

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF LABOR

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12

Case No. 20 FSIP 016

DECISION AND ORDER

This case concerns a request for Panel assistance filed by the Agency involving the parties' negotiations over the last remaining article (Article 45 – Official Time) in the parties' successor collective bargaining agreement (CBA) between it and the American Government of Federal Employees, Local 12 (Union). This dispute was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). On January 8, 2020, the Federal Service Impasses Panel (Panel or FSIP) asserted jurisdiction over this dispute and directed the matter to be resolved in the manner discussed below.

BARGAINING AND PROCEDURAL HISTORY

The mission of the Department of Labor is to foster and promote the welfare of job seekers, wage earners, and retirees of the U.S. by improving their working conditions, advancing their opportunities for profitable employment, protecting their retirement and health care benefits, helping employers find workers, strengthening free collective bargaining, and tracking changes in employment, prices, and other national economic measurements. The American Government of Federal Employees, Local 12 represents a bargaining unit consisting of approximately 2,700 professional and non-professional bargaining unit employees (BUEs), both General Schedule and Wage Grade, who are stationed in the Washington Metropolitan Area. The parties' current CBA, which expired on August 28, 2018, remains in full force and effect until replaced by a successor.

The Agency provided notice to the Union of its intent to open the CBA on January 9, 2019. Between January and August 2019, the parties engaged in face-to-face bargaining on various days. On October 21, 2019, the parties engaged with an FMCS Mediator. The parties engaged with the Mediator again on November 7, 2019. The Mediator released the parties after the November 7-session. On November 15, 2019, the Agency filed a request for assistance with the Panel over the last remaining article (Article 45 – Official Time ¹) in the parties' successor CBA. In its Panel meeting on January 8, 2020, the Panel asserted jurisdiction over the negotiations impasse and ordered the parties to resolve the matter through an Informal Conference. The Informal Conference was conducted in Washington, DC on January 29, 2020. While some of the issues were resolved, there remained one last issue – Article 45, Section 6 – Official Time Bank. As the Parties were not able to resolve all of the issues in the impasse, the Parties were provided the opportunity to submit written submissions to the Panel for consideration of the last remaining issue.

AGENCY'S PROPOSAL AND ARGUMENT

All Union representatives, except officers whose official time is specified in Section a. for the President, Executive Vice President, and Head Steward, shall be allowed to utilize a bank of **1,100** aggregate hours of official time per fiscal year. Official time may be requested on an ongoing and continuing basis, for example on a monthly basis, however requests must be made in accordance with the procedures outlined in this article. The Department of Labor shall provide AFGE Local 12 with a report of all official time used every six months.

The parties have agreed to the concept of an Official Time bank for activities under Section 7131 (d) of the Statute². The type of activities conducted by the Union representatives under this section of the Statute includes: grievances, arbitrations, labor-management meetings, mediations and other representational preparation activities. Other activities such as time spent at the bargaining table and time spent with

¹ Article 45, Section 6b - 3 outstanding issues in this section: 1) amount of Official Time that will be available in the bank, 2) the ability of the Union to carry over the remaining unused hours in the bank into the next calendar year, 3) the bargaining unit employees charging of Official Time to the bank.

Article 45, Section 6c - the President, Executive Vice President, and Head Steward, who are representing themselves or serving as a witness, charging their time to the Official Time bank.

Article 45, Section 6k - bargaining unit employees on Official Time when preparing for or presenting their own grievance or appearing as a witness.

Article 45, Section 6n - what happens when the Union exhausts the bank of Official Time.

Article 45, Section 7 - transition of the Union officers back to their official duties.

² 5 U.S.C. 7131(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.

FSIP are covered by other parts of the Official Time Statute and, therefore, would not be charged to this Official Time bank. The Agency has proposed a bank of Section 7131(d) of Official Time limited to 1,100 hours, excluding the Official Time used by the executives of the Union: President, Executive Vice President, and Head Steward³. The agreement reached regarding the Union executives would account for an additional 1,560 hours of Official Time.

The Agency argues that the 1,100 hours (plus the 1,560 for the Executives) is reasonable, necessary and in the public interest because: 1) it is supported by the data and 2) it is consistent with the Trump Administration's policy⁴ and mandates. First, in terms of the Agency's position that the proposed 1,100 is supported by data, the Agency argues that the decrease in the bank number is reflective of the decreasing number of bargaining unit employees. The bargaining unit shrank from 3,250 at the beginning of FY14 to 2,705 at the beginning of FY20. As a result of the decreasing numbers in the bargaining unit, the Agency also offers data to demonstrate that there are decreased 7131 (d) activities, including fewer grievances and arbitration cases⁵. The Agency asserts that the BUE numbers are likely to continue to decrease, therefore, arguing that the decreased Official Time bank is appropriate as a reflection of an anticipated (albeit speculative) BUE decrease.

Additionally, the Agency asserts, but provided no evidence to support its assertion, that the Agency is faced with a need to reduce costs. The Agency argues that the Agency's proposal of 1,100 hours is necessary because it enables the Agency to manage the costs resulting from Official Time. The Agency asserts that its proposed Official Time bank will save the Agency approximately \$429,784 per year, a total cost savings of \$2,148,920 over the course of the CBA. The Agency asserts that the savings from Official Time can be redirected to fulfilling the mission of DOL, however, no specifics were provided on how that money would be redirected through the budget process or otherwise.

Second, the Agency argues that the Agency's proposal of 1,100 hours is in the public interest as expressed in the Executive Order 13837. The E.O. 13837 offers an official time rate of 1 hour per bargaining unit employee. The Agency asserts that they have a "legal obligation" to meet the Administration's mandate through the bargaining of this CBA. In support of its belief, the Agency did not provide a legal opinion or FLRA determination of the legal significance of the E.O.s. Instead, the Agency relies on and cites the Panel's recent decision (FSIP Case number 19056), where the Panel stated that the E.O.s "serve as the authoritative voice of public policy on the topic of labor relations."

³ The granting of Official Time for Local 12 Union Officers has been agreed to by the Parties in Section 6 (a) of this Article.

⁴ Under the Executive Order #13837, the Trump Administration's mandate is for official time to be limited to 1 hour per bargaining unit employee. (E.O. 13837 Sections 2(j), 3(a)). As of February 1, 2020, there were 2,683 BUEs; which would equate to 2,683 hours. The Agency is proposing in total 2,660 hours in the official time bank.

⁵ The Union argues that there is a growing backlog of grievances and arbitration cases.

UNION'S PROPOSAL AND ARGUMENT

Union representatives, except time specified in Section a. for the President, Executive Vice President, and Head Steward, shall be allowed to utilize a bank of **3,200** aggregate hours of official time per fiscal year. Official time may be requested on an ongoing and continuing basis, for example on a monthly basis, however requests must be made in accordance with the procedures outlined in this article. The Department of Labor shall provide AFGE Local 12 with a report of all official time used every six months.

The Union proposes that the bank of Official Time would be 3,200 hours. The Union argues that historically, the Union has used their time representing a diverse range of positions in multiple locations. Under the former CBA, the Union was permitted at least 3 full time Union Representatives on 100% Official Time (approximately 6,000 hours), as well as nine (9) Union Vice Presidents and up to fifty (50) Union Stewards. Under the agreed upon terms of the successor CBA, the Union representatives are now limited to 25% of Official Time, including the former 100% Official Time-representatives. Because of this commitment to limit each individual representative's maximum use of Official Time, the Union argues that other Union representatives will now need to pick up the representational duties that have been traditionally covered by the 100%-Union officers. Additionally, the Union argues that with the new CBA, which includes revisions to 29 articles, including new provisions, the representational work load is expected to at least stay the same, if not increase. The Union argues that the continued need for Official Time is more likely about 9,400 hours⁶. But, just as the parties have found ways to achieve efficiency savings over the last contract, the Union expects to continue working toward a culture and climate of positive and respectful labor management relations; which should translate to more efficient use of Official Time. Given that commitment and in the interest of good faith bargaining, the Union has offered to reduce the Official Time to a bank of 3,200 hours (plus the 1,560 hours used by the 3 Union Executives).

DECISION

5 U.S.C. §7131(d) provides for Official Time in any amount parties agree to be "reasonable, necessary, and in the public interest." Where the parties have failed to reach agreement, the Panel has the authority to assess the particular circumstances and impose an amount. In making their case, the Panel expects *all* parties to justify their proposed language on official time as "reasonable, necessary, and in the public interest." In the absence of such justification, the Panel has authority to impose a different amount.

⁶ The Union challenges that the Agency is greatly underreporting the number of Official Time hours historically used by the Union.

President Trump's May 25, 2018, Executive Orders that concern, among other topics, Federal-sector collective bargaining have now gone into effect. These Orders provide an important source of public policy guidance for the Panel in making its assessment. Notably, Section 2(j) of Executive Order, 13837 "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (Official Time Order) indicates that the total number of hours that an employee engages in Official Time shall not exceed 1 hour per bargaining unit employee. In accordance with that guidance, an Official Time amount in excess of 1 hour per bargaining unit employee should not ordinarily be considered reasonable, necessary, and in the public interest as a matter of course.

With this framework in mind, the Panel turns to assessing the parties' arguments in this case. The Agency's data supports the fact that the bargaining unit has shrunk over time, as well as the Union's use of official time to represent those BUEs, although the Union does challenge the validity of the data as being underestimated. Not only has the Union used less time, but their use of official time has become more efficient. Neither party offered an explanation as to why the use has become more efficient (e.g. less travel for meetings, more informal resolutions). But, the data shows that in FY14, the Union used 3.8. hours per BUE. In FY19, the Union used 2.37 hours per BUE. As offered by the Agency, the BU will not likely increase (other than perhaps temporary increases as offered by the Union) over the successor CBA, so it is reasonable to expect that the need for Official Time will also not increase under this successor CBA. In fact, the Panel believes that it is possible that the use of Official Time may actually decrease with the efficiency gains agreed to in the successor CBA (e.g. streamlined grievance board procedures).

Looking at the Official Time usage with the current bargaining unit of approximately 2,700 BUEs, the Union used approximately 6,400 hours of Official Time; although that number is not unchallenged (i.e., the Union believes it is closer to 9,000 hours). Using the Agency's more conservative number, if the parties maintain status quo practices, the data demonstrates that the need for Official Time is currently around 4,800 hours. The Agency has proposed 1,100 hours of Official Time in the bank. The Agency's offer is 3,700 hours less than the Union's current use of 4,800 hours. The Agency bases its proposed reduction on an analysis of the historic data to support the argument that as the bargain unit shrinks, the Union has become more efficient in their use of Official Time (i.e., reducing the Official Time hours per bargaining unit employee from 3.8. per BUE to 2.4 per BUE). While that reduction in Official Time usage (i.e., increase in efficiency) is commendable for both parties obligated to manage the use of Official Time, the Agency offered no evidence to demonstrate that the BU will continue to shrink and to what amount it will shrink under the successor CBA. In sum, the Agency failed to support the amount of Official Time that they expect the Union will under the Successor CBA.

The Union has proposed 3,200 of Official Time in the bank. The Union's offer is 1,600 hours less than their current use of approximately 4,800 hours. While the data demonstrates that the current need for Official Time is approximately 4,800 hours (or

higher, if the numbers are in fact underreported), given the Union's offer, the Panel concludes that the Union expects to find some efficiencies under the terms of the successor CBA (although they did not share what they would be). However, the Union failed to support the amount of Official Time that they expect to need under the Successor CBA.

Neither party has suitably justified their position; their proposed amount of Official Time. As discussed already, the Panel believes that the Official Time Order provides important direction to the resolution of issues involving Official Time; particularly where neither party has justified their proposed quantitative number. Given the lack of persuasive support in this dispute, we believe it is appropriate to apply the direction of the Official Time Order to this dispute and impose language that would permit no more than 1 hour of 7131 (d) -Official Time per bargaining unit employee per year. Applying that guidance to this unit would result in an annual expenditure of nearly 2,705 hours of Official Time in FY20 (to be adjust each fiscal year based upon the actual BUE count). The Panel believes that amount of Official Time is reasonable, necessary, and in the public interest in this unit.

Accordingly, the parties will adopt the following language in Section 6:

The aggregate amount of Official Time available in the bank each fiscal year will be calculated based upon the number of bargaining unit employees each fiscal year. The bank is not to exceed more than 1 hour per bargaining unit employee per year. Official Time may be requested on an ongoing and continuing basis, for example on a monthly basis, however requests must be made in accordance with the procedures outlined in this article. The Department of Labor shall provide AFGE Local 12 with a report of all official time used every six months.

ORDER

Pursuant to the authority vested in the Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.



Mark A. Carter
FSIP Chairman

March 13, 2020
Washington, D.C.