

**AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 801,
Federal Correctional Institution,
Waseca, Minnesota,
the Union,**

-and-

**FEDERAL BUREAU OF PRISONS,
North Central Region,
Kansa City, Kansas,
the Employer.**

ARBITRATION AWARD

Official Time Grievance

FMCS Case No. 07-59826

Arbitrator: Barbara C. Holmes

Hearing Date: May 31, 2008

Post Hearing Briefs due: August 1, 2008

Date of Decision: August 23, 2008

Appearances:

For the Union: Aaron Martin
Martin & Kieklak
Fayetteville, Arkansas

For the Employer: Ruby Navarro
Federal Bureau of Prisons
Phoenix, Arizona

INTRODUCTION

The American Federation of Government Employees, Local 801 (herein the Union), as the exclusive representative for Michael Whaley (herein the Grievant), contends that the Federal Bureau of Prisons, Waseca, Minnesota (herein the Agency) violated the parties' collective bargaining agreement. An arbitration hearing was held and both parties had a full opportunity to present evidence through the testimony of

witnesses, the introduction of exhibits, and the submission of post-hearing briefs. A written transcript of the hearing was prepared and provided to the parties and the arbitrator prior to the submission of the post-hearing briefs.

ISSUES

1. Is the grievance arbitrable? Specifically, did the Union violate Article 31, Section f, of the collective bargaining agreement by filing the grievance with the improper person?
2. If the grievance is arbitrable, did the Agency violate Article 11, Section c (7), of the collective bargaining agreement by denying the Union's request for "official time" for the Grievant to attend a union-sponsored training course for union financial officers?

FACTUAL BACKGROUND

On April 1, 2007, Union President William Joenks sent a memorandum to Captain Craig Swartz requesting that the Grievant be granted "official time" to attend a union-sponsored training course for union financial officers. On April 17, 2007, President Joenks sent a memorandum to Acting Warden Dwayne Dubbs (Warden Holinka was on leave) requesting "administrative leave" for the Grievant for the same training course and cited a Federal Labor Relations Authority decision in support of his request.

In a memorandum dated April 27, 2007, Captain Swartz denied the April 1, 2007, request stating that Article 11, Section c (7), of the parties' collective bargaining

agreement permitted “official time” only when union training courses were “mutually beneficial” to the parties. In a separate memorandum also dated April 27, 2007, Acting Warden Dubbs denied the April 17, 2007, request for “administrative leave” citing both the parties’ collective bargaining agreement and a federal statute.

On May 7, 2007, President Joenks sent a memorandum to Warden Holinka (who had returned from leave) requesting “official time” in lieu of the previous request for “administrative leave” that had been denied. On May 11, 2007, Associate Warden Dwayne Dubbs (who had returned to his permanent position of Associate Warden) responded to Joenks’ May 7, 2007, memorandum indicating that the request had been “referred to me for reply.” He denied the request for “official time” stating that it could not be granted for matters of “internal union business.”

The Grievant attended the union-sponsored training course for union financial officers from May 14, 2007, through May 18, 2007, on “leave without pay” status.

On June 20, 2007, President Joenks sent a memorandum to Warden Holinka stating, in part, as follows:

I am writing to you to hopefully change your mind concerning an issue that I feel does not need to be made formal. ... I had previously requested official time in lieu of administrative leave for Mr. Whaley, in which you denied and also denied official time based on a response already made by Captain Swartz. ...

I think I can clear up what happened. When I sent the original request to Captain Swartz, I did not have an agenda of the training. Later, I did provide some documents to you and Captain Swartz, but I think they were somewhat confusing. ... I recently received a fax from [AFGE 8th District Vice President] Ms. Nugaard of the agenda. ... After reading the agenda, I’m sure you will see official time can be authorized for [the Grievant.]

On June 22, 2007, the Union filed a grievance with the Agency's Regional Director in Kansas City citing Warden Holinka's refusal to grant "official time" for the Grievant's attendance at the union-sponsored training course.

On June 29, 2007, Associate Warden Dubbs responded to President Joenks June 20, 2007, memorandum stating that the request for "official time" would be re-evaluated based upon the additional documentation provided. On July 5, 2007, Associated Warden Dubbs responded, in part, as follows:

Your official time request was re-evaluated based on the agenda you submitted. I have determined that this training was directed solely towards internal union business. As you know official time may not be used for matters of internal union business. The request for official time for [the Grievant] is denied.

On July 20, 2007, the Agency's Regional Office in Kansas City responded to the Union's official grievance form as follows:

Your grievance is procedurally rejected. You failed to file your grievance at the appropriate level. The Master Agreement Article 31, Section f., states when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer has authority over. Since your grievance pertains to the actions of the Associate Warden and the Warden has authority over the actions of the Associate Warden, your grievance should have been filed with the warden. Based on the above, your grievance is rejected.

On August 27, 2007, the Union invoked arbitration in accordance with the parties' collective bargaining agreement.

POSITION OF THE PARTIES

Union: 1. Arbitrability. The Union states that the parties' collective bargaining agreement requires a grievance against the actions of a CEO or Warden of a facility to be

filed with the Agency's Regional Director. It asserts that each request for "official time" was directed to the Warden and that the grievance was properly filed with the Regional Director. The Union also notes that President Joenks met with Warden Holinka in an attempt to resolve the matter informally before pursuing the grievance.

The Union asserts that because of an earlier grievance and an unfair labor practice issue, Warden Holinka and the Union had agreed that all requests to use "official time" for activities inside of the facility would be made of the appropriate department head and all requests to use "official time" for activities outside of the facility would be made of the Warden. The Union therefore concludes that the final decision maker on the issue was the Warden and that any grievance regarding her decision was properly filed with the Agency's Regional Director.

The Union also argues that the Agency should have filed its own grievance to assert that the Union's grievance was filed improperly.

2. Request for "official time". The Union states that Article 11, Section c (7), of the parties' collective bargaining agreement permits an employee to use "official time" while attending training that is "mutually beneficial" to the Union and the Agency. It points out that 5 USC 7131(b) and the parties' collective bargaining agreement prohibit the use of "official time" for a training session that relates only to "internal union business." The Union believes that the training session that the Grievant attended addressed more than "internal union business." It argues that the training session provided instruction on collecting information, completing forms and submitting reports to both the U.S. Department of Labor and the Internal Revenue Service. Because this training addressed the Union's relationship with outside parties - federal agencies and the

public – the Union argues that it cannot be considered training about “internal union business.”

The Union also contends that the Agency failed to treat the Grievant fairly and equitably in violation of Article 6 of collective bargaining agreement. It offered testimony that employees at another facility had routinely been allowed to use “official time” for similar training.

The Union believes that the Agency violated the parties’ collective bargaining agreement when it denied the Grievant’s request for “official time.” The Union asks that the grievance be affirmed and the Grievant be awarded all appropriate benefits under the federal Back-Pay Act including reasonable attorney fees.

Agency: 1. Arbitrability. The Agency contends that the grievance was incorrectly filed with the Agency’s Regional Director. It believes that because the initial request for “official time” was made to and denied by Captain Swartz, the collective bargaining agreement requires that the grievance be filed with the Warden. The Agency argues that the grievance is not arbitrable because of this procedural defect and should be denied.

The Agency disagrees with the Union’s suggestion that the Agency is required to file its own grievance to raise the procedural arbitrability issue. The Agency notes that its long-standing practice is to raise arbitrability issues with the same arbitrator that hears the merits of the case. The Agency also points out that its initial grievance response dated July 20, 2007, put the Union on notice of this issue.

2. Request for “official time”. The Agency argues that it was proper for it to deny the Union’s request for “official time” for the Grievant. It asserts that the Union

failed to show that the union-sponsored training course for union financial officers was “mutually beneficial” as required by the parties’ collective bargaining agreement. It believes that this type of training addresses the fiduciary duties of the Union and therefore is about “internal union business.”

The Agency also argues that the Union did not meet its burden in proving its claim that the Grievant was treated unfairly when his request for “official time” was denied. The Agency asserts that the examples offered by the Union to show that similar training has been approved for “official time” at other locations were not comparable.

The Agency requests that the grievance be denied.

DISCUSSION AND OPINION

1. **Arbitrability**. The Agency has raised the issue of the procedural arbitrability of the grievance. I reject the Union’s assertion that to properly raise this issue the Agency should have filed its own grievance against the Union. It is well established that procedural questions growing out of a dispute and bearing on its disposition are to be determined by the arbitrator. See, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557(1964) and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). An employer usually raises the issue of procedural arbitrability as a defense or counterclaim to a union’s grievance. Because the evidence regarding the procedural arbitrability of a grievance is quite often inextricably mixed with the evidence of the underlying dispute, it is more efficient to hear all of the evidence in one hearing. If the arbitrator finds that the grievance is not arbitrable due to a procedural defect, it is unnecessary to rule on the underlying grievance.

The Agency claims that the grievance was filed with the improper person in violation of Article 31, Section f, of the parties' collective bargaining agreement that states, in part, as follows:

1. [W]hen filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;
2. [W]hen filing a grievance against the Chief Executive Officer of an institution /facility, ... the grievance will be filed with the appropriate Regional Director ...

In this case the Union made four separate requests of the Agency in an attempt to obtain paid leave for the Grievant to attend a union-sponsored training course. The first request was made of Captain Swartz, the second of Acting Warden Dubbs, and the final two of Warden Holinka. Additionally, Union President Joenks testified that he met informally with Warden Holinka in an attempt to resolve the matter outside of the grievance procedure.

I find that the Union's grievance was correctly filed with the Regional Director as required by Article 31 of the parties' collective bargaining agreement for the following reasons. First of all, *Acting* Warden Dubbs responded to the Union's second request (dated April 17, 2007.). Although Dubbs replied to the Union's third request (dated May 7, 2007) and fourth request (dated June 20, 2007) in his capacity as *Associate* Warden, these two memoranda had been directed to Warden Holinka. In his May 11, 2007, response Dubbs states:

Your memo dated May 7, 2007, to Warden Holinka regarding [the Grievant's] attendance at Treasurer's Training next week has been referred to me for reply.

I find that Associate Warden Dubbs was acting on Warden Holinka's behalf in responding to the Union's third and fourth request. Additionally, Warden Holinka actually met with Union President Joenks to discuss the issue. Warden Holinka was clearly aware of the issue and the position her facility was taking on the issue. Because it was proper for the Union to file the grievance at the Regional Director level, the matter is arbitrable.

2. **Request for "official time"**. In this case the Union has requested paid leave time for the Grievant to attend a union-sponsored training course. 5 USC 7131, enacted as part of The Civil Service Reform Act of 1978, states, in part, as follows:

- (a) Any employee representing an exclusive representative *in the negotiation of a collective bargaining contract ... shall be authorized official time* for such purposes ... during the time the employee otherwise would be in a duty status. ...
- (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 *non-duty status*.
...
- (d) Except as provided in the preceding subsection of this section ... any employee representing as exclusive representative ... shall be granted *official time in any amount the agency and the exclusive representative ...agree to* be reasonable, necessary, and in the public interest.
(emphasis added)

To summarize, an employee representing a union *must* be given "official time" to participate in the negotiation of a collective bargaining contract, *may not* be given "official time" for any activities relating to the "internal business" of the union, and *may* be given "official time" for any other activities if the union and the agency agree.

In Article 11, Section c, the Union and Agency have agreed to a listing of activities that qualify for “official time”:

It is understood that official time for designated Union representatives can be granted ... for the following purposes:

...

7. to travel to and attend training that is mutually beneficial to the parties;

...

10. to complete necessary reports and forms to meet requirements imposed by federal agencies upon the Union to disclose certain information about its operations.

However, this same section ends with the following provision:

Official time will not be used for internal Union business, as stated in 5 USC, 7131(b).

In this case the parties’ dispute is whether the union-sponsored training course for union financial officers is “mutually beneficial” to the parties. If so, “official time” must be granted.

The Union submitted into evidence the agenda of the training course. The agenda lists the following topics:

- Review Constitutional and Fiduciary Responsibilities as they related to LM reporting
- AFGE WEB SITE – review forms for LM and IRS Reporting
- Demonstration of DOL Web Site
- Demonstration of IRS Web
- Review LMRDA Laws
- Department of Labor Reporting Requirements
- Review of DOL LM Forms
- How to Prepare LM Forms
- IRS Reporting Requirements
- Review of 990/990Z Tax Forms
- How to Prepare IRS Tax Forms
- Addressing you IRS and DOL Reporting Requirements through the use of QuickBooks Pro 2006 &2007
- QuickBooks/LM 3 Training

The Union testified that these topics referred to the Union's statutorily mandated duty to file certain disclosure and financial forms with the U. S. Department of Labor (DOL) and the Internal Revenue Service (IRS). The Agency believes that this type of training addresses the fiduciary duties of the Union and therefore is about "internal union business" for which "official time" may not be given.

I find that the Agency's argument that the subject matter of the training is about "internal union business" to be without merit. The parties have already agreed in Article 11, Section c (10), that "official time" may be used to "complete necessary reports and forms to meet requirements imposed by federal agencies upon the Union to disclose certain information about its operations." The Agency cannot now claim that the subject matter of the training is "internal union business."

It is also well established in case law that such activities are not considered "internal union business." In *American Federation of Government Employees, AFL-CIO, Local 2823 and Veterans Administration Regional Office, Cleveland, Ohio*, 2 FLRA 1 (1979), the Federal Labor Relations Authority (FLRA) held that a union's contract proposal providing for "official time" to prepare the reports required by the DOL was not in violation of the federal statute that prohibits using "official time" for internal union business.

[T]he required reports ... function as an externally imposed disclosure mechanism opening to view facets of the operation of the labor organization, as a means of implementing the policy of the statute. It must be concluded, therefore, that the preparation of the reports is not solely related to the institutional structure of a labor organization and, thus is not an activity related to the internal business of a labor organization within the meaning of Section 7131(b) of the statute.

This decision was affirmed in *National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service*, 38 FLRA 107 (1981), regarding not only reports required by the DOL, but also reports required by the IRS and any federal agency.

Although I have found that the Union's request in this case does not concern "internal union business," and that Article 11, Section c (10), allows "official time" for the *preparation* of these federal reports, the question remains as to whether a *training course* on how to prepare the federal reports is "mutually beneficial" as required of Article 11, Section c (7). The parties have provided no bargaining history to elucidate the meaning they intended for the phrase "mutually beneficial." Neither has any evidence been submitted of other types of training that have been deemed by the parties to be "mutually beneficial."

In *National Treasury Employees Union and U.S. Department of the Treasury, Bureaus of Alcohol, Tobacco and Firearms*, 45 FLRA 30 (1992), a union contract proposal to provide for official time for union stewards to attend union-sponsored training on collective bargaining was held negotiable.

Raising the level of competence of the Union representatives who are involved in the conduct of the collective bargaining relationship would contribute to effective and efficient Government operation.

On balance, we find that the benefits that the provision affords to employees, both individually and collectively, and to the public interest outweigh the burden placed on management's right to assign work..

In this case the Union argues that because previous case law has held that there is a public interest in requiring unions to prepare and submit DOL and IRS reports, there must be a public interest in *training* union representatives how to accurately complete

these reports. But is this public interest “mutually beneficial” as required by the parties’ collective bargaining agreement? I find that it is.

The reporting requirements that were the subject of the union-sponsored training course in this case were enacted in the Labor-Management Reporting and Disclosure Act of 1959. The impetus for this legislation was the unacceptable corruption and criminal activities occurring in several prominent labor unions at the time. The reporting requirements are intended to make certain that labor unions and their officers and employees are held to the highest standards of responsibility and ethical conduct when dealing with union finances and labor-management relations. 29 USC 401, Section 2, b) states, in part, as follows:

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

Because these reporting requirements ensure the integrity of the labor-management system, I find that sending the Union’s treasurer to a 3-day union-sponsored training program that dealt solely with DOL and IRS reporting requirements is “mutually beneficial” to the Union and the Agency. I find that the Agency incorrectly denied the Union’s request to use “official time” in this particular instance.

The remedy requested by the Union is five days of back pay (two days of travel plus three days of training) for the Grievant and attorney fees pursuant to the Back Pay Act at 5 USC 5596. Under this statute an arbitrator may authorize back pay if it is found

that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or the reduction of an employee's pay, allowances or differentials. *See United States Dept. of Health and Human Services*, 54 FLRA 1210, 1218 (1998). A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Act. *See United States Dept. of Defense, Dept. of Defense Dependents Schools*, 54 FLRA 773, 785 (1998). Because Article 11, Section c (7), of the parties' collective bargaining agreement has been violated and because the Grievant took "leave without pay" to attend the training course, I find that the Grievant is entitled to five days of back pay.

Section 5596 (b)(1)(A)(ii) of the Back Pay Act states that reasonable attorney fees "shall be awarded in accordance with standards established under section 7701 (g) of this title." The threshold requirements for an award of attorney fees under section 7701(g) are as follows: (1) the appellant must be the "prevailing party"; (2) the award of attorney fees must be "warranted in the interest of justice"; and (3) the fee must be "reasonable." *U.S. Department of the Navy, Headquarters, Naval District, Washington, D.C. and Fraternal Order of Police, U.S. Navy Yard Labor Committee*, 48 FLRA 1264 (1993). Although the Union, on behalf of the Grievant, is the prevailing party in this matter, I do not find that an award of attorney fees is "warranted in the interest of justice."

Case law has established that an award of attorney fees is "warranted in the interest of justice" if any one of the following criteria is met: (1) the case involves prohibited personnel practices; (2) where agency actions are clearly without merit or wholly unfounded, or where the employee is substantially innocent of charges brought by the agency; (3) when agency actions are taken in bad faith to harass or exert improper

pressure on an employee; (4) when gross procedural error by an agency prolonged the proceeding or severely prejudiced the employee; (5) where the agency knew or should have known it would not prevail on the merits when it brought the proceeding; or (6) where there is a service rendered to the Federal work force or there is a benefit to the public derived from maintaining the action. *U.S. Department of Defense, Defense Distribution Region East, New Cumberland, Pennsylvania and American Federation of Government Employees, Local 2004*, 51 FLRA 155, 161 (1995).

The current case involves a legitimate disagreement over whether a particular training course was “mutually beneficial” to the Agency and Union. I do not find that that agency engaged in a prohibited personnel practice, acted wholly without merit, acted in bad faith, committed any gross procedural error or knew it would not prevail. Nor do I find that there is a service rendered to the federal work force or a benefit to the public derived from maintaining this action. For these reasons, an award of attorney fees to the Union is denied.

AWARD

1. The grievance is sustained.
2. The Grievant is entitled to five days of back pay at the rate of pay he would have received in May of 2007, and any other wage-related benefits required under the Back Pay Act.
3. An award of attorney fees for the Union is denied.

I will retain jurisdiction over this matter for 30 days from the date of the award for the sole purpose of resolving any issues regarding the amount of back pay and any other wage-related benefits awarded to the Grievant.

DATED: _____

Barbara C. Holmes
Arbitrator