FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration between:

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2338,

Union,

and

FMCS No. 230727-07976

DEPARTMENT OF VETERANS AFFAIRS,
JOHN J. PERSHING MEDICAL CENTER,
POPLAR BLUFF, MISSOURI,

Employer.

Appearances:

For AFGE Local 2338:	Kevin Ellis, AFGE Local 2338 Jacob Jordan, AFGE Local 2338 Atty Kierstan Snider on the Brief
For Poplar Bluff VA:	Dane R. Roper, Staff Attorney, OGC Kelsey Vujnich, Staff Attorney, OGC
Arbitrator:	Susan J.M. Bauman

Pursuant to the Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees, the undersigned was appointed to hear and decide a dispute between AFGE Local 2338 and the John J. Pershing Veterans Administration Medical Center in Poplar Bluff, Missouri, regarding official time. A virtual hearing was held on January 23, 2024, but was subsequently adjourned when it was determined that the Employer had prepared for a different grievance. A virtual hearing was then held on March 14 and 15. The hearing was transcribed. Both parties had the opportunity to present evidence and make arguments. At the end of the hearing the parties submitted the case on written briefs, which were received on May 13, 2024, whereupon the record was closed. Based upon all the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

ISSUES

The parties were unable to agree on a statement of the issues. At hearing, the Union proposed the following:

1. In making unilateral changes to official time past practices, did the Department of Veterans Affairs, DVA; Veterans Health Administration, VHA; John J. Pershing, the VA Medical Center, hereinafter referred to as the Agency, violate the Master Collective Bargaining Agreement, MCBA? If so, what shall the remedy be?
2. Did the Agency violate and/or repudiate a long-standing past practice between the parties whereby Local 2338 represented employees within the consolidated unit? If so, was this a violation and/or repudiation in violation of 5 USC § 7116 (a)1, 5 and 8? If so, what shall the remedy be?
3. Did the Agency commit acts of interference, retaliation and anti-union animus in violation of 5 USC § 7116 (a)1, 2 and 4 against members of Local 2338? If so, what shall the remedy be?
4. Did the Agency fail to meet and provide a timely response to the grievance in violation of the parties MCBA? If so, what shall the remedy be?

The Agency frames the issue as:

> Did the Agency violate the Master Agreement by notifying AFGE National pursuant to Article 48, Section 9, that Local 2338 Union officials were using, or attempting to use, locally allocated official time to engage in representational activities involving separate and distinct bargaining units at other facilities?

The parties stipulated that the undersigned would frame the issue(s) based on the evidence presented and the arguments made[1]. The issues to be decided are:

1. Does the Arbitrator have jurisdiction to hear this Grievance?

2. Did the Employer violate the Master Collective Bargaining Agreement between the parties in its handling of the Grievance? If so, what shall the remedy be?

3. Does Article 48 of the Master Collective Bargaining Agreement prohibit Local 2338 representatives from undertaking representational work outside the JJPVACM?

4. Does Authority precedent prohibit Local 2338 representatives from engaging in representational activities at VA facilities other than JPPVACM?

[1] Article 44, Section 2F of the Master Agreement also provides that should the parties fail to agree on a joint statement of the issues, the arbitrator shall determine the issues to be heard.

5. Did the JJPCMVA violate Article 48, Section 9, when Abner Martinez sent the March 9, 2023, email to AFGE NVAC? If so, what shall the remedy be?

6. Was there a past practice of Local 2338 Union representatives engaging in §7131(d) representational activities at other VA facilities? If so, did the Agency repudiate it in violation of USC §7116(a) 1, 5 and 8? If so, what shall the remedy be?

7. Did the Agency demonstrate anti-union animus in violation of USC §7116(a)1, 5 and 8? If so, what shall the remedy be?

8. Did the Agency engage in sex discrimination by naming only male representatives in the March 9, 2023, email? If so, what shall the remedy be?

RELEVANT PORTIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1 – RECOGNITION AND COVERAGE

Section 1 – Exclusive Representative

AFGE is recognized as the sole and exclusive representative for all of those previously certified nonprofessional and professional employees, full-time, part-time, and temporary, in units consolidated and certified by the Federal Labor Relations Authority (FLRA) in Certificate No. 22-08518 (UC) dated February 28, 1980, and any subsequent amendments of certifications. The parties agree that should AFGE request the FLRA to include subsequently organized employees in the consolidated unit, such FLRA certification will not be opposed by the Department if the unit would otherwise be considered an appropriate unit under the law. Upon certification of FLRA, such groupings automatically come under this Agreement.

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.

ARTICLE 17 – EMPLOYEE RIGHTS

Section 1 – General

A. In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, union

activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping conditions irrespective of the work performed or grade assigned. . . .

D. No disciplinary, adverse, or major adverse action will be taken against an employee upon an ill-founded basis such as unsubstantiated rumors or gossip.

ARTICLE 43 - GRIEVANCE PROCEDURE

Section 2 – Definition

A. A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the Department concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its on behalf, or on behalf of some or all of its covered employees.

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 6 – Informal Resolution

. . . The parties agree that every effort will be made to settle grievances at the lowest possible level.

Section 7 – Procedure

A. Grievance meetings under this procedure will be face-to-face at the location of the grievant. By mutual agreement, the parties to the grievance may agree to teleconference the grievance meeting. . . .

B. **. . .**

Step 3.

If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved party or the Union shall submit the grievance to the Director within seven calendar days of receipt of the decision of Step 2. The recipient of the grievance shall date and sign the grievance. The Step 3 grievance must state, in detail, the basis for the grievance and the corrective action desired. The Director or designee shall meet with the aggrieved employee(s) and their Union representative(s) within seven calendar days from receipt of the Step 3 grievance to discuss the grievance. The Director or designee will

render a written decision letter to the aggrieved employee(s) and the Union within 10 calendar days after the meeting.

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.

Section 2 – Designated Union Officials/Representatives

A. Official time in the following amounts is authorized for each of these Union officials:

    1. National VA Council President – 100&
    2. Three National VA Council Executive Vice-Presidents – 50%
    3. National Treasurer – 50%
    4. Fifteen District Representatives – 50%
    5. Twelve Appointed National Representatives – 50%
    6. Five Appointed National Safety and Health Representatives – 50%

    These national Union representatives may designate a Union representative at their home station and transfer unused official time to that representative to perform the duties of the position for which official time is authorized.

    . . .

F. When Union officials visit a facility other than where they are employed for the purpose of engaging in representational activities, they will notify the Department prior to their visit. The Department will notify the Union of any scheduling problems connected with the visit and the parties will attempt to work out a suitable arrangement.

Section 5 – Travel to Other Locations

A. Once official time is authorized for a specific function that requires travel outside a Union representative's duty station, the representatives will be permitted to leave the facility to discharge their functions after notifying their respective supervisor of their destination, expected return date/time, and the category of representational activity involved. The categories are:

1. Negotiation of term collective bargaining agreements;
2. Negotiating changes to conditions of employment;
3. Dispute resolution; and/or
4. General labor-management relations.

B. Where travel to another location within the jurisdiction of a local union is necessary for representational activities consistent with the provisions of this Agreement, and the transportation is otherwise being provided to the location for official business, the Union will be allowed access to the transportation on a space-available basis and also authorized official time for travel. Personal transportation expenses (POV, mileage, etc.) will be reimbursed to the extent permitted by Federal Travel Regulations.

. . .

Section 9 – Allegations of Abuse

Alleged abuse of official time shall be brought to the attention of an appropriate Union official and to an appropriate Department official on a timely basis by supervisors and Department officials. The Department official will then discuss the matter with the Local or NVAC president as appropriate.

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.

. . .

APPLICABLE FEDERAL STATUTES

5 U.S. Code § 7102 – Employees' Rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right –

(1) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
(2) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S. Code § 7119 – Unfair Labor Practices

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

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
(3) To sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an individual basis to other labor organizations having equivalent status;
(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) To refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
(6) To fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
(7) To enforce any rule or regulations (other than a rule or regulation implementing section 2302 of this title) which is in conflict with an applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulations was prescribed; or
(8) To otherwise fail or refuse to comply with any provision of this chapter.

. . .

5 U.S. Code §7131 Official Time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation or membership, election of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.
(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.
(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.

FACTS

The Veterans Administration, hereinafter "VA", and the American Federation of Government Employees, AFL-CIO, hereinafter "AFGE" or "Union", are parties to a national collective bargaining agreement that covers employees represented by AFGE locals at VA facilities throughout the United States. This is a

consolidated bargaining unit, as described in the Decision and Direction of Election issued by the Federal Labor Relations Authority on June 12, 1979, 1 FLRA No. 55. AFGE had petitioned to consolidate 236 units within the VA for which AFGE and its constituent locals had been the exclusive bargaining representatives. An election was held wherein professional employees and non-professional employees voted to be represented in one bargaining unit, with the professionals agreeing to be included in the one consolidated unit with non-professional employees. Certificate No. 22-08518 (UC), dated February 28, 1980, confirmed the results of the election.

There are local unions at many VA duty stations, including the John J. Pershing Veterans Administration Medical Center (JJPVAMC) in Poplar Bluff, Missouri where AFGE Local 2338 provides on-site representation for employees of that facility and the six community based out-patient clinics (CBOCs) associated with it. Local 2338 and the JJPVAMC have a long and contentious relationship as demonstrated by the fact that although JJPVAMC is one of the smallest VA facilities, there are more contested cases, arbitrations, unfair labor practice charges, equal opportunity complaints and the like, than at most other VA sites in the country.

One of the issues that the Union and JJPVAMC have contested in many arbitrations is the amount of, and usage of, official time that Local 2338 representatives are entitled to and the manner in which they may use that time. In 2015, the parties entered into an MOU regarding official time which the Agency sought to modify in 2016. The parties bargained to impasse and requested mediation assistance from the Federal Mediation and Conciliation Service. This was unsuccessful and the matter went to the Federal Services Impasse Panel (FSIP). A decision and order was entered by the FSIP on October 16, 2017, which addressed submission of requests for official time, pre-scheduled official time and tracking of official time. Nothing in the FSIP order delineated the purposes for which Local 2338 representatives could or could not use official time. After a number of arbitrations, specifically the Aleman and Remington decisions, the parties worked to reach a resolution of their disagreements about official time. In late January 2023, Local 2338 President Kevin Ellis negotiated with Abner Martinez, Chief, Employee and Labor Relations for the Shared Services Unit (SSU) for Veterans Integrated Services Network (VISN) 15, among others with respect to official time. They entered into the following agreement:

MEMORANDUM OF UNDERSTANDING (MOU)

> The following constitutes an agreement between the Department of Veterans Affairs (DVA), Veterans Health Administration (VHA), John J. Pershing VAMC (hereinafter referred to as the "Agency"), and the American Federation of Government Employees (AFGE) Local 2338 (hereinafter referred to as the "Union"). Collectively, the Agency and the Union will be referred to as "the Parties" within this agreement.
>
> 1. The Union President allocates official time, in accordance with the Arbitrator Aleman award (FMCS Case No. 180621-05809, page 6). Union representatives are designated by the Union President.
> 2. As of February 1, 2023, the Union's allocated official time is 7,120 hours. The calculation is based upon the Master Collective Bargaining Agreement (MCBA) and

Arbitrator Remington's award (FMCS Case No. 200402-05290). Adjustments to the Union's allocation of official time hours will increase in accordance with the MCBA Article 1, section 4 and Article 48, section 10, paragraph 3.

3. The Union President allocates official time, in the following amounts, to the following individuals:
    a. Kevin Ellis is 100% (2080 hours per year);
    b. Harold Lampley is 50% (1040 hours per year);
        - Mon – Fri from 12:30 pm to 4:30 pm, or the last four hours of representative's tour of duty.
    c. Jacob Jordan is 75% (1560 hours per year);
        - Mon – Fri 10:00 am to 4:30 pm, or the last six hours of representative's tour of duty.
    d. Dorothy Johnson is 25% (520 hours per year);
        - Mon – Fri from 2:00 pm to 4:00 pm, or the last two hours of representative's tour of duty.
    e. Sonia Ellis is 50% (1040 hours per year); and,
        - Mon – Fri from 12:00 pm to 4:00 pm, or the last four hours of representative's tour of duty.
    f. Todd Shimkus is 50% (1040 hours per year).
        - Mon – Fri from 12:30 pm to 4:30 pm, or the last four hours of representative's tour of duty.
4. Union representatives who receive allocated official time will provide a written notice to their respective first-line supervisor and designated Human Resources representative which will include the amount of official time allocated (either by percent, or number of hours for the year), as well as the days of the week and times mentioned above in item 3, in which the allocated time will be used.
5. Changes in the official time allocation (as provided in item 3 of this agreement) may occur in September and March, upon written notice from the Union President, or Union authorized designee no later than ten (10) business days in advance. The Agency will be notified of changes in representatives and official time allocation amounts as they occur upon written notice from the Union President, or Union authorized designee no later than ten (10) business days in advance.
6. Individual adjustments to the hours/days (not the allocation) in item 3 must be by mutual consent.
    a. It is understood that adjustments to hours of the day(s) are only for rare occasions.
    b. Any Union representative or first-line supervisor wishing to make adjustments described in item 6 must provide five (5) business days advanced notice.
7. Union representatives who are allocated official time will not have leave or statutory official time (i.e. 5 USC 7131 (a) and (c)) counted against the representative's allocated official time. Any such unused official time will be transferred to the bank of official time, as described in item 8.

8.

a. The Union's official time that is not allocated, under item 3 above, will be placed in a bank. Time that is not otherwise allocated will be drawn from this bank. Union representatives who need to engage in representational activity during non-allocated office time will initiate a written request which will include the date, times, nature of representational activity, specify the category (8b, i, ii, or iii) from which the official time is taken from. The request must be in writing to the representative's first-line supervisor. If a denial is not received within twenty-four (24) hours any time period associated with the representation activity for which the request is made will be extended until the request is granted.

b. Official time described in this item will be taken from the following sources:
   i. 5 USC 7131 (a) or (c) and leave as described in item 7.
   ii. the Union's bank of official time hours, if not otherwise used; or,
   iii. official time described in item 10.

9. The local reconciliation process will continue as previously established.
   a. The parties agree to meet and resolve any disputes informally; and
   b. Any remaining disputes regarding reconciliation will be resolved though the grievance procedure.
10. The 1,013 official hours awarded to the Union from the Arbitrator Remington award (FMCS Case No. 200402-05290) will be used for Union representational activities not otherwise covered by this agreement. Notification of the allocation and use of this official time will come from the Union President. This time must be utilized no later than June 14, 2025.
11. This agreement is effective upon signature of both Parties' representatives and remains in effect until both Parties agree otherwise.

The MOU was signed by the Medical Center Director and the President of Local 2338 and was intended to resolve all issues between the parties with respect to the usage of official time. Nothing in the MOU limits the location at which Local 2338 officials can utilize their official time.

Since approximately 2012, Local 2338 President Kevin Ellis and others have represented employees of JPPVAMC in various proceedings and have also represented employees at other VA duty stations in arbitrations proceedings. In 2011, Ellis traveled to St. Louis to meet with other VA District representatives to develop a local supplemental agreement template. In 2012, he went to Memphis, Tennessee for meetings regarding local supplemental agreements. In 2021, Ellis represented Local 2483 in an arbitration proceeding in Marion, Illinois. Daniel Kerr, then Assistant Human Resources Officer for VISN 15 represented the agency. In 2018, Ellis represented Local 2054 at an arbitration hearing in North Little Rock, Arkansas. In 2019, together with his wife Sonia, also a union representative, he represented a local in Seattle, Washington. Mr. Ellis testified that he has also represented AFGE locals in Texas, Louisville, Kentucky, Leavenworth, Kansas, Little Rock, Arkansas, Oklahoma, Marion, Illinois, Seattle, Washington, and Michigan, all using official time. He has also represented employees in the United States Postal

Service and the United States Department of Agriculture, while using annual leave. Union representative Harold Lampley represented members of AFGE Local 2342 in Black Hills, South Dakota in 2023 while on official time.

Mr. Ellis testified that numerous labor relations specialists at JJPVAMC knew that he was representing locals outside of Local 2338, including Angela Bostic, a current LR/ER specialist at the facility, and that the 10 to 11 medical center directors that have served at JJPVAMC since 2012 all knew that he was engaged in this activity. He also testified that his current supervisor, Dale Garrett, and his prior supervisors, Ken Vert, Donna Reynolds and Sydney Wertenberger were aware of his representational activities away from JJPVAMC on official time.

Abner Martinez has been in his current position since January 2021. The record is unclear as to when he became aware that Mr. Ellis and Mr. Lampley were representing members of AFGE at duty stations other than JJPVAMC. It appears that Mr. Martinez was doing some sort of investigation of these activities as he received an email on February 15, 2023, from Scott Morris, Human Resources Specialist at VISN 23, with the subject heading: Information Requested. Morris advised Martinez in a series of emails that Harold Lampley and Jacob Jordan were both at an arbitration hearing on February 16, 2023 in South Dakota. Subsequent to the receipt of this email, and without discussion with Mr. Ellis or any Local 2338 officials, on March 9, 2023, Martinez sent an email to Alma Lee, President of AFGE NVAC, Bill Wetmore and Mary-Jean Burke, Vice-Presidents of AFGE NVAC, with copies to Paul Hopkins, Director of JJPVAMC, and Donald Stephen, an intervention specialist from the central office in Washington, D.C. No member of Local 2338 was copied on this email. The email reads as follows:

> Ms. Lee
>
> In accordance with Article 48, Section 9, the John J. Pershing VA Medical Center is bringing to your attention the recurring abuse of official time by AFGE Local 2338 union officials.
>
> As you are aware, AFGE Local 2338 receives an allotment of official time to represent the interests and to bargain on behalf of the employees it represents and assigned to the John J. Pershing VA Medical Center.
>
> We have learned that Mr. Kevin Ellis – Union President, Harold Lampley -1st Vice President and Jacob Jordan, 2nd VP & Sr. Chief Steward have engaged in representational activities including but not limited to: "Preparing and deliver written and/or oral replies to disciplinary and adverse actions, preparing for and participating in Arbitration hearings, and meeting with employees/management officials in connection with representational activities" for bargaining unit employees not covered by AFGE Local 2338.
>
> I remain available to further discuss. I can be reached . . .

Of the recipients, the only response was from Bill Wetmore on March 10. The same people who received the original email were also copied on his response:

> Abner, good morning
> Than [sic] you for sharing this view of events. I appreciate your following the relevant portion of the MCBA. I will contact the named union representatives and ask them to cease and desist such activity, if they have in fact done what you allege.

Bill Wetmore did not contact Kevin Ellis or any other representatives of Local 2338 regarding Martinez' allegation of abuse of official time.

On November 29, 2021, Local 2338 had filed a grievance against JJPVAMC contending that the Agency was violating the MCBA when it denied Harold Lampley use of allocated official time that was needed to carry out the Union's mission and workload. Hearings on this grievance were held on June 17, 2022, April 11, 2023, and June 30, 2023 before Arbitrator Nicholas. Abner Martinez was one of the management representatives at this hearing.

According to the grievance filed by the Union, on March 21, 2023, Abner Martinez' email of March 9 was motivated by the Union's case in the Lampley grievance. The instant grievance alleges that the Martinez' email contains false, egregious, and retaliatory statements meant to cause harm to Ellis, Lampley, and Jordan. The email also violated a longstanding past practice at the JJPVAMC whereby Local 2338 representatives have provided representation to other AFGE locals since about 2012 while on official time. The Local alleges that the Agency failed/refused to recognize Local 2338 as the sole and exclusive representative of all employees in the bargaining unit; the Agency failed/refused to provide fairness and equity to employees who have engaged in Union activity. The Agency engaged in discrimination based on Union activity. Finally, the Union alleged that the Agency failed/refused to have due regard for the obligations imposed by 5 USC Chapter 71 by unilaterally ending a well-established and longstanding past practice.

On April 4, 2023, Angela Bostic, Supervisory Human Resources Specialist emailed the Agency response:

> Dear AFGE Local 2338,
>
> This is to inform you that the John J. Pershing VA Medical Center (JJPVAMC) cannot accept the Step 3 grievance titled "Acts of Retaliation and Violation of an Established Past Practice – 21 MAR 2023" because it is procedurally defective and not properly filed. The Medical Center Director (MCD), Paul Hopkins does not have jurisdiction over administrative actions taken by Abner Martinez, VISN 15 Chief Employee/Labor Relations + Human Resources. The MCD does not have jurisdiction over arbitration proceedings which are being conducted by VISN 15 HR Specialists or the Office of General Counsel.
>
> <u>Additionally</u>
>
> - The charges in the March 9, 2023, email to AFGE National President, Alma Lee are true.

- There is no past practice because both parties were not aware of the abuse of official time.
- There cannot be a past practice that conflicts with clear and unambiguous contractual language.
- There cannot be a past practice that is contrary to law.

The Union is NOT authorized to use JJPVAMC funding or resources outside of purposes for which they were appropriated. This includes official time usage which has been appropriated and agreed to exclusively for representational purposes for the JJPVAMC bargaining unit.

. . .

After a brief email exchange with Don Stephen regarding the procedural question, on April 5, 2023, the Union invoked arbitration.

Additional facts are included in the Discussion, below.

The Union:

The Agency Abandoned its Procedural/Threshold Allegations.

Despite the Agency's contention in its "Response" to the March 9 hearing that the grievance was procedurally defective, the Agency failed to raise any procedural or threshold issues at the hearing. Thus, they forfeited their right to raise these issues at a later date. As to the contention that the Medical Center Director did not have authority to resolve the grievance, Article 43, Section 7, Note 4 makes clear that "At any step of the negotiated grievance procedure, when any management deciding official designates someone to act on his/her behalf, that designee will have the complete authority to render a decision at that step and will render the decision." Thus, the Agency had the ability to appoint someone who did have authority jurisdiction. This appears to be what the Agency did when Angela Bostic, Employee Labor Relations Supervisor for VISN 15, provided a response to Local 2383 without a meeting. The failure to meet with Union representatives is a violation of the collective bargaining agreement.

What is This Dispute Really About?

This is a matter of the Agency preventing the Union from designating representatives of their own choosing, which also resulted in sex discrimination. FLRA case law is clear that agencies and unions have the right to designate their own representatives when fulfilling their responsibilities under the Statute. In this case, of specific concern to the Agency is the Union's representation of other locals in arbitration. By denying official time and threatening discipline, the Agency is interfering with the Union's statutory right to designate its own representatives, at least when it pertains to Ellis, Lampley and Jordan. Failure to recognize duly authorized representatives of a union violates §7116(a)(1) and (5) of the Statute. In *U.S. Dept. of Air Force, HQ, Air Force Material Command,* 49 FLRA 1111, 1120 (1994), the Authority made clear

that provisions within master agreements which impose limits on the number of union representatives who are entitled to work on official time do not limit a union's right to designate as many representatives as circumstances may require nor do they establish limits upon the location from which representatives can be drawn.

Legal Framework for Agency's Reliance on CBA to Justify Its Actions

Abner Martinez testified that it is the Master Agreement, Article 48, Section 10, that was violated by Ellis, Lampley, and Jordan performing representational work at locations other than JJPVAMC on official time. A legal framework has been established by the Authority to resolve this matter. In *Internal Revenue Service, Washington, D.C.,* 47 FLRA 1091 (!993), the FLRA stated:

> We note that, in these cases, once the [charging party] makes a prima facie showing that a respondent's actions would constitute a violation of statutory rights, the respondent may rebut the General Counsel's showing of a prima facie case. This may be done by establishing by a preponderance of the evidence that the parties' collective bargaining agreement allowed the respondent's actions. For example, Action, 26 FLRA 299, 301 (1987). Furthermore, in determining the meaning of the collective bargaining agreement, the administrative law judge should consider, as necessary, any alleged past practices relevant to the interpretation of the agreement. In cases where the judge's interpretation of the agreement is challenged on exceptions, the Authority will determine whether the judge's interpretation is supported by the record and by the standards and principles of interpreting collective bargaining agreements applied by arbitrators and the Federal courts.

In *IRS*, the Authority applied the clear and unmistakable waiver standard to determine if the Union had waived its rights to their statutory entitlements. In 1998, the Supreme Court found, in *Wright v. Universal Maritime Serv. Corp.,* that any waiver must be clear and unmistakable.

Did the Agency Violate the Statute?

The Agency violated 5 U.S.C. §7116(a)(1), (5) and (8) when it unilaterally ended the past practice of granting official time for Local 2338 representatives to provide representation at other locals within the consolidated bargaining unit. It also violated 5 USC §7116(a)(2) and (4) when, acting through Abner Martinez, it abruptly ended the past practice due to anti-union animus towards Ellis, Lampley, and Jordan

Anti-Union Animus: The motivating factor for Martinez to make false and erroneous allegations against the Union is FMCS Case No. 220-104-02301, an arbitration in which the Union pursued a grievance on behalf of Harold Lampley for the wrongful denial of his official time and straight time compensation owed to him for the wrongful denials before Arbitrator NIcholas. Abner Martinez was the representative for the Agency in that case and the email that prompted the instant arbitration was sent out between hearing dates in that matter. The Agency lost in that arbitration and had reason to retaliate against the Union officials responsible for pursuing it. The Agency had never before contended that representation at other VA locations was an abuse of official time until the arbitration involving Lampley's use of official time.

Circumstantial evidence, including the timing of the email from Martinez, creates a reasonable inference that the email was motivated by anti-union considerations. Jacob Jordan provided unrebutted testimony that the email was simply an opportunity for Martinez to enact some type of action against the employees that were causing him so much frustration with all their grievances they were filing and all the arbitrations that were occurring. Martinez could have denied the phone call with Jordan, but he did not do so,

Further, Mr. Martinez's actions were not applied fairly and equitably to all Union representatives, only to those present at the Nicholas hearing. Evidence presented by the Union established that Sonia Ellis also traveled to other locations for representational purposes, but she was not named in the email, nor was she present at the Nicholas hearing.

The Union put forth a prima facie case for anti-union animus in accordance with the test described in *Letterkenny Army Depot,* 35 FLRA 113, 118 (1990). The burden then shifted to the Employer to prove it had a legitimate reason for the action it took. The Agency claimed that their legitimate reason was established in the contract. (Previously the Agency had claimed violation of law but abandoned that claim when asked about such law under oath.)

If the Agency asserts it had a legitimate reason for its action, the burden shifts to the grieving party to show that the reason is pretextual. The MCBA, Article 17(1)(A), requires that all employees shall be treated fairly and equitably and without discrimination. Sonia Ellis was not mentioned in the March 9 email, nor was she issued a Letter of Direction though the Agency was aware of her representational activities. The Agency's discriminatory application of the parties' MCBA is pretextual.

Past Practice: For a practice to develop into an established past practice, it must be followed with such consistency over a period of time that the employees may rely on and reasonably expect such practice to continue as a permanent working condition, even though the condition is not specifically enunciated in the collective bargaining agreement."[2] The Union demonstrated, through exhibits and testimony from Kevin Ellis, that the Agency was aware of the established practice whereby representatives of Local 2338 represented other locals within the AFGE consolidated bargaining unit. The Agency approved Ellis' time, as well as three other representatives, to provide training in Little Rock, Arkansas concerning supplemental agreements. Ellis testified about arbitration awards issued in cases in which he had served as the representative for the local union in numerous locations. He testified that Alma Lee, the President of the National Veterans Affairs Council (NVAC) knew about his representations long before the March 9 email from Martinez. Ellis listed people from AFGE and from the VA who knew about his representations away from Poplar Bluff. The Agency did not call any Agency officials to attempt to rebut Mr. Ellis' testimony, though Karr, Blackstone and Shea, people who Ellis said "knew about it" have all been employed at VISN 15 longer than Martinez.

The Agency's only witness was Abner Martinez whose understanding of the past practice is biased, due to animus, and limited as he has only been employed at VISN 15 since January 2021. He could not speak to any practice that existed, or did not exist, prior to his employment. The Union showed the practice existed at least 7 years prior to Martinez' arrival at VISN 15. The Agency could not, and did not, point to

[2] *Bemis Co., Inc.,* 80 LA 1108, 1110 (Epstein, 1983).

any adequate and proper notice provided to the Union which set out to end the past practice, either prior to or since Mr. Martinez was hired by VISN 15.

The Union believes Martinez was aware of Local 2338 representing employees at other locals because he was aware of the labor matters within VISN 15, including various arbitrations at those locations where Ellis was the representative. Dale Garrett, Kevin Ellis' first-line supervisor was aware, as was the rest of Ellis' chain of command. If a local manager has the authority to establish a practice, the fact that the practice was not known to higher level managers may not be relevant in finding the existence of a past practice.

The Agency, if they wanted to end the past practice, had an obligation to notify the Union and allow the opportunity to bargain. Even when such a decision involves the exercise of a management right, the agency must give notice to the union and provide them with an opportunity to engage in impact bargaining. While an agency may be required to change an unlawful practice without delay, there still remains an obligation to give notice to the union and provide an opportunity to bargain over impact and implementation.

Although the Union submitted its demand to bargain, the Agency refused to bargain. This is also an unfair labor practice.

The Authority has held that in ULP cases that turn on the meaning of a collective bargaining agreement, it will determine whether the administrative law judge's interpretation of the contract is supported by the standards and principles applied by arbitrators and federal courts. The Authority concluded that an administrative law judge may enforce past practices that are contrary to unambiguous contract language.[3] Even if the past practice is in violation of the MCBA, a governing authority may still enforce it. Arbitrators have broad authority in fashioning remedies and may order return to the *status quo ante* for a violation of the duty to bargain.

Does Article 48, Section 10 Waive the Union's Statutory Rights? The Agency relies solely on Article 48, Section 10 to justify their actions in sending the March 9 email and letters of direction to Ellis and Lampley. The Union relies on an established past practice and 5 USC §7102 to represent other locals. There must be a clear and unmistakable waiver within the MCBA to waive the union's statutory entitlements. There is no such waiver in Article 48, Section 10 which would suggest the official time allotted to the local cannot be used to represent at other locals.

The MOU the parties entered into in 2023, at paragraph 4 only requires Union representatives to inform the Agency of the amount of time utilized, as well as days of week and hours. Nothing in the MOU requires the Union representatives to notify the Agency of the specific activities they would be performing. Martinez was involved in the negotiation of the MOU. It appears that he was not concerned about what the union representatives were doing on their official time, only the amount of time allotted to the Union. The Agency could have bargained to restrict official time to be used only for Local 2338 members, but they did not do so.

[3] *U.S. Dep't of Veterans Affairs N. Ariz VA HealthCare Sys., Prescott Ariz.,* 66 FLRA 963 (2012).

Did the Agency Engage in Sex Discrimination? Part of the Union's grievance was a violation of fair and equitable treatment as required under Article 17 of the MCBA. Ellis, Jordan, and Lampley have not received equitable treatment as the JJPVAMC and VISN 15 have allowed past Union representatives to represent other Locals of AFGE without allegations of abuse.

Prima Facie Case of Sex Discrimination via Disparate Treatment: Generally, a prima facie case of sex-based disparate treatment can be established if a complainant of one gender shows that an employment action was taken that led to the complainant being treated less favorably than a similarly situation individual of the other gender.[4]

Here there are four employees, three male (K. Ellis, Lampley, Jordan) and one female (S. Ellis) who were similarly situated in that they were all employees of the JJPVAMC and all were Union representatives. Mr. Martinez' action applied only to the three who were involved in the Nicholas arbitration, all male. There is clear evidence that Sonia Ellis also represented locals away from Poplar Bluff, but she was not accused of abuse of official time.

Having made a prima facie case of sex discrimination, the burden shifts to the Employer to prove it had a legitimate reason for the action it took. The Agency has not rebutted any of the testimony of Jordan and Ellis, nor has it denied that these actions took place. It did not offer a nondiscriminatory reason for the difference in treatment, leaving the obvious conclusion that the consideration of sex led to the disparate treatment of the male representatives.

Arbitration Decision for Unrebutted Testimony: In a disability discrimination case brought against the JJPVAMC, Arbitrator Markus addressed unrebutted testimony and sustained the grievance and found the Agency did engage in disability and race discrimination due to unrebutted prima facie evidence. Here, yhe Agency did not attempt to offer a nondiscriminatory reason for the difference in treatment, leaving the arbitrator to reach no conclusion other than that considerations of sex came into play.

Conclusion and Requested Remedies: The Arbitrator is asked to find that the Agency violated the Statute when it committed acts of anti-union animus, unilaterally implemented changes in conditions of employment, refused to bargain with the Union, and engaged in sex discrimination. The remedies sought are:

- The Parties will maintain the status quo ante until the Agency meets their statutory and MCBA obligations – the past practice will remain in effect until bargaining has been completed.
    - The Agency shall be responsible for scheduling, in coordination with the Union. Should the Agency fail to provide counter proposals within seven (7) days after the award becomes final, they waive their rights to bargain on this matter.
- Make whole any bargaining unit employee adversely affected by the Agency's failure and refusal to follow their obligations as prescribed by Statute and the MCBA.

[4] *McDonnell Douglas v. Green,* 73 FEOR 9001, 411 US 792 (1973).

    - The Agency will ensure any absent without leave (AWOL) charges related to representation at other locals are rescinded for Kevin Ellis and Harold Lampley, with back pay and interest, and shall have their leave statuses fully restored.
- Immediately rescind, with prejudice, and expunge all records of any letters of directions that have been issued as a result of Martinez' anti-union animus.
- Equitable relief in the amount of the cost of arbitration and attorney's fees due to the fact that the Agency knew or should have known that this was a frivolous matter with no legal standing that was not appropriate to arbitrate.
- $300,000 (grossed up) in damages for Kevin Ellis due to sex discrimination.
- $300,000 (grossed up) in damages for Harold Lampley due to sex discrimination.
- $300,000 (grossed up) in damages for Jacob Jordan due to sex discrimination.
- Find Abner Martinez was the individual responsible for violations of Statute and the Master Agreement, and for engaging in sex discrimination.
- Distribute an electronic notice to all bargaining unit employees identifying the Agency's violations and reaffirming its obligations under the MCBA and federal law to be distributed no later than seven (7) days after the award is final.

The Employer:

Engagement in §7131(d) Representational Activities at Different VA facilities for Different Local Bargaining Units while using JJPVAMC Official Time is Prohibited.

Disputes over the entitlement to § 7131(d) time raise contractual issues and the proper forum to resolve disputes over contractual issues is the negotiated grievance procedure. Allowing local units representatives to use local VA Medical Center official time to engage in §7131(d) representational activities for different local bargaining units is contrary to law and contrary to the essence of the parties' Master Collective Bargaining Agreement. The issue has been settled by the Authority in *United States, Department of Transportation, Federal Aviation Administration, Anchorage, Alaska (Agency) and National Air Traffic Controllers Association (Union),* 61 FLRA 176, 61 FLRA No.35 (2005). The Authority held that "official time negotiated under 5 USC §7131(d) was intended by Congress for the use of bargaining unit employees on behalf of their own units, not other bargaining units of which they are not members." Although bargaining unit employees could choose any representative they like, the representative is only entitled to use official time to represent bargaining unit employees in their local unit.

The Authority further held that Congress adopted a unit approach to representational activities under §7131(d) and "in so doing prohibited the granting of official time under §7131(d) for union representatives employed in one bargaining unit to represent employees employed in a different bargaining unit." Furthermore, parties are prohibited from engaging in bargaining over any provision to authorize official time for an employee to perform representational activities when the employee is not a member of the bargaining unit to be represented.

The analysis done by the Federal Service Impasse Panel (FSIP) in their 2017 decision between the parties to this arbitration supports the Employer's position. The FSIP decision was clear that uses outlined for

official time for Local 2338 are for local bargaining unit issues. This decision, as well as two arbitration awards were incorporated into the MOU signed by the parties in 2023.

AFGE Local 2338 is an agent of AFGE for the purpose of representing the bargaining unit employees at JJPVAMC and its CBOCs as outlined by charter. AFGE Local 2338 asserted at hearing in this matter that all local bargaining units are one nationwide consolidated unit which would allow for union representatives to engage in 7131(d) representational activity as any facility and for any other local bargaining unit. The Union pointed to *Dep't of the Navy Naval Weapons Station Yorktown, Virginia & Dep't of the Navy Atl. Ordance Command Yorktown, Virginia & Nat'l Ass'n of Gov't Emps., Loc. R4-1,* 55 FLRA 112 (1999). That case is distinguishable from the case at bar in that it dealt with 7131(a) time which encompasses the negotiation of supplemental agreements, when authorized by the parties at the level of exclusive recognition. In this case, Ellis and the other named representatives were not engaging in negotiations as outlined in §7131(a); they were engaged in §7131(d) representations.

Even if one were to find that §7131(d) representation is covered, the use of official time must be authorized by the National VA Council. Such was not the case here and, in fact, AFGE/NVAC has explicitly disavowed the use of official time in this manner.[5]

The MCBA does not explicitly address the issue, so it is necessary to look at the common sense reading of the contract and the intent of the provisions. Article 48, Section 1(B) provides that official time shall be provided as specified in law, 5 USC §7131. The Authority, in *United States, Department of Transportation, Federal Aviation Administration, Anchorage, Alaska and National Air Traffic Controllers Association,* 61 FLRA 176 (2005), provides needed authority in this matter.

The MCBA recognizes national representatives and their rights and responsibilities in Article 48, Sections 2, 3, and 4, including the ability of the President of AFGE/NVAC to assign official time to those not outlined as national representatives for specific stated purposes. Nothing in the record in this case indicates that any AFGE Local 2338 representatives were assigned by NVAC President Alma Lee to engage in these types of activities. These individuals are also not District Representatives, National Representatives, or Safety Representatives for which official time is allowed under these sections of Article 48.

In detailing the designated union officials/representatives in Section 2, the MCBA also distinguishes those from the rights and responsibilities of local bargaining units in Article 48, Section 10. Official time for AFGE Local 2338 representatives to engage in §7131 (d) activities comes from Section 10 entitled "Local." Local bargaining unit official time hours are calculated based on local bargaining unit positions at JJPVAMC and its CBOCs, provided to the representatives elected by the local bargaining unit employees, and local union representatives are to use the official time provided on local issues.

Employee and Labor Relations Specialist Abner Martinez notified AFGE/NVAC leadership on March 9, 2023, in accordance with Article 48, Section 9, that Kevin Ellis and others were using JJPVAMC official time for §7131(d) representational activities at other facilities for other local bargaining units. AFGE/NVAC Vice-President Bill Wetmore expressed his appreciation for the agency's following the relevant provision

[5] This disavowal is contained in an email exchange between Abner Martinez and Bill Wetmore quoted above.

of the MCBA and that he would ask that the Local 2383 reps "cease and desist" such activity, if they did what was alleged.

Local 2383 President Kevin Ellis acknowledges the use of official time to engage in representational activities at other VA facilities and has refused to abide by orders issues by JJPVAMC officials to cease and desist.

Article 48, Section 5 of the MCBA provides a mechanism for local union representatives to travel to other locations. With the conditions enumerated, travel is permitted for negotiation of term collective bargaining agreements, negotiating changes to conditions of employment, dispute resolution and general labor-management relations. Ellis has been approved for travel on certain occasions, including travel to Washington D.C. to negotiate the MOU. This provision of the MCBA does not provide a wholesale acquiescence on the part of the Agency for any and all times in which a local union representative would like to engage in §7131(d) representational activities for other VA facilities and other local bargaining units. The language outlines very specific instances that do not apply in this matter, for which travel would be allowed.

Past Practice Not Established

In order to establish the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties or followed by one party and not challenged by the other. Factors relevant to a finding of a binding past practice are the duration and consistency of its application and the parties' acquiescence in it. The burden of establishing the existence of a past practice rests with the party asserting it, here AFGE Local 2383.

A refusal to find a past practice can occur if there is a finding that only some supervisors approved of the particular practice. Similar to the instant case, in *Department of Housing and Urban Development,* 60 FLRA 311 (2004), when few instances were discovered and management ordered supervisors to discontinue such arrangement, a past practice is not established. Isolated instances do not amount to a past practice.

In this case, there was evidence of only one supervisor of many (Dale Garrett) in over the nearly twenty years claimed by the Union, who acquiesced to one union representative's utilization of JJPVAMC official time to engage in representational activities for other VA facilities for three to four arbitrations. These were isolated events over an extended period of time and does not show a practice that has been consistently exercised over a significant period of time and followed by both parties.

The Authority has upheld an Arbitrator's decision that a past practice may only be formed when management knows of, and acquiesces to, the practice.[6] The decision was upheld because there were "no reports, calculations, tracking methods, notes or any other conclusive evidence, by either party" that would either favor or disfavor the existence of a past practice. The Agency's acknowledgment that its supervisors occasionally approved additional official time does not establish that management knowingly

[6] *Am. Fed'n of Gov't Emps. Local 17 and United States Dep't of Veterans Affs.,* 72 FLRA 162 (2021).

acquiesced to the practice because the "parties' testimonies were in equipoise" as they were in this matter.

There was absolutely no evidence or testimony presented at hearing that indicated that the supervisors of Harold Lampley or Jacob Jordan knew and acquiesced to their use of JJPVAMC official time for representational activities at other VA facilities. Testimony and evidence showed that these two were not forthcoming regarding the circumstances surrounding their §7131(d) representational activities at the Black Hills, SD VAMC despite Mr. Lampley's supervisor consistently requesting the nature of his official time use. By concealing the nature of their §7131(d) representational activities, there can be no doubt that this was not consistently recognized over a significant period of time nor followed by both parties or followed by one party and not challenged by the other. Thus, there is no past practice. Further, once management at the VISN level discovered the few instances, supervisors were educated and notification was made that engagement in §7131(d) activities at other VA facilities would not be permitted.

Further, there can be no binding past practice that requires the performance of an unlawful act.[7] When an unlawful past practice is wrongfully terminated, a status-quo ante remedy requiring the reinstatement of the unlawful practice is inappropriate.[8] The Authority disallows engagement in §7131(d) representational activities for other VA facilities and other local bargaining units while using one's home facility's official time[9], a past practice cannot be established.

In the FSIP case between these parties, the Union contended there existed a past practice allowing it to use allocated hours in any manner it saw fit. The FSIP rejected the existence of such a past practice or interpretation of the then-existing MOU. Even if it had accepted the union's argument, it ended with the FSIP decision which superseded all previous agreements, MOUs, LSA, ground rules or documents relating to use of official time. The FSIP decision makes no allowance for AFGE Local 2338 representatives to use JJPVAMC official time to travel around the country for representational purposes.

When questioned about the impact of the FSIP decision on Local 2338, Kevin Ellis stated that it "simply told us to go back to the contract is all it did. It didn't change a thing."

The Arbitrator herein is not free to re-write provisions of the FSIP decision as it relates to the use of official time. In order to make a determination that a past practice has been changed, there must be evidence of the practice. To establish a change, there must be evidence of the practice both before and after a given time. Evidence from a few employees involving isolated incidents without evidence showing how these incidents reflect either present practice or a departure from a defined past practice will likely not make out a prima facie case of a ULP. Here, there is neither evidence that management as a whole or even a majority of management acquiesced to the utilization of JJPVAMC official time to AFGE Local 2383 union representatives for engagement in §7131(d) representational activities at other VA facilities not

[7] *Federal Aviation Administration,* 60 FLRA 20 (2004).
[8] *Department of the Navy, NAVFAC Engineering Command Midwest, Crane, Ind.,* 69 FLRA 386 (2016).
[9] *United States, Department of Transportation, Federal Aviation Administration, Anchorage Alaska and National Air Traffic Controllers Association,* 61 FLRA 176 (2005).

represented by the Local. There is no evidence that the approximately four arbitrations Mr. Ellis engaged in were anything more than isolated incidents.

Grievance Response

The Step 3 grievance was filed by the Union on March 21, 2023. Fourteen days later, on April 4, 2023, the Agency issued its written response pursuant to the timeline in the MCBA. The remedy outlined in the contract if the Agency fails to respond in a timely manner is the grievance may be advanced to the next step. Here the Agency did respond in a timely manner, but it did not hold a grievance meeting. The remedy is to advance the grievance to the next step, Arbitration. The Union did this, so no harm came from the lack of a grievance meeting.

The Union did not Show that any of the Agency's Actions were the Result of Retaliation or Anti-Union Animus.

In his opening statement, Kevin Ellis avers that the Union's representational activities were a motivating or contributing factor in the Agency's actions. As evidence of a causal connection between the protected activity and Mr. Martinez' email to AFGE-NVAC, the Union listed numerous arbitration awards that the Union claims have upset the Agency. The Union claims these serve to create a perpetual claim of retaliation and union animus in every grievance.[10]

The Union also claims that a Letter of Direction provided to Mr. Lampley constitutes retaliation. Mr. Lampley's supervisor, Ms. Douglas, clearly stated the Letter was in response to Mr. Lampley's attempt to provide instructions to Ms. Douglas' supervisees that were not accurate and not his to provide. Mr. Jordan claimed to have been retaliated by being included by name in the email from Martinez to AFGE-NVAC. Mr. Jordan's claim of no representation outside of Polar Bluff is belied by information received by Martinez noting his participation in the Black Hills arbitration. These examples submitted by the Union do not establish a nexus to any alleged retaliation.

Once a union meets its initial burden of establishing a prima facie case of anti-union discrimination, the burden shifts to the Agency to provide a legitimate justification for its actions and that the same action would have been taken even in the absence of the protected activity.[11] The Union contends that the Agency failed to show there was a legitimate reason for the email sent by Martinez alleging abuse of official time. The Union claims that there is no legitimate debate surrounding the issue of whether AFGE Local 2338 can use JJPVAMC official time for representational activities at other VA facilities. The Union claims as evidence of anti-union animus, a causal connection in the sequence of events and temporal proximity of an arbitration and the email to NVAC.

The Agency is able to establish legitimate justifications for its action in multiple ways:

[10] Mr. Ellis stated that this is the same opening statement he has given for the past five years.
[11] *Letterkenny Army Deport,* 35 FLRA 113 (1990).

- NVAC agrees with the Agency's interpretation of the use of official time as noted in Bill Wetmor's response to the email.
- The MCBA separates Nation and Local rules for official time, Article 48, Sections 2 and 10.
- The JJPVAMC BUE members elect their AFGE Local 2338 representatives.
- The JJPVAMC BUE members pay dues to fund the representative activities of their AFGE Local 2338 representatives.
- An arbitrator's award shall have only local application unless it was a national level grievance, or the matter was elevated to the national level.

Based on the case law, the MCBA and the facts, the Agency has more than sufficient reason to ask NVAC to weigh in on a misuse of official time by AFGE Local 2338 in a process laid out by the MCBA, Article 48, Section 9. These factors show that Abner Martinez had a legitimate and justifiable reason to reach out to NVAC.

The Union failed to prove the presence of anti-union animus. The Agency has a legitimate belief that case law and the MCBA support its position; AFGE NVAC's response to Mr. Martinez' email confirmed the Agency's position that Local 2338's usage of official time in this manner was not approved by NVAC; Mr. Lampley did in fact attempt to receive official time for engaging in an arbitration in Black Hills, SD on behalf of a bargaining unit employee not covered by AFGE Local 2338; Agency witnesses credibly testified that retaliation was not a factor in the decision to report this attempted abuse of local official time to AFGE National. The Agency contends that Mr. Martinez' email was accurate, well-considered and in compliance with the state of the law surrounding official time use and that the Union's activities played no negative role in the decision to report them to AFGE National.

The Agency asserts that the Union failed to meet its burden of proof and the Grievance should be denied in its entirety.

DISCUSSION

The parties to this grievance, AFGE Local 2338 and the John J. Pershing Veterans Administration Medical Center, appear to have a long history of disagreement. Considering the size of the facility, a disproportionate number of grievances, unfair labor practice complaints, and equal opportunity complaints, among others, have been litigated by the parties. The subject of this dispute, official time, has been the subject of at least two Memoranda of Understanding, one Federal Services Impasse Panel decision and a myriad of grievance arbitrations. The parties disagree as to the issue(s) to be decided and the relevance of many documents.[12]

[12] Numerous exhibits were admitted over the Agency's objection of relevancy. To the extent that many of these are not relevant to the instant grievance, they have not been taken into consideration. For example, Letters of Direction were given to both Kevin Ellis and Harold Lampley which are part of the record. They were not referenced in the grievance that is before the undersigned. The factors that gave rise to those Letters of Direction, the fact that Letters of Direction are, apparently, a new means of counseling employees at JJPVAMC, and whether they were given in retaliation for acts of the employees or were warranted as a result of actions of the individuals who received them is not germane to the issues before me.

Jurisdiction and Arbitrability

In its opening statement, the Agency representative stated:

> Now this is a case about two things. This arbitration is not grievable or arbitrable, so there's no jurisdiction for you, Arbitrator Bauman, to hear this case. And, No. 2, if you do find this arbitration grievable [sic], then the Agency will show that, A., Abner Martinez was in the right when he e-mailed National AFGE representatives to report –report an abuse of power, an abuse of official time by AFGE Local 2338 with regard to its attempted use of official time, local official time at another facility…

Without specificity, one can only assume that the Agency stated the arbitrator is without jurisdiction because the grievance was, allegedly, procedurally defective as stated in the Agency's response to the grievance on April 4, 2023. In an e-mail exchange with the parties subsequent to the hearing, the undersigned specifically asked them to brief this question. As noted above, the Union responded to the request, but the Agency did not do so. The Agency appears to have presented the same question to Arbitrator Rafael Gely who, on May 19, 2023, found a grievance filed in a similar manner to be procedurally and substantively arbitrable.

It appears that the Agency no longer contends that the matter is not properly before the arbitrator and, accordingly, I will proceed to consider the merits of the case.

Did the Employer Violate the MCBA in its Handling of the Grievance?

The Master Collective Bargaining Agreement spells out specific requirements for filing and responding to grievances. In particular, Article 43, Section 7, states that the grievance meetings will be face-to-face. Part B, Step 3, the level at which this grievance was filed, states that the Director or designee **shall** meet with the aggrieved employee(s) and their Union representative(s) within seven calendar days from receipt of the Step 3 grievance to discuss the grievance. (Emphasis added) This section also requires a written decision letter to be rendered within 10 calendar days after the meeting.

The Agency argues that it issued its response within the contractual guidelines, fourteen days after receipt of the grievance. The agency acknowledges that it did not hold the required meeting. The Agency violated the MCBA in its handling of the grievance.

Does Article 48 Prohibit Local 2338 Representatives from Undertaking Representational Work Outside the JPPVAMC?

The Agency has alleged that representatives of Local 2338 are abusing official time when they engage in USC §7131(d) representational activities at VA facilities other than JPPVAMC. While acknowledging that the MCBA does not explicitly address the issue, it contends that a common sense reading of the contract and the intent of the parties prohibits the use of local official time at other VA locations. The Agency

correctly identifies Sections 2, 3, and 4 of Article 48 as pertaining to National officials of AFGE. The Agency fails to notice the discussion in Article 48, Section 2E which addresses national representatives visiting facilities other than where they are employed. Section 5, Entitled Travel to Other Locations, must apply to local representatives, as travel for national representatives is already covered in Section 2E. The Agency has also acknowledged, as shown in the FSIP decision, that Section 6, Other Activities, also applies to local representatives. Section 10, Local, allocates the amount of official time to be provided to local AFGE representatives. This section does not address the question of how such official time can be utilized by the local representatives as that is already addressed in the other sections of Article 48 and includes §7131(d) representational activities.

In addition, it must be noted that Section 10 of Article 48 does not contain any clear waiver of Local 2338 representative's right to represent employees at other VA facilities utilizing official time. A waiver of a statutory right pursuant to §7102 must be clear and unmistakable. Nothing contained in Article 48 comes close to meeting this requirement.

Accordingly, it cannot be the case that Article 48 was violated by Kevin Ellis and Harold Lampley when they engaged in §7131(d) representational activities when they represented locals other than AFGE Local 2338 at VA facilities other than JPPVAMC.

Does Authority Precedent Prohibit the Local 2383 Representatives from Engaging in Representational Activities at VA Facilities other than JPPVAMC?

The Agency contends that this issue has been settled by the Authority in *United States, Department of Transportation, Federal Aviation Administration, Anchorage, Alaska and National Air Traffic Controllers Association,* 61 FLRA 176 (2005). In that case, the National Air Traffic Controllers Association (NATCA) was the exclusive bargaining representative of a nationwide bargaining unit of air traffic controllers employed by the FAA. NATCA was subsequently certified as the exclusive bargaining representative for a separate nationwide bargaining unit of support staff specialists employed by the FAA. An employee employed in the air traffic controllers' unit utilized official time to bargain the initial collective bargaining agreement on behalf of the support staff specialists' unit. The FAA denied this employee's request for official time to engage in representational activities for the bargaining unit of which he was not a member. The Union grieved and the Arbitrator sustained the grievance. The FAA filed exceptions and the Authority upheld the exceptions.

In its Analysis and Conclusions, the Authority reviewed relevant case law which establishes that employees who are not members of the bargaining unit for which they seek to perform representational functions may not receive official time for the performance of those functions either under §7131(a) or §7131(d). In summary, the Authority stated:

> Thus, Authority and judicial precedent applying §7131 confirms that Congress adopted a unit approach to official time for representational activities, and in so doing prohibited the granting of official time under §7131(d) for union representatives employed in one bargaining unit to represent employees employed in a different bargaining unit.

> Consequently, the Statute precludes enforcement of a contractual provision which would authorize official time under §7131(d) for an employee to perform union representational activities, when the employee is not a member of the bargaining unit to be represented.

Here, representatives of AFGE Local 2338 have not represented individuals outside of the bargaining unit to which these representatives belong. As noted above, the Veterans Administration and the American Federation of Government Employees are parties to a national collective bargaining agreement which clearly provides that AFGE is the sole and exclusive representative for all "those previously certified nonprofessional and professional employees, full-time, part-time, and temporary, in units consolidated and certified" by the FLRA. Thus, Kevin Ellis and Harold Lampley, as employees of JJPVAMC, are members of the consolidated bargaining unit and may engage in representational activities on behalf of other AFGE represented employees in the consolidated bargaining unit regardless of the location of those employees.[13]

The Agency argues that because the Local AFGE representatives are elected by AFGE members at the JJPVAMC, and because the JJPVAMC employees pay dues to fund the representational activities of their Local 2338 representatives, Local 2338 representatives may only engage in §7131(d) activities at the JJPVACM. The Agency also contends that the Local 2338 charter only provides for Local 2338 representatives to serve on behalf of JJPVAMC personnel. The charter is not in evidence, so no conclusions can be drawn from this assertion. While these facts are supportive of the Agency's arguments, they are not persuasive. In fact, it is probable that the dues paid by JJPVAMC employees to AFGE are paid to the National AFGE, and only a portion is returned to the Local. Further, the Agency position ignores the fact that this is a consolidated bargaining unit.

The Agency also points to the email exchange between Abner Martinez and Bill Wetmore wherein AFGE Vice President Wetmore replied to Abner Martinez' allegation of abuse of official time by stating: "I will contact the named union representatives and ask them to cease and desist such activity, if they have in fact done what you allege." This email was admitted into evidence without objection. Notwithstanding this fact, the email is hearsay and cannot be utilized to establish the truth of what is asserted. The fact that AFGE NVAC, through Bill Wetmore's email, agreed that the representational activities of Local 2338 were an abuse of official time if they were as described in Martinez' email, does not establish this as Mr. Wetmore's true position. Indeed, the failure of Bill Wetmore to follow-up and contact Mr. Ellis, Mr. Lampley, or Mr. Jordan can be read as Wetmore's disavowal of his statement that appears to support the Agency's position. The Agency could easily have called Mr. Wetmore, or other AFGE NVAC officers, to testify. Had that occurred, the witness would have been subject to cross examination. The Agency has not proven the position of AFGE NVAC. It has not established that what Local 2338 representatives did while representing VA employees at facilities other than JPPMCVA is contrary to the MCBA or law.

[13] It is clear that Local 2338 President Kevin Ellis recognizes this distinction. He testified that when he represented employees of the United States Postal Service and of the United States Department of Agriculture, he did so utilizing annual leave. He recognized that employees of those agencies are in different bargaining units than employees, such as himself, who are members of the VA bargaining unit.

Finally, the Agency argues that an arbitrator's award shall have only local application unless it was a national level grievance, or the matter was elevated to the national level. There is no question that an arbitration award based on a local grievance will only have local application. This, in no way, requires that the person presenting the grievance must be a person affected by the grievance or the award. In fact, Kevin Ellis has represented employees at different VA agencies in arbitrations involving Environmental Differential Pay. Ellis has handled these cases as a member of the consolidated bargaining unit even though he is not directly affected by the decisions that are rendered in any of the cases.

Neither contract language nor case law prohibits the Local 2338 representatives from pursing §7131 (d) representational activities, utilizing local official time, at other VA locations provided, however, that the employees at those other locations are part of the consolidated bargaining unit represented by AFGE.

Did the JJPVAMC Violate Article 48, Section 9, when Abner Martinez Sent the March 9, 2023, E-mail to AFGE-NVAC?

Article 48, Section 9 provides:

> Alleged abuse of official time shall be brought to the attention of an appropriate Union official and to an appropriate Department official on a timely basis by supervisors and Department officials. The Department official will then discuss the matter with the Local or NVAC president as appropriate.

For whatever reason, Mr. Martinez did not bring his allegation of alleged abuse of official time to an appropriate Union official.[14] Instead, he wrote to AFGE NVAC President Alma Lee and Vice-Presidents Burke and Wetmore. In his email, Martinez claimed that three Local 2338 officials, Kevin Ellis, Harold Lampley, and Jacob Jordan had abused official time by representing AFGE locals at other VA facilities. There is no question that Kevin Ellis and Harold Lampley have represented other AFGE locals at other VA facilities. Jacob Jordan, however, categorically denies having done so.[15] Martinez relied on an email dated February 15, 2023, from Scott Morris, a VISN 23 Human Resources Specialist, to make his accusation. Like the email from Bill Wetmore referenced above, this email was admitted into evidence, but it is hearsay and cannot establish the truth of what has been asserted. That is, there is no proof, whatsoever, that Mr. Jordan has ever represented any individual or AFGE Local at any VA facility other than JPPVAMC.

The Agency violated Article 48, Section 9, when Abner Martinez sent the email to the AFGE NVAC without first discussing the matter with local union officials. His characterization of the activities of Kevin Ellis and Harold Lampley as an abuse of official time was inaccurate, and his allegation that Jacob Jordan had represented employees at other VA facilities was erroneous.

[14] There is nothing on the record to show that he brought this matter to the attention of any Agency supervisors either.

[15] Mr. Jordan's testimony was found to be credible.

Was there a Past Practice of Local 2338 Union Representatives Engaging in §7131(d) Representational Activities at Other VA Facilities?

The parties are in agreement as to what constitutes a past practice: It must be followed with such consistency over a period of time that the employees may rely on and reasonably expect that it will continue as a permanent working condition. There must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties or followed by one party and not challenged by the other. In this case, the burden of establishing a past practice rests with Local 2338, the party that asserts the practice exists.

In support of its position, the Union relies on the testimony of Union President Kevin Ellis and a number of arbitration awards issued by different arbitrators at different VA facilities which clearly indicate that Mr. Ellis represented the local union in those proceedings. Ellis claims that he began his §7131(d) representational activities shortly after the MCBA was signed in 2012. He lists a number of locations at which he was the first or second chair at an arbitration proceeding. He has established that he was doing this representational work. He alleges that all his supervisors knew that he was doing this work and thinks that other management representatives were aware that he was engaged in this work. Ellis specifically stated that his current supervisor, Dale Garrett, was aware of his actions. The Union did not produce any other witnesses to support Mr. Ellis' contention that he had been engaged in this activity for a long period of time, and the Employer did not put on any testimony to refute Mr. Ellis' claim.[16]

With the exception of Dale Garrett, and perhaps some of Mr. Ellis' prior supervisors, the persons named by Mr. Ellis were probably aware that he was representing people at other VA facilities, but there is nothing on this record to suggest that they knew he was using official time to engage in this activity. Despite Mr. Roper's concerns noted in footnote 16, the Agency's failure to call Dale Garrett to rebut Mr. Ellis' contention that Garrett knew official time was being used, does lead the undersigned to conclude that Mr. Garrett was aware of Mr. Ellis' use of official time, and that he, in fact approved this usage.

Mr. Garrett has been Mr. Ellis' supervisor since 2018[17], and Mr. Ellis claimed his other supervisors knew of his activities at other VA facilities. Mr. Ellis also testified that he has been doing this since 2012. The number of instances when Local 2338 representatives presented grievances in arbitration hearings at other facilities is rather small. It seems as if there has been more of this activity recently, with Harold

[16] Agency Attorney Roper questioned Ellis about any emails that might exist to support his claims. Ellis replied that it was all verbal. Mr. Roper stated, on the record:

> There have been, believe it or not, some arbitrators in the past who have allowed the Union to make wild, unsubstantiated allegations with no proof whatsoever, complete self-serving hearsay, and if the Agency didn't come back and specifically rebut that wild accusation, that we were like, they can't possibly believe something like this happened. Right. Well, you would be surprised.
>
> Some of them come back and they say, "Oh, the Agency didn't sufficiently rebut it for our purposes, so we're just going to take it as a fact." That cannot stand where all he's doing is saying, "I'm telling you that they knew." No. You need something more than your word. Your word means nothing. This is about – this is about having some proof. Any proof at all is . . .

[17] Mr. Ellis's testimony at hearing stated that Garrett had been his supervisor since 2007, a clearly inaccurate statement.

Lampley also representing other locals.[18] The Union did not present sufficient evidence to establish a past practice. The small number of instances that Mr. Ellis related would be sufficient if he had been able to show that managers other than Mr. Garrett were aware that he was doing this work using official time. While other JPPVAMC representatives and VA representatives at hearings across the country who took part in the arbitrations where Mr. Ellis was first or second chair clearly knew that he was representing VA employees not employed by JPPVAMC, there is nothing on this record to confirm that any of those individuals were aware that he was utilizing official time to do this representational work.

Did the Agency Demonstrate Anti-Union Animus when the March 9, 2023, Email was sent?

The Union alleges that Abner Martinez sent the March 9, 2023, email to AFGE NVAC officials out of frustration about the arbitration hearing before Arbitrator Nicholas regarding Harold Lampley's use of official time. Local 2338 claims that because the email was sent between hearing dates in that case, there is sufficient proximity to make a prima facie case of anti-union animus. A review of the arbitration award reveals that the grievance involved in that matter was filed on November 29, 2021. The first day of hearing was June 17, 2022, with additional hearing dates on April 11 and June 20, 2023. The Agency was represented by Abner Martinez and another management representative, and the Union was represented by legal counsel. The issue in that case was, indeed, official time, but it was not related to the use that is before the undersigned.

The Local 2338 representatives who were present at the Arbitrator Nicholas hearing were K. Ellis, Lampley, and Jordan. Sonia Ellis was not present at that hearing. As the March 9 email from Martinez only references the three Union personnel who were present at the arbitration hearing, and does not reference Sonia Ellis, the Union contends that the Martinez email was a direct result of the Nicholas hearing and in response to the Union's frustrating Martinez.

While the history between the parties, of numerous arbitrations, many involving official time and many involving discipline issued to Kevin Ellis or Sonia Ellis, both Union representatives, the Union has failed to make a prima facie case that Abner Martinez' email was in anyway the result of his frustration about the union or any attempt to harm the Union. There is insufficient evidence to conclude that Mr. Martinez acted in response to the events in the Nicholas hearing. In fact, it is more likely that the timing of Martinez' email was a direct response to Scott Morris' email of February 15 in which Morris alleges that Jacob Jordan and Harold Lampley were present for an arbitration hearing in Black Hills, South Dakota.

The timing claim by the Union to support anti-union animus cannot withstand scrutiny. The grievance had been in play for more than a year and one day of hearing had already taken place. There is no established nexus between the Nicholas arbitration and the email at issue here. The Union has failed to establish that there was any anti-union animus.

[18] Mr. Lampley did not testify and there is nothing on the record to show how often Mr. Lampley has engaged in §7131 representational activities away from JJPVAMC.

Did the Agency Engage in Sex Discrimination by Alleging K. Ellis, Lampley and Jordan Abused Official Time and Omitting S. Ellis?

Abner Martinez' email of March 9, 2023, accuses Kevin Ellis, Harold Lampley and Jacob Jordon of having abused official leave. Had Mr. Martinez done a little investigation he would have found that Kevin Ellis, Harold Lampley and Sonia Ellis were the three Union representatives who utilized official time to represent employees at VA Medical Centers other than JJPVAMC. With respect to Mr. Jordan, it is clear Mr. Martinez failed to do any investigation and relied on an email from a colleague at another VA facility without ascertaining whether that person even knew Jacob Jordan. With respect to Sonia Ellis, had Mr. Martinez done any investigation, spoken to her or her supervisor, or any Union representative as required by Section 9 of Article 48, he would have known that Sonia Ellis had travelled, on official time, to engage in §7131(d) representational activities.

Without any investigation, Mr. Martinez accused three men of abusing official time and did not accuse a woman of doing the same. This is a prima facie case of sex discrimination which the Agency has not rebutted in any fashion. Contrary to the remedy requested by the Union, and the implied harm to Mr. Ellis, Mr. Lampley, and Mr. Jordan contained therein, the Union has failed to make a showing that any of these three individuals were harmed by this discriminatory behavior of the Agency.

Accordingly, based on the above and the record in its entirety, the undersigned issues the following

AWARD

The grievance is sustained in part and denied in part.

1. The Arbitrator has jurisdiction to hear this grievance.
2. The Employer violated the Master Collective Bargaining Agreement between the parties in its handling of the Grievance.
3. Article 48 of the MCBA does not prohibit Local 2338 representatives from undertaking representational activities at VA facilities outside the JPPMCVA.
4. Authority precedent does not prohibit Local 2338 representatives from undertaking representational activities at VA facilities outside the JPPMCVA.
5. The JPPVAMC, through the actions of Abner Martinez, violated Article 48, Section 9 of the MCBA when he sent the March 9, 2023, email to AFGE NVAC.
6. There is not an established past practice at the JPPVAMC of allowing Local 2338 representatives to perform representational activities at VA facilities outside the JPPVAMC.
7. The Agency did not engage in anti-union animus in violation of §7116(a)1, 5 and 8.
8. The Agency did engage in sex discrimination by treating K. Ellis, H. Lampley, and J. Jordan differently than S. Ellis when S. Ellis, K. Ellis and H. Lampley engaged in the same §7131(d) representational activity.

The Agency is directed to continue to permit representatives of Local 2338 to represent employees at other VA facilities using official time as long as these representatives comply with the notice requirements set forth in the FSIP Decision and Order and the MOU entered into in February 2023, including consent of the supervisor with the expectation that "official time *will* granted *unless* operational needs prohibit its use."[19]

If Kevin Ellis, Jacob Jordan, Harold Lampley or Sonia Ellis have been denied official leave and considered AWOL or LWOP for any time they have spent engaged in representational activities at other VA facilities represented by AFGE, they are to be made whole for any financial losses they have sustained.

Further, the Agency is to distribute electronic notices to all bargaining unit employees acknowledging its violations of the MCBA as set forth above within seven (7) calendar days after this Award is final.

The undersigned will retain jurisdiction for the purposes of clarification of the Award, should that be necessary, for 60 days after the decision has been issued and any appeal period has concluded.

Dated at Madison, Wisconsin, this 4th day of June 2024.

__/s/____Susan J.M. Bauman_____
Susan J.M. Bauman

[19] FSIP Decision and Award, at page 10.