



DEPARTMENT OF VETERANS AFFAIRS
OFFICE LABOR-MANAGEMENT RELATIONS
Washington DC 20420

August 12, 2010

Ami Pendergrass, Esq.
Attorney
AFGE/NVAC
1850 Columbia Pike, #117
Arlington, VA 22204

Dear Ms. Pendergrass:

This is the Agency's response to the Union's National Grievance dated May 13, 2010.

The subject stated in the grievance is as follows, "National Grievance in the matter of the Department of Veterans Affairs (VA) full denial of the transfer of national official time by National Veterans Affairs Council 1st Executive Vice President ("EVP") Mary Jean ("MJ") Burke to local officials in Local 609."

To summarize the issue of the national grievance, AFGE has alleged the following:

Ms. Burke and AFGE Local 609 President Teri James sent a memorandum on February 2, 2008 to former Human Resources Chief Herbert , distributing 1 Full Time Equivalent Employee ("FTEE") of Ms. Burke's national official time. This increased the total amount of official time at Local 609 from 1.4 FTEE to 2.4 FTEE, consisting of 1.4 FTEE of local time, as previously decided by the Federal Service Impasses Panel (FSIP) decision, and 1 FTEE of Ms. Burke's national time. AFGE alleges that local management at the Roudebush VA Medical Center adopted the changes which remained in effect until 2010.

It is factually undisputed that per the FSIP's decision in 03 FSIP 29, Department of Veterans Affairs, Veterans Affairs Medical Center, Indianapolis, Indiana and Local 609, American Federation of Government Employees, the Panel decided that Local 609 "shall be allotted 1.4 FTEE of official time; of that, the local Union president shall be limited to .6 FTEE (60-percent official time), and the Union shall have the discretion to distribute the remainder, except that no other Union representative shall receive more than 0.4 FTEE (40-percent official time)." The Panel decision is dated June 5, 2003.

The Ground Rules for the AFGE-VA Master Agreement negotiations succinctly state, "No local supplemental negotiations or local official time negotiations may be initiated after the effective date of this MOU. ... Any local official time or local supplemental

agreements or past practices as of the effective date of this MOU shall remain in effect.” The Ground Rules went into effect July 17, 2003.

Therefore, the FSIP decision was in effect prior to the Ground Rules and as such the allocation of official time contained within that decision are held fixed until the national negotiations are over. Accordingly, all local official time agreements or practices as of the MOU will be in effect.

Additionally, the Ground Rules for the AFGE-VA Master Agreement negotiations state that the Department agrees to approve 100% official time for 11 Union members of the Master Negotiation Committee. It also states, “Official time that would *otherwise be used by a union official participating in the national agreement negotiations* is transferable to another Union official.” (Emphasis added) The VA’s Office of Labor Management Relations (“LMR”) is responsible for reviewing and approving changes in national allocations of official time. Since the inception of the July 17, 2003 Ground Rules, LMR has interpreted and applied this provision to mean that any individual appointed as one of the eleven designated union members on the national negotiating team is being assigned 100% official time dedicated to the negotiations. However, if one of the eleven previously had official time allocations, either locally or nationally, that time could be transferred and used by a different union representative for its intended purpose. Stated differently, unused time owned by one of the eleven can be transferred, so long as the transferred time is being used for what it was assigned for.

The facts in the present grievance demonstrate that Ms. Burke does not have a local official time allocation at the Indianapolis VA Medical Center. As such, Ms. Burke cannot transfer any official time to local union representatives at the Indianapolis VA Medical Center since she has no allocation otherwise being used locally but for the negotiations. Ms. Burke is free to transfer any previous allocations of official time for her national positions but the time given would be only for such duties. For example, Ms. Burke could transfer her time as the EVP but the person assigned could only use the official time for its intended purpose. This interpretation by LMR is consistent with a previous arbitration decision dated March 7, 2007 on similar issues.

The Union also alleges that Ms. Burke has previously distributed national official time since 2008, creating 2.4 FTEE of official time at the Indianapolis facility. As such, the Union asserts that a past practice has been established in allowing Ms. Burke to transfer national time to local officials to perform only local representative duties.

A past practice is a work site behavior that is consistent and of significant duration that takes the form of an unwritten but enforceable policy if it concerns conditions of employment. Once established, management must provide notice and undergo midterm bargaining to change it.

There are four basic elements of a "legitimate past practice ":

1. It must not be in violation of law or government wide regulation.
2. It must have been in force for a substantial period of time.
3. It must affect a condition of employment.
4. It must have been "overtly or tacitly accepted" by a manager.

Therefore, a workplace policy may rise to the level of past practice if it is clear, known to both of the parties, consistently exercised, followed for an extended period of time by both the union and management, and previously unchallenged. In order to establish the existence of a past practice, there must be a showing that the practice had been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. Customs and Border Protection, 104 LRP 22938, 59 FLRA 910 (FLRA 2004). Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce, and the practice must continue for a significant period of time. Department of Health, Education and Welfare, 80 FLRR 1-1479, 4 FLRA 736 (FLRA 1980). However, proposals that are nonnegotiable do not become negotiable through past practices. Department of Labor, 105 LRP 42839, 61 FLRA 209 (FLRA 2005); VA Medical Center, Providence, 88 FLRR 1-1301, 32 FLRA 944 (FLRA 1988).

The Union alleges that since issuance of a memorandum by the Union to the former Chief of Human Resources in January 2008 the past practice of allowing Ms. Burke to transfer nationally allocated official time to local individuals at the Indianapolis VAMC for local official time duties was known, exercised, and followed for an extended period of time. However, no one in the Human Resources office of the Indianapolis VAMC ever received or responded to the memorandum and the record is devoid of any evidence to show local management at the Indianapolis VAMC agreed to the request.

In May 2008, shortly after the Union's request to reallocate official time, Corey Baute became the Chief of Human Resources. Since he became the Chief of Human Resources, Mr. Baute was not aware of any practice allowing such a transfer or redistribution of official time. Moreover, Mr. Baute never allowed or accepted such a practice nor has the Assistant Chief of Human Resources, Aimee Alyea. Ms. Alyea has been the Assistant Chief since October 2008 and was involved in the 2003 FSIP decision as well as enforcement of the official time determination from the decision. Ms. Alyea, like Mr. Baute, was unaware of the Union's desire to use 2.4 FTEE and was the individual who referred Mr. Baute to the 2003 FSIP decision when this issue recently arose at the facility. More importantly in a past practice analysis, neither Baute nor Alyea authorized such a transfer.

After review of the records by Mr. Baute, no documentation was found demonstrating that the facility agreed to the January 2008 memorandum. Mandatory official time reporting by the Indianapolis VAMC for calendar years 2008 and 2009 recorded and reported 1.4 FTEE of official time used, not the 2.4 FTEE as alleged. In fact, when AFGE Local 609 President Terry James told Mr. Baute of the official time usage, Mr. Baute stated that he was unaware of neither such an arrangement nor anyone else within Human Resources or executive leadership to support the Union's assertion.

Beyond these local individuals, the VA's Office of Labor Management Relations is responsible for reviewing and approving changes in national allocations of official time. LMR was never put on notice of this requested change and did not allow such a change to take place. Therefore, the alleged transfer has not been "overtly or tacitly accepted" by a manager, either at the local or national level.

Based upon a review of the record, there is lack of evidence to demonstrate that the alleged past practice of Ms. Burke transferring nationally allocated official time to local union representatives at the Indianapolis VAMC was known to both parties, consistently exercised, followed for an extended period of time, and/or approved by management either locally or nationally. Additionally, there is no evidence to demonstrate that the VA's Office of Labor Management Relations knew of the past practice, let alone agreed to such a transfer of national official time. Both locally and nationally, there is insufficient evidence to demonstrate that management knowingly acquiesced to the official time memo.

The Agency thus denies the grievance. Please contact Attorney Advisor Mark Emilio Frassinelli at 202.438.5296 or 412.954.5177 if you have any questions.

Sincerely yours,



For

Leslie Wiggins
Deputy Assistant Secretary, LMR

CERTIFICATE OF SERVICE

I certify that the attached document was sent first class mail, postage prepaid, and via email, unless otherwise noted, to the following:

UNION:

Ami Pendergrass, Esq.
Attorney
AFGE/NVAC
1850 Columbia Pike, #117
Arlington, VA 22204

Via email pendergrassnvac@aol.com



Date: 8/12/10

MARK EMILIO FRASSINELLI, ESQ.
Agency Representative

(P) 412.954.5177
(F) 412.954.5181
(C) 202.438.5296
mark.frassinelli@va.gov