ARBITRATION OPINION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 2338

and

DEPARTMENT OF VETERANS AFFAIRS, JOHN J. PERSHING VA MEDICAL CENTER, Poplar Bluff, Missouri

Authorized Absence/Information Requests

FMCS No: 190717-09453

Hearing held December 3-4, 2019
John J. Pershing
VA Medical Center
1500 N. Westwood Blvd.
Poplar Bluff, MO

Dennis A. Kist, Arbitrator

APPEARANCES:

FOR THE UNION: Kevin C. Ellis and Jacob Jordan
FOR THE AGENCY: Brandon Hickock

I.

BACKGROUND AND FINDINGS OF FACT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2338 (the "Union") represents between over 650 employees employed by the DEPARTMENT OF VETERANS AFFAIRS, JOHN J. PERSHING VA MEDICAL CENTER (the "Agency") located

in Poplar Bluff, Missouri. The employees in the bargaining unit include a variety of positions including Housekeepers, Maintenance Workers, Nurses, and Physicians. Most bargaining unit employees are located at the Agency's primary facility in Poplar Bluff, Missouri. However, roughly 100 unit employees are scattered throughout six Community Based Outreach Clinics ("CBOC"s) that are associated with the facility and focus on outpatient care. Each CBOC is over 50 miles away from the facility. The parties are governed by a National Collective Bargaining Agreement ("NCBA" or "Master Agreement") negotiated between the United States Department of Veteran Affairs and the American Federation of Government Employees, that expired by its terms in 2014, but appears to continue to roll over on an annual basis. The parties do not currently have a local supplemental agreement.

The parties are governed, not only by the Master Agreement, but by applicable federal law. 5 U.S.C. §7101, et. seq. (the "Statute"). 5 USC § 7131, Official Time, provides in part:

> "(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 a 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.
>
> ....
>
> (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."

Article 48 of the Master Agreement addresses the parties' agreement regarding Official Time, which states, in pertinent part, as follows:

"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 3 - Accumulated Official Time

Official time authorized for National Union representatives may be used as needed; however, upon request, the Union representatives will be advanced official time from future time accrual for that leave year. Any time not used during any pay period will be accumulated for the remainder of the leave year. Any time that was not used as needed by the end of the leave year will not be carried over to the next leave year.

Section 4 - Additional Time Allotted
Time spent in connection with national bargaining and LMR Committee meetings shall not be charged against other official time allotted.

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 6 - Other Activities

A. For the following matters, union representatives will be on official time:
1. All activities related to Labor-Management Committees (Forums);
2. Quality Program;

This official time will not be counted against any allocated official time as described in this agreement.

B. A union official who is designated as an employee's personal representative will be on duty time when preparing or presenting appeals to the MSPB and handling discrimination claims under EEOC procedures.

Section 7 - Performance Evaluation

The use of official time, in accordance with this Agreement, will not adversely affect an employee's performance evaluation.

Section 8 - Substitutions

The Union may substitute a retired VA employee for the designees at national LMR meetings or Department initiatives. The Department will provide travel and per diem, in advance, for that retired employee if they do not have a Department-issued credit card.

Section 9 - Allegations of Abuse

Alleged abuses 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.

****

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

1. Local unions that are above the 4.25 will not be able to receive an increase in official time until the number of bargaining unit employees has increased to the level where they are entitled to have an allocation equal to the 4.25 per bargaining unit employee
2. Local unions that are below the 4.25 minimum shall receive their increase in official time allocation no later than 60 days after this Agreement is effective. The allocation shall be based on the number of bargaining unit employees represented by the local union on the date this Agreement is effective.
3. The calculation period to determine the number of bargaining unit members represented by a local union is every six months after this Agreement is in effect.

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

E. Where arrangements for transfers of official time among Union representatives are not in effect, they can be negotiated locally."

Official time has historically been used by the Union for several things, including pre-approved training of Union representatives. Historically, as long as the training or event did not include internal union affairs, including the solicitation of membership, elections of labor organization officials, and collection of dues, the Agency approved the use of the allocated Official Time for union representatives for pre-approved training, and the time would not be counted against the bank of hours awarded to the Union under Article 48 of the Master Agreement. Such time was designated as Authorized Absence or "AA". The procedure

established by the parties was that a Union representative would email the Agency requesting Authorized Absence or "AA" for the time necessary to attend the training which allowed the employee to be paid his or her normal pay, and since it was an authorized absence, the time would not be counted against the Union's bank of hours under Article 48. Once the request was made, the Agency representative would authorize all or part of the request, or deny all or part of the request.

In early 2017, the Union requested that employees Dorothy Johnson, Katrina Dudley, Rodney Smith, James Gebhardt, and Sonia Ellis be granted authorized absence to attend training in St. Louis in March 2017. The Agency approved, but afterward rescinded the approval. The dispute was grieved and was argued before Arbitrator Steven R. Rutzik.

The parties engaged in Mid-Term Bargaining pursuant to Article 47 of the Master Agreement in or around 2017 regarding Official Time, including the use of Official Time for training. The parties were unable to reach an agreement. Pursuant to 5 U.S.C. §7119, the dispute was presented to the Federal Service Impasses Panel (the "Panel" or "FSIP") to resolve the dispute. Each side presented its case to the Panel, and on October 26, 2017, the Panel issued its decision that constituted a binding agreement between the parties that "replaces and supersedes all previous agreements, MOUs, LSA, ground rules, or documents related to official time."

Prior to 2018, the Agency used a time keeping system known as VISTA. Under that system, authorized training was coded as Authorized Absence or AA. In 2018, the Agency implemented a new time keeping system, named VA Time and Attendance System (VATAS). The coding under this system did not include a provision for Authorized Absence or AA.

On November 8, 2018, Arbitrator Rutzik, without addressing the impact of the FSIP decision, sustained the Union's grievance in regard to non-payment for the authorized absences of Dorothy Johnson, Katrina Dudley, Rodney Smith, James Gebhardt, and Sonia Ellis, and directed the Agency to authorize 40 hours of AA for each grievant.

The Master Agreement also states:

ARTICLE 49 – RIGHTS AND RESPONSIBILITIES

Section 1 – Introduction

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

...

Section 4 – Notification of Changes in Conditions of Employment

A. The Department shall provide reasonable advance notice to the appropriate Union official(s) **prior to changing conditions of employment of bargaining unit employees**. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain. The Department will work with the Union to identify and provide specific training and equipment to address concerns related to the use of technology, to include the sending and receiving of electronic communications. (emphasis added)

Section 5 – Information

If the Union makes a request under 5 USC 7114(b)(4), the Department agrees to provide the Union, upon request, with information that is normally maintained, reasonably available, and necessary for the Union to effectively fulfill its representational functions and responsibilities. This information will be provided to the Union within a reasonable time and at no cost to the Union. (emphasis added)

The Statute also provides:

5 USC § 7114(b)(4) Representation rights and duties

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –

(4) in the case of an **agency to furnish** to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data:

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining .... " (emphasis added).

On December 21, 2018, Kevin Ellis, President of the Union, requested AA to attend the annual scheduled St. Louis Area Council Training for himself, Jacob Jordan, Todd Shimkus, Keira Edson, Sonia Ellis, Dorothy Johnson, Tim Pennington and Brandi Briscoe for March 18 through March 22, 2019. On February 13, 2019, Patricia Hall, Medical Center Director for the Agency, approved the December 21, 2018 request of Ellis.

Upon return from the training March 18 through March 22, 2019, the employees that had been granted AA were instructed to change their AA time to Official Time, which would count against the Union's bank of hours.

On March 27, 2019, Ellis submitted an information request, asking for the past 5 fiscal years up to March 27, 2019 of employees attending training or meetings. On March 27, 2019, the Union also grieved the denial of AA for the March training. In the information request, the Union requested that the information be put into the following format:

1) A column consisting of the names of the employee(s) who attended trainings or meetings during duty hours of Sunday through Saturday.

2) A column consisting of the type of training or meeting the employees attended.
3) A column for the dates of training attended.
4) A column for the amount of Authorized Absence (AA) granted.
5) A column for the amount of forced Annual Leave (AL) employees were told/required to utilize.

The Union stated that the information was needed to show that the Agency is requiring employees to utilize Annual Leave (AL) to attend training sessions instead of Authorized Absence (AA).

The Agency failed to respond to the information request by either supplying the requested information, or by denying the request, and then stating the reasons why the request was denied.

On April 25, 2019, Ellis submitted another information request for Authorized Absence (AA) records for all employees who have been granted and utilized AA over the past fifteen (15) years. The Union stated that the information was needed because the Union filed a step 3 grievance and invoked arbitration against the Agency for forcing Union representatives to switch their approved AA time. The Agency failed to respond to the information request by supplying the requested information or by denying the request, and stating the reasons why the request was denied.

On July 10, 2019, Ryan Wells, Executive Assistant to the Director of the Agency, sent an email to Ellis notifying him that the Union has exhausted all negotiated Official Time under the Master Agreement and FSIP Order dated October 26, 2017.

On July 18, 2019, Ellis emailed a Step 3 grievance to Patricia Hall stating as follows:

"AFGE LOCAL 2338 GRIEVANCE

Date: July 18, 2019
Step 3 Grievance: Step Three Grievance

To: Patricia Hall, Medical Center Director

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 (MCA). Article 1, Article 2, Article 4, Article 17, Article 21, Article 35, VACO Guidance, an any other relevant article contained within the master agreement, and any violation of rule, law, or regulation, to include EEOC Guidelines.

The Union sent the agency a 5 U.S.C. 71 14(6)(4) Information Request on or about March 27 April 25, 2019. The Union sent this request to the agency for the sole purpose of representing bargaining unit employees who have attended trainings over the past 15 plus years. The information will show and prove, with 100% certainty, Libby Johnson and the agency are totally incorrect in it ascertain, that union officials have used Official Time or annual leave to attend trainings. Union officials have always been granted AA to attend trainings over the past 15 years at this agency. In addition, Union representatives from across the nation will testify during any arbitration that AA is always granted to attend trainings. The agency, through not supplying the information has caused a delay and the restriction, and coercion of the agency towards Union representatives. The act of not supplying the information is an ongoing act and ongoing occurrence as the agency has not supplied the information and the union has been waiting now 60 days to receive the information to represent its employees.

It's a requirement for the agency to supply information it maintains and is readily available. Article 49, Section 5 states: *If the Union makes a request under 5 USC 7114(b)(4), the Department agrees to provide the Union, upon request, with information that is normally maintained, reasonably available, and necessary for the Union to effectively fulfill its representational functions and responsibilities. This information will be provided to the Union within a reasonable time and at no cost to the Union.*

Second, it's a 5 U.S.C. 7116 Violation for failing to provide information the union needs to represent its bargaining unit employees. The agency, to date, has not provided the requested information which would prove overwhelmingly, the agency cannot force employees to use annual leave to attend trainings or official time. Upon returning from training, the agencies associate director forced and coerced union representatives through their supervisors. The Agency has been informed through an arbitrator's decision to grant Authorized Absence (AA) for attending trainings, and, to return Annual Leave (AL) to Union Representatives. Despite sharing with the Associate Director Libby Johnson an arbitrator's decision, and this agency's continual 15 plus years of practices, the agency still refuses to grant AA. Not only will employees from this facility testify, but representatives from across the nation will also testify.

The agency is fully aware, they will not win or prevail in this case before an arbitrator, and in the issue of justice will be requested and required to pay entire cost of arbitration and attorney fees.

Please note that the subject matter presented at all of the trainings, have always fallen within the purview of the Comptroller General's decision concerning administrative leave to attend training that is beneficial to both management and labor organizations. That decision is supported by PPM Chapter 630: S11-5E.

AFGE Local 2338 reserves the right to amend this grievance if other applicable laws, rules, regulations or additional contract violations are discovered dining the course of the attempting to resolve the issue, invoke arbitration, or performing arbitration before a third party.

The Remedy:

1. The agency will immediately grant 40 hours of AA to representatives attend trainings, including travel days.

2. Any Union representative that did not receive 40 Hours of AA to include travel will have their VATAS time and leave system corrected to reflect a granting of 40 hours of AA.

3. The agency will make the Union whole, and in the interest of justice, knowing they will not prevail, pay all applicable attorney fees and arbitration cost.

Kevin Ellis, President
AFGE Local 233E
Information Copy to: HR /LR"

The information requests of March 27, 2019 and April 25, 2019 were incorporated into the grievance.

On July 31, 2019, Wells emailed the Agency's response to the July 18, 2019 Step 3 grievance denying all issues raised in the grievance.

On August 5, 2019, the Union sent and email to the Agency invoking arbitration of the July 18, 2019 grievance, and the matter was submitted to this neutral Arbitrator for decision. A hearing was held on December 3 & 4, 2019 in Poplar Bluff, Missouri.

II.

ISSUES PRESENTED

The parties were unable to stipulate as to the issues to be determined by the Arbitrator. They parties did stipulate that the matter was substantively proper before the Arbitrator, that the matter was properly before the Arbitrator and that the Arbitrator had the authority to issue a full, final, and binding decision. The Agency raised the issue that the requested remedy exceeds the actual scope of the arbitrability issue. The Agency argues that there were no requests or denials for official time of authorized absence within the 30 days preceding the grievance. The Union has argued that it is a continuing violation and therefore the 30 day limit does not apply.

The Union presented the following proposed issues:

"Did the John J. Pershing VA Medical Center, hereby known as the Agency, willfully abrogate the American Federation of Government Employee, AFGE, Local 2338, hereby known as the Union, rights under 5 USC Chapter 71, subchapter 1, subsection 7114 B 4, when it failed to respond to two data/information requests sent by the Union on March 27 and April 25, 2019. And in so doing, violated USC Chapter 71, Subchapter 1, subsection A 1, A 5, and A 8, as well as the parties' master collective bargaining agreement, Article 49, Section 5, page 252 of the hard copy, and page 237 of the electronic copy. Also, has the Agency failed to act in good faith by denying this grievance as they know should have known that the Union officials are entitled to authorized absences while attending training. In addition, has the Agency abrogated the Union's rights and Agency obligations outlined in the parties' master collective bargaining agreement and past practice as outlined in the Union's Step 3 grievance dated July 18, 2019. If so, what shall the remedy be?"

In its brief, the Union restated its proposed statement of issues as follows:

:Did the John J. Pershing VA Medical Center, (the Agency), violate the Master Collective Bargaining Agreement, (Master Agreement) Jx1, and Federal Labor Statutes, Jx2, and in doing so:

Did the Agency refuse to answer valid information requests as required pursuant to 5 USC 7114(b)(4), Representation rights and duties, and the failure to provide the information is an unfair labor practice, 5 USC § 7116 (a) Unfair Labor Practices;

Did the Agency refuse to grant authorized absence/administrative leave for authorized Union training, refuse to release Union representatives on official time for representational duties, and changing authorized absences to other time, and incorrectly computing total official

time to limit the Union's ability to represent the bargaining unit employees of the Agency, all unfair labor practices under 5 USC §7102 Employee rights, 5 USC 7114(b)(4), Representation rights and duties Employee rights and 5 USC § 7116 (a) Unfair Labor Practices; and

Did the Agency refuse to negotiate with the Union in good faith over changes in the use of authorized absences/administrative leave, 5 USC §7106(b)(3), Management rights, 5 USC §7114 Representation rights and duties, 5 USC § 7116 (a) Unfair Labor Practices and 5 USC §7117 Duty to bargain in good faith."

The Agency presented the following proposed statement of issues:

"So as previously noted, the first issue we're looking at is in terms of the arbitrability. And that's specifically the issue concerning the - - Union's request for AA as a remedy in this case, exceeds the scope of the current grievance which is concerning a failure to respond to an information request. The reason the Agency is contending that in this circumstance is that there were no requests for AA or official time for training or denials for AA or official time for training within the 30 days preceding the actual filing of the grievance, on I believe it was June 18th, 2019. The contract, Article 43, Section 7, stipulates that grievances will be filed within 30 days of the actual personnel action that's being grieved.
As far as the information request itself, the Agency is not contending that there was a duty to respond to that matter. However, it is the Agency's contention that the information request itself is overly broad in scope, vastly exceeds what the authority would consider a normal time frame, and as such the Union, to date, has not accurately established particularized need with that. In addition to that, since the matter of authorized absence was raised, it is the Agency's contention that the contract and the binding federal service impact panel decision that we have here locally, the unambiguous terms of that states that on - - should be on official time, not on authorized absence, so the remedy sought in terms of authorized absence is inappropriate as it doesn't draw any sort of essence from the contract and is direct violation of that."

In its brief, the Agency restated its issue:

The issue as presented by the Agency is whether the American Federation of Government Employees (AFGE) Local 2338's (Union) grievance concerning their information request of March 27, 2019, is properly before the Arbitrator. Additionally, whether the Union's information request of April 25, 2019, adequately establishes a particularized need for the information, and, if so, what is the extent of the information the John J. Pershing VA Medical Center (Agency) is required to provide? Lastly, whether the Union's requested remedy of Authorized Absence (AA) for Union-Sponsored Training exceeds the scope of the timely grieved issue. If not, is such a remedy of AA consistent with the type of time/leave authorized for Union Sponsored Training under the Parties' Collective Bargaining Agreements (CBA), and has the Union provided sufficient evidence to warrant such a remedy? If so, what shall the remedy be?

In that the parties were unable to stipulate to the issues before the Arbitrator, the parties stipulated that the Arbitrator has the authority to frame the issues after hearing the testimony and arguments.

Based upon the evidence and arguments of the parties, I have determined that the issues to be decided are as follows:

1. Did the Agency violate the Master Agreement and commit an unfair labor practice by undercounting the number of bargaining unit employee, thereby reducing the amount of Official Time allocated to the Union under the Master Agreement?
2. Did the Agency violate the Master Agreement and commit an unfair labor practice when it changed its conditions of employment by charging training time that counts against Official Time, rather than as Authorized Absence which does not count against the Union's bank of hours of Official Time?
3. Did the Agency violate the Master Agreement and commit an unfair labor practice when it failed to provide information as requested by the Union?
4. Did the Agency violate the Master Agreement and commit and an unfair labor practice when it denied AA for approved training in March 2019?
5. If any of the violations of the Master Agreement are established, do they also constitute an Unfair Labor Practice?
6. If violations of the Master Agreement or Unfair Labor Practices are found by the Arbitrator, what shall the remedy be?

III.

ARGUMENTS OF THE PARTIES

Arguments of the Union:

- The Agency did not object to Union's statement of issues and therefore they are accepted.
- The grievance is of a continuing nature.
- Master agreement allows disclosure under Article 24, 2(D).
- Agency violated Master Agreement and committed unfair labor practices by:

  Refusing to respond to information requests

  Failing to provide requested information

  Failing to grant authorized absence/leave for union training

  Failing to release union representatives on official time for representational duties

  Changing authorized absences to other time

  Incorrectly computing official time
- Failing to negotiate with the Union over changes in the use of authorized absences/administrative leave, 5 USC §7106(b)(3), Management rights, 5 USC §7114 Representation rights and duties, 5 USC § 7116 (a) Unfair Labor Practices and 5 USC §7117 Duty to bargain in good faith.

Arguments of the Agency:

- The grievance is untimely.
- The disclosure barred by Privacy Act and does not fall within exclusions.
- The FLRA has routinely affirmed that the disclosure of name identified records are within the scope of the Privacy Act are prohibited from release under 5 U.S.C. § 7114(b)(4) unless the public interest served by the disclosure outweighs individual privacy interests of employees.

- Disclosure of the information is barred because there was no written consent by employees.
- The Union did not satisfy particularized need standard.
- The Master Agreement does not provide a timeframe for response to information request.
- Article 48 Sec 10 governs Official Time and provides official time for training will be negotiated locally.
- In Octobert 2017, after negotiating to impasse, the issue of Official Time was submitted to Federal Service Impasses Panel; the order addresses official time for training purposes.
- There is a clear difference between official time and authorized absence/administrative leave.
- Prior to the implementation of VATAS, there was no code for authorized absence so it was tracked as official time.
- The information requests involve a finite number of persons, i.e., union representatives, therefore the union should have been able to obtain written consent, or the individuals should have been able to obtain their own records.
- The grievance only involves the failure to provide requested information; it does not mention the denied AA leave; Ellis testified that the grievance had not been amended to include the denial of AA leave; denies due process.
- No basis for attorney fees under Back Pay Act.
- Official Time is the appropriate category for training.

- A past practice ceases to be relevant once the parties have negotiated binding terms which conflict with the past practice.
- Arbitrator Rutzik's decision is misplaced and does not take into consideration the FSIP decision.
- The parties' agreements clearly demonstrate that official time is to be used for Union sponsored training and that such official time is deducted from their bank of hours.
- Neither agreement makes any indication that the Union is entitled to authorized absence for such training, and despite the Union's argument of past practice, the unambiguous terms of the contract prevail.

III.

OPINION

In that this is a contract interpretation case, the burden of going forward and the burden of proof is on the Union. The Union must meet its burden of proof by a preponderance of evidence.

A.

AGENCY MISCOUNTING OF EMPLOYEES REGARDING OFFICIAL TIME

One of the issues that the parties dedicated a good deal of time and effort on was the issue as to whether or not the Agency violated the Master Agreement by undercounting the number of employees upon which Official Time is based, and therefore whether the Agency has violated the Master Agreement when it declared that the Union had exhausted its Official Time on July 10, 2019. The Union alleged at the hearing that the Agency has not properly counted employees located at CBOC facilities, and has undercounted bargaining unit employees in general.

When reviewing the Step 3 grievance of July 18, 2019, there is no reference to this issue. 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, nor did it in any way amend the grievance (assuming the Union's claim that it can do so is valid), 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 rendered in that regard.

B.

FAILURE TO PROVIDE REQUESTED INFORMATION

The Union made 2 separate information requests to the Agency on March 27, 2019 and April 25, 2019. These information requests grew out of the Union's allegations that Agency violated the Master Agreement when it denied the use of AA for the authorized leave for March 18 through March 22, 2019, after the Agency had previously approved the use of AA for the leave. No evidence was presented by the Agency that it responded to the requests, or even acknowledged the requests. Even the July 31, 2019 long winded response of Wells to the Step 3 grievance does not address or properly respond to the information requests. I found the testimony of Well not to be credible and therefore do not credit much of what was in the July 31 response or his testimony at the hearing.

The Agency raises the defense that the failure of the Agency to provide the information requested on March 27, 2019 and April 25, 2019 was not grieved by the Union and therefore is not properly before this Arbitrator.

Article 43 – Grievance Procedure, Section 7 of the Master Agreement, provides

> B. 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.

When a Union makes a request for information, the Agency is required to respond within a reasonable amount of time. In light of the 30 calendar days limit for a grievance, it is not unreasonable for the Union to expect the Agency to comply with, or respond to, the request within 30 calendar days. Each day beyond in which the Agency failed to provide information, or respond to the request, would constitute a violation of a "continuing nature".

Information requested from a Union is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. When requesting information, under Section 7114(b)(4), the Union is required to "demonstrate a particularized need for information it seeks." The Agency must then weigh the particularized need against the Agency's interest in withholding it. The purpose of Section 7114(b)(4) is to provide unions with access to information that is necessary for them to provide effective representation to employees in their bargaining units.

The Union is responsible for articulating and explaining its interests in requesting the disclosure of the information. Satisfying this burden requires more than a conclusory or bare assertion. Among other things, a request for information must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. The Agency must at the very least respond to an information request in a timely manner. An Agency may not satisfy its burden by ignoring the request, by saying that it is too busy, or simply by

saying "no". Requiring an Agency to at the very least respond, and to respond in a reasoned and articulated manner, facilitates and encourages the amicable settlement of disputes, and effectuates the purposes and policies of the Statute. It also permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement. It is expected that where the Union puts forth a particularized need, and the Agency expresses a countervailing interest, the parties can then consider and determine whether and/or how disclosure is required, and consider alternative forms or means of disclosure that may satisfy both the Union's information needs and the Agency's interests in information.

In this case, the Agency approved the use of AA for attendance of training to attend the annual scheduled St. Louis Area Council Training March 18 through 22, 2019. Upon return from the training March 18 through March 22, 2019, the employees that had been granted AA were instructed to change their time to Official Time, which would count against the Union's bank of hours. The Union made information requests of the Agency on March 27, 2019 and April 25, 2019 in order to investigate the information that would support their claim that Agency had unilaterally changed their conditions of employment. There was no evidence presented at the hearing that the Agency denied, or even responded to the Union's information requests until the Agency responded to the underlying grievance on July 31, 2019, some 3 to 4 months after the requests were submitted. And the "response" was nothing more than a conclusory denial, or that the Agency was too busy to respond.

The actions of the Agency clearly do not meet the requirements of the Master Agreement. The contract requires that the information be supplied within a "reasonable time". 90 to 120 days is not reasonable. The Statute as interpreted by the FLRA and the courts also requires a

reasoned response either agreeing to provide the information, or setting forth a counterveiling interest. It also requires the Agency to offer more limited information if it determine that the request is overbroad. In this case, the Agency did not respond in a reasonable amount of time, or offer a counterveiling interest. There is no other conclusion to draw than the Agency violated the Master Agreement, and committed an unfair labor practice, when it failed to provide the information requested on March 27, 2019 and April 25, 2019, and when failed to provide a timely response.

I do not need to reach the issue as to whether or not the Union's request met any of the requirements, such as particularized need, or an appropriate time period. I do not need to consider the Privacy Act arguments. The Agency violated the Master Agreement and law by simply ignoring and not responding to the request.

C.

FAILURE TO PROVIDE AA FOR TRAINING MARCH 18-22, 2019

The Union has alleged that there is a past practice of using "Authorized Absence" or "AA" for pre-approved training. The Union alleges that this past practice has existed for over 14 years, and that the information requested from the Agency would have proved that such was the case. The facts, as presented to the Arbitrator, would support the Union's argument. The facts also support the notion that the Agency was on notice as to this dispute since the employees returned from training in March 2019.

However, the facts also establish that the parties engaged in Mid-Term Bargaining pursuant to Article 47 of the Master Agreement in or around 2017 regarding Official Time, including the use of Official Time for training. The parties were unable to reach an agreement.

Pursuant to 5 U.S.C. §7119, the dispute was presented to the Panel to resolve the dispute. On October 26, 2017, the Panel issued its decision that constituted a binding agreement between the parties that "replaces and supersedes all previous agreements, MOUs, LSA, ground rules, or documents related to official time."

Prior to 2018, the Agency used a time keeping system known as VISTA. Under that system, authorized training was coded as Authorized Absence or AA. In 2018, the Agency implemented a new time keeping system, named VA Time and Attendance System (VATAS). The coding under this system did not include a provision for Authorized Absence or AA.

Notwithstanding the past practice as promoted by the Union, the Panel ruled that Official Time may be used for training, and that the Union will provide an

> "agenda or other documents detailing the topics to be covered during the training to the agency. The agency will review the document to determine whether any of the time is inappropriate for official time as specified in law and regulation (such as internal union business, Hatch Act activities, etc.,) and will provide a written notice to the union if any time is deemed inappropriate for official time. . . ."

The Panel also ruled that

"[t]he agency and the union agree to the following definition of non-allocated hours (previously referred to a "bankable" time):

i. Non allocated time is time spent by the union representatives in activities which are excluded from counting against the annual allocated base hours as outlined in the Master Agreement. The only activities included in this category are:
   a. Quality Programs – the union and agency agree to one union representative on the following quality program activities locally:
      i. Environment of Care Committee (EOC)
      ii. Quality, Safety, and Value Council (QSVC)
      iii. All sub-committees of the QSVC
   b. Labor Management Forum – an equal number of union representatives to the number of agency representatives
   c. EEO/Diversity Committee – One union representative
   d. New Employee Orientation – One union representative, 30 minutes bi-weekly

e. Time spent in EEO MSPB matters will be governed by NCBA Article 48, Section 6."

The Union does not address the effect of the Panel decision in its argument in regard to what it argues is an established past practice. The facts as presented show that the Agency, notwithstanding the Panel's decision of October 26, 2017, continued to engage in a past practice of a condition of employment of allowing employees to apply for, and received AA, for pre-approved training.

The Agency points out, however, that in 2018, the FRLA ruled in, *United States Small Business Administration and American Federation of Government Employees, Local 3841*, 70 FLRA NO. 107 (May 2, 2018) that "arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms."

The Union's argument, however, does not rest entirely upon past practice. The Union also argues that the Agency violated the Master Agreement by changing an existing condition of employment without notice or bargaining with the Union.

The language of the Master Agreement is clear and unambiguous. Article 49, Section 4(A) states:

> The Department shall provide reasonable advance notice to the appropriate Union official(s) **prior to changing conditions of employment of bargaining unit employees.** The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain. The Department will work with the Union to identify and provide specific training and equipment to address concerns related to the use of technology, to include the sending and receiving of electronic communications. (emphasis added)

The evidence introduced at the hearing established that AA was granted to Ellis and Jacob Jordan for training on January 16-17, 2018. It also established that AA was granted to Tyler McCarty and Ellis for training on June 25-29, 2018. In that the Agency refused to comply with a validly issued Arbitrator's subpoena, committed an unfair labor practice, and breached the Master Agreement by failing to respond to requests for information dated March 27 and April 25, 2019, an adverse inference will be applied to actions of the Agency. It will be inferred that the information requested/subpoenaed, and not supplied by the Agency, would further support the Union's position that a condition of employment existed that AA would routinely be granted by the Agency for training.

Based upon the foregoing, I find that when the Agency denied AA to Kevin Ellis, Jacob Jordan, Todd Shimkus, Keira Edson, Sonia Ellis, Dorothy Johnson, Tim Pennington and Brandi Briscoe for pre-approved training on March 18 through March 22, 2019. the Agency violated the Master Agreement, Article 49 Section 4(a), by changing an existing condition of employment without giving notice to the Union. The Agency also committed an Unfair Labor Practice by changing a condition of employment without first bargaining with the Union.

BACK PAY ACT

Under the Back Pay Act, 5 USC Section 5596(b)(1) an award of back pay is authorized when (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or reduction of the employee's pay, allowance, or differentials. The Agency violated Article 49 Section 4(a) of the Master Agreement by changing an existing condition of employment without giving notice to the Union

and is the unjustified and unwarranted personnel action that resulted in several employees' loss of allowances under the Master Agreement. The Back Pay Act is applicable.

The Union may make the appropriate application for an award of attorney fees and costs.

AWARD

The Grievance is sustained in part and denied in part.

REMEDY

1. The Union did not properly grieve its accusation that the Agency violated the Master Agreement by undercounting bargaining unit employees and thereby awarding an improper amount of Official Time as set forth in Well's memorandum dated July 10, 2019. Therefore, in regard to that portion of the issue raised by the Union is denied;
2. The Agency violated the Master Agreement when it failed to respond to the Union's information requests of March 27, 2019 and April 25, 2019;
3. The Agency violated the Master Agreement when it changed conditions of employment without notice to Union by compelling Kevin Ellis, Sonia Ellis, Jacob Jordan, and Tim Pennington to change their time from Authorized Absence to Official Time when they attended pre-approved training March 18, 2019 to March 22, 2019;
4. The Agency committed Unfair Labor Practices, pursuant to 5 USC § 7116, and the Agency will cease and desist from;
   a. Failing to timely provide information requests, pursuant to 5 USC 7114(b)(4), and
   b. failing to grant authorized absence/administrative leave for authorized Union

training, and changing authorized absences to other time designations, without prior notice to the Union and bargaining with the Union; and

c. failing to negotiate with the Union in good faith over changes,

5. The Agency will, within 30 days of this Award, provide all the unredacted information requested in the data/information requests of March 27, 2019 and April 25, 2019, from the date of the FSIP Decision, i.e., October 26, 2017;

6. The Agency will reimburse the following employees for all time, pay, and benefits lost due to compelling them to change their time from Authorized Absence to Official Time for March 18 through March 22, 2019, plus any appropriate travel time: Kevin Ellis, Jacob Jordan, Todd Shimkus, Keira Edson, Sonia Ellis, Dorothy Johnson, Tim Pennington and Brandi Brisco

7. The Agency will restore any Official Time that was reduced by it compelling the employees listed in No. 6 above to change Authorized Time to Official Time as set forth in No. 6 above;

8. The Union is entitled under the Back Pay Act to apply to the Arbitrator for an award of attorney fees and costs;

9. The Arbitrator will maintain jurisdiction for the implementation of this award, attorney fees and associated costs of this arbitration.

Dated this 27 day of March, 2020.

Dennis A. Kist
Arbitrator
Hartsel, Colorado