BEFORE THE FMCS
IN THE MATTER OF ARBITRATION BETWEEN

American Federation of
Governmental Employees, AFL-CIO and
its Local 1594
Union

FMCS # **170309-53669-3**
Issue: Union Leave/Official Time
National Grievance NG-1/25/17

And

Veterans Administration
Employer

Arbitrator's Decision and AWARD

FOR THE UNION:
Thomas Dargon, Esq.
AFGE and its Local

FOR THE EMPLOYER:
W. Iris Barber, Esq.
Veterans Administration

BEFORE:
SANDRA MENDEL FURMAN, J.D., Arbitrator

Table of Designations

American Federation of Governmental Employees, AFL-CIO	Union
Bargaining unit	BU
Exhibit	Ex.
Federal Labor Relations Authority	FLRA
Full Time Equivalent	FTE
Human Resources	HR
Joint Exhibit	Jt. Ex.
Labor Management Relations	LMR
Local 1594, AFGE, AFL-CIO	Local 1594
Master Collective bargaining agreement	MCBA
Memorandum of Understanding	MOU
National Cemetery Service	NCS
Unfair Labor Practice	ULP
United states Code	USC
Veterans Administration	VA
Veterans Affairs Council	VAC
Veterans Affairs Central Office	VACO
Veterans Administration Regional Office	VARO
Veterans Service Representative	VSR

Introduction

This matter was heard in Clearwater FL at the offices of Legal Counsel for the VA on December 6, 2017.

Thomas Dargon Esq. represented AFGE and its Local. Also present and testifying were Valorie Reilly, Local 1594 President and Mary Jane Burke, Executive Vice President at the National AFGE level.

Iris Barber Esq. represented the VA. Steven Acevedo, HR Technician was present. Karen Kormelink and Kristin Langwell Esq. testified.

All witnesses were sworn.

There was no transcript.

The parties presented stipulations and joint exhibits.

Procedural arbitrability was disputed.

All briefs were filed by the agreed extension upon date.

The decision issued within the agreed upon timeframe.

ISSUES:[1]

Was NG-1/25/17 filed timely?

Whether the Agency violated the 2011 Master Agreement in denying the December 1, 2016 transfer of 720 hours of official time to Valorie Reilly? If so, what shall be the remedy?

Relevant MCBA/USC Provisions Relating to Arbitrability [Issue 1]:[2]

Article 3-Labor-Management Cooperation.

Section 1-Guidance
The parties agree that the following sections should be interpreted as suggestions, not prescriptions.
…
Section 3-Purpose
…The parties support and encourage cooperative labor-management relationships at all levels.

Article 43 Grievance Procedure
…
Section 2-Definition

A. A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the Department concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule or regulation affecting conditions of employment. …

…

Section 4-Jurisdiction
If either party considers a grievance non-grievable or non-arbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision.
…
Section 11-National Level Grievances
A national level grievance is one that is filed by the Union of the department. Grievances between the department and the Union at the national level shall be filed by the aggrieved party as follows:

[1] The parties stipulated the issues.

[2] The Union cited certain cba articles as relevant as did the City. The arbitrator will cite to and discuss those that were relevant to her decision making.

A. Within 30 calendar days of the act or occurrence or within 30 days of the date the party became aware or should have become aware of the act or occurrence or at any time if the act or occurrence is continuing, the aggrieved party (the department or the Union) may file a written grievance with the other.

…

FACTS:[3]

The parties have had a bargaining relationship for years. The current MCBA [the "green book"] is in effect from March 15, 2011 and was set to expire March 14, 2014. There is language in the MCBA that continues in place the language in the 2011-14 MCBA until such times as the parties open negotiations pursuant to the language in Sections 2 and 3 of the Duration clause.[4]

This dispute has a local backdrop and chronology.

Reilly has been the Local President of Local 1594 since 1997. The Local is based in St. Petersburg Florida. Reilly has over the past twenty years held various National AFGE elective and appointive positions. During the relevant time period, she was holding Local office.

Reilly had been operating on 100% official time until October 28, 2016. On October 28, 2016, her 100% official time status was revoked by Boor, the St. Petersburg VARO Director. She was directed to report to work as a VSR.

Prior to filing a grievance at Step 3 on November 28, 2016, Reilley had filed a ULP both at the VARO in St. Petersburg and with the FLRA. These documents are attached to Jt. Ex. 3.

The November 28, 2016 grievance related to the October 28, 2016 memo to report to work as a VSR was denied by Boor on December 7, 2016. The VA response cites numerous procedural flaws as well as substantive bars due to the filing of a ULP preceding the grievance. Jt. Ex. 3.

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[3] The parties' grievance documents set forth many of the facts regarding timeliness and process. There was no testimony on the processing of the current grievance at the arbitration hearing. Instead the documents were admitted.

[4] The arbitrator was not made aware of the reasons why as of the hearing date, there have been no attempts to reopen the MCBA. Jt. Ex. 1.

The local grievance involving Reilly's loss of 100% official time release status is being separately heard and decided. Although the Jt. Exs. show the matters are intertwined and related, both sides indicated that the local dispute was proceeding on a separate track. [5]

In reaction to Reilly's October 2016 loss of official time, National AFGE President Alma Lee attempted by a memorandum dated December 1, 2016 to Larry Bennett, Acting Deputy Assistant Director from National LMR, to assign 720 hours of union leave for Reilly. That amount of time would have allowed Reilly to be on 100% union release through April 5, 2017. The memorandum from Lee states: "The purpose of this time is to provide resources to fulfill her representational responsibility to the Local."

Reilly sought confirmation that she would be permitted to use the "loaned" union time in an email dated December 5, 2016. The email stated if she did not receive confirmation of her ability to use the loaned hours by December 6, 2016 she would assume the request was denied. VA Ex.1. No acknowledgement of the receipt of Reilly's communication was ever made by the VA. Likewise, no response to her inquiry was ever made.

The stipulated facts indicate that the request to transfer hours was denied. No date is attached to the denial of the request or how/if the denial was communicated to either Lee or Reilly.

The instant grievance was filed as a National Grievance on January 25, 2017 by Thomas Dargon, AFGE counsel. Jt. Ex. 2.

The VA's grievance answer and other supporting documentation relating to the matter are part of the record as Jt. Ex. 3. The VA answers include defenses relating to the filing of the above referenced local grievance involving Reilly in addition to the instant grievance arising from the denial of official time.

[5] Both parties advised that the local grievance filed in late October 2016 is preceding to arbitration at a later date. No direct evidence was presented concerning tat grievance and no ruling is anticipated/expected or sought on the merits of that matter.

The VA answer contends that the current grievance is untimely and is therefore non-arbitrable. It cites as its basis for denial that the grievance arose from facts and circumstances in late October 2016. Therefore, it is untimely.

VA Ex. 2 is a tracking sheet recording instances in 2014-2017 where Lee specified National hours to be transferred to certain specified individuals. It also includes the memoranda/letters from Lee asking for the transfer of hours in prior instances beginning in 2014. None of the past requests indicate any sort of acknowledgement of receipt or approval from LMR. Included as part of VA Ex. 2, there is a MOU between AFGE and the Cleveland VARO regarding official time for a particular union member. By its terms it indicates that the named individual is barred from local representational activities. Review of the remaining documents in VA Ex. 2 indicated that national Union time was assigned out for national level activities.

Testimony indicated that the tracking sheet system was initiated by the LMR office beginning in 2014. The MCBA indicated that the development of the tracking sheet was to be a joint project. There was limited testimony on the evolution of the tracking sheet. If Union hours were taken/used from the national bank before that date, there is no record of such.

Kormelink stated that the general rule from LMR's perspective was "if Alma [Lee] granted it, it was ok." The tracking sheet does not indicate that any Official Time transfer requests were denied. The Union did not challenge the forms' authenticity. [6]

Union Exs. 2 and 3 are Union proposals relating to Official Time that were exchanged during the past negotiations leading to the green book.[7]

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[6] The MCBA provides in relevant part:

> … Prior to use of this official time, VACO LMR and the Union will develop a tracking accountability system for the bank of hours within 30 days after the effective date of this Master Agreement.…

It is unknown whether or not there is any history behind the belated development of the tracking system. Regardless, it was accepted into evidence.

[7] Kormelink testified that she was unfamiliar with the contents of Union 2 and 3.

Testimony indicated that the Official Time section language went to mediation during the green book's negotiation process. Testimony from both Burke and Kormelink further indicated that the language in that section was worked out between the Chief Negotiators.

UNION POSITION on Procedural Abitrability

In its Step 3 response, the VA argued that since Boor ordered Reilly to report for work as a VSR on October 28, 2016 that the instant grievance "should have been filed within 30 days of the October 28, 2016 memorandum, or [by] November 28, 2016." This response ignores the fact that the basis for filing NG-1/25/17 was the refusal to honor the December 1, 2016 transfer of official time from AFGE/NVAC to Reilly. The Arbitrator should deny the original timeliness argument raised and find the matter to be procedurally arbitrable.

At the arbitration hearing, the VA presented an additional, new timeliness argument. VA Attorney Langwell presented an email chain from December 1 – 6, 2016 regarding Reilly's official time. VA Ex.1. The VA relied upon a December 5, 2016 email from Reilly to Sandra Smith to argue that Reilly had herself "deemed the official time denied" as of December 6, 2016. The VA argued NG-1/25/17 is untimely because Reilly did not receive a response from her chain of command on December 6, 2016. Due to the failure of any response, NG-1/25/17 should have been filed by January 7, 2017. The arbitrator should reject this reasoning.

Article 43 Section 4 of the 2011 MCBA entitled "Jurisdiction" requires parties to "assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision." Since the VA did not present the above argument in its response to NG-1/25/17 the Arbitrator lacks jurisdiction to consider this argument.

In the event the Arbitrator elects to consider the merits of the later, new timeliness objection first offered at the arbitration hearing, it is the Union's position that the revised timeliness objection relies on a contorted reading of the December 5, 2016 email. Reilly needed to know whether to report to her workstation as a VSR or to the local union office. In response to the silence of management officials at the St. Petersburg VARO, Reilly's email aims to clarify her report status.

Reilly's email does not initiate the timeline for filing a grievance. The VA had an obligation to issue a one sentence denial of the December 1, 2016 Lee transfer of official time. Had that occurred the 30-day grievance timeline would have commenced. Reilly offered uncontroverted testimony that the VA never issued a written or oral decision on the December 1, 2016 transfer.

Any denial must also be communicated to Lee. Lee communicated the transfer of official time. Lee is the only party authorized to do so under the MCBA. The attempt by Reilly to determine her situation locally does not serve to supplant the Union's designated representative: Lee.

Following the above and the "long standing principle of labor law that a forfeiture of a grievance based on missed time limits should be avoided whenever possible,"[8] [cited cases favoring procedural arbitrability omitted] the Arbitrator should find that NG-1/25/17 was timely filed.

VA POSITION on Procedural Arbitrability

The grievance is non-arbitrable. The grievance was not filed within thirty days of the act or occurrence.

Reilly herself set the deadline for responding to her December 5, 2016 letter. She stated:

> If I do not receive a response by close of business Tuesday, December 6, 2016, I will presume that the official time is not being recognized by the chain of command.

As Reilly indicated if she didn't hear a positive response by December 6, 2016, she would consider the request denied. Then she knew or was deemed to know her grievance time was running.

Local AFGE counsel Kitchens contacted Langwell from the VA office of Counsel stating that Reilly was not being allowed to utilize the grant of official time from the National Union. VA Ex.1. Langwell believed there was a national grievance already in place at the time of this conversation and so informed Kitchens. Nothing further was heard from the Union until January 25, 2017.

[8] Cases cited by the Union were reviewed but not referenced in the above summary.

The national grievance was not filed until January 25, 2017- fifty days after December 6, 2016.

Prior to the hearing the Union did not seek any stipulations regarding the issue of timeliness. It was on notice that the VA was going to argue against arbitrability. It was incumbent on the Union to put on some evidence to overcome the plain language in Reilly's email: no response by December 6th was tantamount to a denial of the request. No additional evidence was presented by the Union to indicate that Lee's letter was still under consideration.

There is no support for a continuing violation argument by the Union. [case citation omitted]. The denial was a discrete act; happening once, and Reilly set the deadline for tolling the grievance filing.

The grievance must be denied as untimely.

Decision

The grievance is timely for a variety of reasons.

The arbitrator notes the cases cited by the Union and agrees that the arbitral overwhelming preference in the main is for proceeding to a hearing on the merits. But with the right facts, this arbitrator will (and in the past has found) deem a grievance untimely. This is not that case.

The parties are bound by the plain language of the MCBA, as is the arbitrator. In Article 43 it states in part:

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

Although the VA did claim untimeliness in its Step 3 answer, its basis for doing so was not the argument presented at the arbitration hearing. In paragraph D. of Jt. Ex. 3, the grievance denial by the VA makes it clear that it dates the original date of adverse action that should have triggered the grievance as October 28, 2016. The fact that the VA relies upon that late October date is not only specifically stated in its Step 3 answer at D. but is evident from the additional arguments it

makes at paragraphs B. and C. of its March 8, 2017 response. In fact the entire Step 3 answer ignores the December 5, 2016 memorandum from Reilly.

The management answer does in Paragraph F. talk about Lee's December 1, 2016 attempt to transfer "official time", but responds to it not as a timeliness bar but rather in a discussion on the substantive merits of the Union's claim it should be able to transfer the national time.

The VA came up with this timeliness argument long past the Step 3 answer. The confusion as to the intent of the current grievance began in December 2016. Review of VA Ex. 1 makes it clear that Langwell believed the matter of official time for Reilly was being handled by LMR [National]: "The grievance regarding Mr.[sic] Reilly is being handled by our LMR office." At this point, the only related grievance filed is the October 28, 2016 Reilly grievance on loss of her full release status. Langwell's answer thus leaves open the question: what is the VA's official or even local response to Lee's transfer of hours and Reilly's questions about her status? The VA chose for unclear reasons to ignore the substance of content in the January 28, 2017 National Grievance. It responded as though it was still dealing with Reilly's local grievance which is not before this arbitrator.

Procedural defects such as timeliness must be raised at Step 3. To arrive at arbitration and claim a new argument is inconsistent with the plain language of the MCBA. None of the alleged defects raised in the Step 3 answer deal with the December 5, 2016 letter and the attempted transfer of time by Lee on December 1, 2016. The VA cannot benefit at this late hour from its own failure to follow plain MCBA language regarding timeliness defenses.

Another reason to find the grievance timely is that the parties have fallen off track in this matter in terms of communication by and through designated representatives.

In somewhat brusque language, Reilly has made it clear that communication to her qua Union representative needed to go through a chain of

command. But no one from management responded to anyone in the Union about her request to determine her status.

In a similar vein, the critical memorandum is from the National AFGE President Lee. It would require a response to her as author, as a matter of common courtesy and ordinary protocol. It is a business norm to respond to the author of a correspondence. It is a matter of basic labor relations as well. [9]

Reilly by setting up the dynamic in her communication created a not unreasonable expectation that a formal protest would follow. Reilly also had a responsibility to be following the MCBA. It is possible to draw the conclusion that silence from the VA in response to her December 5, 2016 letter *could* have been a triggering date for grievance filing. But in view of all the extant circumstances: communications between Lee and the VRBO which went unanswered; no direct denial ever stated to Reilly; communications between Kitchen and Langwell which reveal a misunderstanding as to one of the issues Kitchen was asking about-the issue involving the national transfer of time- it was not unreasonable for Reilly to wait and see over how all the communications would pan out.[10]

Also, the very nature of the claim here makes this a National Grievance: Reilly's local status re: 100% release time was and is being otherwise handled. Reilly is not the initiator of the request to transfer; the denial implicated national concerns relating to the ability of the National to transfer hours to a Local for Local purposes. This had much weight with the arbitrator in determining the arbitrability issue. A simple "NO" to Lee would have triggered time limits. The record is silent on any such acknowledgement of receipt.

The argument that the conduct of the VA in refusing to allow the transfer of time was a continuing violation is made somewhat more viable because the

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[9] Interestingly, a review of the Lee requests to transfer time in VA Ex. 2 indicate a pattern of no apparent response by LMR to Lee's transfers under 2.G. Other than Reilly, it does not appear that anyone else has ever been denied the transfer of official time from the national bank. This pattern of no written acknowledgement has added unnecessarily to the confusion about Reilly's status in December 2016. Again, a simple written-or even a clear verbal NO-transmitted by LMR to Lee or locally by anyone to Reilly would have made the VA claimed failure of timeliness argument more tenable.

[10] There was a separate issue being addressed about union office space and furniture.

appropriate and responsible labor relations response to Reilly would have been: "NO, we don't recognize the hours transfer by Lee" or words to that effect. More significant is that no one answered Lee that her transfer of hours to Reilly would not be acceptable. Every day the VA refused to allow a draw down from the national bank- or respond why it was not going to allow the transfer- triggered a new timeframe because it was a continuing refusal to follow protocols for communicating with the Union.

By its silence and the VA's own failure to follow MCBA language and timely raise the argument it now makes in arbitration the Union may address the merits of the grievance.

The grievance is timely.

CBA/STATUTORY PROVISIONS ON THE MERITS Issue 2: Transfer of National Hours to Local[11]

Article 2-Governing Laws and Regulations

Section 1-Relationship to Rules and Regulations
In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

Article 48-Official Time

…
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

…

Section 2-Designated Union Officials/Representatives

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

[11] Although the Union grievance cites Article 3, no evidence was presented on that Article and the Union did not argue its applicability in its brief. Therefore the arbitrator did not address that section of the MCBA.

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

These national Union representatives may designate a Union representative at their home station and transfer unused official time to that representative to perform the duties of the position for which official time is authorized. [12]

…

G. In addition to the above official time, the Union shall have a bank of hours from which to draw in order to have subject matter experts, administrative support during negotiations, support for national grievances, labor-management collaboration support, special projects and department initiatives, etc. The President of the NVAC shall assign the time in no less than one-hour increments. There shall be a one-time 25,000 hours for the first calendar year in which this agreement is in effect. Any hours remaining at the end of that calendar year shall carry-over until depleted. Prior to use of this official time, VACO LMR and the Union will develop a tracking accountability system for the bank of hours within 30 days after the effective date of this Master Agreement. VACO LMR and the NVAC President may arrange for additional hours to be added to the bank after the first contract 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 and VBA local union is entitled to a minimum of 50% local time…

…

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.

5 USC section 7131

(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.

[12] Neither party contends this section applies to the dispute.

The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section--

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

UNION ARGUMENTS ON THE MERITS

The plain meaning of the language Article 48, Section 2.G.:

> …the Union shall have a bank of hours from which to draw in order to have subject matter experts, administrative support during negotiations, support for national grievances, labor-management collaboration support, special projects and Department initiatives, etc., …

is clear and unambiguous. Express language states that AFGE shall have a bank of hours from which to draw for a variety of uses. The list of potential uses is non-exhaustive as indicated by the "et cetera".

Under the plain meaning rule of interpretation an arbitrator must interpret contractual language as its plain or usual meaning when that language is written in clear and unambiguous terms. [case citations omitted].

Legal and dictionary definitions of et cetera make it self-evident that the list in the above language is non-exhaustive and non-exclusive.

The parties did not agree to the restrictions the VA seeks to insert into the MCBA. If the purpose of the 25,000 hour bank was solely to perform "national level duties" that language is missing from the MCBA.

Burke and Kormelink both testified that the last paragraph of Article 48 Section 2.A. serves as a restriction on "surplus" official time for national officers and representatives. It restricts how and for what purpose "surplus" time may be transferred. Jt. Ex.1. That paragraph reads:

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

Both witnesses agreed that this restriction applies only to the official time granted in Article 48 Section 2.A. The portion of this paragraph bolded above is a substantive restriction on the purpose for which transferred official time in Article 48 Section 2.A. may be used.

It is well-settled that "the absence of language speaks volumes" in matters of contract interpretation.[13] There is no restrictive language in Article 48 Section 2.G. The parties knew how to place a substantive restriction on how official time could be used since such a restriction exists in Article 48 Section 2.A. If the intention was to restrict the use of official time to national matters exclusively in the 25,000 hour bank, that intent would appear in language.

Comparing Section 2.A. with Section 2.G. is highly probative of intent. By reviewing sections within the same article and sub-sections within the same section of a single article the parties' deliberate intention to restrict the use of official time in 2.A. but not in 2.G. is demonstrated.

The VA argued that Article 48 Section 2 refers to "National" official time and Article 48 Section 10 refers to "Local" official time. However Article 48 Section 2 contains several references to grants of official time below the "national level." Section 2.A. grants 50% official time to District Representatives- a non national

[13] Case citations omitted.

level position. Sections 2.D. and 2.E. make further mention of District Representatives. Section 2.C. grants 100% official time to certain members of the VA and VBA Mid-Term Bargaining Committees. Burkes' testimony indicated these groups handle bargaining issues affecting only a single VA facility or campus with more than one AFGE Local-a non-national concern. The VA argument that Article 48 Section 2 only concerns "National" official time is plainly incorrect.

Section 2 is entitled "Designated Union Officials/Representatives," not "National." While titles and headings may be considered when interpreting ambiguous language, that construction rule provides no relief to the VA. [case citations omitted]. Experienced negotiators' decision not to use the title "National" is further support for the Union's position.

The arbitrator needs to also reference the prior article Article 47: Mid-Term Bargaining. It contains separate sections entitled "National" and "Local." Jt. Ex. 1.

The only bargained-for, substantive restrictions on the 25,000 hour bank are listed in Article 48 Section 1. The Arbitrator should find that the contextual meaning of the MCBA gave AFGE the right to transfer official time to Reilly.

If the above rationale is not persuasive the arbitrator should nonetheless find that parole evidence supports the Union's position.

Burke testified that the parties engaged in "horse-trading" and spent years exchanging multiple rounds of bargaining proposals on Article 48. In addition to the increase in official time granted in Article 48 Section 2.A., the 2003-2011 negotiations resulted in two primary changes relevant herein: (1) the creation of the stand-alone bank of 25,000 hours in Article 48 Section 2.G. and (2) the restructuring of the methodology for calculating official time at the local level in Article 48 Section 10.

Burke testified that the restructuring of Article 48 Section 10 was motivated by issues stemming from the "flat percentage" model contained in Article 45 Section 10 of the 1997 MCBA [blue book]. Percentages varied depending on whether the local union represented BU employees in the VHA, VBA or NCS. Local parties had the ability to negotiate additional official time hours above the MCBA

minimum. Union Ex.1. The “flat percentage” model resulted in smaller facilities having a surplus of official time and larger facilities having a deficit of official time.

Representation is the core function of labor unions, and as such was a major concern at the bargaining table. Burke testified that the size of the BU had dramatically expanded post 1997. The BU went from (in round numbers) 200,000 FTE to 320,000 FTE. Due to issues regarding the then allocated hours, the Union sought to restructure the “flat percentage” model. The goal in bargaining was for the calculation of official time hours to vary depending on the size of the BU. (i.e. larger units, more time allocated.)

The most recent negotiations resulted in the “4.25 model.” Jt. Ex.1.

In exchange for agreeing to restructure the “flat percentage” model to the “4.25 model”, the Union received a bargained-for benefit: the 25,000 hour bank in Article 48 Section 2.G. Burke testified that this bank was created so that AFGE had the ability to allocate official time hours wherever needed. The only restrictions on the 25,000 hour bank were that the time had to be allocated in one hour increments.

At hearing the Union presented bargaining proposals from 2008 and 2010 as representative samples of the written proposals regarding official time that were exchanged during the 2003–2011 negotiations. Union Exs. 2-3. The permitted use of official time is covered in Article 48 Section 1 which was largely rolled over from the blue book.

Union Ex. 2 indicates that in April 2008, the parties were disputing the amount of official time that would be placed in AFGE’s bank and whether those hours would be carried over from year to year. Union Ex. 3 indicates a similar dispute during negotiations in March 2010. The parties continued to exchange proposals on the amount, rollover and a tracking accountability system for official time.

The Union’s bargaining proposals demonstrate that the parties were not in dispute about use of official time– just the amount of time and related procedural issues.

Burke testified that the understanding at the bargaining table was that so long as the 25,000 hours of official time were used within the confines of Article 48 Section 1 (which references 5 U.S.C. §7131), AFGE was free to allocate that time to union representatives as it saw fit.

Kormelink testified that she was not involved in any face-to-face negotiations on Article 48 and that the official time subject was not addressed until the very end of negotiations. She testified Article 48 was negotiated "behind closed doors" between Chief Negotiators.

Burke testified that the only thing negotiated "behind closed doors" on Article 48 Section 2.G. was the amount of official time and how it would be tracked not the purpose for which the time would be used. Use of official time was never at issue at the bargaining table, so long as the time was used in accordance with law and contract.

Kormelink further testified that the capitalization of the letter "U" in the first sentence of Article 48 Section 2.G. meant that the parties intended for the 25,000 hours of official time to be used for the "national Union" not the "local union." The Arbitrator should dismiss this notion. Kormelink admitted that the Editing Committee was tasked with the duty of reviewing issues of grammar and spelling. It convened after the parties had approved the green book and signed the final versions of each article. The Editing Committee's work was purely clerical. The Arbitrator should not assign any weight to the VA argument that the capitalization of the letter "U" supports its interpretation. [See footnote 6 in AFGE's Brief, which lists multiple instances where the capital U is used to signify the local Union.]

The VA offered Ex. 2 in support of its position that the 25,000 hour bank could be used for "national level duties" only. There are no instances of denied transfers of official time to local representatives on VA Ex. 2. There is no evidence of a binding past practice concerning the interpretation of Article 48 Section 2.G. [Case citations omitted]. VA Ex. 2 fails to prove that the parties had an unequivocal, clearly enunciated, long-standing past practice of **not** using the 25,000 hour bank

to transfer official time to local representatives. Use of official time for one purpose does not constitute a prohibition on its use for another purpose.

The Union requests the grievance be granted so as to permit the grant of 720 hours by Lee to Reilly.

VA Arguments on the Merits

The 1997 MCBA did not have contain a bank of hours for use by the National President. Negotiations for the current MCBA began in 2003 and were on-going in 2011.

The negotiations on official time were left to the end of the bargaining as this was a contentious issue. The language found in Article 48 Section 2.G. was negotiated behind closed doors by the chief negotiators for each side: Wiggins for the VA and Lee for AFGE. Testimony at the arbitration hearing made this clear. Neither chief negotiator was an attorney.

Although the language in Section 2.G. required the parties to establish a joint method of tracking hours, this to date has not occurred. Hours used from the bank began to be tracked in 2014 by the VA through Bennett in LMR. Lee sends in the hours reported and Bennett does the tracking report. VA Ex. 2.

There has never been an instance since hours have been tracked where Lee sought to transfer hours from the National bank to a local or for local purposes. There is no evidence in the record that before or after December 1st that Lee used the national bank for local matters. This current situation is an isolated, one time attempt.

Plain language makes it clear that Article 48 Section 2.G. does not contemplate a use of national hours for local purposes. The VA's refusal to recognize the attempted transfer of hours does not violate the MCBA.

The grievance must be denied on the merits.

Burden of proof

The Union has the burden of proof. It must prove its case by a preponderance of evidence. The Union has the burden of persuasion as to each alleged cba violation and issue presented.

Analysis

This case posed a presumed first-time issue for the parties: what is the scope of latitude for the AFGE National President to dispense from a national bank, official time [union leave] hours to locals who are in need of greater representational time allotments?

The plain language of the MCBA provides the answer.

Although the parties presented testimony from two national level bargaining representatives, neither party was able to state in a declarative manner: “we agreed at the bargaining table that the National President had utter discretion to distribute hours in undefined amounts from the national bank to any AFGE affiliate or unit of employees up to 25,000 hours.”

Both parties agreed that the negotiations for this critically important section (from the perspective of the Union’s representational interests) with at least the issue of the amount of time was done behind closed doors. So the “best” evidence in the sense of the most pertinent and reliable evidence on what the intent behind the use of the word etc. and more significantly the intent behind the listing of uses was absent. There were no notes from those closed door sessions and no live testimony from those participants. Indeed if as indicated the sessions were part of mediation, the availability of notes and testimony would be inappropriate.

Both parties agreed that most of the discussion surrounding Article 48 in general and Sections 2.G. and 10 in particular had to do with setting the amount of time in the national bank and changing the methodology of hours allocations for the local units. This is supported by Union Ex. 3 which contains language at paragraph I. identical to the final language in the ratified Article 48 regarding use of the hours.

What is evident therein in the Union’s bargaining proposal is that the Union sought a bank of 100,000 hours but ultimately agreed to the current level of 25,000. The 25,000 hour national bank was a brand new benefit. The language regarding allowed uses of the time was brand new as well.

Unfortunately no one was able to add any first hand recollections of the give and take on any aspect of the language ultimately agreed to, other than it is possible to draw a conclusion from the Union proposals that it wanted more hours in the bank.

No bargaining testimony was presented at hearing from either party about use of hours from the national bank. This was not surprising to the arbitrator. The split between national level representation and local representation was embedded in the blue book language. There would be little need to discuss and articulate the parameters of use unless there had been unresolved grievances on that language. None were made part of the evidence or discussion at hearing.

From the record it seemed clear that there two major problems to solve for the Union during the most recent national negotiations with respect to Article 48: how to get more official time hours for the locals? Secondly but not in order of importance, establishing a national bank of hours for the President to distribute in furtherance of union business.

Union Ex. 1 is the pertinent language from the blue book. The Official Time language was then found at Article 45.

Tracking changes from the blue book language to the current MCBA is helpful to explain the rationale herein. In section 2, a change made in the current MCBA was to add two additional categories of National representatives who would have release time: 12 appointed national representatives and 5 appointed National Safety and Health Representatives. It is of note that in the listing, there are no local level positions; albeit there are district level positions.

Article 48 Section 2 Paragraphs B., C., and D. are new paragraphs in the green book with language not found in the blue book. All three paragraphs relate to persons participating in national level activities. Paragraph E. has language previously used in 1997 as does paragraph F. None of those sections B-F provide support for the proposed Union interpretation of Article 48 Section 2.G.

As both parties recognize in the respective arguments, it is within paragraph G. of the green book that is the pivotal language to interpret to resolve the instant dispute. It states in part:

> In addition to the above official time, the Union shall have a bank of hours from which to draw in order to have subject matter experts, administrative support during ***negotiations, support for national grievances, labor-management collaboration support, special projects and department initiatives, etc.*** …

The parties agree that the list of activities for which the bank may be used lists what are mutually understood as **national level matters**: negotiations; support for national grievances; labor–management collaboration support; special projects and department initiatives.

The Union posits that the absence of restrictive language in the above quoted section and the addition of the "etc." demands an interpretation that the list is illustrative but not limiting. The arbitrator cannot agree.

The record is devoid of evidence about what the discussions were surrounding the national bank uses, either for the listed categories or for the unhelpful "etc."

The arbitrator appreciated the detailed analysis presented in the Union brief. The arbitrator appreciates that the word "etc." may reasonably lead to an expansive definition. But the ordinary, typical use of the word in that context supports instead a finding that it was activities *above and beyond* the local level that were encompassed in the 25,000 bank.[14] Ordinary meanings and use of etc. follow: and so on; and all that; and so forth; and the like and the rest. Etc. is in that sentence used to describe activities like or similar to those listed. All items in the list are national level. To grant the Union's grievance would require reading in language that does not exist.

Article 48 Section 2. Sections A-G. all concern national level/district level union concerns as discussed above.

[14] It also is devoid of evidence as to where the number 25,000 came from-a matter not dispositive of the dispute.

To handle local matters the parties negotiated a separate section-10- to deal with exclusively local representational activities.

The arbitrator was not swayed by VA arguments about capitalization of the word Union. As is clear from the record, the editing took place after the MCBA was reviewed and ratified by the parties. Kormalink testified that she "didn't care" how the Union wanted to be referenced; she wisely saw it wasn't management's issue. As the Union pointed out in a footnote in its brief, there are multiple places within the MCBA where the reference to local union is upper case.

The most significant factor in concluding the Union's proposed interpretation is a stretch beyond the power of the arbitrator to flex is the separate existence and specific language of section 10. In that section, the parties addressed the "Local" use of hours. The use of the word "Local" is not insignificant to this analysis.

As explained at length in the Union's brief [summarized above in the Union position], the parties implemented a new, more generous system for allocation of local Union hours in the green book. The new language granted both a minimum number of hours based upon local BU size and upped the minimum percentage of time from 40% to 50% for VHA and VBA locals.[15]

Other enhancements in Article 48 Section 10 included a hold harmless for official time allocation for a merged local; an immediate (60 days post ratification) make whole for locals below the 4.25 hours and a six-month defined period for readjustments of the numbers of hours based upon changes in size of the BU. See Article 48 Sections 10 C. 2. and 3.

Yet another reason for denying the Union's request to read in the language about enhancements to local time coming from the national bank of 25,000 hours is the language found at 10 D. and E.

Article 48 Section 10 D. states:

[15] New language also allocated time to different entities: the CBOC; CMOP, clinic, service center or successor at a duty station greater than fifty miles from the facility. This language is not germane to the instant dispute but rather illustrates the issues at hand: amount of time, not use.

> 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.** [Emphasis added]

This language was in the blue book MCBA at Paragraph C. The arbitrator reads this language as the route and only route currently for a local to gain more hours than the prescribed amounts in Section 10. A. There is no attempt thus to limit the ability of a local to negotiate beyond the minimum hours set forth in 10. A. Quite the contrary. The pathway for Reilly's local or any other local to achieve greater numbers of union leave hours is by and through local level negotiations (or an increase in the numbers of persons in the BU-which is not in the Local's control). Or, make the desired changes in Article 48 Section 2.G. at the next bargaining round for the successor agreement.

Article 48 Section 10.E. states:

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

This is new language as well. Although neither party referenced this section in the final arguments, it is obvious that the Union referenced in that section relates to the local union [despite the capitalization]. Otherwise, the inference would be that the National Union would be engaged in negotiating the transfer of time to locals on a local basis. This is a concept nowhere else sanctioned and would be highly impractical in the execution. This section lends further support for the principle that local official time hours are set exclusively in Article 48 section 10.

AWARD

The grievance is granted in part and denied in part.

The grievance was filed timely.

There is no support in the plain language/contextual background/past practice or bargaining history to support a finding that National Union time in the 25,000 hour bank may be transferred to a Local to engage in local representational activities.

IT IS SO HEREBY ORDERED.

s/ *Sandra Mendel Furman*

Sandra Mendel Furman J.D.
Issued on this 8th day of February, 2018 in Columbus, Ohio