

IN THE MATTER OF ARBITRATION:

OPINION

AND

**U.S. DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MO**

AWARD

NOVEMBER 13, 2023

AND

FMCS CASE NO. 220104-02301

A.F.G.E

LOCAL 2338, AFL-CIO

Arbitrator: John T. Nicholas

Representatives: Agency – Travis Gann, Human Resource Specialist
Abner Martinez, Mgmt. Rep.
Union – Shalonda Miller, Esq.

OPINION AND AWARD

I.

The American Federation of Government Employees and its Local 2338 (“Local 2338”) (“Union”) and the United States Department of Veteran Affairs (“Agency”) have brought forth to arbitration an unresolved Step 3 grievance filed by the Union on behalf of Local 2338 Chief Steward, Harold Lampley, on November 29, 2021.¹ The Union alleges that Agency officials acting on behalf of the Department of Veteran Affairs, John J. Pershing Medical Center, violated the terms of the parties’ Master Agreement when it denied Lampley use of allocated official time that was needed to carry out the Union’s mission and workload. The Union contends that the denials were ongoing and continuous in nature, and occurred during the period of April 2021 to May 2022 while Lampley was assigned to a temporary detail under the supervision of James Gebelhardt in the Health Administration Service. The Union further contends that the denials of

¹ Lampley was Chief Steward at the time the grievance was filed; he is currently the First Vice-President of the Union. (Tr. 12:11-13).

official time forced Lampley to complete work outside normal duty hours so that he could meet his Union duties.

By agreement of the parties, a virtual arbitration hearing was held on June 17, 2022; April 11, 2023; and June 20, 2023. All parties at the hearing were afforded a full and fair opportunity to call, examine, and cross-examine witnesses, to present relevant written and/or other documentary evidence, and to argue orally on the record. Upon conclusion of the hearing, the parties agreed to submit post-hearing briefs. The briefs from the parties were received on or around September 1, 2023, and the case record was deemed closed.

II.

The parties have stipulated that the issue is as follows:

Whether the agency violated the Federal Service Labor Management Relations Statute, the parties' collective bargaining agreement, and final and binding arbitration awards when it denied 100% official time to AFGE Local 2338's Chief Steward, Harold Lampley? If so, what shall the remedy be?

III.

The following provisions of the 2011 Master Agreement are deemed relevant to the instant dispute:

Article 2 – Governing Laws and Regulations

Section 2 – Department Regulations

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

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.

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 the 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, Consolidated Mail Out Pharmacy (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.

The following statutes and decisions are also deemed relevant:

5 U.S.C. § 7131

(d) Except as provided in the preceding subsections of this section -- (1) any employee representing an exclusive representative, or (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest. 5 U.S.C. § 7131(d) (2023).

5 U.S.C. § 7119

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(c)(5)(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

IV.

The record reflects that from April 2021 to May 2022, Lampley was assigned to a temporary detail as GS-06 Advanced Medical Support Assistant (MSA) with an official duty station at West Plains Community Based Outpatient Clinic (CBOC). Lampley's first level supervisor was James Gebelhardt in the Health Administration Service, and Lampley's job duties were to process beneficiary travel reimbursement claims. Lampley was expected to process 11 claims per hour.

During this time, Lampley also served as Union Representative for the West Plains, Farmington and Cape Girardeau CBOCs. Lampley testified that he was allocated 40 hours of official time per week, or 100%, by Union president Kevin Ellis to perform his representational duties. Lampley made numerous official time requests to Gebelhardt through the Veterans Affairs Time and Attendance (VATAS) system, which is the system that VA national policy requires for tracking official time requests and other time and attendance related matters. However, Gebelhardt never approved 100% official time. Gebelhardt explained that he based his decision to deny 100% official time on the May 10, 2021 memorandum ("Adkins Memo") that provided guidance to supervisors in approving or disapproving official time requests. Based on the instructions within the Adkins Memo, Gebelhardt determined that Lampley's official time was restricted to his duty station and should be 25% instead of 100%. In addition to the Adkins Memo, Gebelhardt based his denials on operational needs since there was a consistent backlog in processing beneficiary travel claims and the Agency needed Lampley to perform his job duties to keep up with demand.

As a result, the Grievant performed his representational duties while off duty and recorded 905.5 hours on an Excel spreadsheet that he had worked in support of Union activities. The Grievant is seeking make-whole relief, which includes compensation for the official time activities performed while on nonduty time, interest, and attorney's fees.

V.

The parties' positions are summarized as follows:

Union

The Union contends that the agency violated federal law, the master agreement, and binding arbitration decisions when it denied 100% official time to the Grievant, Harold Lampley. The Union further submits that these violations constitute unfair labor practices and interfered with Lampley's rights to participate in union activities.

The Union suggests that the Agency's reliance on operational need as a basis for denial of official time was not in good faith because the Agency never hired additional staff or took appropriate measures to address the consistent backlog of beneficial travel claims. For example, Gebelhardt only required one stand down during the entire period that Lampley was under his supervision in an effort to remediate the backlog. Moreover, the Agency has now hired additional positions to process travel reimbursement claims. This shows that Lampley could not have eliminated the backlog in his position alone and is evidence that the Agency's use of the backlog as a basis for denying official time requests was merely pretext for anti-union animus.

In addition, the Union posits that the Agency's reliance on the Adkins Memo was incorrect. The Adkins memo is not controlling over the Master Agreement. In contradiction to the Master Agreement, the Adkins memo required agency officials to restrict official time to 25%

at the employee's duty station. This restriction is not found in the provisions of the Master Agreement. The Adkins Memo was unilaterally provided by the Agency and was not bargained by the parties. The Agency cannot circumvent the provisions of the Master Agreement by use of internal memorandums purporting to provide guidance of its own interpretation of the Master Agreement.

In its request for relief, the Union requests the Arbitrator to uphold the grievance and require the Agency to make the Grievant whole with all applicable back pay, benefits, interest and attorney's fees. The Union also seeks restoration of all remaining official time that should have been allocated to the Grievant to the Union's official time bank and an order requiring the Agency to issue a remedial notice posting regarding its violations.

Agency

The Agency agrees that official time is authorized by 5 U.S.C. 7131. However, the Agency argues that the issue is over how official time is used, not the amount of official time. The federal statute requires that official time be reasonable, necessary, and in the best interest of the public. The Agency claims that Lampley's numerous official time requests were flawed and not in the best interest of the public.

The Agency's witness, Gebelhardt, testified that Lampley never provided any context as to why he needed to use official time when he submitted his requests. As such, Gebelhardt could not determine if the use of the official time was reasonable, necessary, and in the public interest, as required by federal statute. Gebelhardt emphasized throughout his testimony that the VA's mission was to serve veterans and Lampley's job duties were needed to meet that mission because veterans depend on beneficiary travel to make it to their medical appointments. The

Agency further brought out during Gebelhardt's testimony that Gebelhardt is also a prior union steward and understands the importance of union activities.

Gebelhardt recalled certain occasions when he approved the use of Lampley's official time, and the other occasions when he denied the use of official time due to operational needs. Gebelhardt testified that he considers whether he has enough staff to handle the workload when determining if an operational need exists. At the time, Lampley was his only employee who did 100% telework. Other than Lampley, Gebelhardt had two other employees who processed beneficiary travel claims. Gebelhardt testified that he had to balance Lampley's requests to use official time against the needs of his other employees as well, which alluded to the fact that the department did not have adequate staffing. Further, Gebelhardt testified that when he denied Lampley's request, he offered an alternative schedule for Lampley to complete his Union activities or a service line for Lampley to contact to schedule alternative times for the use of official time. Gebelhardt also admitted in his testimony that he never approved 100% official time for Lampley pursuant to the instructions of the Adkins Memo. In addition, the Agency introduced email correspondence through Gebelhardt's testimony that shows where Gebelhardt notified Lampley that he could not approve the use of official time during off duty hours because he was not authorized to approve overtime for Union activities.

The Agency submits that Gebelhardt acted in good faith when considering and denying Lampley's requests to use official time. The Agency argues that the Union has failed to present sufficient evidence of a violation on the part of the Agency. For this reason, the grievance should be denied.

In essence, the Agency's argument is that management has the right to approve use of official time and that management needs to know the reason for the use of official time when determining if it should be approved.

VI.

Article 48, Section 10 of the Master Agreement grants the Union the use of "official time" to carry out its representational functions and duties on behalf of unit employees. Section B of the Article states that "as provided in 5 USC 7131, the official time shall be granted as specified in law and in any additional amount that the Department and the Union agree to be reasonable, necessary, and in the public interest." Section 10 also 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 conducted on a semi-annual basis. Section 10 further provides that a minimum 25% of official time shall be allocated at the duty station where a local represents employees at a Community Based Outpatient Clinic (CBOC), Consolidated Mail Out Pharmacy (CMOP), clinic, service center, or successor, at a duty station greater than fifty miles from the main facility. The interpretation of the allocation of 25% official time is the gravamen of the instant grievance.

The record reflects that the Union president, Kevin Ellis, is responsible for allotting the official time to other Union officials or representatives. The Agency did not produce any evidence to dispute such. However, the Union official must still obtain approval for use of the official time from his or her supervisor when seeking to use the official time that is allotted to him or her.

In 2017, the Federal Services Impasse Panel issued a Decision and Order that provided operating instructions regarding the allocation and use of official time. *See* 17 FSIP 032. While

the Panel pointed the parties back to the provisions of the Master Agreement in regards to the allocation of official time, the Panel explained that the “expectation is that the requests for official time will be granted unless operational needs prohibit its use.” The Panel went on to say that there are “no other circumstances in which the Agency could deny these requests”. The Panel further instructed the parties to work together to identify an alternative time for use of the official time when a request for official time is denied.

On October 20, 2021, Arbitrator Remington issued a decision which explained that the contractual minimum of 25% is independent of the block of hours created by the formula of 4.25 times the current bargaining unit count. *See* FMCS 200402-05290. Arbitrator Remington noted that Section 10 guarantees that there will be a union representative available, on official time, for at least 25% at the eligible duty stations.²

The testimony of the witnesses at the hearing shows that the parties have had extreme difficulties in the past in resolving official time disputes and other bargaining-related issues. For example, Ellis testified to a side issue that is not before the Arbitrator but is illustrative of the parties’ disputes involving official time. According to Ellis, the Agency has incorrectly applied Article 48’s formula for allocation of official time. Ellis claims that the Agency distributed official time according to the number of employees represented by the Union instead of according to the number of positions, which led to the loss of time that the Union is entitled to under the Master Agreement.

In support of its defense, the Agency, through Gebelhardt, offered emails into evidence that were exchanged between Gebelhardt and Lampley regarding official time. The Agency used

² Note that Arbitrator Remington’s decision also address the 50% official time requirement in Section 10. However, the 50% official time requirement was not in dispute in this instant grievance; thus, this opinion is limited to discussing the 25% official time requirement of Section 10.

these email exchanges to show where Gebelhardt approved official time on occasions when it was reasonable, and to show that he offered alternative schedules when he denied official time due to operational needs.

The Agency also called Kimberly Adkins as a witness. Adkins is currently the associate medical director at John J. Pershing VA and she testified to the internal memorandum, the “Adkins Memo”, that she created in an effort to interpret Article 48, Section 10 and the 2017 FSIP decision for supervisors who are responsible for approving or denying the use of official time. Adkins testified that Section 10 in Article 48 does not detail how the 25% minimum official time should be allocated for CBOCs located greater than 50 miles away from the main facility.

During its rebuttal, the Union called Jennifer Gum, the president of the AFGF local union at the Lenoir, Kansas VAMC, as a witness. Gum testified that she allocates 100% official time to a single representative to cover different CBOC's, which is the same manner in which Ellis assigned Lampley to cover different CBOC's. Gum explained that Article 48 provides that each duty station that is greater than 50 miles from the facility is entitled to a minimum of 25% official time, which adds up to 100% official time for her representative who covers different CBOCs. Gum's testimony supports the Union's position that it has been past practice to allow a single representative to represent different CBOC's, although such representation gives 100% official time to the representative after adding up the minimum 25% official time for each CBOC.

Overall, it appears that the underlying issue that may be the cause of past and ongoing difficulties between the Agency and the Union in resolving conflicts involving official time is that it is difficult for the parties to clearly delineate a balance between the Union representative's need to meet Union duties and the need to further the VA mission. The parties appear to

consistently engage in a tug of war in trying to reach a common understanding for the appropriate use of official time. For example, the term “operational need” is not defined, and it likely cannot be defined for the sake of clarity because each department within the VA has different types of staffing needs and production goals. Nevertheless, the lack of having the constraints of a definition may allow Agency officials the freedom to use the term in a general manner when denying official time requests. On the other hand, “official time” is not defined either and Union representatives may use this term broadly as well when they request use of official time. Thus, whether operational needs are a legitimate reason to deny a union representative the use of official time must be considered on a case-by-case basis.

Here, the Agency has not shown that a legitimate operational need existed for the denial of Lampley’s official time. Although the parties do not dispute the existence of the backlog of beneficiary travel claims that needed to be processed, the Agency did not offer prevailing evidence to show that the backlog became a current issue when Lampley started working under Gebelhardt’s supervision. Indeed, the backlog may have continued even if the Agency had filled Lampley’s position with a full-time employee who was not a Union member. Based on the testimony of Gebelhardt and Lampley, the backlog appears to be the result of insufficient staffing. If the Arbitrator finds that the Agency acted appropriately in citing “operational need” as a basis in this instance, then the Agency may place Union representatives in positions where there are always insufficient staffing and a backlog of some in order to create a basis for denying official time on a whim.

Although the Agency failed to prove it had a legitimate operational need for denying Lampley’s use of official time, the Arbitrator does not agree with the Union that the Agency’s actions were pretext for anti-union animus and discrimination. Rather, Gebelhardt made a

mistake by relying on an inaccurate interpretation of the contract language regarding the amount of official time that is allocated for CBOCs.

The Agency's proffered interpretation of Article 48 is strained. Article 48 does not imply that the minimum 25% of official time must be used solely at the representative employee's duty station. More importantly, neither party has cited contract or statutory provisions that prohibit the Union president from assigning a representative to cover different CBOC's at the same time. Based on the plain language of Article 48, a minimum of 25% official time should be allocated for *each* CBOC, consolidated mail out pharmacy, clinic, service center, or successor, and duty station that is greater than 50 miles from the facility. If the parties had intended for 25% official time (or 10 hours per week) to be used solely at the Union representative's duty station, then the Union president would never assign a representative to cover more than one CBOC because the representative would not have enough official time to meet his or her duties at more than one CBOC. The arbitrator cannot insert language into a contract provision based on one party's strained interpretation of the provision.

Moreover, while the Arbitrator can certainly agree that it is good practice for union officials to communicate with management the context of why they need to use their official time, the Agency failed to present any evidence that requires the Union to do so. As such, the Arbitrator can only encourage the parties to do so in an effort to foster ongoing communications and come to an understanding of why official time is necessary.

Having considered the documentary evidence produced and the testimony adduced at the hearing in this matter, the Arbitrator finds that the Union has established by a preponderance of evidence that the Agency violated Article 48 of the Master Agreement when it continuously disapproved the Grievant's requests to use official time without providing a legitimate

operational need of the denial. The Arbitrator further finds that the Agency misinterpreted Article 48 of the Master Agreement when it determined that the Union was restricted to allocating 25% official time at the employee's duty station, in lieu of allocating 25% official time at each CBOC that is more than 50 miles away from the facility. Accordingly, the Agency's request that the grievance be denied is rejected.

VII.

AWARD AND REMEDY

To remedy the violations that have occurred, the Agency shall be required to immediately restore 654.5 official time hours to the Union's overall bank of official time hours, or a greater amount of time as determined by a later count. This amount represents the hours of official time based on the Agency limiting the official time to 25%, or 520 hours, annually. The Union will have three years from this decision 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.

Further, the Agency will pay 905.5 hours of straight time to Harold Lampley with interest for performing representational responsibilities after duty hours due to the denial of official time.

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.

The Arbitrator retains jurisdiction for a period of sixty (60) days from the date of this decision to assist the parties in resolving any issues that may arise regarding the implementation of the remedial portion of this Award.

John T. Nicholas,
Arbitrator

November 13, 2023


