FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

IN THE MATTER OF ARBITRATION	)	
	)	
Between	)	
	)	**File# 200402-05290**
	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2338	)	
	)	
and	)	
	)	**John Remington, Arbitrator**
JOHN J PERSHING VETERANS ADMINISTRATION MEDICAL CENTER	)	
	)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the Employer's alleged miscount of bargaining unit employees in violation of the VA-AFGE Master Agreement, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a virtual hearing via Zoom was held on March 24, March 25, March 26 and March 30, 2021 at which times the parties were represented and were fully heard. Oral testimony and documentary evidence were presented by the parties; a stenographic transcription of the proceedings was taken; and the parties waived

closing arguments and instead elected to file post hearing briefs which were to be submitted to, and exchanged through the Arbitrator on or about May 16, 2021. However, the parties subsequently requested the Arbitrator to extend the time for the filing of briefs and did not actually submit those briefs to the Arbitrator until July 30, 2021.

The following appearances were entered:

For the Employer:

Ronald D. Veal	Human Resources Specialist
Shaun McCollough	Human Resources Specialist

For the Union:

Jacob Jordan	Union Advocate and Chief Steward
Kevin Ellis	President

THE ISSUE

The parties were unable to stipulate to a joint statement of the issue. However, the Arbitrator is satisfied that an appropriate statement of the issue is:

> DID THE AGENCY MISCALCULATE OR MISCOUNT THE NUMBER OF BARGAINING UNIT EMPLOYEES IN VIOLATION OF THE PARTIES' MASTER AGREEMENT AND, IF SO, WHAT SHALL THE REMEDY BE?

The difference in the issue statements proposed by the parties is essentially that the Union maintains that the above asserted miscount or miscalculation by the Agency was an intentional manipulation intended to prevent the Union from effectively representing bargaining unit members.

PERTINENT CONTRACT PROVISIONS

ARTICLE 1- RECOGNITION AND COVERAGE

Section 2- AFGE Role

As the sole and exclusive representative, the Union is entitled to act for and to negotiate agreements covering all employees in the bargaining unit. The Union is responsible for representing the interests of all employees in the bargaining unit.

Section 3- Employees Representation

A. The Department recognizes that, as the exclusive representative of employees in the bargaining unit, the Union has the right to speak for and to bargain on behalf of the employees it represents. The Department will not bypass the Union by entering into any formal discussion or agreements with other employee organizations or bargaining unit employees concerning all matters affecting personnel policies, practices, or working conditions. The Department will not assist or sponsor any labor organizations other than AFGE in an matter related to grievances, collective bargaining, or conditions of employment of employees in the AFGE bargaining unit.

Section 4- Unit Clarification

A. The Union will be predecisionally involved in bargaining unit determination for position changes and establishment of new positions. When a position changes, and the parties do not agree over whether the position(s) is/are inside or outside the unit, the parties are encouraged to utilize the Alternative Dispute Resolution (ADR) process. If still unresolved either party may file a Clarification of Unit (CU) petition with the FLRA. If the position previously has been in the bargaining unit, the employee and/or position will remain in the bargaining unit until a decision is issued on the petition.

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.

Section 2- Department Regulations

Where any Department regulation conflicts with this Agreement and/or Supplemental Agreement, the Agreement shall govern.

ARTICLE 17-EMPLOYEE RIGHTS

Section 1- General

A. In an atmosphere of mutual respect, all employees shall be treated fairly and equitable 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.
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Section 2- Rights to Union Membership

Under 5 USC 7102, each employee shall have the right to form and join a Union, to act as a designated Union representative, and to assist the Union without fear of penalty or reprisal. This right shall extend to participation in all Union activities including service as officers and stewards/representatives. A bargaining unit employee's grade level, or duties shall not limit the employee's right to serve as a Union official, to represent the bargaining unit or to participate in any Union activities.

Section 3- Rights to Union Representation

The Department recognizes an employee's right to assistance and representation by the Union, and the right to meet and confer with local union representatives in private during duty time, consistent with Article 48- Official Time, and supplemental agreements. .....

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ARTICLE 47- MID-TERM BARGAINING

Section 1- General

A. The purpose of this article is to establish a complete and orderly process to govern mid-term negotiations at all levels. .....
B. Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they no not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded form mid-term bargaining will be identified within each article.
C. As appropriate, the Union may initiate mid-term bargaining at all levels on matters affecting the working conditions of bargaining unit employees.

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Section 4- Local

A. On all policies and directives or other changes for which the Department meets its bargaining obligation at the national level, appropriate local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated national policy and agreements. Upon request, the Union will be briefed on the proposed subject prior to the demand to bargain.
B. Proposed changes in personnel policies, practices, or working conditions affecting the interests of one local

union shall require notice to the President of that local.

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C. Upon request, the parties will negotiate as appropriate. The Union representative shall receive official time for all time spent in negotiations as provided under 5 USC 7131(a).
D. Ground Rules for local bargaining shall be established by the parties at the local level.

ARTICLE 48- OFFICIAL TIME

Section 1- Purpose

A. Official time as a necessary part of collective bargaining and related activities is in the public interest. The parties recognize that good communications are vital to positive and constructive relationships between the Union and the Department. These communications should facilitate and encourage the amicable settlement of disputes between employees and the Department involving conditions of employment and should contribute to the effective and efficient conduct of public business. They further recognize that this consolidated unit is very large and complex and requires Union coordination of its representational activities at several levels.

B. As provided in 5 USC 7131, official time shall be granted as specified in law and in any additional amount the Department and the Union agree to be reasonable, necessary, and in the public interest. Official time shall be granted for activities as specified in law and in amounts specified by this Agreement or otherwise negotiated. Official time shall be used for:
1. Handling grievances and other complaints;
2. Handling other representational functions; or,
3. Engaging in appropriate lobbying functions

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Section 10-Local

A. Every local union will receive an allotment of hours equal to 4.25 hours per year for each bargaining unit position represented by that local union. Each VHA and VBA local union is entitled to a minimum of 50% official

time. Each NCA local union is entitled to a minimum of 25% official time. Where a local represents employees at a CBOC, CMOP, clinic, service center, or successor, at a duty station greater than 50 miles from the facility, that local union will be allotted 25% official time at that duty station.

B. There shall be no reduction in the official time allocation due to a merger. When mergers occur, the official time carried over from the local union's allocation shall not be less than the combined total of the local union's allocation prior to the merger.

C For local unions already above the minimum amount of official time described above, existing local agreements and past practices regarding official time on the effective date of this Master Agreement shall continue in full force and effect.

1. Local unions that are above the 4.25 will not be able to receive an increase in official time until the number of bargaining unit employees has increased to the level where they are entitled to have an allocation equal to the 4.25 per bargaining unit member.

2. Local unions that are below the 4.25 minimum shall receive their increase in official time allocation no later than 60 days after this Agreement is effective. The allocation shall be based on the number of bargaining unit employees represented by the local union on the date this Agreement is effective.

3. The calculation period to determine the number of bargaining unit members represented by a local union is every six months after this Agreement is in effect.

D. The minimum amounts of official time described in Paragraph A in this Section are not intended to limit the amount of official time that can be negotiated by the parties locally.

E. Where arrangement for transfers of official time among Union representatives are not in effect, they can be negotia6ted locally.[1]

[1] A Decision and Order of the Federal Services Impasses Panel in Case #17 FSIP 032 is also relevant here: "The following constitutes an agreement between the John J. Pershing VAMC and the American federation of Government Employees Local 2338 regarding the allocation and use of official time hours. This agreement replaces and supersedes all previous agreements, MOUs, LSA, ground rules, or documents

ARTICLE 49- RIGHTS AND RESPONSIBILITIES

Section 1- Introduction

The parties recognize that a new relationship between the Union and the Department as full partners is essential for reforming the Department into an organization that works more efficiently and effectively and better serves customer needs, employees, Union representatives, and the Department.

A. In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the obligations imposed by 5 USC Chapter 71 and this Agreement, and the maintenance of a cooperative labor-management working relationship.
B. Each party shall recognize and meet with the designated representative(s) of the other party at mutually agreeable times, dates, and places that are reasonable and convenient.
C. The Department supports and will follow statutory and contractual prohibitions against restraint, coercion, discrimination or interference with any Union representative or employee in the exercise of their rights.

Section 3- Union Representation

The Union will be provided reasonable advance notice of, be given the opportunity to be present at, and to participate in any formal discussion between one or more representatives of the Department and one or more employees in the unit or their representatives concerning any grievance, personnel policy or practice, or other general condition of employment. .....

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related to official time.

1. Hours: a. The official time allocation will be calculated each year in March and September based on the total number of bargaining unit employees located multiplied by 4.25 as outlined in Article 48, Section 10 of the master agreement.
2. Allocating Official Time: a. The Union and the agency recognize that the use of official time must be balanced with mission requirements in a way that is mutually beneficial. ..... "

BACKGROUND

The American Federation of Government Employees and its Local # 2338, hereinafter referred to as the "UNION," represents classified employees of the Department of Veterans Affairs, excluding certain managerial and administrative employees, for purposes of collective bargaining. The Department of Veterans Affairs, hereinafter referred to as the "DEPARTMENT," "AGENCY" or "EMPLOYER," operates multiple medical centers around the United States including the John J. Pershing Veterans Administration Medical Center in Poplar Bluff, Missouri.

The instant grievance arose on July 10, 2019 pursuant to an electronic mail notice sent to Union President Kevin Ellis by Agency Executive Assistant Ryan Wells which advised Ellis and other members of the Poplar Bluff Bargaining Group that the Union had "exhausted all negotiated official time" and that "effective immediately through the end of the fiscal year the only official time hours that would be approved are statutory official time when appropriately requested."[2] According to Wells' memo, this exhaustion of official time did not apply to CBOC representatives. On October 24, 2019 the Union submitted a Step 3 grievance alleging violation of Articles 1, 17, 47, 48 and 49 of the Master Agreement and specifically, an apparent error in the bargaining unit count utilized by Wells in his determination that the Union was out of official time. It further alleged that this determination was motivated by union animus. Wells testified at the hearing that his calculation was based on bargaining unit count (Bargaining Unit Status Codes) but was unable to recall what that count was at the time. He later testified that this count was either 548 or 558 bargaining unit employees. Ellis subsequently testified that, based on a

[2] The Federal Fiscal year ended on September 30, 2019. Union Exhibit #1.

prior notification from the Employer in March of 2019, the correct bargaining unit count was 664 or 665. The grievance asserts that the count provided by Wells does not match previous counts provided to the Union. It goes on to request a meeting with Wells and the facility director at the time (McMullan) and request information as to how Wells had arrived at a count of 558 bargaining unit employees.

The Employer responded to the grievance on November 7, 2019 following a grievance meeting on November 5 involving Ellis, union representative Candanesha Brown, Human Resource Specialist Ron Veal and Wells. This response denied the grievance in its entirety alleging that it failed to articulate how the Agency's actions had violated the articles of the Master Agreement cited by the Union. This grievance answer does not directly respond to the claimed bargaining unit miscount by Wells nor to the Union's request for information. However, it does identify what the Employer deemed to be threshold issues that it maintained would be required to be evaluated by an arbitrator prior to a hearing on the merits. These issues included an assertion by the Agency that the grievance was not grievable or arbitrable. The Union invoked arbitration in response to this denial on November 19, 2019.

The parties selected Arbitrator Anne Draznin to hear the grievance on April 10, 2020. However, following communication with the parties, Draznin withdrew as Arbitrator on June 29, 2020 and a new panel of arbitrators was provided by FMCS. The undersigned arbitrator was selected by the parties on December 11, 2020 and subsequently appointed to hear this matter by the FMCS. The Agency then raised a

question of arbitrability contending primarily that the matter was procedurally barred by the provisions of the Master Agreement. [3]

A virtual hearing via Zoom was held on February 25, 2021 to consider only the question of arbitrability. At the hearing the undersigned Arbitrator denied the Union's request to hear both the question of arbitrability and the merits of the dispute together and fully heard only the parties' contentions and arguments concerning procedural arbitrability. Following the submission of post hearing briefs he issued an award on March 6, 2021 rejecting the Agency's procedural claim and finding the grievance arbitrable within the meaning of Article 44 of the Master Agreement. The grievance is therefore properly before the arbitrator for final and binding determination on its merits.

CONTENTIONS OF THE PARTIES

The Employer contends that the Arbitrator failed to allow a full hearing on its claims of arbitrability, grievability and other procedural claims and renewed those claims in its post hearing brief. It asserts, among other claims, that the Arbitrator failed to allow sworn testimony or sufficient time for argument or rebuttal in the above arbitrability hearing of February 25, 2021. Specifically, the Agency reasserted its claim that the grievance was untimely appealed to arbitration within the meaning of Article 44 of the Master Agreement. Further, the Employer contends that the grievance is not grievable and that the Agency committed no grievable action within the thirty calendar day period prior to the filing of the above noted October 24, 2019 Step 3 grievance. Indeed, the Employer maintains that the Union has presented no evidence to show that the

[3] The Agency, in addition to its procedural claim based on an alleged violation of the time limits to pursue arbitration, asserted claims of res judicata and collateral estoppel but presented no relevant evidence to support these claims.

Employer's bargaining unit count was incorrect or inaccurate, and that the grievance was improperly filed at Step 3. The Employer therefore requests that the grievance be dismissed as being neither grievable nor arbitrable.

The Union takes the position that the Employer unilaterally changed the bargaining unit count in an attempt to reduce official time available to the Union and thereby interfere with the Union's ability and duty to represent bargaining unit members. The Employer's erroneous bargaining unit count also impacted Union officers who were compelled to engage in representational activities on their own time, and most severely impacted the Union President who had been on 100% official time but was then counted absent without leave from July 2019 through September 30, 2019. Further, the Union contends that the Employer's decision to count official time used by Community Based Outpatient Clinic (CBOC) representatives in the overall count of official time hours is in violation of the Master Agreement and longstanding past practice. The Union maintains that the Employer has violated several provisions of the Master Agreement; refused to involve the Union predecisionally in the establishment of BUE counts, unilaterally changed the bargaining unit count, and refused to bargain with the Union over the determination of bargaining unit count within the meaning of Article 48 of the Master Agreement. Finally, the Union contends that the Employer's claim that the grievance is barred by collateral estoppel is misplaced and was simply an attempt to delay or avoid a hearing on the merits of the grievance. The Union therefore asks that the grievance be sustained and further requests significant remedies in the form of restoration of official time, restoration of leave time, compensation for Union representatives and reasonable legal fees.

TESTIMONY AT THE HEARING

Ryan Wells was called as an Adverse Witness by the Union. Wells is a former bargaining unit member and Union officer. He was, at the time of the hearing, the Executive Assistant to the facility director (then Patricia Hall) and Associate Director, then Libby Johnson. Wells testified that he handles interactions with the Union, grievances and unfair labor practice charges on behalf of the Agency, and tracks official time usage. He further testified that he obtains data related to bargaining unit count from "HR Smart." He did not, nor was he requested to, explain what HR Smart is nor where the data in HR Smart comes from. He testified that he does not have access to HR Smart and it was clear from his testimony that he has little, if any, knowledge of HR Smart which apparently is a computer based human resources data base. Wells further testified that he did not recall the current bargaining unit count but that the last count in September of 2020 was somewhere between 500 and 700 bargaining unit members. Neither did he recall the bargaining unit count in 2019 which gave rise to the grievance but thinks that it was 558 bargaining unit members. He recalled that this count, which showed that the Union had exhausted its official time allocation, was arrived at by using the "BUE Bargaining Unit Employee) count in September" and that this number came from the "BUS Code" (Bargaining Unit Status Code). However, he conceded that he did not know the different BUS Codes. Neither was he aware of any employee being moved out of the bargaining unit. Wells also testified that he didn't recall when the notice to the Union indicating that they had exhausted their official time was sent and didn't think that the Union was involved in the pre-decision to establish BUE counts.

Wells further testified that while he had had disagreements with the Union, he had no animus toward the Union. He also testified that he was familiar with the Master Agreement and had received training on that agreement (as a union representative) in 2011 or 2012 following its negotiation. However, he also testified that he was unfamiliar with Article 1, Section 4 of the Master Agreement concerning Unit Clarification and the requirement that the Union be "predecisionally involved in bargaining unit determinations."

Wells was recalled later in the hearing by the Agency and provided further direct testimony. He reiterated that he was involved in labor relations functions on a daily basis and that his involvement in handling grievances depended upon whether or not he was designated to do so by the director or associate director. He further described his former role as a union representative and training that he had received on the Master Agreement provided by the Union. He was questioned at length about his grievance response to November 7, 2019 and the grievance meeting that preceded this response. He concluded that the Union had failed to sufficiently articulate the alleged contractual violations and that he found no such violations. He further testified that he had denied the Union's request to meet with the Director because he felt that there was no need to meet over the calculation of bargaining unit count. He testified that he never claimed that the Union had somehow lost over 100 positions and only provided the count as he had calculated it. He further testified that the matter of official time had already been resolved by the award of Arbitrator Michael Jordan and that it was needless to revisit the matter.[4] He again testified that he had taken the 558 member bargaining unit count from HR Smart. Wells

[4] The Arbitrator has previously found, in connection with the arbitrability award issued on March 6, 2021, that the Jordan award is not directly relevant to the current dispute and does not address the question of bargaining unit count.

further testified concerning the inclusion of bargaining unit employees at the six CBOC locations represented by the Union. He admitted that the employees at the CBOC's were not included in the calculation of bargaining unit employees at the main facility. Significantly, Wells identified and testified concerning Agency Exhibit W-9, a list of bargaining unit employees drawn from BUS Codes. This exhibit shows a bargaining unit count of 537 employees as of 12/4/18 but the exhibit is incomplete. Wells testified that he had developed an Excel spreadsheet which provided additional detail.[5] It is noted that the above 537 number of bargaining unit employees is substantially less than the 661 bargaining unit employees provided in an email from Veal to Ellis on 12/28/18 (Union Exhibit #23). The only reasonable explanation for this apparent difference in the calculations provided by Veal in Human Resources and Wells in the Director's office, is that Wells ignored the bargaining unit count at the CBOCs or that the BUS Code based data that he used somehow excludes CBOC bargaining unit members. Finally, Wells was re-called to testify as an Agency rebuttal witness.

A summary of Wells testimony, both on direct and cross examination and as both an Agency and Union witness, reveals that his credibility as a witness was significantly diluted by his obvious evasiveness and apparent uncertainty about events in the grievance process and how he had determined his various counts of bargaining unit employees. Wells testimony was often vague, sometimes contradictory, and apparently based on limited knowledge of the Master Agreement and recent arbitration decisions involving the parties. He was particularly disingenuous when he claimed no knowledge of how the bargaining unit count had dropped by over 100 employees when he obviously

[5] This Excel spreadsheet was never provided to the Arbitrator nor had it been provided to the Union at the time the Union submitted its post hearing brief. The Arbitrator is compelled to draw an adverse inference from Wells' failure to provide this documentation.

knew, or should have known, the basis of the Union's complaint in this regard. His failure to submit the above noted Excel spreadsheet compelled the Arbitrator to draw an adverse inference concerning his mis-calculation of the bargaining unit count.

Angela Smith was also called as an adverse witness by the Union. Smith was assigned to the public affairs office of the Agency at the time of the arbitration hearing but worked as an HR Specialist in 2018-2020 at the VAMC- Pershing and was Acting Chief of Human Resources in 2019. The Union had requested a bargaining unit list from Smith as Acting HR Chief and on March 28, 2019 she provided such a list by electronic mail. This list shows 665 bargaining unit members. Ellis responded to Smith on the same day indicating that he believed there were positions and names missing from this list of bargaining unit members. (Union Exhibit #24). However, at the hearing Smith was only able to identify this exhibit. She was unable to recall the number of bargaining unit employees shown on the attached list (even though she was provided with a copy of the exhibit) or where she had obtained this list. She wasn't even sure if the list had been provided by HR. Smith's lack of recall was less than credible.

Lisa Edwards was called to testify for the Union concerning her bargaining unit status. It appears from Edwards' testimony that she had at various times during her employment at the VAMC Pershing been both in and out of the bargaining unit. She was purportedly a member of the bargaining unit as a Privacy Officer at the time of the hearing, but her bargaining unit status was in dispute. Edwards' testimony was largely irrelevant as her inclusion or exclusion from the bargaining unit is tangential to the gravamen of the grievance.

Kevin Ellis, the Union President was called to testify extensively and his testimony carried over into the second day of the hearing. He was called both as a witness for the Union and later as an adverse witness for the Agency. He has been a union member since 2003, is a former steward and chief steward, and has served as President of the local since 2011. He testified concerning the filing of the grievance and asserted that he never received an explanation from Wells as to how he had arrived at a bargaining unit count, a count which the Union argued was a serious undercount of bargaining unit positions represented by the Union. He further testified, contrary to Well's testimony, that Wells had never been involved in BUE count as a union member or representative. Ellis conceded that there were errors in the original grievance including references to a "Mrs. Groves" and "particularized need" and that these references were mistaken and not part of the grievance. He did testify concerning CBOC official hours which he contended were improperly taken from the Union total and maintained that CBOC time has never been taken from the bank of official time hours, and that CBOC official hours can be allocated at the Union's discretion. He testified that, but for the improper removal of these official time hours, there would have been sufficient official time available to the Union for the remainder of the 2019 fiscal year. He further testified that he had been marked absent without leave from July 8 to July 20, 2019, once when he was actually in arbitration, and that he had been forced to take annual leave time to represent employees and provide for his family following the Agency's determination that the Union had exhausted its official time. Ellis testified that, in an attempt to resolve the dispute over official time, he requested the Agency to bargain on July 10, 2019 but that the Agency refused to respond. He further testified concerning a proposed attempt to remove him

from employment; described what he believed to be incidents motivated by the Agency's animus toward the Union including a memorandum of conversation with the VAMC Pershing Chief of Police (Union Exhibit #18), and an abuse of authority complaint filed against Libby Johnson (Union Exhibit #20). In summary, Ellis testimony was generally credible and specific. He was knowledgeable and responded candidly on cross examination and when he was again called as a rebuttal witness by the Union. His testimony was largely unrebutted by the Agency.

Jennifer Gum, the President of the AFGE local union at the Lenoir, KS VAMC, was called to testify by the Union as a rebuttal witness. Gum has served as a local union president for eight years and testified that she is familiar with the Master Agreement, specifically how CBOC bargaining unit employees are counted for purposes of official time. She testified that CBOC employees are always included in the bargaining unit count. However, she further testified that she uses one individual 100% to cover the different CBOCs she is responsible for. She explained that she can do this because Article 48 of the Master Agreement provides that each duty station greater than 50 miles from the facility is entitled to a minimum of 25% of official time. Gum's testimony was not rebutted by the Agency.

The Union then proffered the testimony of **Diana Hix, Barbara Witsun-Casanova, and Khip Chappell.** The proffer was accepted by the Agency. This accepted proffer of testimony means that were they to testify, Hix, Witsun-Casanova and Chappell would corroborate the testimony of Gum.

Libby Johnson was not called to testify at the hearing. Johnson was the Associate Director at the Pershing VAMC in 2019 and Wells' direct supervisor. It is

clear from the record that she directed Wells' actions in initiating the improper and inaccurate bargaining unit count in 2019. It is undisputed that she also refused the Union's July 10, 2019 request to bargain over official time, apparently in violation of Article 47 of the Master Agreement. Johnson's failure to appear and provide a response to the various Agency actions attributed to her did nothing to support the Agency's case. While Johnson was no longer Associate Director at the time of the instant arbitration hearing, she was still an Agency employee. Although she was no longer stationed in Poplar Bluff, since the hearing was via Zoom she could easily have participated. The Arbitrator can only draw an adverse inference from Johnson's failure to testify.

DISCUSSION, OPINION AND AWARD

Prior to addressing the merits it is appropriate to consider the Agency's renewed claims concerning grievability and arbitrability of the grievance. The matter of arbitrability has already been addressed in a separate award issued on March 6, 2019. The Arbitrator deems it unproductive to fully review or comment on this award except to note that the grievance was determined to be arbitrable on its merits within the meaning of Article 44 of the Master Agreement, specifically, the exceptions set forth in Section 2 of Article 44. The Agency also asserts that the grievance is barred by collateral estoppel or res judicata. As noted above this argument is misplaced. Although the parties submitted prior arbitration decisions, none of these decisions addressed the issue of calculation of official time granted to the Union by the collective agreement. Indeed, the most recent decision concerning official time, the January 13, 2020 award by Arbitrator George Aleman (FMCS 1860621-05809), was concerned solely with the approval of

official time by the Agency and did not address the alleged miscalculation of bargaining unit membership and its relationship to the amount of official time provided to the Union by the provisions of Article 48, Section 10 of the Master Agreement. Res judicata could only apply where there is an identical claim between the same parties, and that is not the case here as the Union's claim in the instant grievance is not even similar to its claim resolved by the Aleman award or other awards between the parties offered into evidence.

Brief comment is warranted here with regard to the Agency's complaint that it was not provided with a fair and full hearing on the jurisdictional or procedural issues raised in its Motion to Dismiss the grievance submitted to the Arbitrator on February 23, 2021 and in its post hearing submission following the above referenced hearing on arbitrability. This claim is wholly without merit. The Arbitrator convened a Zoom hearing limited to the question of arbitrability on February 25, 2021 and both Mr. Veal, for the Agency, and Mr. Ellis, for the Union, presented their respective positions concerning arbitrability. Neither party requested witnesses at the March 25 hearing; no relevant facts were disputed; and it was made abundantly clear to the Arbitrator that the decision on arbitrability was to be determined through the interpretation of Article 44 of the Master Agreement.[6] Indeed, this is the only issue that the Agency argued in its post hearing brief. The Arbitrator offered both parties the opportunity to present post hearing evidence and arguments which they did provide by March 3, 2021. He is satisfied that the record upon which the arbitrability decision was made was full and complete and that the various positions taken by the Agency were fully considered.

[6] The Union did request the opportunity to present witnesses in connection with the merits of the case, but the Arbitrator denied the Union's request to hear the merits on February 25, 2021 and only scheduled a hearing on the merits after he had determined that the grievance was arbitrable.

Calculation of Official Time

Article 48 of the Master Agreement clearly states in Section 1 that official time is a "necessary part of collective bargaining and related activities and is in the public interest." It goes on to state that the parties "recognize that good communications are vital to positive and constructive relationships between the Union and the Department" and "encourage the amicable settlement of disputes." Further, it specifies that official time shall (emphasis added) be granted as provided for in 5 USC 7131 and "in any additional amount the Department and the Union agree to be reasonable, necessary and in the public interest." It follows that official time is to be utilized broadly by the Union in handling grievances, complaints and other representational issues in the interest of resolving these disputes at the lowest levels. Such an outcome is in the best interest of both the Agency and the Union and should lead to the resolution of most issues without recourse to protracted grievance proceedings, arbitrations, or determinations by the FLRA. Unfortunately, that is not what has occurred with these parties. The record in this matter is filled with arbitration awards and an FSIP decision dealing with official time. While none of these are directly relevant to the instant dispute over bargaining unit count, it is readily apparent that the Employer, specifically in the last four years, has attempted to restrict the Union's legitimate and proper use of official time in a number of ways. As Arbitrator Michael Jordan wrote in his 2018 decision concerning the use of official time in mid-term bargaining preparation, "apparently, under the latest management structure, communication, trust, and direct party interaction and resolution has failed." Jordan goes on to note later in his award that "the Agency wants efficiency but invites grievance upon grievance by being evasive and condescending."[7] The Agency has obviously learned

[7] FMCS 180201-01013 (Jordan, Arbitrator) August 7, 2018.

little from Arbitrator Jordan and has continued to invite grievances. It is readily apparent that the Agency, through Johnson and Wells, willfully provided a bargaining unit count which it knew, or should have known, was misleading and significantly lower than counts previously provided. Accordingly, it reduced the number of official time hours available to the Union based on this bargaining unit count, and continued to do so. The Agency then denied the grievance which it had invited by its specious refusal to resolve the matter as provided for in Article 43, Sections 6 and 7 of the Master Agreement. The Agency continued its duplicitous conduct toward the Union in denying the grievance largely on the grounds that the grievance was not sufficiently specific and failed to articulate how the Agency had violated the Master Agreement. Despite the language of its Step 3 denial, the Agency was well aware of the gravamen of the Union's complaint.

The evidence of the Agency's duplicity is overwhelming. On October 14, 2017 the Federal Services Impasse Panel issued a Decision and Order which includes, inter alia, a finding that AFGE Local 2338 represents between 650 and 725 bargaining unit members at the John J. Pershing VAMC. (Union Exhibit #8- 17 FSIP 032). On July 18, 2018, VAMC Associate Director Libby Johnson, in an email to the Union and others, stated that there were 642 bargaining unit employees. (Union Exhibit #27)[8] On March 28, 2019, Acting Human Resources Director Smith provided Ellis with a bargaining unit count of 665 (Union Exhibit #24). Based on this history, it is evident that when Wells issued his above memorandum to the Union on July 10, 2019, the correct bargaining unit count was at least 665 bargaining unit members.[9] Further, the Arbitrator is compelled to

[8] Ellis accepted this count of bargaining unit employees but responded to Johnson that she had incorrectly calculated the number of official time hours based on a bargaining unit count of 642 and had thereby shorted the Union 471.75 official time hours.

[9] A February 28, 2021 bargaining unit count provided by Human resources officer Travis Gann shows 724 bargaining unit members. This count was made well after the filing of the grievance and while it may be accurate, it is not relevant to the events of 2019.

find, based on the cumulative and unrebutted testimony of Ellis, Gum and others hereinabove noted, that Wells miscount was the result of improperly excluding CBOC bargaining unit members from the count in violation of Article 48, Section 10 of the Master Agreement.

The basic official time formula is contained in Article 48, Section 10. It provides that every local union receives an allotment of official time hours equal to 4.25 hours per year for each bargaining unit position represented by the union. The count of bargaining unit positions is to be done twice each year, in March and September, as provided for in the Decision and Order at 17 FSIP 032 noted above. It therefore appears that Wells' above miscount, apparently done in June of 2019, was contrary to the FSIP Decision and Order. Section 10 further provides that where a local represents employees at a CBOC greater than fifty miles from the main facility, the local union will (emphasis added) be allotted 25% of official time for that duty station. This section also provides that "each VHAS and VBA local union is entitled to a minimum (emphasis added) of 50% official time." Accordingly, under Section 10 the local union president is entitled to a minimum of 50% official time irrespective of how many official time hours the Union has in its bank of official time. This is also true for the 25% official time at each duty station. Both the 50% official time requirement for the local union president and the 25% official time requirement for certain CBOCs are contractual minimums. This minimum official time requirement is independent of the block of hours created by the formula of 4.25 times the current bargaining unit count. This is so because it is clear in the language of Section 1 of Article 48 that the parties intended to provide for minimal accessible union representation for all bargaining unit employees. Section 10 guarantees that there will be a union

representative available, on official time, for at least 50% at the main installation and 25% at the eligible duty stations. Given that the Union in this instance is responsible for representation of employees at six (6) CBOCs, and that there are only four of those duty stations with an assigned 25% representative, the remainder of that official time can be used by the local union at its discretion. Indeed, there should have been more than enough official time available to allow the local president to continue on 100% official time for the remainder of FY 2019 even if the Union had fully depleted its formula allocation of official time which, as hereinabove determined, it had not.

Section 10 also provides, in subpart C, that local unions already above the minimum amount of official time will continue existing local agreements and past practices regarding official time. This provision was obviously ignored or misinterpreted when the local union president was advised he was out of official time since it is undisputed that the local union president has been on 100% official time for at least seven years. This section provides for a maintenance of existing minimum official time levels without reduction, and further provides for an increase in official time for local unions that are above the 4.25 formula. There is no provision in Section 10 for a reduction of official time, even if the bargaining unit is reduced, and the Arbitrator can only conclude that this omission was intentional. This indicates that the parties intended to establish minimum levels of official time and that these levels could increase, but not decrease. Indeed, it would appear that the only way to reduce the amount of official time allocated to a local union under the current Master Agreement is through collective bargaining. It follows that even if the number of bargaining unit employees at an installation declines (as the Employer claimed here) it would not reduce the amount of official time that the

Union is entitled to. In light of the foregoing discussion the Arbitrator can only find that the Agency violated Article 48 of the Master Agreement when it determined that the Union had exhausted its allocation of official time in July of 2019.

Union Representation

The grievance also alleges the violation of Article 1, 17 and 49 of the Master Agreement. All of these Articles address, in whole or in part, union representation. The repeated reference to union representational rights in different sections of the Master Agreement is indicative of the importance the parties have placed on providing all bargaining unit members with effective representation. The attempt here by the Agency to reduce the amount of official time available to the Union can only be viewed as an effort to deprive bargaining unit employees of effective representation, a result clearly contrary to the intent of the Master Agreement, specifically: Article 1, Sections 2 and 3; Article 17, Sections 2 and 3; and Article 49, Section 3. The failure to provide union representation is not only a problem for the union. Where bargaining unit employees, whether members of the union or not, allege that the union has failed to fairly and properly represent them, they may be entitled to sue the union for breach of its duty to represent. However, such lawsuits will also be directed at the employer since the courts have held that fair representation claims are a hybrid action requiring the complaining employee to sue both the employer and the union. Such lawsuits are obviously undesirable from the perspective of both the employer and the union. There can be little doubt here that the Agency's attempt to reduce official time utilization by the Union directly interfered with the Union's right and duty to represent all bargaining unit members in violation of Articles 1, 17 and 49 of the Master Agreement.

Refusal to Negotiate

It is clear from the above FSIP decision and the provisions of Article 48 of the Master Agreement that the only way to change the amount of official time allocated to the Union is through bargaining. Mid-term bargaining on this issue is clearly permissible within the meaning of Article 47 of the Master Agreement. In an attempt to resolve the instant dispute with the Agency over bargaining unit count, Ellis requested the Agency to bargain on July 10, 2019. On the same day Libby Johnson responded:

> We have bargained to impasse over official time and we are under an order from the FSIP regarding this matter. At this time the Agency declines to reopen this topic. The prior guidance stands.

Johnson's response clearly misinterprets the FSIP order which does not address bargaining unit count and only concerns itself with issues which were at bargaining impasse at the time. Issues not at impasse as determined by the FSIP are open to new or reopened bargaining and there would appear to be no basis for Johnson's decision declining to bargain. While this refusal by Johnson is in violation of Article 47, Section 1 of the Master Agreement, the Arbitrator has no authority here to determine whether or not the Agency's refusal to bargain constitutes an unfair labor practice within the meaning of 5 USC. Indeed, the alleged refusal to bargain arose from the instant grievance and is, at most, a side issues beyond the scope of this grievance. It cannot be denied that official time is negotiable within the meaning of Article 47 of the Master Agreement as are changes in working conditions and policies that impact union representation, however arbitration is not the appropriate forum in this instance.

Failure to Predecisionally Involve the Union

Section 4 of Article 1 of the Master Agreement deals with bargaining unit clarification. The Union maintains the Agency violated this section of the agreement by failing to involve the Union in position changes and/or the establishment of new positions. However, there was no evidence presented of new positions being created, and the sole instance of a position change which occurred without the Union's involvement prior to the change involved privacy officer Lisa Edwards. Edwards testified that she had been informed by her supervisor that she was no longer a member of the bargaining unit around September 1, 2019 although it appears that her current position is properly within the bargaining unit. It is undisputed that the Union was not involved in any way with the decision to remove Edwards from the bargaining unit, and that Edwards unilateral removal would constitute a violation of Article 1, Section 4 of the Master Agreement. However, the Arbitrator must find that this violation is de minimus.as the removal of a single position from the bargaining unit has little impact on the bargaining unit count and the resulting official time calculation. Further, it is evident that the Edwards matter is concerned with unit clarification, not official time, and is therefore at best tangential to the Union's grievance over official time denial and beyond the scope of the Arbitrator's authority.[10] There is no evidence to show that the Agency has attempted to systematically dilute the bargaining unit by improperly removing individual employees from the unit. Accordingly, the Union's claim regarding the Agency's failure to predecisionally involve the Union, while apparently a violation of the Master Agreement, is outside the scope of the instant grievance and no remedy for this violation is ordered.

[10] See 32 FLRA No. 125, O-AR-1489 (August 17, 1968) holding that an Arbitrator has no authority to determine bargaining unit status.

The Arbitrator has made an exhaustive review and analysis of the entire record in this matter including a thorough review of the voluminous hearing transcript and a careful reading of the parties' post hearing briefs. Further, he is persuaded that the crucial issues raised at the hearing and in the briefs have been addressed above, and that certain other matters that arose in these proceedings must be deemed irrelevant, immaterial or side issues at the very most, and therefore have not been afforded any significant treatment, if at all, for example: whether or not Lisa Edwards was improperly removed from the bargaining unit; whether or not the Agency relied on data from HR Smart and Bargaining Unit Status Codes in its determination of bargaining unit count; the Agency's claim of collateral estoppel; whether or not there were minor errors in the original grievance; Wells' claimed utilization of VASTA in calculating official time; the Agency's "Managers Guide;" the awards of Arbitrators Kist, Persina, Kane, and Rutzick; FLRA arbitration review decisions 71 FLRA No. 189, O-AR-5571; 180126-00816, O-AR-5540; 71 FLRA No, 143, O-AR-5435; 70 FLRA No. 32, O-AR-5201; 70 FLRA No. 146, O-AR-5292; 71 FLRA No. 43, O-AR-5408; 71 FLRA No. 221, O-AR-5409; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes that with the specific facts of the subject grievance, and within the meaning of the parties' master collective agreement the Union has established by clear and convincing evidence that the Department willfully miscounted the number of bargaining unit employees in its calculation of official time in violation of Article 48 of the Master Agreement. The Agency must be cognizant that when the union, its officers and its

members are not treated with respect, morale and service are negatively impacted. The obvious result is that more complaints from bargaining unit members will arise, grievances will increase, and the veterans being served will ultimately suffer.

Accordingly, an award will issue, as follows:

AWARD

THE AGENCY VIOLATED ARTICLE 48 OF THE MASTER AGREEMENT WHEN IT WILLFULLY MISCALCULATED THE BARGAINING UNIT COUNT IN JUNE OF 2019 AND CONTINUED TO VIOLATE THIS ARTICLE. IT FURTEHR VIOLATED ARTICLES 1, 17, 47 and 49 OF THE MASTER AGREEMENT BY IMPROPERLY REDUCING THE AMOUNT OF OFFICIAL TIME AVAILABLE TO THE UNION AND EFFECTIVELY INTERFERING WITH THE UNION'S RIGHT AND DUTY TO REPRESENT BARGAINING UNIT EMPLOYEES.

REMEDY

1. The Agency will within thirty (30) days re-issue BUE counts for the time periods for which the counts were issued on July 10, 2019, March 2020, September 2020, and March 2021 and in doing so the Agency will count all Bargaining Unit Employees into the overall bargaining unit count, including all CBOC employees. If the Agency is unable or unwilling to provide a count then the count in Union Exhibit 26, 724 bargaining unit employees, will be used.

2. The Agency will immediately restore 1,013 hours (869-CBOC & 144 Union Sponsored Training) to the union's overall bank of official time hours, Union Exhibit 14, or a greater amount of time as determined by a later count.

3. The Union will have three years from this order to utilize the restored official time. Any official time unused due to the Agency's denials will rollover each year until such restored official time has been exhausted.

4. The Agency will within 30 days restore all annual leave, sick leave, leave without pay and absent without leave utilized by Kevin Ellis from July 8th, 2019, through September 30th, 2019.

5. The Agency will pay 196.5 hours of straight time to Kevin Ellis for performing representational responsibilities in after duty hours due to the denial of official time. The restoration of compensation will be with interest and special pay entitlements including Saturday premium pay, Sunday premium pay and/or shift differential pay for applicable days. Any restoration of compensation will be with interest.

6. The Agency will compensate all Union representatives that have not been reimbursed for the effects of the intentional miscount by reimbursing them for any time not otherwise compensated for due to the refusal of allowing official time, such compensation will include interest. Union officials will provide dates and times of official time utilized outside of duty hours.

7. This award will be implemented forthwith pending any timely appeal from the Agency. Should the Agency decide to appeal the decision, the award will remain pending any successful appeal.

8. The Arbitrator retains jurisdiction for ninety (90) days for the settlement of attorney fees and the enforcement of the remedies herein.

John Remington, Arbitrator

October 20, 2021

Minneapolis, MN

ARBITRATOR'S FEES AND EXPENSES

Fees:

4 Hearing Days @ $1200	$4800	
6 Study/ Writing Days @ $1200	7200	
Fee Total		$12,000

Expenses:

Word Processing/ Clerical; Postage	217.50	
Expense Total		217.50
Total Due		$12,217.50

Payable by Department``	$6108.75
Payable by Union	$6108.75

Make checks payable to: John Remington, Arbitrator- 1109 N. Lucas Lane, Gilbert, AZ 85234

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