

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1431

And

U.S. DEPARTMENT OF VETERAN AFFAIRS,
NEW JERSEY HEALTHCARE SYSTEM

Case Nos. 23 FSIP 066

ARBITRATOR'S OPINION AND DECISION

BACKGROUND

This case arises from a request for assistance filed by the National Federation of Federal Employees, Local 1431 (Union or NFFE), with the Federal Service Impasses Panel (FSIP or Panel) over a dispute concerning negotiations over an increase in the amount of official time allotted to the Union by the U.S. Department of Veteran Affairs (VA), New Jersey Healthcare System (Agency or Management). The Union filed this request pursuant to Section 7119 of the Federal Service Labor Management Relations Statute (the Statute).

The Agency is a component of the United States Department of Veteran Affairs. Its mission is to provide health care to veterans and their dependents throughout the New Jersey area. It contains a number of offices and facilities including, as relevant, a main facility in East Orange, New Jersey (East Orange facility) and an outpatient health care clinic in Brick, New Jersey (Brick clinic).

The Union represents around 847 bargaining unit employees in the East Orange facility and the Brick clinic, and the employees encumber a variety of positions. The parties are governed by a national collective bargaining agreement (CBA) between the VA and NFFE that expires in July 2024.

BACKGROUND AND BARGAINING HISTORY

In 2018, the parties executed an MOU to govern the use of official time (2018 MOU or the MOU). Among other things, the MOU provided the Union with an annual block of 2,584 hours of official time. The Union requested to bargain over the topic of official time in 2022 following a change in Union leadership. The Union's primary concern was bargaining for a dedicated block of official time for usage at the Brick clinic. The Agency believed it was inappropriate to carve out a block of time only for the Brick clinic. Eventually, the parties agreed to bargain a single MOU to cover official time for East Orange and Brick.

The parties had about 4 hours of negotiations between November 2022 and April 2022. On July 10 and 11, 2023, the parties met for about 5 hours of assisted mediation with the Federal Mediation and Conciliation Services (FMCS). The parties were unable to reach an agreement and the FMCS Commissioner released the parties from mediation on July 11, 2023. The Union subsequently sought assistance from the FSIP.

On September 28, 2023, the Panel formally informed the parties that it had voted to assert jurisdiction over this matter and decided to resolve it via a Mediation-Arbitration. I held a virtual mediation on November 15, 2023, and the parties were unable to resolve their dispute. Accordingly, we proceeded to arbitration where the Union presented testimony from two witnesses and the Agency was provided with an opportunity to cross examine these individuals. The parties were given an opportunity to submit closing briefs and rebuttal briefs; both parties submitted closing briefs and only the Agency submitted a rebuttal brief. The record is hereby closed and I am now obligated to issue a final award resolving all remaining issues.

SUBSTANTIVE ISSUE AND PARTIES' ARGUMENTS

This dispute concerns the amount of official time the Union shall be entitled to on an annual basis. Both parties are amenable to an increase of the current allocated amount of 2,584 hours per year, however, they do not agree on the amount of time that the official time shall increase to in excess of 2,584 hours.

I. Union Position

On November 15, 2023, prior to the initiation of the arbitration portion of the Mediation-Arbitration, the Union submitted the following language as its final offer:

NFFE's final offer is that the official time allocation for Local 1431, including time for use at the Brick facility, be increased from 2584 hours per fiscal year, to 3359 hours per fiscal year. This represents a 30% increase in the official time allocation.¹

The Union's justification for an increase in official time is threefold. First, the Union argues that its current workload needs warrant it. Both the Union President and Vice-President testified that they do not believe that current levels of official time allow them sufficient time to perform representational duties. The Union has five pending unfair labor practice (ULP) complaints and thirty grievances that are "outstanding."² Moreover, the Union estimates that its bargaining unit has "recently" grown by 11% and that its representatives have utilized 2724.50 hours of official time in fiscal year 2023 and 384 hours of official time as of November 9, 2023. The Union claims it utilized 288 hours of personal non-duty time in the past year to attend to representational matters.³ The Union also claims that a significant amount of representational time is devoted solely to traveling from the Agency's main facility in East Orange, New Jersey to the Brick clinic due to New Jersey traffic congestion.

Second, the Union argues that its future needs justify an expansion of official time. Specifically, the Union notes that the Agency intends to open a new clinic in Toms River, New Jersey (Toms River facility) and will relocate employees from the Brick clinic to this new location. The Union anticipates that agency staff, workloads, and services to the public will increase as a result of the opening of and relocation to the Toms River facility. Thus, the Union believes it is very likely that additional representational and bargaining obligations will arise.

Third, the Union argues that an increase in official time will ensure consistency with other similarly situated unions. The Union claims that its situation is analogous to a 2021 official time MOU executed between NFFE, Local 1138 and VA, Amarillo Veterans Health Care System (VA, Amarillo) wherein those parties agreed to an increase of 30% official time due to the establishment of a VA satellite clinic in Lubbock, Texas (Lubbock clinic).⁴ The Union believes that the Toms River facility will be comparable in size to the Lubbock facility and, as such, the MOU executed between VA, Amarillo and NFFE, Local 1138 (Lubbock MOU) is an apt comparator.

¹ Email from Jefferson Friday, Subj: NFFE Final Offer, Nov. 15, 2023.

² Union Post Hearing Brief at 4.

³ *See id.*

⁴ *See* Union Post Hearing Brief, Exhibit 1.

The Union also asserts that it is comparable to the American Federation of Government (AFGE) bargaining unit situated at the Agency's facility.⁵ The Union argues that under the national agreement between the AFGE and VA, local AFGE units would be entitled to 4.25 hours of official time per bargaining unit employee per year.⁶ Applying the calculation under the AFGE and VA national agreement would grant the Union 3,604 hours per year. However, the Union highlights that it is only requesting 3,359 hours per year under its final offer, and therefore actually seeking less time than the similarly situated AFGE unit.

II. Agency Position

Following the initiation of the arbitration portion of the Mediation-Arbitration on November 23, 2023, the Agency submitted the following language as its final offer:

Based on several hours of mediation, the Agency's last, best, final offer, is a 7% increase to NFFE 1431's 2,584 hours of official time. This corresponds to an additional 180 of official time hours. The Agency believes this alleviates NFFE's concern for additional hours, as this LBFO totals 2,764 hours of total official time for [the Agency], inclusive of the Brick Clinic.⁷

The Agency contends that its offer of a 7% increase of official time, or 180 hours additional per year, is appropriate under the circumstances of this dispute. In order to reach this figure the Agency noted the total size of the bargaining unit, 879 employees, and reviewed the number of bargaining unit employees at the Brick facility, which totals 54. As representation at the Brick facility was the primary motivator cited by the Union during negotiations to justify an increase in official time, the Agency calculated that the 54 number represents 7% of the *total* bargaining unit. As a result, the Agency believes that no more than a 7% official time increase is appropriate.

The Agency contends that the Union's proposal for a 30% increase is unjustified. Per the terms of the 2018 MOU, the Union is allotted 2,584 hours of official time per year. While the Union argues that this time is insufficient, the Agency claims that its records show that the Union had 269 *remaining hours* of official time for fiscal year 2023.⁸ Thus, the Agency counterargues that the Union is

⁵ Per information submitted in the Agency's post hearing brief, there are two AFGE locals associated with the Agency. AFGE, Local 2425 represents approximately 1,517 non-professional employees affiliated with the Agency, and AFGE, Local 1012 represents 442 employees situated at the Agency's campus at the Lyons VA Medical Center facility in Lyons, NJ. See Agency Post Hearing Brief at 1. The Union does not refute this description nor does it clarify which of these two locals it is referring to in its arguments. See Union Post Hearing Brief at 6.

⁶ See Union Post Hearing Brief at 6.

⁷ Agency Final Offer, Nov. 15, 2023.

⁸ Agency Post Hearing Brief at 4.

not even using the full amount of time already allotted to it. Indeed, a review of records led the Agency to conclude that, outside of this hearing, there are only 2 grievances, 1 demand to bargain, and 3 unresolved ULP charges that are pending between the parties.⁹ The foregoing information establishes that the Union's workload does not justify an increase in official time.

The Agency also notes that the Union Vice President testified that, although he performs some representational duties at the Brick facility, he also performs representational duties at the Agency's East Orange facility. This fact, the Agency contends, undercuts the Union's reliance on an alleged workload increase at the Brick facility. Additionally, although the Union President testified that some of her official time is devoted to allegedly lengthy trips to the Brick facility, alternatively she could use videoconferencing technology in order to circumvent travel issues. And, in any event, the Agency notes that the Vice President is stationed at the Brick facility. Thus, the Union has on site representation that should obviate the need for the President to travel.

The Agency rejects the Union's reliance on the Lubbock MOU. Under cross examination at the arbitration the Union President admitted she did not know the makeup of the Lubbock NFFE bargaining unit or the Lubbock facility itself. Additionally, the Agency's own research establishes that this facility has 225 employees, which distinguishes it from the Brick facility.¹⁰

Finally, the Agency claims that the Union's dependence upon the impending establishment of the Toms River facility is inappropriate. As an initial matter, although the current estimate is that the Toms River facility will be fully operational by May 2024, there is no guarantee of this fact. Additionally, it has not been established that the Union will actually serve as the representative of this facility once it is established. To wit, the current unit of certification does not list employees stationed at the yet unopened Toms River facility.

ANALYSIS AND CONCLUSION

Having reviewed the parties' arguments and their submissions, I conclude that it is appropriate to impose the Agency's proposal to resolve this dispute. As noted above, the Union initiated these negotiations in an effort to alter the status quo, i.e., increase the total number of official time hours allotted to it under the 2018 MOU. Therefore, the Union bears the responsibility of establishing a demonstrated need for this increase. The Union did not do so. In summary, the Union offered three primary rationales in support of its position: (1) increased workload; (2) the impending establishment of the Toms River facility; and (3) parity with other unions. I will address each rationale in turn.

⁹ See *id.* at 10.

¹⁰ See *id.* at 8.

The Union’s claims that it has experienced an increased workload appears overstated based on the record – or lack thereof – before me. It presented an exhibit claiming that it used 2724.50 hours of official time for fiscal year 2023 and has, at the time of the arbitration, used 384 hours of official time for fiscal year 2024.¹¹ This exhibit lacked supporting documentation or an explanation for how this official time was actually calculated or utilized other than a brief statement that the fiscal year 2023 figure is “ballooned” due to an inclusion of committee events. The Union did not provide, for example, an itemized breakdown, calendars, or emails to establish how official time was utilized or tabulated by the Union.¹² Similarly, although the Union claimed that it has used around 288 hours of personal time to attend to representational matters the Union offered very little information in support of or to demonstrate how they arrived at this figure. Finally, I note that the Agency argued that the Union actually only used 2,315 hours of official time in fiscal year 2023, or less than the annual allotted bank of 2,584 hours. Given the Union’s failure to support its position as the moving party in this dispute, it is hard for me to ignore the Agency’s competing figures.

The Union also claims that it has five open ULP complaints and thirty “outstanding” grievances. By contrast, the Agency contends there are only 2 grievances and 3 ULP matters. I am unable to resolve this disparity, however, because once again the Union failed to offer supporting documentation in support of its claim. Thus, I have no way of gauging the Union’s litigation activities. Simply put the Union’s efforts to establish a heavy workload were lacking.

The next argument offered by the Union is that increased official time is necessary due to the forthcoming Toms River facility. But, again, little was offered in the way of specifics. Although it is clear that this facility will replace the Brick clinic sometime in 2024 and will also be larger, it is unclear how many bargaining unit employees will be added to this facility. Indeed, as the Agency rightfully notes, it is not even clear yet that the Union will be recognized as the representative of this facility (a fact that the Union does not dispute). The Union’s position is essentially one that is filled with conjecture. This conjecture is readily apparent from the closing Union’s brief. To wit, in discussing Toms River, the Union’s brief contains the following sentences:

- “[T]here is a great *likelihood* that the bargaining unit represented by the Union will grow substantially[.]”¹³

¹¹ See Union Ex., FSIP Total Official Time at 1.

¹² At the arbitration hearing the Union President raised an email it intended to submit as an exhibit with its post hearing brief that would be used to establish a need for increased official time. The Union did not submit or otherwise reference this item.

¹³ Union Post Hearing Brief at 5. (emphasis added).

- “*If* there is an increase in staff, there will be an increase in the bargaining unit and therefore additional official time to represent the unit will be needed[;]”¹⁴ and
- “This *expected* volume at the new Toms River facility also *suggests* that the number of staff and therefore bargaining unit at the facility will increase. Additionally, when new VA facilities open, there is *usually* a large amount of employment issues that arise.”¹⁵

The above sentences from the Union’s brief have a number of qualifying words -- which have been highlighted -- that demonstrate that even the Union’s view on the impending facility is rife with conjecture. It is a difficult proposition to accept that Toms River *must* lead to an increase in official time when even the Union hedges its supposed need with terms such as “likelihood” and “expected.” A supposition cannot support imposition of the Union’s proposal.

The final arrow in the Union’s quiver is its allegation that its proposal would align the Union with two other unions and their respective amounts of official time. Notably, the Union leans on the MOU between NFFE, Local 1138 and VA, Amarillo which states that, in light of the establishment of the Lubbock facility, those parties agreed “to allocate 30% of official time as needed with a progression of 2 years up to reach 40% as additional Bargaining Unit Employees increase significantly are added.”¹⁶ But, the Union did not offer information about this facility, the bargaining unit at this facility or in general, or how the Lubbock MOU operates in conjunction with operations at the facility. Problematically, at the arbitration hearing and under cross examination, the Union President admitted that the Lubbock facility and the Brick clinic/Jersey clinic are “different.” Instead, the Union’s position is that because Lubbock is a satellite facility it should be viewed the same as the Brick facility because that is also a satellite location. But, I cannot agree with this logic given the aforementioned unknowns. The Union fell short of offering reasons for me to consider the Lubbock MOU to be an appropriate comparator.

The Union’s reliance on the AFGE unit at the Agency’s facility suffers from many of the same defects discussed above. Although AFGE represents employees at the facility the Union did not offer information about that unit, what the employees do at that unit, and how official time operates within the context of that unit and that facility. Indeed, as noted above, in its post hearing brief the Agency identified two AFGE units that are affiliated with the Agency and the Union failed to even address this alleged distinction despite having an opportunity to submit a rebuttal brief. Instead, the Union appears to believe it is entitled to a similar amount of official time because the Union’s bargaining unit employees work side by side with

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.* (emphasis added).

¹⁶ Union Post Hearing Brief, Ex. 1 at 1.

employees represented by AFGE. In the absence of additional information, I cannot agree with this conclusion.

Having rejected all of the Union's proffered rationales in support of its proposal, it logically follows that I must reject the Union's proposal as well. Doing so leaves me only with the Agency's proposed 7% increase. The Agency offered this proposal at the onset of the arbitration proceeding and at no time has it suggested any alternative language, e.g., an increase or a decrease of this figure. Because neither party offered any other language, and because I have rejected the Union's proposal, I am left only with the Agency's language. I conclude that it is appropriate to impose the Agency's language to bring this matter to a conclusion.

DECISION

Following carefully consideration of the arguments and evidence presented in this case, as the Statute requires, I hereby order the imposition of the following language to resolve this dispute:

NFFE, Local 1431 will be entitled to 2,764 hours annually (October 1st through September 30th).

/Tamiko Watkins/
Tamiko Watkins
Panel Member

January 23, 2024