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|---|---|---|---|
| In the Matter of the Arbitration | ) | | |
| | ) | Grievant: | Class Action |
| between | ) | | |
| | ) | | |
| U.S. Department of Veterans Affairs | ) | | |
| John J. Pershing VA Medical Center | ) | FMCS Case Number: | 220526-06309 |
| | ) | | |
| and | ) | | |
| | ) | | |
| American Federation of Government Employees Local 2338 | ) | | |
| | ) | | |

BEFORE: Christopher L. Beebe

APPEARANCES:

| | |
|---|---|
| For the Agency: | Noah Smith, Executive Employee/Labor Relations Specialist |
| For the Union: | Kevin Ellis, President Local 2338 |
| Place of Hearing: | Virtual |
| Dates of Hearing: | August 23, October 5 2023 |
| Date of Award: | December 20, 2023 |

AWARD: The Agency violated Articles 17 and 48 of the collective bargaining agreement when it denied official time which was properly requested by Union representatives. Additionally, the denial of the official time is found to be a violation of 5 U.S.C. § 7116, and therefore constitutes an unfair labor practice. The Agency is ordered to implement the remedy indicated herein.

*Christopher L. Beebe*

Christopher L. Beebe, Arbitrator

## STATEMENT OF THE CASE

This grievance arose under the parties' 2011 Master Agreement (contract, CBA) when the staff at the John J. Pershing VA Medical Center, located in Poplar Bluff, MO, (Agency, Management) allegedly refused to provide Union representatives with official time for representation. The grievance was filed at Step 3 of the parties' grievance process on April 27, 2022.

The matter was not resolved and was heard by the undersigned on August 23 and October 5, 2023. The hearing was quite contentious. The hearing time on both dates was marked by extensive arguments from both parties. These occurred before, during, after, and in between witness testimony. The arguments and much of the witness questioning and testimony was highly repetitive. Over forty-five exhibits were submitted.

The evidentiary record was closed on October 5, 2023. The parties elected to submit post-hearing briefs, both of which were received by November 22, 2023. The combination of post-hearing briefs and accompanying arbitration awards and case law consisted of approximately five-hundred pages of material.

## ISSUE

The parties did not agree on a joint statement of the issues. In accordance with Article 44.2.F of the contract, the arbitrator has determined the issues to be as follows:

1. Is the grievance timely?
2. Is the grievance procedurally arbitrable?
3. Did the grievance filing provide sufficient information for the Agency to respond? If not, what is the appropriate remedy?
4. Did the Agency violate the contract by denying official time for representation, including at arbitration? If so, what is the appropriate remedy?
5. Did the Agency commit Unfair Labor Practices by denying official time? If so, what is the appropriate remedy?

## BACKGROUND

On April 27, 2022, AFGE Local 2338 President Kevin Ellis filed the instant grievance at Step 3 of the parties' grievance procedure. The grievance was an attachment to an email, the subject line of which stated "[EXTERNAL] Step Three Grievance." The email was addressed to Acting Medical Center Director Chandra Miller and Associate Medical Center Director Kimberly Adkins, as well as various Union officials.

The grievance states in part:

> This grievance is filed in accordance with Article 43 of the Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees, signed March 15, 2011 (MCBA).
>
> The agency has violated Article 1, Article 2, Article 17, Article 18, Article 47, Article 48, Article 49, FSIP Submission, FSIP Decision. 5 USC 7131 and any other relevant article contained within the master agreement rule, and/or rule, law or regulation, to include Equal Employment Opportunity Commission.
>
> **Statement of the Issue**
>
> The agency has purposefully refused to approve official time that's afforded to the union for representation on behalf of bargaining unit employees. This is an ongoing and continuing action from the agency over the past five to six years. This repeated pattern makes this action fit the definition of ongoing and reoccurring.
>
> The agency has lost every single arbitration related to official time, official time denials, after duty hours and after duty work, and has been order to pay and compensate employees for denials. This action by the agency is on full display. The agency is either playing ignorant of the facts, or cannot understand their actions are illegal. Either way, it is illegal.
>
> The agency has utilized illegal, evasive, manipulative, false and misleading tactics in targeting the union's ability to provide representation. This includes purposefully violating the FSIP decision, utilizing an unapproved managers guide which is not an approved agreement between the national parties.
>
> The agency and its representatives such as Shaneatra Jones, Omari Andwele, Kimberly Adkins, Libby Johnson, Chandra Miller, Dale Garrett and others are fully aware of their malfeasance and misconduct. The agency made this false claim based upon knowing to union representatives starting on or about April 1st, 2022, and continuing forward.

> Nowhere within the parties agreement will you find any language placing a ceiling on official time. In fact, the contract makes it very clear, the formula provided is the floor or minimum time the union will be allotted, not the ceiling. The agency's malfeasance and misconduct in this area is on full display.
>
> The agency is forbidden from supervising, communicating, meeting with any employees until all of the union's official time is approved, to permit the employee's rights to representation. Your right to supervise is subservient the employees statutory and contractual rights.
>
> The agency interfered with the union's ability to represent employees within arbitration by denying preparation time, resources and time spent in arbitrations. The agency caused stress, harmed, inadequate representation by denying official time needed and required to perform arbitrations without fear, retaliation and other means.
>
> Without official time, they agency interfered with the union's ability to fulfill its representational responsibilities. The following series of agency actions, provide a clear picture of their intentions. [sic]

This was followed by a brief synopsis of nine arbitration awards on various issues, including awards by Arbitrators Rutzick, Kapsche [sic], Remington (2), Kist, Aleman, Sonneborne, Kane, and Cerone.

The text of the grievance continued

> As you follow the pattern just laid out for you by the union, there is a clear and consistent pattern of Union Animus from agency's leadership. Previous arbitrators have also ruled the agency's actions are illegal, target, manipulative, evasive and untruthful, There are no other VA Medical Center within the entire United States with this record of Union Animus. [sic]

Cited in the grievance were the following sections of the contract:

Preamble, Sections 1-2;
Article 1 – Recognition and Coverage, Sections 1-3, 6;
Article 2 – Governing Laws and Regulations, Sections 1-2;
Article 17 – Employee Rights, Sections 1-5, 7-8, 10-15;
Article 18 – Equal Employment Opportunity, Section 1;
Article 47 – Mid-Term Bargaining, Sections 1-3, 4A;
Article 48 – Official Time, Sections 1-2, 4-7, 9-10;
Article 49 – Rights and Responsibilities, Sections 1-3, 4A;

The closing portion of the grievance stated as follows:

> **AFGE Local 2338 reserves the right to amend this grievance if other applicable laws, rules, regulations or additional violations are discovered during the course of attempting to seek resolution. The agency has not been forthcoming with all necessary information needed to have an informed specific discussions about the issues.** (emphasis in original)
>
> Resolution:
>
> 1) The agency will immediately approve all of the union's allocated official time when submitted.
> 2) The agency will place all denied official time not utilized over the past six years immediately into the union's bank of hours.
> 3) The agency will compensate any and all union representatives for time spent performing duties after duty hours and weekends due to the big lie of the union exhausting official time.
> 4) The agency will pay the Union's cost of any arbitration in which they interfered by refusing to provide information, time, resources, to include after duty hours and weekend times.
> 5) Make the union whole with any other remedy necessary.
>
> [sic]
>
> Kevin Ellis, President
> AFGE Local 2338
> Information Copy to: HR/LR

On May 11, 2022, President Ellis sent an email to Agency officials, advising that there had been no grievance meeting, and "Today is Day 14..." Associate Medical Center Director Kimberly Adkins responded, asking whether President Ellis was available to meet on May 20. On May 13, President Ellis emailed Agency officials, stating "The Union invokes Arbitration. The union did not meet with the agency concerning this issue."

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 17 - EMPLOYEE RIGHTS

* * *

**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 local supplemental agreements. If the employee and the local union representative cannot be released immediately, the employee and the local union representative will normally be released two hours before the end of their tour of duty. If such release is not made, appropriate relief from time frames will be afforded (e.g., one day extension for each day of delay).

* * *

## ARTICLE 43 - GRIEVANCE PROCEDURE

* * *

**Section 4 - Jurisdiction**

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

**Section 7 - Procedure**

* * *

Step 1.

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

*  *  *

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

*  *  *

## ARTICLE 44 - ARBITRATION

*  *  *

**Section 2 - Arbitration Procedure**

*  *  *

C.

*  *  *

A reasonable amount of preparation time for arbitration will be granted in accordance with the provisions of Article 48 - Official Time and local supplemental agreements.

*  *  *

## ARTICLE 48 - OFFICIAL TIME

**Section 1 - Purpose**

*  *  *

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.

* * *

**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, 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.

* * *

## RELEVANT STATUTORY LANGUAGE

**5 U.S.C. § 7116 - Unfair labor practices**

**(a)**For the purpose of this chapter, it shall be an unfair labor practice for an agency—

* * *

**(2)** to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

* * *

## POSITION OF THE UNION

The Union argues that this grievance was properly filed under Article 43 of the contract. The Agency's position regarding timeliness and arbitrability are unsupported. The Agency failed to provide any timely grievability or arbitrability assertions, thus waiving any procedural or threshold claim. Therefore, the grievance must be found to be arbitrable.

In accordance with the 2017 Federal Service Impasse Panel (FSIP) decision, the Agency is not to deny official time unless there is an operational need to do so. If official time is denied, the Agency must offer alternative dates and times. In this case, time was denied when there was no operational reason for doing so. The Union contends that the denial of official time required that representatives work on employee issues after hours and without pay.

The affected representatives were Kevin Ellis, Harold Lampley, Jacob Jordan, Dorothy Johnson, Todd Shimkus, and Sonia Ellis. Kevin Ellis and Harold Lampley were allocated one-hundred percent official time (eight hours of their tour of duty). Jacob Jordan, Sonia Ellis, and Todd Shimkus were allocated fifty-percent official time, and Dorothy Johnson was allocated 25% official time. The Union asserts that due to the Agency's wrongful denial of official time between April 1 and July 31 of 2022, these representatives had to work after their tours of duty to ensure employees received the representation they are entitled to under statute and the contract.

The denial of official time is also a violation of Article 17.1, which states that any employee who "exercises any statutory or contractual right shall not be subjected to reprisal or retaliation." Further, the Agency also failed to abide by final and binding arbitration awards concerning official time.

According to the Union, the denial of representation was due to an illegitimate calculation of official time. The issue began when Human Resources Specialist Omari Andwele miscalculated the official time, and notified the Union via email that official time for fiscal year (FY) 2022 was exhausted. Not only did the Agency use bargaining unit employees for the calculation, when the contract specifies bargaining unit positions, it also did not include the contractually specified time for the Community Based Outpatient Clinics (CBOCs). Regardless, the Agency thereafter used HR Specialist Andwele's email to justify denial of official time.

The Union claims the Agency calculation was done using VATAS, a timekeeping system that was implemented without bargaining. The national Union took the VATAS issue to arbitration and Arbitrator Malcom Pritzker held that the Agency could not use VATAS with regard to calculations of, requests for, or approval of official time.

The above actions by the Agency resulted in lack of representation for bargaining unit members, claims the Union. Under the Federal Service Labor-Management Relations Statute, employees have the right to form Unions, which are entitled to duly represent those employees. When employees need advice, guidance, and counsel from their Union, and representation is unavailable due to the Agency's denial of official time, employee morale is negatively impacted. Low employee morale affects the ability of the Agency to deliver care to veterans.

The denial of official time is not only a contract violation, it also constitutes an unfair labor practice (ULP), and demonstrates Union animus on the part of the Agency. The Agency interfered with the employees' right to representation. Specifically, the Agency violated § 7116(a)(2) and (4) of the Statute, discriminating against the Union. The Union notes the test for determining "discrimination" or "anti-Union animus" is described in the Federal Labor Relations Authority (FLRA) decision in Letterkenny Army Depot, 35 FLRA 113, 118 (1990).

The Union notes a long list of arbitration awards identifying violations by the Agency, and that these recurring and continual violations stem from their discriminatory anti-Union animus practices. Defenses to the Union's charge of discriminatory animus were absent at hearing. The Agency failed to rebut the Union's prima facia case of anti-Union animus.

The Union has demonstrated, by preponderant evidence, that the Agency violated federal law, the contract, and arbitration awards that were final and binding on the parties when it denied the grievants' allocated official time. The Union asks that the grievance be sustained, and the arbitrator grant any lawful relief he deems fit, including, but not limited to

1. Pay the grievants for their allocated time between April 1 and July 31 of 2022, as they were forced to work after their tours of duty. There were 83 work or business days in this time frame. Given the grievants' allocated time, the amounts are as follows: Kevin Ellis and Harold Lampley at 100%, which equals 664 hours; Jacob Jordan, Sonia Ellis, and

Todd Shimkus at 50%, which equals 332 hours; Dorothy Johnson at 25%, which equals 166 hours.

2. Restore to the Union 4,633 hours of official time, to be allocated by the local Union president as he sees fit, for a period of three years from the date of the decision. This is the difference between HR Specialist Andwele's number of 759 employees and the 1,115 total positions the Agency later provided. That difference (356) times the 4.25 hours specified by Article 48.10 equals 1,513. That number plus the 3,120 hours of the CBOC official time allotment equals 4,633 official time hours.

3. For the ULP violations of 5 U.S.C. § 7116(a)(1), (2), (5), (7) and (8), provide make-whole relief to the grievants (Kevin Ellis, Harold Lampley, Jacob Jordan, Dorothy Johnson, Sonia Ellis, and Todd Shimkus), consistent with Authority precedent: Straight-time pay for all improperly denied official time, interest, and attorney's fees.

4. Order the Agency to distribute a remedial notice posting by email to AFGE 2338 bargaining unit employees regarding its violations of the Statute.

## POSITION OF THE AGENCY

The Agency contends that the grievance is not arbitrable due to its being untimely and procedurally defective. The contract requires the Union to file within thirty calendar days of when it became aware, or should have become aware of the violation. While the Union claims this has been an ongoing violation, the evidence indicates that other grievances on official time were adjudicated during the time frame the Union claims.

The grievance is procedurally defective, as it should have been filed at Step 1. The Union in this case bypassed Steps 1 and Step 2, which are a contractual requirement. An arbitrator cannot assume jurisdiction over the merits of a grievance when the party invoking arbitration fails to comply with the procedural requirements of the contract.

According to the Agency, the Union also invoked arbitration improperly. Article 44.1 states that a party may refer to arbitration any grievance that remains unresolved after the final step. Here, Union representatives' pay records were corrected, accounting for the denied official time,

before arbitration was requested by the Union. The official time issues had already been resolved and were moot.

This case constitutes arbitration by ambush. The Union's grievance did not specify the particulars of the alleged violation. The Union waited for arbitration to provide those details. This leads the Agency to question the Union's motives and good faith in this arbitration, based on the lack of information provided to support the grievance.

The Agency urges that any evidence or arguments outside of what was provided with the grievance filing be deemed new evidence/argument and barred as prejudicial. The Union should not be permitted to wait until arbitration to disclose the issues and evidence. A ruling in favor of this approach will have a negative effect on the Agency's ability to resolve issues prior to arbitration. In the Agency's view, where the Union has failed to provide explicit information or has been deliberately vague in its submissions, a negative inference should be drawn. It is also noted that the Union attempts to confuse the issues in this case by citing prior arbitration decisions that have been adjudicated.

If the grievance is found to be arbitrable, the Agency requests that it be denied on the merits. As noted above, the time records were corrected. Furthermore, the Union provided no evidence of any representative working after-duty hours for representation.

Should the arbitrator consider a remedy, the Agency notes that the discretion to fashion a remedy includes determining whether any remedy at all is warranted. An arbitrator isn't required to provide a remedy, even after finding a violation of the contract, absent a contract provision that requires such. Also, when a violation is found, putting the Agency on notice that future violations could result in corrective action constitutes a remedy. An award of compensatory time off for an improper denial of official time is not appropriate in the circumstances of this grievance.

## DISCUSSION AND OPINION

The first issue to be addressed is the Agency's claim that the grievance is barred due to being untimely and/or procedurally defective. The grievance was filed at Step 3 of the parties' grievance procedure. Article 43.7 of the contract includes several notes. "Note 5" states "When

a grievance is initiated at a higher step, the time limits of Step 1 will apply." The procedure for Step 1 states

> An employee and/or the Union shall present the grievance to the immediate or acting supervisor, in writing, within 30 calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature.

The grievance states "The agency has purposefully refused to approve official time that's afforded to the union for representation on behalf of bargaining unit employees. This is an ongoing and continuing action from the agency over the past five to six years." The Union argues that, as a continuing violation, the grievance cannot be deemed untimely. The above statement from the grievance, however, was refuted in the Union's post-hearing brief, which stated "both parties were aware that the timeframe for the Union's grievance (Jx. 2) covered April 1, 2022 through July 31, 2022." While the evidence doesn't demonstrate the ending date of that statement to be accurate, clearly grievance doesn't span "the past five to six years." Therefore, the thirty-calendar day limit of a Step 1 filing applies.

Given that the start of the timeframe was April 1, and the filing of the grievance was April 27, it is found to be timely.

The next issue to be addressed is procedural arbitrability. The Agency asserts that, by bypassing Steps 1 and 2, the Union violated the procedure set forth in the contract. Note 5 states that grievances "should normally be resolved at the lowest level possible," but then gives examples of when filing at the second or third step of the process may be appropriate. One such example is "when the Union grieves an action of a management official other than a Step 1 supervisor." In this case, the Union has grieved the denial of official time. The evidence includes a March 31, 2022 email from Human Resources Specialist Omari Andwele to POPBLUFF-BargainingGroup, stating, in part, "AFGE Local 2338, This email is notice that you have depleted the Union official time bank of hours for the FY22 fiscal year per the Master Agreement and the FSIP order dated October 26, 2017." The evidence indicates HR Specialist Omari is not a Step 1 supervisor.

In an April 6, 2022 email addressed to POPBLUFF-CITC Timekeeping, 2nd Vice President & Sr. Chief Steward Jacob Jordan requested official time for several dates during the week of April

11. A supervisor, Marsha Woolard, replied to this request, stating “Per the Guidance we received from HR ER/LR the Union Hrs have been depleted so I am unable to approve at this time.” [sic] Thus, the denial of official time originated with an official other than a Step 1 supervisor, and the filing at Step 3 in this particular case was warranted.

Article 43.4 states “If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision.”

The filing date of the grievance is April 27, 2022. It was emailed, on that date, by Local President Kevin Ellis to Acting Medical Center Director Chandra Miller and Associate Medical Center Director Kimberly Adkins, among others. The evidence indicates that the next action on the grievance occurred on May 11, 2022, when President Ellis forwarded or replied to the April 27 email, again sending it to Director Miller and Associate Director Adkins, as well as others. In this email President Ellis stated “we have not met about this grievance. Today is Day 14…” [sic] Associate Director Adkins then emailed the Director and President Ellis, asking “Are you available next Friday, May 20th at 8 a.m. or noon?”

The testimony regarding this email produced contentions regarding to whom it was addressed, which of President Ellis’s email accounts it was sent to, and other issues. The fact is that the Step 1 time limits require an Agency official to meet with the employee or representative and provide a written answer within 14 calendar days of receipt of the grievance, and neither action was completed. Article 43.4 states “The Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision.” Since there was no evidence of a Step 3 decision, the Agency did not meet the contractual requirements for a claim of non-arbitrability.

Therefore, given the circumstances specific to this particular grievance,[1] and the contract language as indicated above, it is found to be procedurally arbitrable.

<u>Did the grievance filing provide insufficient information for the Agency to respond?</u>

[1] Testimony indicated that there may be other grievances pending arbitration, or already heard at arbitration, dealing with the issue of the Union filing grievances at Step 3 of the process. The finding here does not speak to that issue. Rather, it is based solely on the circumstances of the case at bar.

The Union claims its grievance provided "gravamen."[2] In response, the Agency referred to *American Federation of Government Employees, Local 1741 and United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Milan Michigan* (72 FLRA 501). That case, however, differs from the case at bar. There, the parties met at a lower level of the grievance process, where the Agency denied the grievance for lack of specificity and requested additional information from the Union. The Union then filed with a higher authority and, when denied at that level, invoked arbitration. The decision notes "Specifically, the Arbitrator found that the Union refused to provide the warden with requested information about the alleged violations before arbitration and, therefore, the Union failed to engage in the informal resolution process as required by Article 31.1."

Nevertheless, the filing in the instant case contains little in the way of specifics. Objectively, the sole issue appears to be the denial of official time. At arbitration the Union presented four issues, three of which were directly related to the denial of official time. The other issue questioned whether the Agency miscalculated the Union's official time for FY 2022. Nothing in the grievance suggests this as an issue, and nothing in the five-part requested resolution of the grievance relates to calculation of official time.

One of the arbitration awards submitted with the Union's post-hearing brief was decided by Arbitrator Dennis Kist.[3] On the issue of miscounting employees and hours allocations, Arbitrator Kist opined

> The Master Agreement, and the basic notions of due process, require that the Union put the Agency on actual notice as to the issues being grieved and what issues will be raised in arbitration. In this case, the Union failed to raise this issue in the grievance…therefore the issue of the Agency allegedly violating the Master Agreement or committing an unfair labor practice by undercounting the appropriate bargaining unit employees is not before this Arbitrator and therefore no decision will be rendered in that regard.

The undersigned agrees with Arbitrator Kist and adopts the same finding in the instant case.

Returning to the issue of the time frame of the grievance, the Union's post-hearing brief references President Ellis and Supervisor Employee Labor Relations Angela Bostic in claiming

[2] The substantial point or essence of a claim, grievance, or complaint.
[3] FMCS Case 190717-09453

"both parties were aware that the timeframe for the Union's grievance covered April 1, 2022 through July 31, 2022." There was no testimony from President Ellis to this effect. Supervisor Bostic never stated this. She testified that the Union was made whole for all instances to July 2022. That testimony was given during a series of questions regarding correcting pay records to account for time which should have been official time, including time from other grievances. That testimony was not given in the vein of defining the parameters of the grievance at bar. The evidence, as considered below, will define the time frame of the grievance.

Did the Agency violate the contract by denying official time?

Article 48.10.A. states in part "Each VHA and VBA local union is entitled to a minimum of 50% official time." The Union's asserted that its official time consisted of "allocated" and "non-allocated" time. According to the Union, allocated time was official time which President Ellis scheduled for specific representatives, and that these representatives were not required to request time from their supervisors. Non-allocated time was time which other representatives requested from supervisors. President Ellis stated that the affected Union representatives in this case were himself, Sonia Ellis, Harold Lampley, Jacob Jordan, Dorothy Johnson, and Todd Shimkus. The Union also claimed that when official time was denied, the Agency never mentioned an operational need, nor did it offer to reschedule the time, as required by a FSIP decision.[4]

Despite these assertions, the record reflects that several of the representatives did, in fact, request official time from Agency officials. In an arbitration award submitted by the Union,[5] Arbitrator John T. Nicholas stated

> The record reflects that the Union President, Kevin Ellis, is responsible for allotting the official time to other Union officials or representatives… 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.

The grievance before Arbitrator Nicholas was filed on November 29, 2021, just a few months before the instant grievance. Thus, there is a conflict between how allocated official time was handled in November 2021 and how it was alleged to have been handled in April 2022. No

[4] Neither party submitted the FSIP decision as evidence.
[5] FMCS Case 220104-02301

evidence which would resolve this conflict was presented in the case at bar. Given the requests, in the instant case, for official time by Union representatives who were allegedly on allocated time, and the finding by Arbitrator Nicholas, the undersigned holds that the official time in question here was to have been requested of the Agency.

These requests took various forms, as indicated below. The record on what time was requested, and whether time was approved or denied, is conflicting in some instances. The evidence shows that President Ellis requested official time from 0800-1630 for the following date ranges:

April 4-8
April 11-15
April 18-22
April 25-29
May 2-6
May 9-13
May 16-20
May 23-27
May 30-June 3
June 6-10
June 13-17
June 20-24
June 27-July 1

While the record indicating these requests shows that they were denied, Union exhibit 20a (U-20a) includes an email from Union representative Jacob Jordan, stating that Agency official "Ms. Jones stated, Kevin Ellis will be on official time" for a hearing on April 11-12.

Additionally, U-5 is a spreadsheet showing President Ellis's official time for June 2022. He testified that the Union tracks its official time on such spreadsheets. President Ellis testified regarding the spreadsheet that for June, he was due 184 hours of allocated time, but that he only used 69 hours. Thus, while one part of the record shows that various dates and times were denied, other evidence shows some of those same dates and times being used as official time.

Despite this testimony, U-5 was the only spreadsheet of this type submitted into evidence. No such record was submitted for other representatives.

The time denied President Ellis totals 520 hours (65 days x 8 hours per day). The evidence shows he was on official time for at least 85 hours (the 69 hours from his testimony re: U-5, plus the 16 hours indicated on U-20a). Therefore, Mr. Ellis was improperly denied 435 hours.

The record for local Vice President Harold Lampley takes another form, that being Timesheet Summaries. Exhibits U-19 and U-19a show requests for dates from April 1-22. These summaries indicate a mix of denials and approvals, in some instances for the same date and time range. For most of the denials, the approver comments state "denied - operational need. Bene Travel backlog. Email sent with alternate schedule." With the exception of two dates, the Union did not present enough evidence to prove that all of the time requested by VP Lampley was improperly denied. For April 25 and April 28, the Agency did disapprove the requested official time without indicating an operational need. These two disapprovals total 7 hours.

For Jacob Jordan, On April 6 he sent an email to timekeeping, requesting official time from 0800-1630 for April 11-13 (total of 24 hours). This request was denied. On April 11, he utilized the VA Time and Attendance System[6] (VATAS) to request time on April 13, from 0800-1630. This request, too, was denied. On April 12, he requested annual leave for April 13, which was approved.

The record also shows Mr. Jordan requested official time from 1230-1630 on the following dates: April 14-15, 18-22, 25-29, May 2-6, 9-13, and 16-20 (total of 108 hours). These requests were denied via email on April 11. On April 25, he requested annual leave for 0800-1630 on April 26 and April 28. This request was approved. It is noted that some of Mr. Jordan's requests specifically indicated the time was needed for arbitration. Thus, Mr. Jordan was improperly denied official time for a total of 132 hours.

There is no record of the disapproval of any official time requests for Sonia Ellis, and there is no evidence of any official time requests for Todd Shimkus or Dorothy Johnson.

[6] The Union utilized a significant amount of hearing time arguing that VATAS was not to be used for requesting or approving official time, but did not propose the use of VATAS as an issue in the grievance, during the hearing, or in its post-hearing brief.

Did the Agency commit unfair labor practices when it denied Union representatives official time to represent the bargaining unit, including at arbitration?

The Union claims that the denial of official time amounts to a ULP. Supervisor Bostic testified that, for a specific issue, the Union can file a ULP or a grievance, but not both, and that ULPs had been filed for issues in this grievance. However, the Agency provided no documentation to substantiate that testimony.

The record shows that official time for some Union officials was approved, while time for others was improperly disapproved. The arbitrator finds this is a violation of 5 U.S. Code § 7116 (a) (2), and is therefore a ULP.

In conjunction with the claim of a ULP, the Union asserts that the Agency's actions are a result of anti-Union animus. In support of this contention, the Union provided approximately fifteen arbitration awards and/or FLRA decisions in which the Union prevailed. The arbitrator is not persuaded that these amount to a demonstration of anti-Union animus. First, these decisions span nine years. In the experience of the undersigned, it is not significant in any Union-Employer relationship for there to be fifteen grievances being heard at arbitration in the span of nine years. Second, while some of these hearings involved Union officials being disciplined or denied Union rights in some form or another, those situations were not present in all the cited cases. Third, there was very little commonality in the Agency officials involved the decision making in those cases. In some of them, no specific Agency official was named at all. Put another way, the Union provided no evidence that the Agency-at-large (e.g. every Agency official at the facility over the nine-year period) had animus towards the Union, or that there had been some coordinated effort over the nine-year period to harm the Union.

Remedy

The Union requested that its named grievants be paid for their allocated time between April 1 and July 31 of 2022, claiming they were forced to work the total amount of allocated time after their tours of duty. This is denied for several reasons. The proven period of time for the grievance, based on evidence showing Union activity or requested official time, is April 1 through July 1. The time frame notwithstanding, the arbitrator is not persuaded that this time was worked after duty hours. President Ellis and VP Lampley were allegedly on 100% allocated

time, meaning they would have worked 16-hour days for three months. Other representatives were on 50% allocated time, meaning they would have worked 12-hour days for three months.

President Ellis testified “we had to work after duty hours, and we have not been paid for that after duty hour work,” and the Union noted in its post-hearing brief that the Agency did not produce any evidence to address or contradict this testimony. Not only would this claim be extremely difficult, if not impossible, to refute, but the burden is on the Union to prove the claimed damages. As President Ellis stated, while objecting to testimony by Supervisor Bostic, “That’s a fact not established in evidence. Just because she said it doesn’t make it true.”

A similar dispute involving the parties was heard by Arbitrator George Aleman.[7] In finding for Union officials who were wrongfully denied official time, Arbitrator Aleman relied upon spreadsheets, submitted by the Union. These spreadsheets showed the hours worked beyond regular duty hours, doing Union-related representative work without compensation. Likewise, in the case before Arbitrator Nicholas,[8] VP Lampley was denied official time and had recorded using his own time on a spreadsheet. There was no such evidence in the instant case, and this element of the requested remedy is denied.

With regard to the ULP violation, the Union requested a make-whole remedy for the named grievants. In its post-hearing brief, the Union noted that

> (W)hen official time authorized by a collective bargaining agreement is wrongfully denied and the representational activities are performed on nonduty time, § 7131(d) of the Statute “entitles the aggrieved employee to be paid at the appropriate straight-time rate” when the following requirements are met: 1. An employee requested official time to perform official-time activities during the employee's regularly scheduled duty hours; 2. Management wrongfully denied the request; and 3. The employee thereafter performed the official-time activities on nonduty time.

As indicated above, the arbitrator finds that the following Union representatives were improperly denied official time in the corresponding amounts:

President Ellis: 435 hours

[7] FMCS case 180621-05809
[8] Supra

VP Lampley: 7 hours
Mr. Jordan: 132 hours
There was no evidence that the other grievants named by the Union met the first requirement, that being that they "requested official time to perform official-time activities during the employee's regularly scheduled duty hours." Therefore, those grievants are not included in the remedy for this case.

The arbitrator notes that, at least in Mr. Jordan's case, annual leave was used in lieu of official time that was denied. Any representative who utilized paid leave on the dates and times for which official time was denied is to have that leave restored in lieu of straight-time pay. If the representatives due a remedy were recorded as AWOL or another non-pay status on the dates and times in question, the Agency is ordered to pay them at the straight-time rate for the hours at issue.

There was significant testimony and evidence presented by the Agency allegedly demonstrating that time which was used in a non-pay status had had been restored through the Agency pay system. Where that has been done *for the dates and times in question*, as indicated above, the restoration will be considered a proper remedy.

Additionally, there was testimony indicating that some of the dates and times in question were also at issue in other cases. According to this testimony, for cases that had already been decided, the Agency had already made harmed employees whole. Other cases may have involved the same dates and times, but may not have been heard as of the date(s) of hearing in the instant case. If the specific dates and times found to be in violation here were remedied as a result of other cases, the representatives will be considered to have been made whole.

The Union noted in its post-hearing brief that, in addition to the straight-time pay for improperly denied official time, the representatives may be entitled to interest and attorney's fees. For any of the dates and times in question here, if those instances were remedied prior to the hearing dates of this case, the issue of interest will be considered *de minimis* and is not ordered. For violations on dates and times indicated which were not paid prior to the hearing dates, the Agency is to pay the affected representative's interest.

Regarding attorney's fees, there was no evidence that any attorney took part in the preparation or presentation of the case. Therefore, attorney's fees are not awarded.

Finally, the Union requested that the Agency be ordered to distribute a remedial notice posting, by email, to AFGE 2338 bargaining unit employees regarding its violations in this matter. Given the Union's ability to share this award with its membership as it sees fit, this aspect of the remedy request is denied.

## CONCLUSION

The Agency violated Articles 17 and 48 of the collective bargaining agreement when it denied official time which was properly requested by Union representatives. Additionally, the denial of the official time is found to be a violation of 5 U.S.C. § 7116, and therefore constitutes an unfair labor practice. The Agency is ordered to implement the remedy indicated herein.

*Christopher L. Beebe*

Christopher L. Beebe, Arbitrator