In the Matter of the Arbitration Between:

American Federation of Government Employees, Local 910, Union And Department of Veterans Affairs Kansas City Veterans Affairs Medical Center (KCVA), Agency/Employer	)	FMCS Case No. 200424-06178 **DECISION**

Duly selected by the parties and appointed under the rules and regulations of the Federal Mediation and Conciliation Service (FMCS), the undersigned arbitrator held a hearing on December 7, 2021. The parties were given full opportunity to present their proofs and to cross-examine sworn witnesses. The parties submitted briefs on March 18, 2022, whereupon the record was declared closed.

APPEARANCES

For the Agency/Employer: Kathleen M. Hunter

For the Union: Donny Boyte

ISSUE

The Union stated the issue as follows:

Did the Agency violate the Master Collective Bargaining Agreement, specifically but not limited to Article 16 and Article 17 in failing to give proper documentation to the reason why an individual received incentive pay, retention pay, or monetary awards and additionally failed to

distribute the incentive pay, retention pay, and monetary awards in a fair and equitable manner? If so, what will be the remedy?

The Agency stated the issue as follows:

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, OCHCO guidelines and Federal Code of Regulations?
4) If the arbitrator answers either issue 2 or 3 in the affirmative, what is the remedy?

FACTS

The parties have had a collective bargaining relationship for a significant period of time. The Union represents a variety of employees working for the Agency pursuant to a certification by the Federal Labor Relations Authority in 1980. The current collective bargaining agreement applicable to the relationship is titled: Master Agreement Between the Department of Veteran Affairs and the American Federation of Government Employees. It is dated March 2011.

In early 2020, the Agency was confronted with the same issues facing the rest of our country related to the pandemic. The Agency provides both critical and routine medical services to our nation's veterans. Significant disruption of those services due to the pandemic could have been catastrophic.

In an attempt to assure the uninterrupted continuation of services, the Agency used monetary retention incentives to induce certain employees to remain with the VA and not leave for more lucrative employment.

Retention incentives are not specifically addressed in the CBA. They're authorized in the Code of Federal Regulations at 5 C.F.R. 575.308. The criteria to be utilized in determining whether retention incentives should be used is at 5 C.F.R. 575.306.

The CBA addresses Employee Awards and Recognition at Article 16. Although Article 16 describes an incentive program, its use as a tool for retention of critical employees is not one of the purposes described for the program. Those critical purposes of the awards program appear to be employee achievement and improvement.

Article 17 of the CBA addresses employee rights and requires in general, that all employees be treated equitably, fairly and without discrimination.

The Agency presented evidence regarding some nineteen categories of employees that were approved for retention incentives. See Agency Exhibits 4 through 22.

In each instance, the category of employee that received a retention incentive was subjected to analysis of the nine factors laid out in the CFR for determining whether such an monetary incentive is appropriate.

In addition, the Human Resources Officer for this area, testified at length about why certain categories of employees were given retention incentives and others were not. The Associate Director for Patient Care Services also testified. She stated that a blanket award or incentive for all bargaining unit employees, simply based on the pandemic would not have been feasible or appropriate. This was not a bonus for potential exposure to COVID-19, but rather a tool used in an attempt to assure that the Agency continued to meet its statutory charge during this difficult period.

The former Executive Director of the Agency testified that incentives are not awards as that term is used in the CBA and involve the considerations of factors contained in the Federal Code, specifically related to retention of employees rather than recognition. Use of retention incentives is within the sole discretion of the Medical Center Director within his or her approval limits.

On May 6th, 2020, the Union filed a step three grievance alleging that the Agency violated the CBA at Articles 16 and 17 by not providing all bargaining unit employees retention incentives during the COVID-19 pandemic. That grievance was denied and the matter was arbitrated.

DISCUSSION

I will begin by stating that I agree with the Agency that retention incentives are not awards as that term is used by the CBA. Consideration of Article 16 to this case appears to be irrelevant.

Consideration of Article 17 of the CBA requiring in general, fair and equitable treatment of all employees, is relevant to consideration in this case. However, there was no evidence presented upon which I could conclude that the process utilized by the Agency in determining which category of employees would receive retention incentives was either unfair, inequitable or improperly discriminatory in any way. I note here that any process designed to affect a subset within a larger group is inherently discriminatory. In this case it is not disputed that the Director exercised his authority to differentiate between all bargaining unit employees to determine which categories should receive the incentive pursuant to the Code factors. In other words, I find that the process of discriminating between groups of employees to determine which of them would receive a retention incentive was done properly without any evidence of discrimination based upon illegal or improper considertations.

This appears to be almost two different cases. The Agency offered its proofs that its process for discriminating between catagories of employees was done properly. It was neither required to nor did it seek to prove that the decision to use the funds in this manner was the best or fairest use of that money. The Agency's case is that the pandemic required emergency type action by the Director to examine and utilize retention incentives to assure that it did not lose critically needed employees during this very difficult time. The Agency presented its unrebutted testimony that the analysis performed was based solely on the objective criteria of the CFR in determining who would be eligible for a retention incentive and who would not. While the very nature of this analysis required that the Agency discriminate between categories of employees, that discrimination was based upon a statutorily recognized need to retain critical employees rather

than irrelevant criteria such as being part of the bargaining unit, Union affiliation, etc. It is difficult to see how the Agency could or should have done it differently.

On the other hand, the Union's complaint is not that the retention incentives should not have been given, but rather that the decision to implement retention incentives and the process followed should have been conducted with the Union's knowledge and input. The Union believes doing so would have resulted in a more equitable distribution of COVID funds among all bargaining unit members. Quite simply put, the Union would like to have seen additional compensation of some kind for all bargaining unit members for their service during this very difficult time.

The simple fact however, is that there is nothing in the CBA or law that required the Agency to distribute this money in a manner more inclusive of all bargaining unit members. No reasonable person would disagree with the proposition that any employee continuing to provide these critical services during this pandemic was and is entitled to immense gratitude. However, this fact does not provide a legal basis for ordering the Agency to go back and provide a similar monetary incentive to all other bargaining unit employees who did not receive it.

The Union also argues that the Agency failed to demonstrate that its use of retention incentives was done fairly and equitably. According to the Union, the only way to remedy this is to order the Agency to provide a list of all employees who received COVID-19 retention incentive pay and to work with the Union to determine whether there are other employees who should have received it as well.

There are two problems with this argument. First, it is the Union's burden to demonstrate that a violation of the CBA took place before a remedial order may be issued. No, the Union is not required to provide information contained in records that it does not have, but it is required to provide some evidence that indicates the Agency took some action which is in direct violation of the CBA or the law. The evidence in this case demonstrates that the Agency went through an exhaustive process utilizing the specific criteria required by the Federal Code to determine which categories of employees should receive retention incentives as objectively as possible. There is no evidence at all to indicate that any part of that process was done unfairly, inequitably, or in an improperly discriminatory way. Without such evidence, I do not have the authority to order the Agency to provide a remedy for the alleged grievance.

I cannot possibly say whether this matter would have been resolved differently had the Union been informed of the Director's intentions and the process he or she intended to follow for determining eligibility for a retention incentive. However, it is clear that the decision whether to award retention incentives and how much they should be, is completely within the discretion of the Director. In other words, it was the Director's choice whether to include the Union in the decision or process used and does not constitute a violation of the CBA or law.

When all is said and done, the Union's claim is really about the fairness and equity of the Director deciding to use additional funds allocated to the Agency because of COVID in this manner. In other words, the Union's claim of unfairness appears to be over the Director's choice to use the funds for retention incentives rather than for a bonus or award to be equitably

distributed among all bargaining unit employees. However, the decision to use the money for retention incentives distributed to the subset of employees defined by the CFR is not a violation of the contract or law.

AWARD

For all the reasons set forth herein, the grievance is denied. I will retain jurisdiction of this matter for ninety days.

Dated this 27th day of April, 2022

Patrick L. Dunn, Arbitrator