

ARBITRATION DECISION

For
Department of Veterans Affairs-Long Beach Health Care System
And
AFGE Local 1203

In the Matter of

FMCS 15-55597-A

Official Time
(Grievance)

April 25, 2017

I. Appearances

A. For the Department of Veterans Affairs - Long Beach Health Care System ("VA-Long Beach")

1. Ely Quesenberry, Employee/Labor Relations Human Relations Specialist, VA-Long Beach
2. Sohrab Tanavoli, Hospitalist, VA-Long Beach
3. Lori M. Karin, Chief of Human Resources, VA-Long Beach

B. For AFGE, Local 1203 ("Union")

1. Virginia Speth, Union President
2. Yvonne Wheeler, AFGE National Representative
3. Dr. Bawan Juneja, Hospitalist, VA-Long Beach and Union Treasurer
4. Gregory Garcia, Senior Social Worker Case Manager, VA-Long Beach

II. Exhibits

A. Joint Exhibits

1. Master Agreement between Dept. of Veterans Affairs (“Agency” or “DVA”) and Union (“Master Agreement”), Article 1 – Recognition and Coverage (2011)
2. List of Union Officers
3. List of Union’s Bargaining Unit Titles
4. List and Number of Union’s Bargaining Unit Employees by Job Title (June 2016)
5. AFGE, Local 1203 and VA-Long Beach Healthcare System, FMCS Case No. 14–7–55718 (Butler, 2015)
6. Letter from Herbert Moisa – Asst. Chief of Human Resources (“HR”) to Union President Virginia Speth, Re: Denial of Official Time Request for Dr. Junejauneja, for July 15-31, 2015 (July 14, 2015)
7. Letter from Moisa to Speth, Re: Denial of Official Time for Dr. Junejauneja for Sept. 14-18, 2015 (Sept. 2, 2015)
8. Letter from Union to Marybeth McMartan – Chief of HR, Re: Official Time Request for Dr. Juneja for March 21-25, 2015 (Dec. 22, 2015)
9. Letter from Union to McMartan and Moisa, Re: Official Time Request for Dr. Juneja, Union Treasurer for March 1-2, 2016 (Feb. 22, 2016)
10. Letter from Union to McMartan and Moisa, Re: Official Time Request for Dr. Juneja for May 24-27 and Gregory Garcia for May 24-25, 2016 (March 11, 2016) **and** Letter from Moisa to Speth, Re: Approval of Official Time Request for Dr. Juneja for May 24-27 and Gregory Garcia for May 24-25, 2016 (April 1, 2016)
11. Letter from Union to Moisa, Re: Official Time Request for Dr. Juneja for April 25-29, 2016 (April 13, 2016)
12. Email from Moisa to Speth, Re: Official Time/Office Coverage Request for Dr. Juneja (April 22, 2016)
13. Letter from Union to Moisa, Re: Official Time Request for Dr. Juneja for June 6-14, 2016 (May 6, 2016)
14. Letter from Moisa to Virginia Speth, Re: Denial of Official Time for Dr. Juneja for June 6-14, 2016 (May 16, 2016)

15. Letter from Moisa to Speth, Re: Denial of Official Time for RN Robin Williams, Union Secretary, for June 6-14, 2016 (May 16, 2016)
16. Email from Speth to Williams, Re: Trip – Official Time to Cover Union Office (June 1, 2016)
17. Letter from Union to Dr. Sohrab Tanavoli – VA-Long Beach Chief Hospitalist and Adrienne Johnson – VA-Long Beach, Chief of Employee and Labor Relations, Re: Official Time Request for Dr. Juneja for August 17-20, 2016 (July 22, 2016)
18. Email from Speth to Johnson and Corlyn Huddon, Re: Official Time Request for Dr. Juneja for August 17-20 (August 1, 2016)
19. FLRA Charge SF-CA-16-0660, Union Charge Against VA-Long Beach, Re: Official Time Denial (Aug. 18, 2016)
20. Letter from Lori Karin, VA-Long Beach Chief of HR Management Services to Speth, Re: Approval of Official Time Request for Speth for Dec. 6-9, 2016 (Dec. 1, 2016)
21. Master Agreement, Article 48 – Official Time (2011)
22. Title 5, Government Organization and Employees, Subchapter IV – Administrative and Other Provisions, 5 U.S.C. Sec. 7131 – Official Time
23. Letter from Union to Karin, Re: Official Time Request for Dr. Juneja for Dec. 29-30, 2016 (Dec. 27, 2016)
24. Letter from Union to Karin, Re: Official Time Request for Dr. Juneja for Jan. 18-20, 2017 (Jan. 6, 2016)
25. Email Chain from Donna Richard to Speth, Re: Time Extension Request (January 11, 2017)
26. Email Chain from Dr. Juneja to Karin, Speth and Ely Quesenberry, VA-Long Beach Employee/ Labor Relations Human Relations Specialist, Re: Official Time for Jan. 19 and 20, 2017 (January 18, 2017)
27. Letter from Union to Karin, Re: Official Time Request for Dr. Juneja for Feb, 1-3 and 15 24-27 and Williams for Feb. 6-10, 2017 (Jan. 18, 2017)

B. Agency Exhibits

1. Letter from Moisa to Vera Logan, Union President, Re: Official Time Approval (Feb. 9-12, 2015) and Denied (Feb. 8, 2015) for Dr. Juneja (Feb. 4, 2015)
2. Step 1: Grievance and Response, Re: Official Time (March 20 and 30, 2015)

3. Step 2: Grievance and Response, Re: Official Time (Feb. 26 and March 9, 2015)
4. Letter from Union to McMartan, Re: Official Time Request for Dr. Juneja and Rocco Garcia for May 4-9 (March 26, 2015) and Letter from Moisa to Speth, Re: Partial Approval Official Time Request for Dr. Juneja - Approved for all days but May 9, 2015 (April 6, 2015)
5. Step 3: Grievance and Response, Re: Official Time (March 31 and April 10, 2015). Also, Letter from Michael Fisher, VA-Long Beach Medical Center Director to Speth, Re: Negotiating a Possible Agreement on Official Time (April 20, 2015)
6. Letter from Union to McMartan and Moisa, Re: Official Time Request for Dr. Juneja for Dec. 14-18, 2015 (Dec. 2, 2015) and Letter from McMartan to Speth, Re: Denial of Official Time Request for Dr. Juneja (Dec. 10, 2015)
7. Letter from Moisa to Speth, Re: Denial of Official Time Request for Dr. Juneja for March 21-25, 2016 (Jan. 28, 2016)
8. Letter from Moisa to Speth, Re: HR Proposal on Official Time Requests (Feb. 29, 2015)
9. Letter from Karin to Speth, Re: Partial Approval of Official Time Request for Williams for Nov. 7-11, 2016 (Sept. 15, 2016)
10. Letter from Union to Karin, Re: Official Time Request for Dr. Juneja for Nov. 6-12 (Aug. 31, 2016) and Letter from Karin to Speth, Re: Partial Approval Official Time Request for Dr. Juneja - Approved for all days but Nov. 9, 2016 (Sept. 13, 2015)
11. Letter from Union to Karin, Re: Official Time Request for Williams for Dec. 5-7 and Dr. Juneja for Dec. 8-9, 2016 (Nov. 21, 2016) and Letter from Karin to Speth, Re: Partial Approval Official Time Request for Williams (all but Dec. 7) and Approval for Dr. Juneja (Dec. 2, 2016)

C. Union Exhibits

1. Union Office Closed (July 16, 2015)
2. Union Office Closed (Dec. 14, 2015)
3. Union Office Closed (Feb. 3, 2016)
4. Union Office Closed (March 25 2016)
5. Union Office Closed (Aug. 5, 2016)

6. Union Case Summary (Dec. 20, 2016)
7. Union Case Summary Chart of 2016 Cases (July 16, 2015)
8. NTEU and IRS, 38 FLRA No. 107 (Jan. 8, 1991)

III. Issue

The parties stipulated to the following issue in the case.

Has the Veterans Administration [of the] Long Beach Healthcare System denied the American Federation of Governing Employees, Local 1203, official time to its union officers and stewards?¹

Tr. 7.

IV. Collective Bargaining Agreement

Article 1 – Recognition and Coverage

Section 1 – Exclusive Representative

...No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service...

Section 2 – AFGGE Role

Section 3 – Employee Representation

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...

B. As provided in 5 USC 7131, official time shall be granted as specified in life and in any additional amount the Department and the Union agree to be reasonable, necessary, and in the public interest...

Section 3 - Accumulated Official Time

¹ The parties stipulated that the matter was properly before me, both in terms of substantive and procedural arbitrability. Tr. 7.

Official time authorized... 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 leave year. Any time that was not used as needed by the end of leave year will not be carried over to the next leave year.

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 [Veterans Health Administration]...local union is entitled to a minimum of 50% official time....

V. Facts

The hearing, conducted on January 20 at the VA-Long Beach concerns the denial of union requests for “official time” for union officials to conduct union business.

The Union is the exclusive bargaining representative for 1294 licensed professional staff in 41 positions at that VA-Long Beach facility. Jt. Exh 3 and 4. According to Union President Virginia Speth, there has been a “tremendous increase in representational issues ... a 55% increase [in the last year]...” Tr. 15. See also, Union Exh. 6. Pres. Speth also testified that the procedure is for the Union to

...request official time to train union stewards and officers to make them more knowledgeable... Current practice for requesting official time is that if it's eight hours or less ‘I speak directly to the supervisor.’

[The supervisor] is the one who gives the approval. If the official time request is eight hours or more, it's a more formal practice. I must go through human resources, through the Chief of Human Resources (Lori Karin)...And she is the one that approves it or denies it."... Have asked for official time repeatedly and "always been denied"... Only received two approvals

The current practice with official time, if it's eight hours or less, I speak directly to the supervisor of that union officer or steward to request that they be released for whatever procedure I need them, whether it's a fact finding or mediation or a facilitation, et cetera.

**

The supervisor is the one who gives the approval. If the official time request is eight hours or more, it's a more formal practice. And I must go through human resources, through the Chief of Human Resources. Lori Karin, currently she is holding that position. And she is the one that approves it or denies it.

Tr. 19-20. See also, 27-28. Speth later amended her statement, noting that the Union “only received

two approvals” and, as a result, had to close the Union office on several occasions. Tr. 20-24.

Approval, according to Speth, has been dependent on the employee’s job:

I can get official time granted on a very easy basis for Gregory Garcia who is our social worker. And he is one of our newest stewards.

It has been very easy to ask, I think it's, Michelle Casey Plumber for official time for him. But when I ask for official time for the union officer Dr. Bawan Juneja,² or when I ask for official time for Robin Williams, who is the secretary, he is a registered nurse working in the spinal cord injury outpatient clinic, I always go through HR.

And it's always been denied.

Tr. 28. See also, Tr. 38. Dr. Sohrab Tanavoli, the VA’s Chief Hospitalist, testified that

My instructions by HR have been request for leave through union goes through HR first. HR determines of all the staff that are union representatives who should go. And then they tell me.

They ask me if this would pose significant limitations for our staff, if we have availability of clinical staff, and if it would be a significant financial burden for the department. If not, we will approve.

Tr. Dr. Tanavoli further testified that the "most important” factor in making the decision to grant “official time” is “patient safety, make sure somebody is there to take care of our patient.” Tr. 54. See also, Tr. 67. The Chief of HR, Lori Karins, testified that such decisions were made on a “case-by-case” basis, even though she was aware that Article 48 of the parties’ Agreement required an allocation of 4.2 hours of official time per year for each bargaining position represented by that local union. Tr. 62-63, 67.

Dr. Tanavoli noted that VA-Long Beach has been under staffed with regard to hospitalists “as long as I've been a hospitalist” and "from the get go.” Tr. 55 and 58. The situation only got worse when UC Irvine stopped providing night coverage in the December 2015 and the hospital was unable to employ with per diem staff to cover the shortage. Tr. 60 and 78. The problem was so significant that he had to deny all vacation time for hospitalists for two months during the summer of 2016. Tr. 58. The

² Dr. Juneja, a “hospitalist” (i.e., the position title for a hospital physician), was elected the Union’s Treasurer in October 2015 and assumed the position in 2016. Tr. 39.

Chief of HR also acknowledged that the hospital was “very short staffed” when it came to hospitalists such as a Dr. Juneja and that, as a result, “...it's very difficult to release him from a patient care schedule.” Tr. 71.

The Chief Hospitalist testified that the hospital provided “a lot” official time to the Union and the Chief of HR testified that there were more approvals than disapprovals. Tr. 51 and 71. The record provided at the hearing indicated that VA-Long Beach denied, in whole or in part, Union requests for “official time” off for local union officials to conduct local union business was as follows:

- Four hours on Wednesday and all day on Thursday and Friday in 2015 for Dr. Juneja. Agency Exh. 2. See also, Agency Exh. 3
- Feb. 8, 2015 (but approving February 9-12) for Dr. Juneja. Agency Exh. 1.
- May 9 (but approving May 4-8, 2015) for Dr. Juneja. Agency Exh. 4.
- July 15-31, 2015 for Dr. Juneja. Jt. Exhibit 6
- Sept. 14-18, 2015 for Dr. Juneja. Joint Exhibit 7
- Dec. 14-18, 2015 for Dr. Juneja (not working). Agency Exh. 6.
- Tues. and Wednesday all day in 2016 for Dr. Juneja rejected. Agency Exh. 8.
- March 22-25, 2016 for Dr. Juneja (not working). Agency Exh. 7.
- April 22, 2016 Dr. Juneja’s request in the event he has not called for jury duty. Joint Exh. 12.
- June 6-14, 2016 for Dr. Juneja. Joint Exh. 14.
- June 6-14, 2016 for Robin Williams, RN. Joint Exh. 15.
- August 16-20, 2016 for Dr. Juneja. Joint Exh. 17.
- Nov. 7, 9 and 11 (but approving Nov. 8 and 10) for Robin Williams. Agency Exh. 9.
- Nov. 9 (but approving Nov. 6-8 and 10-12, 2016 for Dr. Juneja. Agency Exh. 10.
- Dec. 29-30, 2016 for Dr. Juneja. Joint Exh. 23.
- Jan. 18-20, 2017 for Dr. Juneja. Joint Exh. 24.

The Agency has also approved such requests, in full, on the following occasions:

- May 24-27, 2016 for Dr. Juneja. Joint Exh. 10.
- May 24-27, 2016 for Mr. Garcia. Id.
- Dec. 5-6 2016 for Robin Williams. Agency Exh. 11.
- Dec. 8–9 for Dr. Juneja. Id.
- Dec. 6-9, 2016 for Speth. Joint Exh. 20.

VA-Long Beach has denied these requests on the grounds that releasing these individuals would

jeopardize “patient care”³ due to staffing shortages among hospitalists, skilled nurses and ???.

VI. Parties’ Positions

A. Union’s Position

The Union argues that there are several reasons to find that VA-Long Beach is violating the parties’ Agreement by not approving its requests for official time off so that local union officials can conduct local union business.

First, the Union notes that there are 1,294 members of the bargaining unit and, as such, based on the formula set forth in Article 48, Section 10(A) of the parties’ Master Agreement it should be allocated

...5,499.5 hours per year, minimum. A full time staff equivalent for a VA employee is 2080 hours per year. This calculation provides for 2.6 full-time AFGE Local positions. (emphasis original)

Union Brief at 204-207.⁴ Instead,

...there is only one Union Official with 100% Official Time, Virginia Speth, Registered Nurse, AFGE Local 1203's Union President. Gregory Garcia, Steward, is using 4 hours of official time per week only when his direct patient care duties permit. As per his testimony, there are days that he cannot come to the Union Office to work because of patient care needs, 204 and vacation days. (citations omitted).

Id. at 209-211.

Second, the Union maintains that it has

...attempted to obtain Official Time for its officers and stewards many times. In a previous Arbitration on 1/9/2015, Virginia Speth, Registered Nurse, was awarded 100% Official Time. Since then, despite many discussions with the Long Beach VA, they have repeatedly denied Official Time for any of Local 1203's officers and stewards. Of the fourteen (14) requests for official time in the past year and a half, only three were granted. (citations omitted)

Id. at 66-71.

³ On a few occasions VA-Long Beach denied the Union’s official time off requests because it included non-work days.

⁴ The citations to the Union’s post-hearing brief are by lines, not pages.

Third, the Union claims that, due to denials of its requests for official time, the Union office “...was closed twelve, (12), days and we were denied our ability to our represent our bargaining unit employees.” Id. at 77-79. The Union further asserts that official time was denied numerous occasion causing numerous problems, including:

- September 2, 2015: for Dr. Juneja to attend the "Train the Trainer" class on the 2011 AFGE Master Agreement, September 14 to 18, 2015.
- December 14-18: coverage was denied so the Union's office has to be closed.
- December 22: for Dr. Juneja to attend treasurer training, as he had been elected Treasurer in November, 2015, even though this request was made three months in advance, it was denied.
- February 3-15, 2016: Union office had to be closed for eight days because coverage was denied.
- February 22: for a standing block of official time for Dr. Juneja (no response).
- April 13: for Dr. Juneja to work in the Union office while President Speth was on annual leave from April 25-29.
- April 22: for Dr. Juneja to work in the Union office while President Speth, President was on vacation from April 25-29, even though they had already approved him for time off for jury duty since they had already arranged to have another doctor on duty.
- May 18: for Dr. Juneja to work in the Union office while President Speth was on annual leave from June 6-14 in spite of being given a months' notice.
- June 6: for Williams to work in the Union office while President Speth was on vacation from June 6-15.
- July 22: for Dr. Juneja to attend the FMCS Labor-Management Conference August 15-20 despite providing over one month's notice (citations omitted).

Id. at 81-149. The Union asserts that, once this arbitration was approaching, VA-Long Beach began to suddenly grant “...limited amounts of Official Time to its Union Officers.” Id. However, “[e]ven with the granting of 32 hours of Official Time, AFGE Local 1203 was left without coverage for an entire day...” Id. at 154-155. (citation omitted).

Fourth, the Union notes that its representational work has increased significantly. Id. at 166-182.

Fifth, the Union asserts that the amount of official time it is entitled to is clearly set forth in Article 48, Section 10(A) of the Master Agreement. Here,

...using the approximate bargaining unit employees (BUE) number of 1,294, multiplied by 4.25 hours, the resulting Official Time is 5,499.5 hours per year, minimum. A full time staff equivalent for a VA employee is 2080 hours per year. This calculation provides

for 2.6 full-time AFGE Local 1203 positions. Currently there is only one Union Official with 100% Official Time...Speth...Union President. Gregory Garcia, Steward, is using 4 hours of official time per week only when his direct patient care duties permit. As per his testimony, there are days that he cannot come to the Union Office to work because of patient care needs. (citations omitted)

Id. at 185-204.

Sixth, the Union notes that 5 USC §7131 states that

...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.

Id. at 207-214. The Union bolsters its claim by citing and FLRA decision that states that

...any Union Official performing treasurer duties required by the Internal Revenue Code, the Civil Service Reform Act, and the Labor Management Discloser Act does so to meet the requirements established by Federal agencies and is NOT related to the internal business of a labor organization within the meaning of section 7131(b). The use of Official Time to maintain financial records and reports is in the "public interest." (emphasis original)

Id. at 217-222. The Union maintains that "this Official Time is in addition to the minimum Official Time calculated by the 2011 Master Agreement." (citation omitted). Id. at 222-224

Seventh, "it is the AFGE Local 1203's position that Federal Law 5 USC §7131, and the 2011 Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees has precedence over any VA policy, procedure, or VA handbook." Id. at 227-230.

Eighth, the Union argues that "it is important to note that the Union alone retains the authority to allocate official time." Id. at 231-232. It rejects the notion that VA-Long Beach HR can dictate to the Union who will represents the bargaining unit employees; noting that HR's recommendation (Gloria Rosenberg) has been a retired VA nurse for more than 10 years and is in

declining health. Id. at 232-237.

Finally, the Union maintains that

Staffing issues are a management responsibility and they should not limit the Union's ability to utilize as many employees as needed to provide representational duties from any area of the hospital. Since Local 1203 has over 41 different hospital professionals in our BU, we need Union trained subject matter expert practitioners in order to represent our diversity.

During the testimony, Dr. Kern, Chief of Medical Services, indicated that he has been short of staff for the past 2 years. . . Because of the lack of competitive pay, Long Beach VA has not been able to attract primary care providers.

[Moreover, while]...the testimony of Ms. Lori Karin, Chief of Human Resources, [was] that official time is only being granted on a "case by case" basis, the 2011 AFGE Master Agreement mandates a 4.25 hours per bargaining unit employee...[The Union was never] included in [any] negotiations...and never signed the letter indicating this "case by case" granting of Official Time.

Id. at 239-258.

As a result, the Union requests the following remedy:

- Stipulate to the Department to comply with the 2011 AFGE Master Agreement in regards to official hours calculations and 5 USC §7131, and grant AFGE Local 1203 the official time that they are entitled.
- Order the parties to begin negotiating an official time transfer policy within 14 calendar days of the award.
- Grant the hours of previously denied Official Time to the Union's bank of hours
- Reimburse Union President Speth for any personal time she had to use to prepare for this arbitration to the Union's bank of Official Time hours and
- Cease and desist engaging in anti-union animus against Local 1203 and its officers
- Participate in a joint labor-management intervention and
- Award any other relief that is warranted.

Id. at 261-276.

B. Agency Position

The Agency asserts there are four reasons that this grievance should be denied.

1. The Union is erroneous in stating the Agency prevented union stewards' ability to act for, negotiate agreements, and represent their bargaining unit employees by the denial of official time.
2. The Agency has granted official time several times to the Union for its

- union stewards to attend training, represent employees, or office coverage.
3. The Union has requested standing block of time for Dr. Pawan Juneja to perform union treasury duties; however the Union did not provide evidence or testimony of how much time is actually spent performing union treasury duties.
 4. The Union is not utilizing all of its union officers to either cover the union and/or represent their employees during grievances/fact-findings.

Agency Post-Hearing Brief at 1. The Agency argues that it is

...unreasonable and unnecessary to place a physician on 100% official time or even a standing block of time on a weekly basis due to patient care needs. In addition, the Agency argues that under 5 U.S.C. 7106, management has the right to "assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted." The determination of this arbitration is essential in that patients need to be seen by a physician. Removing a physician from patient care duties on a permanent basis will prevent the Agency from fulfilling its mission to care for Veterans.

Id. The Agency then goes on to attack the basis for the Union's claim.

First, the Agency argues that

The Union did not cite any circumstances where bargaining unit employees were not able to obtain representation by a union steward due to denial of official time. In addition, the Union alleges management denied official time when requests were made to supervisors for less than 8 hours, but the Union provided no evidence...or testimony where official time was denied when a bargaining unit employee was in need of representation. The Union did not involve Human Resources-Employee/Labor Relations during the time of the alleged denials of requested official time of less than 8 hours. It is also imperative to point out that the Union made contradictory statements, regarding the release of a union official for official time. The Union stated that "Gregory Garcia, steward...is unable to work in the union office because of his direct patient care duties." During the same witness' testimony, the witness stated the opposite "Usually, when I speak to the supervisor, I can get official time granted on a very easy basis for Gregory Garcia who is our social worker." (citations omitted)

Id. As a result, the Agency maintains that the Union's statements "...are misleading compared to when official time was actually granted and denied. Id.

Second, the Agency asserts that "...the Union is mistaken in their opening statement "all attempts to have official time granted to AFGE Local 1203 has been met with repeated resistance

and refusals." Id. At 2. The Agency maintains that, not only are such claims inaccurate, but Mr. Garcia's own testimony was that he has never been denied official time, acknowledging that "...my direct supervisor has actually been very supportive." Id.

The Agency stresses that it has "...given authorization of official time on more than one occasion to union officials:

- Dr. Pawan Juneja was approved for official time to attend AFGE's 2015 Legislative Conference from May 4, 2015 to May 8, 2015 (Agency Exhibit 4).
- Dr. Pawan Juneja was approved for official time to attend a training from May 24, 2016 to May 27, 2016, and Gregory Garcia was approved to attend a conference from May 24, 2016 to May 25, 2016 (Joint Exhibit 10).
- Virginia Speth was given authorization for official time to attend AFGE/12 District Training from December 5, 2016 to December 9, 2016 (Joint Exhibit 20).
- Robin Williams was granted official time to cover the union office from November 8, 2016 and November 10, 2016 (Agency Exhibit 10).
- Dr. Pawan Juneja was authorized official time to attend the AFGE/NVAC 2016 Triennial Training Convention on November 6, 2016 through November 8, 2016 and November 10, 2016 through November 12, 2016 (Agency Exhibit 10).
- Robin Williams and Dr. Pawan Juneja were granted official time to cover the union office on December 5, 2016 through December 6, 2016 and December 8, 2016 through December 9, 2016, respectively (Agency Exhibit 11).

Id.

Third, the Agency notes that:

Dr. Pawan Juneja is a hospitalist. A hospitalist is a unique position in that of a physician who covers consults and/or admissions and crossover various medical healthcare groups. A hospitalist's tour of duty is of 7 days on-duty and 7 days off-duty. The medical center has a limited number of hospitalists on staff and it is extremely difficult to find coverage when official time is requested for an entire work week. The Agency has actively recruited for hospitalists since early 2016. At the moment, vacant positions still exist to be filled.

Id. As a result, the Union's request that Dr. Juneja be relieved of his duties as a hospitalist two days a week is too burdensome. Id. Moreover, even if Dr. Juneja is doing union-related work as its treasurer, the Union was unable or unwilling

...to provide an approximate or a set amount time to complete treasurer duties, it makes it difficult to bargain on a set block of time. The Agency finds it difficult to release a

hospitalist on official time to complete treasurer duties compared to taking care of patients, but even more difficult to bargain with the Union when there is an unknown factor of how much official time is actually needed.

Id. at 2-3.

Finally, the Agency maintains that any inability to staff the Union office was due to the Union's own poor planning, pointing out that

...the Union appears to not been in communication with Dr. Juneja to determine his availability to cover the union office. The Union did not plan ahead and did not make an alternate request for another union steward to cover the union office in the event that Dr. Juneja was not granted official time or in this case he was off-duty. The Agency is not in a position to grant Dr. Juneja official time when he is scheduled to be off duty as his tour of duty as a hospitalist is 7 days on, 7 days off.

Additionally, going by AFGE Local 1203's List of Union Officers, why the Union did not make a request of Official Time for Union Stewards Gregory Garcia or Rocco Garcia to cover the union office? The Union could have arranged for either Russell Bennett, Vice President (Title 5) or Gloria Rosenberg, Retired, Vice President-(Title 38) to be at the union office? Any one of these individuals probably could have covered the union office. The Union chose to not utilize all of its union stewards to either cover the union office or representational duties; instead the Union closed its doors. (citation omitted)

Id. at 3.

The Agency concludes by stating that:

...the Agency has partnered in good faith with the Union regarding the authorization of official time for its union stewards based on the valid operational needs of the medical facility. The determining factor when releasing a union steward on official time is to safeguard that the level of patient care is met for the medical center. The Agency maintains it is difficult to justify a position such as a hospitalist at 100% official time or even a standing block of time on a weekly basis due to the responsibilities the hospitalists have in providing direct patient care. In the past, the Agency has proposed requests for official time for Dr. Juneja be considered and approved on a case-by-case basis when patient care duties are not negatively impacted. The Agency supports in providing official time on a case-by-case basis due to patient care duties, specifically given the position of a hospitalist who provides patient care to Veterans as part of the Medicine Healthcare Group (Internal Medicine). From the Agency's point of view, the Union did not provide valid justification to release Dr. Juneja for a standing block of official time and to take him away from performing his patient care duties.

Id.

VI. Discussion

Title 5 USC Section 7131 states that:

- (a) Any employee representing an exclusive representative in negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes...
- (b) Any activities performed by any employee relating to the internal business of a labor organization⁵...shall be performed during the time the employee is in a non-duty status...
- (c) Except as provided in subsection (a) of the section, the Authority shall determine whether any employee participating for, or on behalf of, and labor organization in any phase of proceedings before the Authority shall authorize official time for such a purpose during the time the employer otherwise would be in a duty status.
- (d) Except as provided in the preceding subsections of the 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 that the Agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.
(emphasis added).

Jt. Exh. 22. As noted in Article 48, Section 1 of the parties' Master Agreement,

- 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 relations between the Union and the Department
- 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**

⁵ Precedence establishes that financial work done to meet reporting requirements, such as that done by Dr. Juneja, the Union Treasurer, is not merely "internal business of a labor organization," but rather a necessary part of collective bargaining and related activities that is in the public interest and for which "official time" can be used. See, Jt. Exh. 5.

reasonable, necessary, and in the public interest⁶...Official time shall be used for

1. Handling grievances and other complaints
2. Handling other representational functions; or,
3. Engaging in appropriate lobbying functions (emphasis added)

Jt. Exh. 21. Section 10(A) of the same Article further provides that “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...” (emphasis added). Id. The Union’s undisputed claim is that the word “position” is synonymous with the word “employee.” Tr. 10. See also, Tr. 64 and Jt. Exh 4. Since the Union represents 1,294 bargaining unit employees, it is therefore entitled to 5,499.50 hours of “official time” per year. Currently, the Union President has a 100% “official time” allocation, the equivalent of 2,080 hours a year. As a result, the Union is entitled to an additional 3,419.50 hours of “official time” each year.

While there is some disagreement regarding the basis for denying requests for “official time,” there does not appear to be any disagreement regarding how “official time” requests are made. In short, it appears that the parties had developed a past practice⁷ when it comes to making “official time” requests. For example, testimony from both Union and Agency witnesses stated that the procedure for “official time” requests of eight hours or less was to first alert their immediate supervisor. Tr. 19, 27-28, 38, and 73. On the other hand, if the official time request was more than eight hours, the uncontroverted testimony at the hearing was that a written request was made to the VA-Long Beach’s HR Department. Tr. 20 and 38. The question in this case is not so much the procedure, but the

⁶ I interpret this to mean that the parties may agree to any amount reasonable, necessary, and in the public interest, in addition to what is already set forth law. In this case, that amount is set forth in Article 48, Section 10(A) of the parties’ Agreement. See, Jt. Exh. 21.

⁷ For a past practice to exist "...it should be (1) clear, (2) consistently followed, (3) followed over a reasonably long period of time, and (4) shown by the record to be mutually accepted by the parties." Dobbelaere, Arthur, William H. Leaky, and Jack Reardon, "The Effect of Past Practice on the Arbitration of Labor Disputes", 40 Arbitration Journal 27, 32 (December 1985).

result.

The Agency states that it approves “official time” requests on a case-by-case basis depending on the patient care needs at the facility. Tr. 13 15, 46, 54, 67 and 70-72. Article 48 of the parties’ Agreement, however, states that “...official time **shall** be granted.” (emphasis added). Jt. Exh. 21. While hindsight suggests “patient care” should have been addressed, there is no such qualification in the allocation of “official time” in Article 48. Consequently, the “plain meaning” rule of contract interpretation would suggest that all Union requests for “official time” must be granted as long as a sufficient number of hours (allocated per Article 48, Section 10) exist in the Union’s bank of “official time.” Such a literal interpretation, however, could create a myriad of problems. For example, such an interpretation could potentially have a dire impact in emergency situations. On the other hand, the Agency’s unilateral decision to approve or deny requests for “official time” based on something as ambiguous and subjective as “patient care” is likewise problematic. If such a unilateral interpretation were to be accepted, it would essentially write this contractual benefit out of the parties’ bilateral Agreement. The facts seem to underscore this concern. Here, Union requests for “official time” were rejected in whole or in part almost 80% of the time (16/21 requests), most on the basis of “patient care.” See, p. 8 infra.

In addition to claiming that it should be allowed to decide “official time” requests on a case-by-case basis on whether it believed “patient care” would be adversely impacted, the Agency makes two additional claims.⁸

First, it claims that allowing “official time” off for employees in understaffed positions, such as hospitalists, would “prevent” it from fulfilling its mission or, at the very least, be “difficult” to

⁸ The Agency also claims that the Union failed to provide proof regarding how much time Dr. Juenja was appending doing work as the Union’s Treasurer. Agency Brief at 1-3. If the Agency had a concern in that regard, however, it should have denied the “official time” request specifically on those grounds. If the Union was not forthcoming with proof that the work was covered, the Agency could then have denied the claim, leaving the Union to grieve the decision.

implement:

...[P]atients need to be seen by a physician. Removing a physician from patient care duties on a permanent basis will **prevent** the Agency from fulfilling its mission to care for Veterans.

...to provide an approximate or a set amount time to complete treasurer duties, it makes it **difficult** to bargain on a set block of time. The Agency finds it **difficult** to release a hospitalist on official time to complete treasurer duties compared to taking care of patients, but even more **difficult** to bargain with the Union when there is an unknown factor of how much official time is actually needed.

... The Agency maintains it is **difficult** to justify a position such as a hospitalist at 100% official time or even a standing block of time on a weekly basis due to the responsibilities the hospitalists have in providing direct patient care. (emphasis added)

Agency Brief at 1-3. There are several problems with the Agency's argument. It does not have to be the case, for example, that approving a request for "official time" for a hospitalist would automatically result in "removing a physician from patient care duties" if the hospital was properly staffed. Instead, the fact that VA-Long Beach has, according to its own witness, been short staffed with regard to hospitalists (physicians) "from the get go" appears to be the real reason behind its unwillingness to provide "official time" for hospitalists. See, Tr. 58. In short, it is the Agency's own staffing decisions that have prevented it from fulfilling its mission. Moreover, the fact that a particular contract provision is "difficult" to administer does not mean it can be ignored. If that argument were to succeed, the parties' Agreement would soon become meaningless.

Second, the Agency maintains that the Union's inability to staff the Union office was the result of the Union's own poor planning:

...the Union appears to not been in communication with Dr. Juneja to determine his availability to cover the union office. The Union did not plan ahead and did not make an alternate request for another union steward to cover the union office in the event that Dr. Juneja was not granted official time or in this case he was off-duty. The Agency is not in a position to grant Dr. Juneja official time when he is scheduled to be off duty as his tour of duty as a hospitalist is 7 days on, 7 days off.

Additionally, going by AFGE Local 1203's List of Union Officers, why the Union did not make a request of Official Time for Union Stewards Gregory Garcia or Rocco Garcia to cover the union office? The Union could have arranged for either Russell Bennett, Vice President (Title 5) or Gloria Rosenberg, Retired, Vice President-(Title 38) to be at the union office? Any one of these individuals probably could have covered the union office. The Union chose to not utilize all of its union stewards to either cover the union office or representational duties; instead the Union closed its doors. (citation omitted)

Id. at 3. The fundamental flaw in the Agency's argument is the assumption that the Union has an obligation to request "official time" in a way that is in the best interest of the Agency, rather than in the best interests of the Union and its members. Who represents the Union and the bargaining unit members, however, is for the Union and the bargaining members alone to make. Furthermore, it is nonsensical to suggest that the Union is somehow to blame because it did not ask a retired employee to cover the Union office.⁹

What this case does make clear is that there are serious issues surrounding the implementation of "official time" under Article 48 that need to be addressed by the parties. Hopefully, with the benefit of hindsight, the parties can spell out a more detailed, workable system in the future. In the meantime, I am left to resolve this grievance in a way that best represents the intent of the parties under the language in the current Agreement.

As a seminal text on labor arbitration notes:

When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally plausible, would lead to just and reasonable results, the latter interpretation will be used. Indeed, where the extreme positions taken by both parties will produce absurd results an arbitrator may reject them and make an independent interpretation of the disputed provision.

Elkouri & Elkouri, How Arbitration Works, (Sixth Edition), Washington, D.C.: Bureau of National Affairs, pp. 470-471. Since I believe both the Union's and the Agency's positions would produce an unreasonable result, I am left to craft a plausible alternative interpretation that would produce a just and

⁹ By definition, it does not appear that an ex-employee would be eligible for "official time."

reasonable result. That being said, I am mindful of the fact that it is not the role of an arbitrator to legislate what they believe is in the best interests of the parties, but rather to attempt to reasonably interpret the parties' negotiated agreement. In this case, that means attempting to honor the parties' Agreement and past practice, while giving due deference to both the Union's legitimate right to represent its bargaining union members and the Agency's legitimate business needs.

VII. Decision

The Veterans Administration, Long Beach Healthcare System denied the American Federation of Governing Employees, Local 1203, "official time" to its union officers and stewards.

As a result, the remedy in this case is as follows:

- The Union is currently entitled to 5,499.5 hours of "official time" per year (beginning each year on March 15, corresponding to the date of the contract). See, Jt. Exh. 1, p. 301. Since this grievance was filed on February 26, 2015, the parties must determine how much "official time" was used during the period, March 15, 2014 through March 14, 2015 and credit any unused "official time" to the Union's bank of "official time" for the period March 15, 2015 through March 14, 2016. See, Agency Exh. 2. The parties must then determine how much "official time" was used during that period and credit any used "official time" to the Union's bank of "official time" for the period March 15, 2016 through March 14, 2017 and credit any unused "official time" during that period to the Union's bank of "official time" for the period March 15, 2017 through March 14, 2018.
- The parties are hereby ordered to negotiate over the implementation of the "official time" policy in Article 48, including but not limited to, issues such as: (1) who should send and receive a request for "official time," (2) should all requests and responses be in writing, (3) what should be stated in the request (e.g., should there be an explanation for the reason for the request to indicate it for "approved" union-related work), (4) when should the "official time" request be made (i.e., how much time prior to the "official time" off), (5) should any distinctions should be made regarding "official time" requests of less/more than 8 hours, (6) what would constitute a legitimate reason to deny an "official time" request (e.g., it is not for authorized Union work, it was not requested in a timely manner, if the Agency experiences an unforeseen emergency such as an unexpected illness, natural disaster, etc., and (7) what will happen if there is any accrued, but unused, "official time" at the end of the Agreement?

Respectfully Submitted,



Labor-Management Arbitrator