

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

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

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2338

Case No. 17 FSIP 032

DECISION AND ORDER

The American Federation of Government Employees, Local 2338 (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri (Agency or VAMC).

Following an investigation of the Union's request for assistance, which involves official time, the Panel initially determined to resolve this impasse through Mediation-Arbitration with a Panel representative. On September 7, 2017, after further consideration, the Panel concluded that this impasse should be resolved through a Written Submissions procedure process with the opportunity for rebuttal statements. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which may include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' final offers, written submissions, and the parties' rebuttal statement.¹

¹ The parties were given until close-of-business October 10 to file 4-page rebuttal statements. The Union submitted a

BACKGROUND

The Union represents between 650-725 employees in a variety of positions including Housekeepers, Maintenance Workers, Nurses, and Physicians. Grade ranges go up to the General Schedule-12 level. Most bargaining unit employees are located at the Agency's primary facility in Poplar Bluff, Missouri. However, roughly 100 unit employees are scattered throughout six Community Based Outreach Clinics (CBOCs) that are associated with the facility and focus on outpatient care. Each CBOC is over 50 miles away from the facility. The parties are governed by a National Collective Bargaining Agreement (NCBA) negotiated between the United States Department of Veteran Affairs and the American Federation of Government Employees that expired in 2011 but continues to roll over on an annual basis. The parties do not currently have a local supplemental agreement.

Pursuant to NCBA Article 48, Section 10.D,² in 2015 the parties negotiated a local Memorandum of Understanding (2015 MOU) to govern official time. It granted 3,400 hours of official time to the Union annually. The MOU also discussed official time allotment for CBOC-related representation. Additionally, the MOU required the parties to "diligently track the hours used by the Union," and submit those hours to the Agency's Human Resources Department on a monthly basis. Finally, the MOU stated that the parties would "reevaluate and revisit" the MOU within 6 months of its execution.

In accordance with the foregoing language, in early 2016 the Agency sought to reopen the 2015 MOU. The parties had several bilateral negotiation sessions, and they also received one-and-a-half days of mediation assistance in January 2017 from a Federal Mediation and Conciliation Services (FMCS) Commissioner in Case No. 201711800023. The Commissioner

12 page statement on October 10. On October 11 the Agency objected and in response, but without Panel consultation, the Union submitted a revised 4-age rebuttal the morning of the 11th. The Agency continued to object. In response, the Panel agreed to consider the Union's revised rebuttal submission but also granted the Agency an opportunity to submit a reply statement. The Agency did so.

² "The minimum amounts of official time described in [Article 48] are not intended to limit the amount of official time that can be negotiated by the parties locally."

referred the parties to the Panel because he believed the parties were unable to make progress on a settlement agreement.

ISSUES

The parties disagree over: (1) the amount of official time the Union should receive on an annual basis; and (2) the use of official time.

POSITIONS OF THE PARTIES

A. Official Time Amount

1. Union Position

The Union proposes increasing the block of official time to 8,500 hours.³ 800 of these hours would be set aside for training, both for external and internal purposes. The Union would also provide a training agenda to management for review. In addition, CBOC representatives would be entitled to official time in "the amounts specified" under Article 48, Section 10 of the NCBA. That is CBOC representatives would receive 25% official time. However, travel time to and from CBOCs would not be deducted from any bank of hours. Finally, several functions would not be deducted from the main block of official time hours, including negotiations and related prep time, joint-committee and other group meetings, and "weekly union meetings."⁴

The Union feels that the 2015 MOU does not adequately covers its needs. It represents members with regard to numerous grievances (15 pending with 10-15 hours spent on each), issues arising from Agency policies (over 600 with 20-25 hours for each), MSPB disputes (60-80 hours for each case), ULPs (10 pending at 20-25 hours per case), and equal employment opportunity (EEO) claims (20 cases at 80-100 hours a case). One particular area of concern for the Union is workers'

³ In its request for Panel assistance, the Union initially requested a block of 9,230 hours per year.

⁴ The Agency argues that official time for "weekly Union meetings" and internal training is illegal because 5 U.S.C. § 7131(b) prohibits official time for internal Union matters. See Agency Rebuttal at 2. Based on our decision below, it is unnecessary to address the Agency's argument.

compensation claims. It has processed nearly 10-20 workers' compensation claims in the past 2 years because the Agency has allegedly provided inefficient and unsafe equipment to its employees. The Union argues that it encounters regular difficulties processing these claims because it does not receive adequate official time (it argues that each case requires 8 to 25 hours). The Union deals with a number of committee meetings often initiated by management. As a result of the foregoing, the Union argues it needs 8 dedicated representatives who will spend a combined 280 hours per 2 week pay period in official time status.

2. Agency Position

The Agency counter proposes aligning with Article 48, Section 10's establishment of a base line of 4.25 hours per bargaining unit employee stationed at the facility and CBOCs. In the event the Union chooses to station a representative at a CBOC, however, employees at that CBOC would not be included in the foregoing calculation. The CBOC representative would be entitled to 25% official time. The Union must inform management by March 1st and September 1st of each year how it intends to conduct CBOC representation. The Agency also proposes excluding several activities from counting against the overall block of official time to the Union with the caveat that the Agency could limit the number of participating Union representatives. But it also proposes that negotiations should be deducted from the Union's bank of hours to encourage quick resolution of bargaining disputes. Finally, time spent on training would also be deducted from the Union's bank of hours and the Union would have to provide management with an outline of topics to be covered so that the Agency can ensure that inappropriate topics will not be discussed. On a quarterly basis, the Agency is also willing to authorize one 8-hour trip for a CBOC representative to travel to the main facility for training.

Management believes that Article 48, Section 10 establishes a national baseline for official time and the Union has not justified straying from it. Management argues that the Union's use of official time produces few results: of 57 ULP charges filed since 2016 only one has resulted in a settlement, and of 53 Step 3 grievances only four went to arbitration. Additionally, because of the Union's rampant official time usage, the Agency has been forced to hire 4 employees to cover for Union officials. The Union's proposal, and the 2015 MOU, is also inconsistent with other similarly-situated VA facilities. The VA has developed criteria for establishing complexity levels

for its medical facilities. This Agency is a Level 3 facility, which is on the lower end of the complexity scale. Including the Agency, there are 30 Level 3 facilities nationwide and 20 of those facilities abide by the minimum levels of official time established under Article 48, Section 10. The Agency could find only two other Level 3 facilities that went above the amount of time prescribed under Section 10.

CONCLUSION

Having carefully considered the evidence and arguments presented in support of the parties' positions, we shall order adoption of a modified version of the Agency's last best offer.⁵

a. Bank of Hours

Both parties wish to alter the status created by the 2015 MOU. The Agency seeks a reduction that is tied to the contractual level of official time permitted under the NCBA. By contrast, the Union requests a dramatic increase because it allegedly has a workload that warrants increased hours. On balance, the Agency has the better argument.

The Agency's contentions focus primarily on comparably-situated VA facilities. As noted above, it is a Level 3 facility and 20 out of 30 other such facilities - or 2/3rds - adhere to the base level established by Article 48, Section 10 of the NCBA. Thus, the Agency's approach is in lockstep with the majority of similarly-situated comparators. The Union did not refute the Agency's data and cited only one comparable facility that allegedly goes above the levels provided in the NCBA to support its position. Yet even that facility provides only 5,980 hours per year, or nearly 2,500 less hours than the number sought by the Union. Put simply, the Union's request appears to be unprecedented. The Agency has also raised concerns about its ability to carry out its mission while accounting for budget and staffing realities. In this regard, it provided an unrefuted assertion that it has had to hire 4 individuals to serve in the place of Union representatives on official time. In other words, the Union's use of official time is hampering the Agency's ability to conduct its mission and also increasing its operating costs.

⁵ The revised Agency last best offer is attached to this Decision and Order in Appendix I.

The Union provided little supporting evidence to demonstrate that its requested hours are necessary to further its own goals. It offered lists of pending unfair labor practice charges, matters to be bargained, discussions over Agency policies, and training along with estimates on time spent for each type of matter but little in the way of detail or context. Thus, it is difficult to draw substantive conclusions from these lists. One of the Union's other chief complaints is that it is not receiving sufficient time to handle workers' compensation claims and, relatedly, it needs dedicated Union officials for these types of claims. The Union provided inconsistent information about the number of hours necessary to represent an employee in such a case, originally claiming it needs 8 to 10 hours per case but subsequently stating it requires 20-25 hours. There is no explanation for this inconsistency and, as such, it is difficult to credit the Union's claims much less support its assertion that it needs Union representation dedicated solely to this cause.

The Union also believes it needs significant official time to address EEO issues. However, Article 48, Section 6 of the NCBA states that Union representatives will be on "duty time," rather than official time, if they represent an employee in EEO issues (and MSPB disputes for that matter). Moreover, most if not all of the Union's complaints appear to arise from Agency challenges to the Union's unilateral allocation of official time to its representatives. As discussed below, however, we are adopting the Agency's collaborative process for official time distribution thereby potentially rendering the Union's concerns moot. And to the extent the Union still intends to pursue EEO complaints, management has agreed those matters should be excluded from the Union's bank of official time. In below discussions, we will adopt this approach, albeit with modification.

Based on the foregoing, we shall impose the Agency's proposal concerning the overall bank of hours.

b. CBOC Representation

The Panel adopts modified compromise language for CBOC representation. The parties offer proposals that attempt to reflect the language of Article 48, Section 10. The Agency proposes granting the Union "25% official time at each [CBOC] station over 50 miles from the main facility to which they assign a representative in accordance with Article 48, Section 10" of the NCBA. (emphasis added). The Union proposes official

time "allocated in the amounts specified in Article 48, Section 10 . . . for CBOCs greater than 50 miles away from the main facility." But the Union also requests that no Union official shall be charged official time when travelling to and from a CBOC to the main facility.

Both parties are attempting to add language to Article 48, Section 10. This Section states only, in relevant part, where a Union "represents employees at a CBOC . . . at a duty station greater than 50 miles from the facility . . . that [Union] will be allotted 25% official time at that duty station." The Agency's language attempts to reinforce its interpretation of this language, i.e., ensuring that 25% official time is allocated for CBOC representation only when a representative is actually stationed at a CBOC. The Union's language seeks exemption for travel time, a topic that is not discussed in Section 10. Essentially, then, the parties are asking the Panel to enforce their respective views of Article 48, Section 10. Rather than adopt either party's interpretation we shall remove references to CBOCs. Because Article 48, Section 10 already discusses CBOC representation additional language is unnecessary; the parties may simply refer to the NCBA should any disagreement arise concerning CBOC representation.

c. Deducted Activities

The parties also disagree over what activities should be deducted from the Union's bank of hours. The Agency agrees that several activities will not be deducted from the bank but will authorize only one representative for some activities while authorizing multiple Union representatives for other activities. The Union essentially asks for a blank check approach with numerous non-deductible activities and no limitation on representative numbers. We adopt the Agency's proposal with some modification. The Agency wishes to deduct time spent in negotiations. This approach is permissible in terms of deducting hours from the Union's overall bank, so we adopt it. But we shall reject the Union's language requesting that preparation for negotiations not be deducted from the bank. The FLRA has held that preparation time is not a statutory right. So although a Union has the right to negotiate over its use, it is not legally entitled to that time.⁶

⁶ See, e.g., *AFGE, Local 1692 and Headquarters, 323rd Flying Training Wing, Mather Air Force Base, California*, 3 FLRA 304,308 (1980).

We also adopt but modify the Agency's language that states EEO and MSPB representation will not be deducted from the Union's bank of hours. Article 48, Section 6 of the NCBA authorizes the use of only "duty time" for EEO and MSPB matters. Thus, the Agency cannot deduct official time for EEO disputes because the contract *does not even permit its use* for that purpose. The NCBA's approach is consistent with FLRA precedent which states that parties may negotiate how - or if - they will use official time for EEO and MSPB representation.⁷ The parties at the national level have already decided how to address this topic. Thus, we modify this portion of the Agency's proposal to merely refer the parties back to Article 48, Section 6 should any controversy arise.

B. Use of Official Time

1. Union's Position

The Union proposes that it will provide management with 7-days' notice of how it intends to allocate official time to its representatives. The Union and the representative's first-line supervisor will meet within 48 hours of this notice to discuss scheduling, but otherwise the foregoing time is not subject to negotiations or Agency approval. The Union is in favor of pre-scheduling employees on a set amount of time, e.g., the President being on 100% official time. But it does not agree with the idea that hours should be limited to certain times of the day, e.g., the afternoon.

From at least 2003 until the 2015 MOU, the parties had a past practice allowing the Union to allocate official time as it deemed fit. The parties have "always" accepted that the Union would provide only "reasonable advance notice" of which Union officers would receive official time and in what amount. The current Union President was elected in 2011. After his election he decided he needed 100% official time - all prior Presidents had been on 50% time - and informed his supervisor of this change. The supervisor charged the President with AWOL and the Union filed an EEO complaint in response, which the parties settled. Since then, several Union representatives have had to

⁷ See, e.g., *U.S. Dep't of Veterans Affairs Medical Center, Richmond, Va. and AFGE, Local 2145*, 64 FLRA 701, 707 (2010) (citations omitted); *AFGE and U.S. Dep't of Justice, INS*, 45 FLRA 391, 400-01 (1992) (citations omitted).

file EEO complaints as a result of the Union's attempts to allocate official time to representatives, and they always result in a settlement. The Union's proposal will allow it to meet its representation goals and stem off any potential future EEO litigation. The Union believes there is no circumstance in which the Agency should deny it official time.⁸

2. Agency's Position

The Agency would require employees to submit a written request in advance to their supervisors listing the times and purpose for official time use. Management is required to approve these requests except when operational needs dictate otherwise. Additionally, the Agency proposes that the Union limit regularly scheduled official time to 1.25 full-time employees. Specifically, the Union President would be on 100% official time and the Chief Steward would have 25% official time but no other representatives would have a set amount. The Union would distribute the remaining official time as it deems fit.

Management must maintain its ability to fulfill its mission and it also has a management right to assign work. It does, however, recognize the importance of ensuring that the Union can still accomplish its goals. The Agency's approach strikes a balance between these two interests. The 1.25 FTE proposal is necessary because the Union has attempted to unilaterally allocate regular official time usage to 8 Union officials since January 2016. This time would have totaled 5,460 hours per year, on top of the 2,080 hours per year the Union President uses. The Union's constant requests for pre-scheduled official time are a distraction for management because the parties engage in regular "back and forth" on that topic. The Agency's approach creates a bright-line rule and more certainty for supervisors.

CONCLUSION

We shall adopt a modified version of the Agency's final offer to resolve this issue.

⁸ See Union Rebuttal at 3. The Agency also claims that this position is inconsistent with management's right to assign work under the Federal Service Labor Management Relations Statute. See Agency Rebuttal at 2 (citing 5 U.S.C. § 7106(a)(2)). It is unnecessary to consider the Agency's argument in light of our decision.

a. Submission of Requests

The main dispute on this issue is the degree of autonomy the Union should have when it requests official time. The Union essentially asks for carte blanche use limited only by the amount of notice it must provide to individual supervisors. Under the Agency's approach, requesting employees must submit a request to their supervisor prior to use and then the supervisor will approve it unless "operational needs" dictate otherwise. But even upon rejection the parties would work together to find an alternative time.

A primary instigator for the Agency's proposal was the Union's alleged failure to track its use of official time. That failure created concerns that the Union was and is using well above the amount of official time promised under the 2015 MOU. The Union has provided no evidence showing how much official time it uses on an annual basis. Thus, the Agency and other third-parties can only make ad-hoc guesses as to the amount of actual official time used by the Union per year. It is therefore difficult to say whether the Union is adhering to the MOU or creating a "blank check" scenario for itself.

By contrast, the Agency's proposed approach strikes a balance between the Union's need to use official time and the Agency's need to fulfill its mission. The expectation is that requests for official time will be granted unless operational needs prohibit its use. There are no other circumstances in which the Agency could deny these requests. Additionally, in the event a request is denied, the language calls for the parties to work together to identify alternative times. This approach fosters a more collaborative approach to labor relations. It also provides the Agency with a tool to ensure its mission needs are being met and helps it ensure that the Union is not seeking to exceed the amount of its granted official time.

Attempting to refute the Agency's proposal, the Union leans heavily on a claimed past practice dating to at least 2003 in which the Union would unilaterally allocate official time to itself. However, the Union also admits that "frontline and supervisors and the union representative[s] ha[ve] always worked together to schedule [official] time."⁹ Indeed, one of the

⁹ Union Statement of Position at 6.

exhibits provided by the Union shows a 2013 email exchange between the Union President and an Agency official in which the official agreed to authorize the President's decision to use 100% official time. The official, however, stressed that the authorization was consistent with Article 48, Section 10 and he repudiated the Union's suggestion that the parties could not negotiate over supervisor authorization of official time. Thus, even under the Union's asserted past practice there is evidence that the parties worked together to schedule the use of official time.¹⁰

Accordingly, we adopt the Agency's language for requesting official time.

b. Pre-Scheduled Official Time

The Agency proposes that pre-scheduled official time be limited solely to the Union President and Chief Steward at 100% and 25% respectively. It appears that the parties have had discussions regarding how the Union allocates its official time to its representatives. However, this proposal appears to be a new one that the Agency raised for the first time in its submission to the Panel on September 26, 2017. It does not appear in the Agency's prior final offer that the parties provided to the Panel previously, and the Agency never raised the proposal during the investigation or at any point prior the September 26th submission. There is no evidence to indicate that the parties fully negotiated or mediated this topic, and the Panel never asserted jurisdiction over it. In summary, this new topic represents an issue that the parties are not at impasse over within the meaning of the Panel's governing framework and, thus, the Panel will reject this language.

c. Tracking Official Time

¹⁰ The Union claims that it filed an EEO complaint against the Agency because it placed the President on AWOL after he went on 100% official time and improperly attempted to force the Union to negotiate over official time. See *id.* at 5. The Union asserts that the parties settled the complaint by, among other things, rescinding this AWOL and agreeing not to require negotiations over using official time. However, the Union did not provide the actual settlement agreement or its language. Thus, the foregoing is difficult to credit.

The parties agree that the Union should track its official time and provide reports to the Agency's HR department. The Agency seeks regular monthly reporting and more specificity whereas the Union wishes to wait 9 months before the monthly requirement kicks in. Given that one of the instigators for this dispute was the parties' conflict over the Union's tracking efforts, we adopt the Agency's approach of a once-a-month reporting requirement from the outset. We also impose the Agency's suggestion the Union should provide specificity about any activity it claims should be excluded from the Union's overall bank of hours.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the adoption of the modified Agency offer in Appendix I.

By direction of the Panel.



Mark A. Carter
FSIP Chairman

October 26, 2017
Washington, D.C.

Appendix I - Revised Agency Proposal

The following constitutes an agreement between the John J. Pershing VAMC and the American Federation of Government Employees Local 2338 regarding the allocation and use of official time hours. This agreement replaces and supersedes all previous agreements, MOUs, LSA, ground rules, or documents related to official time.

1. Hours:

- a. The official time allocation will be calculated each year in March and September based on the total number of bargaining unit employees located multiplied by a factor of 4.25 as outlined in Article 48, Section 10 of the master agreement.

2. Allocating Official Time:

- a. The union and the agency recognize that the use of official time must be balanced with mission requirements in a way that is mutually beneficial. Therefore, the parties agree to the following process for requesting use of official time outside the set office hours listed in 2.a.:

- i. The employee will submit a written request in advance to their immediate supervisor giving the times and purpose (for tracking and compliance purposes only) for the official time. The agency will approve the request except when operational needs would prevent the employee's absence at that time, in which case the agency will offer an alternative time the employee may be released. The parties recognize that the earlier a request is submitted, the easier it will be to approve.
- ii. The supervisor will respond to the request for use of official time, indicating approval or disapproval. If the request is disapproved, the supervisor will provide a written statement detailing the operational need or other circumstance which precludes the employees' absence at the requested time. Where appropriate, the employee and supervisor will communicate to find a mutually agreeable time whereby the employee can be released to perform union duties. The parties recognize the importance of open and transparent communication between the employee and the supervisor in

maintaining a mutually beneficial working relationship.

3. Training: The same procedures outlined in paragraph 2 will be used for requesting official time for training purposes. In addition:
 - a. The union agrees to provide an agenda or other document detailing the topics to be covered during the training to the agency. The agency will review the document to determine whether any of the time is inappropriate for official time as specified in law and regulation (such as internal union business, Hatch Act activities, etc.) and will provide a written notice to the union if any time is deemed inappropriate for official time.
 - b. The agency agrees to authorize travel for one (8 hour) trip per quarter for each CBOC representative from the assigned duty station to the main facility (round trip), in accordance with all appropriate federal travel regulations. Additional travel must be requested and approved in advance.

4. Hours Tracking: The parties agree to diligently track the hours used by the union in the interest of being good stewards of resources. Tracking of hours will follow the below process:
 - a. The union will submit hours for all union officials using official time to the Human Resources officer (HRO), ER/LR Specialist, and Associate Director via email on the embedded excel document by the 10th of each month.
 - i. Any submissions claiming time that does not count against the allocation (i.e. quality programs, EEO, etc.) must include sufficient detail for the agency to determine the time to be a non-allocated appropriate activity.
 - b. Human Resources will notify the union of any discrepancies between the agency and union submissions by the 20th of each month and provide the union with a running total of annual base hours used.
 - c. The parties agree that regular and transparent communication regarding the use of official time will assist in maintaining an effective relationship.

5. Non-Allocated Hours:
 - a. The agency and the union agree to the following definition of non-allocated hours (previously referred to as "bankable" time):

- i. Non-allocated time is time spent by union representatives in activities which are excluded from counting against the annual allocated base hours as outlined in the Master Agreement. The only activities included in this category are:
 - a. Quality Programs-the union and agency agree to one union representative on the following quality program activities locally:
 - i. Environment of Care Committee (EOC)
 - ii. Quality, Safety, and Value Council (QSVC)
 - iii. All sub-committees of the QSVC
 - b. Labor Management Forum-an equal number of union representatives to the number of agency representatives
 - c. EEO/Diversity Committee-One union representative
 - d. New Employee Orientation-One union representative, 30 minutes bi-weekly
 - e. Time spent in EEO and MSPB matters will be governed by NCBA Article 48, Section 6.