. 181, lines 1-25; p. 182, line 1-4.

11) Medical Instrument Technician (Polysomn). *See* Agency Exhibit 14.

Medical Instrument Technicians (polysomn), also known as Polysomnography Technicians, in normal circumstances administer the sleeping tests for sleep apnea and other tests that have to do with the airway obstructions, etc. However, during COVID-19, the Agency used those individuals to help supplement the registered/certified respiratory

therapists because they have similar training, and their clinical competencies allow them to do respiratory treatments that were needed during COVID-19. The individuals in this group that received a retention incentive are bargaining unit employees. *See* HT, p. 183, lines 6-20; p. 184, lines 13-17.

12) Medical Instrument Technician (EEG). *See* Agency Exhibit 15.

Medical Instrument Technicians (EEG) performed they the test on the cardiovascular system so that physicians can interpret and provide care. Due to COVID-19 being a respiratory focused disease, some patients were experiencing abnormal breathing or abnormal cardiovascular function. An EEG (electroencephalogram) or EKG (electrocardiogram) became necessary in medical treatment of Veterans. This retention incentive was approved, but never given to any employees because the demand for these technicians did not come so a retention incentive was unnecessary. *See* HT, p. 185, lines 1-25; p. 186, lines 1-15.

13) Health Technician. *See* Agency Exhibit 16.

Health Technicians are very similar to Nursing Assistants and perform similar job duties. However, the Agency utilizes Nursing Assistants in more complex areas. At KCVA, none of the Health Technicians were in critical care, emergency room or inpatient. This position was approved for a retention incentive, but the Agency found that these employees were not being highly sought after in the community and none of the employees were in the areas where their job was vital to the mission of the Agency. If they had left, it would not have been detrimental to the Agency. *See* HT, p. 187, lines 11-23; p. 188, lines 1-25; p. 189, lines 1-17.

14) Hospital Housekeeping Officer. *See* Agency Exhibit 17.

This position is the head of the facility's housekeeping and sanitation department. The Housekeeping Officer is responsible for ensuring the department functions, makes sure the cleaning processes meet the standards, whether it be the Environmental Protection Agency (EPA) standards or Centers for Disease Control (CDC) and Joint Commission Standards. During COVID-19, these policies/procedures continued to change and develop, and the Housekeeping Officer made sure the facility stayed current on internal and external guidance. During the pandemic, the Housekeeping Officer at KCVA was without a Deputy so losing him would have been detrimental to the Agency. *See* HT, p. 190, lines 14-25; p. 191, lines 1-22.

15) Medical Technician. *See* Agency Exhibit 18.

A medical technician is a pathology laboratory employee who assists with processing of collected specimens which was necessary during COVID-19. When VISN 15 initiated the COVID-19 response, KCVA was one of two facilities that received the equipment necessary to process COVID-19 tests and had to process tests for its facility but also for facilities in Columbia, Missouri, Topeka, Kansas, Leavenworth, Kansas and Wichita, Kansas. The work of the medical technicians increased substantially, and they were being sought outside of the Agency so the likelihood of them leaving increased. It would have been detrimental to the Agency to lose these employees. Most of the employees in this group are bargaining unit employees. *See* HT, p. 192, line 25; p. 193, lines 1-25; p. 194, lines 1-17; p. 195, lines 8-17.

16) Pharmacist. *See* Agency Exhibit 19.

The individual who was approved a retention incentive here was the Chief of Pharmacy service who was instrumental in the initial response to COVID-19 and the vaccination process. The Chief was the one that was responsible for ensuring that the COVID-19 vaccine was handled/administered appropriately and kept the vaccine at the appropriate temperatures. The Chief was not only responsible for ensuring KCVA received the vaccines at appropriate temperatures but was also responsible for distribution to facilities in Columbia, Missouri, Topeka, Kansas, Leavenworth, Kansas and Wichita, Kansas. It would have been detrimental to the Agency had the Chief been recruited away from KCVA. *See* HT, p. 196, lines 9-17; p. 197, lines 1-10.

17) Medical Supply Technician. *See* Agency Exhibit 20.

Medical supply technicians work in the sterile processing service that is responsible for decontaminating equipment, cleaning equipment and sterilizing equipment for future use. In general, this department has issues retaining employees. *See* HT, p. 198, lines 16-21, p. 199, lines, 1-9.

18) Maintenance Mechanic. *See* Agency Exhibit 21.

This incentive was specifically targeted at maintenance mechanics who operate the central plants, which is responsible for 24/7 operation and provides the steam, hot water, and cold water to the medical center. These mechanics are the most highly specialized facilities workers that work at KCVA and without them the hospital could not function which placed the facility at risk. *See* HT, p. 200, lines 13-18; p. 201, lines 3-16.

19) OIT Employees. *See* Agency Exhibit 22.

The Director of KCVA does not have authority to make decisions about retention incentives as it applies to Office of Information and Technology (OIT) employees, but the facility was aware of the incentives due to the facility having to code the incentives. *See* HT, p. 206, lines 9-24.

Dr. Kelly Goudreau, Associate Director for Patient Care Services, testified that it would be inappropriate to give a blanket retention incentive to all bargaining unit employees because there was not an issue retaining all bargaining unit employees. *See* HT, p. 68, lines 11-16. Additionally, Dr. Goudreau testified that COVID-19 exposure was not a factor in determining who received a retention incentive – retention of staff in critical care and inpatient areas was the purpose. *See* HT, p. 66, lines 11-25. Dr. Goudreau also testified that the difference between a retention incentive and award is that an award provides a one-time cash award that provides recognition for an employee while a retention incentive is used for retention needs for employees in specific areas. *See* HT, p. 62, lines 4-10; p. 67, lines 20-22.

David Isaacks, former Executive Director of KCVA, testified that retention incentives are utilized to retain certain skills or abilities of a workforce when competition with the private sector is an issue. *See* HT, p. 91, lines 5-16. The criteria used to establish who will receive a retention incentive was developed by the Office of Personnel Management (OPM) and includes things such as the skills that are being retained, the need for those skills, whether the skill can be replaced in a timely manner as well as things like vacancy rates or turnover rates. *Id.* at lines 17-21. Director Isaacks testified that retention incentives are a tool used by management to retain employees. *See* HT, p. 94, lines 2-6. Additionally, Director Isaacks testified that retention incentives are not awards, further distinguishing that retention incentives are used to retain and

compensate while awards are related to a specific accomplishment. *Id.* lines 18-25. It is in the executive director's sole discretion to apply a retention incentive to an employee or group of employees. *See* HT, p. 95, lines 8-10. Regardless of the external forces that are on the organization, such as a pandemic, the same criteria are applied for retention and recruitment incentives. *See* HT, p. 99, lines 6-14. When the pandemic hit, KCVA looked across their enterprise to determine where certain employee loss could be detrimental to operations. *See* HT, p. 100, lines 6-12. Director Isaacks testified, that exposure to COVID-19 was irrelevant to selections for retention incentives because it was about the impact to the Agency and having the skills and abilities to maintain operations. *See* HT, p. 101, lines 2-14. Director Isaacks further testified that he did not consider bargaining unit status when approving or disapproving a retention incentive because that would have been irrelevant. *See* HT, p. 105, lines 20-23. Lastly, Director Isaacks testified that it would be inappropriate to give a blanket retention incentive to all bargaining unit employees because not all bargaining unit positions are hard to fill, nor would they all meet the criteria for retention. *See* HT, p. 114, lines 8-25.

Zachariah Rounds, Supervisory Human Resource Specialist for compensation and staffing within the VISN 15 HRMS facilities, testified that retention incentives are a tool that medical center directors or network directors can utilize to maintain key staff or key functions within a service mission or critical items. *See* HT, p. 119, lines 22-25; p. 120, lines 1-19. Additionally, he testified that retention incentives are not awards. *See* HT, p. 121, lines 19-23. It is the sole discretion of medical center director, unless the range that is being requested is in excess of his or her approval limits, to apply a retention incentive. *See* HT, p. 122, lines 2-8. Mr. Rounds testified that retention incentives are not an entitlement and can be terminated at any time. *See* HT, p. 124, lines 5-15. Mr. Rounds testified that bargaining unit status is not assessed

when making a determination on a retention incentive and that it is specifically about the position in question. *See* HT, p. 128, lines 8-22. Additionally, Mr. Rounds testified that KCVA followed all Office of Chief Human Capital Officer (OCHCO) guidelines and the Code of Federal Regulations when applying retention incentives during the pandemic. *See* HT, p. 131, lines 15-24; p. 136, lines 4-13; p. 137, lines 21-24

V. APPLICABLE LAW; CBA PROVISIONS; AND VA POLICIES/PROCEDURES

Collective Bargaining Agreement (CBA)

Article 2: Governing Laws and Regulations

- **Section 1: Relationship to Laws and Regulations**

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

Article 16: Employee Awards and Recognition

- **Section 1: Background and Purpose:**

Recognition of employees through monetary and non-monetary awards reflects the parties' efforts to promote continuous improvement in Department performance. The employee recognition program provides a positive indication of the parties' commitment to providing quality public service. The employee recognition program, as described in this article, has the following characteristics:

- A) It is an incentive program; that is, employee recognition is based on achievement and improvement. Achievements are linked to the Department's mission of providing high quality care and service to veterans and the public. The program is intended to motivate employees to strive for excellence. Strong emphasis is placed on recognition of efforts to improve service to veterans and the public.
- B) It recognizes the accomplishments of employees both as individuals and as members of groups or teams. Because of the interrelationship of work performed by employees, enhanced Department performance is sought through teamwork, not through competition among individuals. This program is based on the concept that individual employees who, through personal efforts and accomplishments support the goals of their teams, work units and, thus, deserve recognition. It is also based on the concept that groups or teams which improve Department

performance deserve recognition. It recognizes that the Department, the Union, and employees have important roles in identifying and recognizing employees deserving of awards and praise. The intent of this program is to promote a positive work environment and to link awards to employee contributions that enhance Department performance.

- C) Further, it is the intent of this program to ensure that employees will be appropriately rewarded regardless of changes in the Department's organizational structure, work processes, or work initiatives.

- **Section 2: Policy**

- A) There is no limit on the number of awards that employees may receive or the frequency with which they may receive awards unless otherwise stated in this article.

- B) When employees are considered for awards, the relative significance and impact of their contributions will be considered in determining which type of award would constitute appropriate recognition and, for monetary awards, in determining the amount of money to be granted. Funding availability must also be considered in the granting of monetary awards.

- C) Awards will be processed in a timely and expeditious manner.

- D) The Department will provide an award recipient with written documentation that clearly articulates the specific reason(s) that the employee received the award. Employees are encouraged to relate this information to specific evaluation criteria when completing applications for merit promotion.

- **Section 3: Types of Awards**

Awards which employees may be eligible to receive include but are not limited to:

- A) Special Contribution Award
- B) Instant Award
- C) Suggestion Award
- D) Time-off Award

- **Section 5: Monetary Awards**

- A) Special Contribution Awards

The special contribution award is a special act or service award which recognizes individuals or groups for major accomplishments or contributions which have promoted the mission of the organization. Award amounts should be linked to the significance and impact of the

accomplishment or contribution. A special contribution award may be made to an individual employee or to a group. A group may consist of individuals from a single organization or multiple components/offices/units.

B) Instant Awards

This is a special act or service award given to an employee for noteworthy contributions or accomplishments in the public interest which are connected with or related to the recipient's official employment. The distinction between a special contribution award and an instant award rests in the relative significance of the contribution or accomplishment.

C) Suggestion Awards

The Department will encourage employees to file suggestions under the Department's Suggestion Program. Suggestions will be considered in a fair and equitable manner. Suggestion awards will be appropriate for tangible suggestions, intangible suggestions, and problem identification, as defined in the Department's Suggestion Program.

- 1) In the event no decision is made regarding adoption or non-adoption of a suggestion within 90 days of submission, the employee, upon request, will be given a written or oral status report.
- 2) Non-adoption of employee suggestions is to be written and contain specific reasons for non-adoption.
- 3) If the idea set forth in a rejected suggestion is later adopted, the appropriate suggestion coordinator will reopen the case for award consideration if the matter is brought to their attention within two years after the date of rejection notice.

Article 17: Employee Rights

- **Section 1: General**

- A) In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping conditions irrespective of the work performed or grade assigned. Employees will also be afforded proper regard for and protection of their privacy and constitutional rights. It is therefore agreed that the Department will endeavor to establish working

conditions that are conducive to enhancing and improving employee morale and efficiency.

- B) Instructions will be given in a reasonable and constructive manner. Such guidance will be provided in an atmosphere that will avoid public embarrassment or ridicule.
- C) If an employee is to be served with a warrant or subpoena, it will be done in private without the knowledge of other employees to the extent it is within the Department's control.
- D) No disciplinary, adverse, or major adverse action will be taken against an employee upon an ill-founded basis such as unsubstantiated rumors or gossip.
- E) No employee will be subjected to intimidation, coercion, harassment, or unreasonable working conditions as reprisal or be used as an example to threaten other employees.
- F) Recognizing that productivity is enhanced when employee morale is high, managers, supervisors, and employees shall endeavor to treat one another with utmost respect and dignity.
- G) An employee who exercises any statutory or contractual right shall not be subjected to reprisal or retaliation, and shall be treated fairly and equitably.
- H) All VA employees will, consistent with the Master Agreement and other collective bargaining agreements:
 - 1) Be provided a healthy and safe environment;
 - 2) Be encouraged to give suggestions and ideas to make the Department a better workplace and enable the Department to better serve veterans;
 - 3) Be encouraged to enhance their work life and career development; and,
 - 4) Be afforded assistance and told of expectations by the Department to enable them to perform their jobs.

- **Section 8: Dignity and Self Respect in Working Conditions**

Employees, individually and collectively, have the right to expect, and to pursue, conditions of employment which promote and sustain human dignity and self-respect.

- **Section 12: Improper Orders**

An employee has the right to question an improper order that would direct him/her to act outside the scope of practice, privileges, competencies, or qualifications. The employee will promptly bring his/her concern about the

improper order to an appropriate supervisor. The supervisor will promptly apprise the employee whether the order was proper or improper. A refusal to obey an improper order will not subject the employee to disciplinary or adverse action or major adverse action.

- **Section 13: Conflicting Orders**

When an employee receives conflicting orders, he/she will bring the conflict to the attention of the supervisor who gave the last order or another appropriate supervisor. The employee will be given a clarified order. The employee will not be subject to disciplinary, major adverse or adverse action for following the clarified order.

5 C.F.R. 575.308 – Agency Exhibit 23

- (a) An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may approve a retention incentive for an individual employee or group or category of employees using the approval criteria in § 575.306.
- (b) For each determination to pay a retention incentive under this subpart, an agency must document in writing
 - (1) The basis for determining that the unusually high or unique qualifications of the employee (or group of employees) or a special need of the agency for the employee's (or group of employees') services makes it essential to retain the employee(s);
 - (2) The basis for determining that the employee (or a significant number of employees in a group) would be likely to leave the Federal service in the absence of a retention incentive; and
 - (3) The basis for establishing the amount and timing of the approved retention incentive payment and the length of the required service period.

5 C.F.R. 575.306 – Agency Exhibit 24

- (a) Authority of authorized agency official. An authorized agency official retains sole and exclusive discretion, subject only to OPM review and oversight, to —
 - (1) Determine when the unusually high or unique qualifications (i.e., competencies) of an employee or a special need of the agency for the employee's services makes it essential to retain the employee and when the employee would be likely to leave the Federal service in the absence of a retention incentive;
 - (2) Determine when a group or category of employees has unusually high or unique qualifications (i.e., competencies) or when an agency has a

special need for the employees' services that makes it essential to retain the employees in that group or category and when there is a high risk that a significant number of employees in the group would be likely to leave the Federal service in the absence of a retention incentive;

- (3) Approve a retention incentive for an employee (or group or category of employees, except as prohibited by § 575.305(c)) in a position (or positions) listed in § 575.303;
 - (4) Establish the criteria for determining the amount of a retention incentive and the length of a service period under §§ 575.309 and 575.310, respectively;
 - (5) Request a waiver from OPM of the limitation on the maximum amount of a retention incentive for an employee (or group or category of employees) under § 575.309(e); and
 - (6) Establish the criteria for terminating a service agreement or retention incentive payments under § 575.311.
- (b) Factors for authorizing a retention incentive for an individual employee. An agency must consider the following factors, as applicable to the case at hand, in determining whether the unusually high or unique qualifications of an employee or a special need of the agency for an employee's services makes it essential to retain the employee and that the employee would be likely to leave the Federal service in the absence of a retention incentive:
- (1) Employment trends and labor market factors such as the availability and quality of candidates in the labor market possessing the competencies required for the position and who, with minimal training, cost, or disruption of service to the public, could perform the full range of duties and responsibilities of the employee's position at the level performed by the employee;
 - (2) The quality and availability of the potential sources of employees that are identified in any agency succession plan (e.g., succession plans required for leadership positions), who possess the competencies required for the position, and who, with minimal training, cost, and disruption of service to the public, could perform the full range of duties and responsibilities of the employee's position at the level performed by the employee;
 - (3) The success of recent efforts to recruit candidates and retain employees with competencies similar to those possessed by the employee for positions similar to the position held by the employee;

- (4) Special or unique competencies required for the position;
 - (5) Agency efforts to use non-pay authorities to help retain the employee instead of or in addition to a retention incentive, such as special training and work scheduling flexibilities or improving working conditions;
 - (6) The desirability of the duties, work or organizational environment, or geographic location of the position;
 - (7) The extent to which the employee's departure would affect the agency's ability to carry out an activity, perform a function, or complete a project that the agency deems essential to its mission;
 - (8) The salaries typically paid outside the Federal Government; and
 - (9) Other supporting factors.
- (c) Factors for authorizing a retention incentive for a group or category of employees. (1) An agency must consider the factors in paragraph (b) of this section as they relate to determining whether a group or category of employees —
- (i) Has unusually high or unique qualifications (i.e., competencies) or that the agency has a special need for the employees' services that makes it essential to retain the employees in that category; and
 - (ii) That it is reasonable to presume that there is a high risk that a significant number of employees in the targeted category would be likely to leave the Federal service in the absence of a retention incentive.
- (2) An agency must narrowly define a targeted category of employees using factors that relate to the conditions described in paragraph (c)(1) of this section. Factors that may be appropriate include the following: occupational series, grade level, distinctive job duties, unique competencies required for the position, assignment to a special project, minimum agency service requirements, organization or team designation, geographic location, and required rating of record. (While a rating of record of higher than the "Fully Successful" rating of record required by § 575.305(d) may be a factor used in defining the targeted category, a rating of record by itself is not sufficient to justify a retention incentive. A rating of record may function as a supporting factor in authorizing an incentive or setting the incentive rate only to the extent it directly relates to the conditions in paragraph (d) of this section.)

- (d) An agency must document the determinations required under paragraphs (b) and (c) of this section as required by § 575.308.

VA Handbook 5007/59 – Agency Exhibit 1

Part VI, Chapter 3:

1. General

a. Retention incentives may be used to retain full-time or part-time employees with high or unique qualifications or whose services are essential to a special VA need and are likely to leave Federal service without an incentive. These incentives are authorized under 5 U.S.C. § 5754, extended to title 38 employees under the authority of 38 U.S.C. § 7410, and are governed by regulations at 5 CFR part 575, subpart C, and the provisions of this chapter. For retention incentives based on the closure or relocation of the employee's office, facility or organization refer to Appendix VI-Q, Retention Incentive Due to the Closure or Relocation of Employing Office, Facility or Organization.

...

e. A retention incentive is an effective tool only when strategically and prudently used to retain employees with high or unique qualifications or whose services are essential to a special VA need when such employees are likely to leave Federal service without an incentive. A retention incentive is not appropriate when used primarily to compensate high performing employees for their services or essential employees who are not likely to leave Federal service...

7. Authorization of Retention Incentives

a. VA Form 10017, Authorization and Review of Retention Incentive, in Appendix VI-C must be used for the authorization and review of all retention incentives (except retention incentives authorized for the Office of Inspector General).

b. A retention incentive may be authorized for an employee or group of employees whose retention is essential because of unusually high or unique qualifications (i.e., competencies) or a special need of the Department and who would otherwise leave the Federal service if an incentive were not authorized. The authorization must fully document the factors demonstrating the essential need to retain and the basis for

determining that the employee or group would likely leave Federal service without the incentive.²

Office of the Chief Human Capital Officer (OCHCO) Bulletin – Agency Exhibit 2

- “Recruitment, relocation and retention incentives are important tools that can be used to strategically address recruitment and retention challenges during the COVID-19 pandemic...” *See* p. 1.
- “Retention incentives are used to retain current employees with superior or unique competencies in positions that are likely difficult to fill or whose services are essential to meet a special need and are likely to leave Federal service without an incentive. Retention incentives may be offered to individuals on temporary appointments.” *See* p. 3.

VI. ARGUMENT

1. Are retention incentives an award, as the term award is described in the CBA?

It is apparent that the Union wants to argue that the retention incentives received by some KCVA employees during the COVID-19 pandemic are essentially awards – simply put, retention incentives are not awards. The testimonial evidence and paper evidence is clear that retention incentives are a managerial tool that can be used to strategically address recruitment and retention challenges. *See* Agency Exhibit 2. In fact, the Collective Bargaining Agreement (CBA) is silent as to retention incentives and certainly does not classify them as an award. In Article 16, Section 3, the CBA states the types of awards bargaining unit employees may receive: A) Special Contribution Award; B) Instant Award; C) Suggestion Award; D) Time-off Award. Nowhere in the CBA does it state that a retention incentive approved by the Director is considered an award.

Article 16, Section 1, states that employee awards should be used for recognition of employees through monetary and non-monetary awards to promote the parties’ continuous

² The Handbook cites to the nine factors that must be considered to establish the essential need to retain and the likelihood to leave federal service which is all consistent with what must be addressed in 5 C.F.R. 575.306 and 575.308 as outlined above. The Agency believes it would be repetitive to cite it here again.

improvement in Department performance. However, VA Handbook 5007/79, Part VI, Chapter 3(e) makes it clear that retention incentives are not appropriate when used primarily to compensate high performing employees for their services or essential employees who are not likely to leave Federal service. *See* Agency Exhibit 1. In this case, KCVA authorized 19 individuals/groups of people for retention incentives, pursuant to 5 C.F.R. 575.306 and 575.308, VA Handbook 5007/79, Part VI, Chapter 3, and OCHCO guidance, during the pandemic for those employees that were hard to retain and met the criteria as outlined in the law/policies identified. The Agency never classified these retention incentives as awards. In fact, Director Isaacks, Human Resources Officer for VISN 15 Daniel Karr, Associate Director for Patient Care Services Dr. Kelly Goudreau, and Supervisory Human Resource Specialist for compensation and staffing within the VISN 15 HRMS facilities Zachariah Rounds, all testified unequivocally and credibly that retention incentives are not awards. The Union provided no evidence to support this contention.

2. If retention incentives are not an award, did management apply them in accordance with VA policy, Office of the Chief Human Capital Officer (OCHCO) guidelines and Federal Code of Regulations?

The Agency correctly applied VA policy, OCHCO guidelines and the Federal Code of Regulations when it approved 19 groups of people and/or individuals for retention incentives during the pandemic at KCVA. The Union appears to want to argue that a blanket approval of retention incentives is appropriate for all bargaining unit employees during the pandemic. This assertion is contrary to Federal law, VA policy and OCHCO guidelines.

The Agency and its officials are governed by applicable federal statutes. Here, that is what governs. According to 5 C.F.R. 575.306(a)(1), an authorized agency official retains the sole

and exclusive discretion to determine when the competencies of an employee or the special need of the agency for the employee's services makes it essential to retain the employee and when the employee would likely leave Federal service absent a retention incentive. Likewise, an authorized agency official retains the sole and exclusive discretion as it applies to groups of employees. 5 C.F.R. 575.306(a)(2). Approval of retention incentives for an employee or group of employees also lies within the sole discretion of the authorized agency official. 5 C.F.R.306(a)(3). Nowhere in 5 C.F.R. 575.306 does it state that retention incentives are subject to local bargaining, instead it repeatedly asserts that retention incentive approvals and determination lie within the sole discretion of the Agency.

According to 5 C.F.R. 576.306(1-9), there are certain factors that must be assessed when authorizing a retention incentive, including: 1) employment trends and labor markets; 2) the quality and availability of employees in the Agency's succession plan; 3) success of recent efforts to recruit candidates in similar positions; 4) special or unique competencies for the position; 5) the Agency's efforts to use non-pay authorities; 6) desirability of position/work/organization and geographic location; 7) the extent the employee's departure would effect the Agency's mission; 8) the salaries paid outside federal government; 9) other supporting factors. *See* Agency Exhibit 24. Additionally, 5 C.F.R. 575.308, requires the Agency to document in writing its determination to pay a retention incentive. Here, the Agency clearly cites to, in writing, all of the factors it considered, and described each, for all 19 retention incentives groups it issued during the pandemic at KCVA. *See* Agency Exhibit 4-22, Section C(a-i). More specifically, the Agency described employment trends and labor-market factors, recent recruitment efforts, special unique competencies required for the position, efforts to use non-pay authorities, desirability of the duties, work or organizational environmental, or

geographic location of the position, effect on the department if employee is not retained, salaries typically paid outside of the federal service, the quality and availability of potential sources of employees identified in the organization's succession plan, likelihood of leaving federal service and other supporting factors. *Id.* The Agency clearly followed 5 C.F.R. 575.306 and 575.308 when it made all 19 determinations and approvals in this instant case.

According to VA Handbook 5007/79, Part VI, Chapter 3(7)(a-b), VA Form 10017, Authorization and Review of Retention Incentive *must* be used for the authorization and review of all retention incentives. Here, the Agency used this form 19 times, making the appropriate determinations as to the essential need to retain and the likelihood of leaving federal service pursuant to the Handbook and 5 C.F.R. 575.306 and 575.308. *See* Agency Exhibits 4-22.

Lastly, OCHCO put out a bulletin in April of 2020, advising VA Human Resources Offices advising them that there was a temporary waiver of exclusion of temporary appointment to receive recruitment, relocation and retention incentives during the COVID-19 pandemic. *See* Agency Exhibit 2. In its bulletin, OCHCO referenced VA Handbook 5007/79, Part VI, Chapter 3 and 5 C.F.R. 575 as governing bodies on this matter. *Id.* Further, it pointed out that retention incentives are important tools that can be used to strategically address recruitment and retention challenges during the pandemic. *Id.* The Agency fully incorporated this bulletin when it complied with VA Handbook 5007/79, Part VI, Chapter 3 and 5 C.F.R. 575 as notated above.

VII. Conclusion

The Union failed to establish that retention incentives are awards, as defined by the CBA. The Union also failed to establish that the Agency violated the CBA when it appropriately approved retention incentives for groups of employees in accordance with Agency policy, OCHCO guidelines and Federal Code of Regulations, during the COVID-19 pandemic (March

2020 – current). The Agency respectfully requests that the Arbitrator deny the grievance in its entirety.

KATHLEEN M. HUNTER
Staff Attorney
Department of Veterans Affairs
Office of Chief Counsel, Midwest District
1201 Walnut Street, Suite 800
Kansas City, MO 64106
Telephone: 816-572-8699
Kathleen.hunter@va.gov

CERTIFICATE OF SERVICE

At the conclusion of the arbitration hearing, the parties agreed that each would submit its briefs to each other and then the Arbitrator. In accordance with that agreement, the undersigned hereby certifies that the Agency's Closing Brief for FMCS No. 200424-06178 was sent on this day to the following in the manner indicated:

Arbitrator Patrick Dunn
Email: arbitratorpdunn@gmail.com

Electronic Mail

KATHLEEN M. HUNTER
Staff Attorney
Department of Veterans Affairs
Office of Chief Counsel, Midwest District
1201 Walnut Street, Suite 800
Kansas City, MO 64106
Telephone: 816-701-3085
Kathleen.hunter@va.gov

March 16, 2022

Date