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| In the Matter of the Arbitration Between | ) | |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Council 222 | ) | Case No.: 200310-04768 |
| "Union" | ) | |
| and | ) | |
| U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) | ) | |
| "Agency" | ) | |

BEFORE: Joshua M. Javits, ARBITRATOR

APPEARANCES:

For the Agency: Ryan Donaldson

For the Union: Javier Soto

Date of Hearings: September 3, 4, 9 and 11, 2020

Dare of Briefs: December 20, 2021

Date of Award: March 28, 2021

**ISSUE:**

The Union proposes that the issue presented is as follows:

> Did the Agency violate the Labor statute when bargaining Article 47 (Official Time)? If so, what shall the remedy be?

In contrast, the Agency presented the issue as:

> By its conduct during term negotiations in 2019, did HUD fail to negotiate in good faith in violation of Section 7116(a)(1) or (5) of the Federal Labor-Management Relations Statute while bargaining over Article 47 of the parties' CBA, titled Union Representative and Official Time? If so, what shall be the remedy?

**BACKGROUND AND FACTS:**

The instant grievance arises from the parties' negotiations over Article 47 (Official Time) of the parties' CBA. Negotiations between the parties were initiated when the Agency sent an initial notice of intent to renegotiate the CBA to the Union on May 21, 2018. The parties' existing 2015 Collective Bargaining Agreement was due to expire on July 23, 2018.

The 2019 Term negotiations began in February 2019 and included some fifty-one (51) CBA articles. Initial proposals were exchanged in February 2019 and proceeded throughout 2019. Negotiations regarding Article 47 between the parties began in December 2019.

It is worth noting that the parties exchanged three (3) respective proposals dealing with Article 47 during the initial period of the term negotiations. Management made its proposals on February 28, 2019; December 3, 2019, and then on December 4, 2019. The Union made proposals on December 3, 2019; December 4, 2019; and then again on December 4, 2019.

The parties, however, were unable to reach an agreement on Article 47 and the Agency subsequently declared that the negotiations were at an impasse on December 6, 2019.

On January 16, 2020, the Union filed a grievance alleging that Agency management's proposals over Article 47 constituted a failure to bargain in good faith in violation of Section 7116(a)(1) and (5).

Against this backdrop, the CBA articles that the parties were unable to agree to were submitted to the FSIP. After the FSIP asserted jurisdiction over the matter, the parties exchanged an additional proposal over Article 47 in May 2020 – several months after the Union originally filed the instant grievance regarding Article 47.

At the hearing, Agency Negotiator Katherine Hannah testified that she was management's Chief Negotiator for the HUD-AFGE term negotiations in 2018 through the present. Negotiator Hannah testified that Agency management was aware of a number of existing problems with the HUD-AFGE 2015 CBA and, because of this, the Agency had an interest in reopening the CBA for term negotiations.

According to Hannah, she gathered data about the CBA and the issues that could potentially be addressed during the term negotiations. After consulting with and surveying all HUD managers and supervisors about requested changes to the CBA, it was determined that Article 47 (Official Time) was considered one of the two biggest concerns that needed to be addressed during term negotiations. The Agency negotiating team spent time discussing Article 47 and considering what uses of Official Time, beyond that which is statutorily required, met the "reasonable, necessary, and in the public interest" standard within 5 U.S.C. 7131(d), Negotiator Hannah explained.

There was concern that the amounts of Official Time used by certain HUD employees was 100% Union work, Negotiator Hannah explained. Although some HUD employees were not doing any Agency work, these employees were not classified as being on Official Time 100% of their time. Negotiator Hannah testified that this caused her to look further to determine "where that time was going."

It was subsequently discovered that the HUD timekeeping system was coding telework as Agency work rather than Official Time – even for employees who did not do any Agency work whatsoever. This problem meant that the amount of Official Time used at HUD was under-reported compared to the total amount of Official Time that was actually being used, Hannah testified. After discovering this issue, Ms. Hannah worked to ensure that a new timekeeping code was added so as to more accurately capture the amount of Official Time used at the Agency.

According to Agency Negotiator Hannah, the management team drafted an initial proposal that would address the concerns that HUD managers had reported about Article 47 (Official Time). Management's proposal was designed to (1) limit the allowable uses of Official Time only to those statutorily required activities and the discretionary activity of attending investigatory interviews; (2) not to include a specified allocation bank of Official Time hours as the prior CBA had done; (3) limit individuals to a specified amount of Official Time (10% of total

paid duty time compared to the unlimited amount of Official Time under the prior CBA); (4) require Union officials to submit a written request giving information about the Official Time sought to his/her immediate supervisor to improve accountability;' (5) give supervisors the ability to deny Official Time requests.

According to Negotiator Hannah, the Agency's proposals on Article 47 were aimed at addressing the issues that HUD managers and supervisors had regarded as the main misuses of Official Time at the Agency.

Management's first proposal was initially presented to the Union on February 28, 2019. Although it was in possession of the Agency's initial proposal with respect to Article 47, the Union, however, refused to begin discussing Article 47 from February 28, 2019 through December 2019. It was not until December 2, 2019, that Agency management was able to formally present and discuss its initial proposal on Article 47 with the Union negotiating team, Negotiator Hannah stated.

This initial proposal limited the allowed uses of Official Time to statutorily required activities and the discretionary activity of attendance at investigatory interviews. According to Negotiator Hannah, the Agency's first proposal did not include an allocated bank of Official Time hours, as the prior CBA had done, and it did not include an overall cap on the amount of Official Time that AFGE could use. Hannah testified that the initial proposal sought to introduce a new structure

to reduce the amount of Official Time that an individual could use. To this end, the proposal limited any individual employee's use of Official Time to no more than 10% of the employee's total duty time.

Agency Negotiator Hannah testified that the Union dismissed management's initial proposal because it believed the 10% cap would not be sufficient to cover things like investigatory interviews. Hannah testified that, in her opinion, it was unlikely for a Union representative to require more than 10% of total duty to attend investigatory interviews. However, Negotiator Hannah testified that the Agency team was prepared to "permit a Union Official to attend investigatory interviews on paid time every time" because the Agency team believed it was reasonable, necessary and in the public interest to have a Union Representative available at investigative interviews.

Negotiator Hannah noted that HUD had historically high rates of Official Time usage compared to other federal agencies, averaging more than 2.5 times more than government-wide average for the most recent year published by OPM. This unusually high rate of Official Time had an negative impact on producibility at HUD and created resentment between managers and Union officials. Workload changes that were required to accommodate Official Time for Union representatives meant that other HUD employees were forced to pick up the Agency work that could not be completed by the Union representatives. As a result of this shift in workloads to accommodate Official Time other HUD

employees, through no fault of their own, had to pick up the slack, something that created resentment within the Agency's workforce.

To remedy this problem, the Agency's proposed changes that would allow managers to consider if Official Time requests were necessary. According to Negotiator Hannah, the current CBA required the Agency to prioritize Official Time usage over accomplishing HUD's mission. Moreover, the current Official Time system required other employees to disrupt their work assignment so as to complete any critical work assignments that might be left uncompleted by Union representatives and stewards.

According to Negotiator Hannah, the Agency negotiating team explained to the Union that managers and supervisors needed to know basic information about any use of Official Time. Information such as how much time is needed and where the employee would be were needed that Agency management could approve and certify the usage of Official Time for that employee, Hannah explained.

The Union rejected this approach, however, insisting that management had no right to have any information about an employee's usage of Official Time. Apparently the Union felt that requiring this level of detail was an invasion of privacy of employees, especially in small offices where employees could be easily identified.

Negotiator Hannah testified that the Union's position was that no information was required to be provided to a manager or supervisor just as had been the case for the 2015 CBA.

On December 3, 2019, the second day of bargaining over Article 47, the Union presented its first proposal to the Agency team (See Agency Exhibit 33). This proposal sought to maintain all the same allowed uses off for Official Time that was in the 2015 CBA, although it did propose to limit quarterly allocations of Official Time to 50% at the National Level and at "169 hours per quarter per representative." Agency management dismissed this approach because the Union's proposal had no limit on the total number of AFGE Union representatives and, in management's view, this could result in a dramatic increase in the amount of Official Time usage.

Negotiator Hannah testified that she was worried that the Union could have an unlimited number of Union representatives since the 2015 CBA had no limit on the number of Union representatives (although it did have a set number of hours that was allowed – 58,000 hours). She testified that by increasing the number of Union representatives and allowing them to use up to 50% of their duty time for Union responsibilities, the Union's first proposal would have actually worsened the problems with Official Time that management was trying to remedy.

It is worth noting that this point that the Union only used some 24,000 Official Time hours for the 2016 year.

At the hearing, Ms. Hannah testified that one of the most contentious areas during the Article 47 negotiations was whether or not Official Time would be permitted for the handling of Union grievances. Management wanted to ensure that Official Time could not be used for the handling of grievances, she testified. If Official Time covered the handling of grievances, they would only encourage an increase in the number of grievances filed by the Union.

The Union dismissed this argument, claiming that including grievance handling in the permitted uses of Official Time would result in the Union having to file less grievances.

In its second proposal, the Agency moved the 10% individual cap on Official time usage to a 15% individual cap. According to Agency Negotiator Hannah, this move by the management negotiating team was in response to the Union's assertion that 10% of paid time would not be sufficient. Management's second proposal also offered more allowed uses of Official Time. Attending formal discussions, preparing for mid-term negotiations, preparing for FLRA proceedings, and training Union representatives would be permitted uses of Official Time. The Agency's second proposal also changed the denominator to be used in calculations to duty time instead of paid time.

During discussion over the Agency's second proposal, Union representatives insisted that management's approach to negotiating Article 47 was based entirely on the recently issued Executive Order.

On December 4, 2019, the Union presented its second proposal to the Agency negotiating team (See Agency Exhibit 33). In its second proposal, the Union suggested that Official Time be limited to 30,000 hours per year (down from 60,000 under the 2015 CBA), excluding negotiating time, FLRA proceedings, or Union administrative time. The Union believed that 30,000 total hours constituted a significant reduction from the 60,000 total hours that was available under the prior CBA. The Union's offer further proposed that 15 Union representatives could use up to 832 hours of Official Time, while other representatives could use up to 676 hours of Official Time.

Agency Negotiator Hannah testified that although this appeared to be a significant reduction in the number of hours available for Official Time, she believed that it was not "an actual reduction" since the 30,000 hours proposed was still a lot more than the Union had used in the last couple of years. Hannah further noted that the Union's proposal did not include the time spent in negotiations and in FLRA matters in the 30,000 total hours figure. She testified that the management negotiating team was concerned that under the Union's proposal the Agency would not be able to perform a performance evaluation on some employees. Management was unable to perform performance appraisal

on employee's who worked less than 50% of their duty time, she explained. Under the Union's most recent proposal, there would continue to be numerous Union representatives who did not meet the required 50% work threshold in order to receive a work evaluation.

Later on December 4, 2019, the Agency presented management's third proposal on Article 47 to the Union. Agency Negotiator Hannah testified that management's latest changes were made in an attempt to reach an agreement with the Union on Article 47.

The Agency's latest proposal added labor-management relations meetings to the list of permitted uses of Official Time following discussions with the Union. The proposal also explicitly allowed the Union to carry over unused Official Time allocations from one quarter to the next quarter, something that the Union had requested during prior discussions. Management's third proposal also removed language that would have required employees to spend at least 85% of their paid time doing Agency work (so as to be consistent with management's second proposal that allowed individuals to use Official Time for up to 15% of all paid time rather than duty time).

That same day, the Union presented its third proposal on Article 47. The Union's third proposal reduced the total amount of Official Time hours to 15,000 for the fiscal year. This figure, however, excluded time spent in negotiations,

mediation and impasse resolution, FLRA matters, labor-management meetings that did not include employees, or time spent participating in EEOC matters/MSPS proceedings/OSC matters/Workers Compensation claims and OSHA visits.

Negotiator Katherine Hannah testified that she informed the Union the following day, December 5, 2019, that the Agency intended to move on to bargaining the next CBA article as the parties were so far apart that there appeared to be no prospect of reaching an agreement on Article 47.

Although the management negotiating team had examined the Union's latest proposal, it was unable to find any area where the Agency was prepared to move any further. Since the parties had each presented the minimum of three (3) proposals on each contractual article as provided for under the negotiating ground rules, and given that the parties did not appear to be any closer to reaching any sort of agreement, Agency Negotiator Hannah informed the Union that management's third proposal was the Agency's last and best offer and declared that the negotiations had reached an impasse.

During her testimony, Ms. Hannah dismissed the Union's assertion that the Agency's movement on Article 47 were minimal or insignificant. According to Hannah, the Agency went from having no bank of Official Time to a bank of thousands of hours of Official Time; it made significant changes to the way an

individual's cap on Official Time would be calculated; and it made movement on procedures and administrative issues that were designed to help reach an agreement with the Union.

During her testimony, Agency Negotiator Katherine Hannah testified that the Agency did not base any of its proposals or other negotiation considerations in EO 13837. By the time that Agency management delivered its initial proposals to the Union in February 2019, EO 13837 had been enjoined by federal court for more than five (5) months (August 2018), she explained.

Agency Negotiator Hannah testified that in September 2018 she and her team "removed anything that could have been based on the executive order" as they "wanted to make sure that everything that we were seeing was based on our own experience at HUD." Even after the injunction on EO 13837 was lifted in October 2019, Agency negotiators did not base any of their proposals on the executive order because it was unclear whether the EO would remain in effect. According to Ms. Hannah, Agency negotiators "didn't feel comfortable relying on the executive order" and therefore did not include it in their proposals to the Union.

Section 7116 (Duty to Bargain in Good Faith) states that:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency…

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

….

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.

Section 7114(b) details the obligations of the Union and the Agency when engaged in collective bargaining under the Statute:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining…"

At the hearing, Union Local President and Chief Union Negotiator Dr. Ashaki Robinson testified that the Agency failed to bargain in good faith during the term negotiations. The Agency wished to make huge changes to the parties existing contractual provision dealing with Official Time (Article 47). Management was insisting on strict caps on the amount of Official Time that would permitted – both the overall total hours and the hours afforded to each individual Union representative. The Agency was further insisting that the permitted uses of Official Time were greatly reduced for Union representatives, Dr. Robinson testified.

According to Dr. Robinson, the effect of the Agency's proposals was that Union officials would be precluded from representing bargaining unit members in investigations and grievances. Agency management discounted the importance of Union representatives in dealing with employee complaints without having to file an official grievance, Dr. Robinson explained. These constituted major changes in how the parties had previously administered Official Time in the past; particularly after there had been no changes in Article 47 for many years.

Union Negotiator Robinson testified that the Agency also demanded that Union representatives submit requests for Official Time to management or supervisors and insisted that managerial approval be granted before Official Time was authorized. In addition, the Agency was insisting that Union representatives provide details of why they were seeking Official Time before any request would be approved. According to Robinson, the Union could not agree to such a proposal as it would put the privacy of employees – the individual who was making a complaint – in jeopardy, especially in smaller HUD offices.

Union Negotiator Robinson noted that the parties only really negotiated over Article 47 for three (3) days (and for a total of 10 hours) before the Agency claimed that the parties had reached an "impasse." While Robinson accepted that each party had been able to present three (3) proposals during negotiations over Article 47, she nonetheless argued that the Agency's actions in declaring an

impasse over such a contentious issue was precipitous – particularly where the Agency was seeking major changes to the existing contractual provision on this issue.

According to Dr. Robinson, Agency management declared the negotiations to be at impasse in the belief that the FSIP would almost certainly find in favor of the Agency on all open issues. Management's approach to negotiating Article 47 was to essentially offer the most basic statutory level by only allowing Official Time if "reasonable, necessary, and in the public interest." The Agency was seeking, Dr. Robinson testified, the very lowest interpretation and application of that statutory language regarding Official Time.

Union Negotiator Robinson testified that she believed that management's proposals were based on Executive Order 13837, which directed government agencies to restrict the scope of bargaining with federal sector Union and limit Official Time for representational duties. According to Robinson, the OPM directed federal sector Agencies to implement the President's EO with respect to Official Time and effectively instructed federal agencies to cut Official Time. The Agency's proposals even matched the language of the EO dealing with Official Time, Dr. Robinson noted.

Union Negotiator Robinson testified that the problems with the Agency's last proposal (proposal 3) were threefold. Not only did the Agency's proposal provide for insufficient Official Time hours, but it also removed the handling of grievances from Official Time. The other problem, Dr. Robinson explained, was that the Agency wanted to be able to deny Official Time if "operational needs" required it to do so. This "operational needs" standard was overly broad and would effectively allow Agency management to deny Official Time for any reason.

According to Robinson, one of the biggest concerns that the Union had with management's proposals on Official Time was that it did not cover "grievance handling." This was particularly problematic, Dr. Robinson testified, given that Union representatives spend some 60% of their time handling grievances. Under the Agency's proposals, only investigatory meetings would be considered allowable Official Time – not grievance handling. However, much of the Union's time is spent trying to resolve issues before the filing an official grievance, Robinson testified. By removing grievance handling from Official Time meant that Union officials would not have enough time to fulfil its obligations under the disciplinary provision of the parties' contract, Dr. Robinson testified. This meant that the Union would no longer be able to represent bargaining unit members properly and would take away the Union's overall ability to function.

Dr. Robinson testified that she explained to the management negotiating team that its proposals not to allow Official Time for the filing of grievances was unacceptable. If there was no Official Time for the filing or handling of grievances, then this would undermine the Union' statutory duty to represent bargaining unit members. Management, however, was unwilling to make any concessions on this issue. In fact, the Agency's negotiating team members "participated very little" during the negotiations, Dr. Robinson stated. The Union "couldn't really engage with the Agency team" and, even though the Union moved significantly in its proposals, the management team "moved only a little – just enough to check the box."

According to Robinson, the Agency acted in a way that was not normal bargaining but rather was designed to force the Union into extreme concessions. The management team's insistence on terms that would hamper the Union's statutory duty to fair representation to employees meant that the proposals were dead on arrival, Robinson argued. Robinson testified that the Agency failed to bargain in good faith during the mid-term negotiations. During the discussions, the Agency refused to compromise in any way and refused to modify its initial proposals. According to Robinson, the Agency refused to amend or alter its proposals in any way. Although the Union repeatedly amended it proposals in an effort to reach a compromise agreement between the parties, management's proposals never meaningfully changed.

**POSITIONS OF THE PARTIES:**

**The Union's Position:**

The Union argues that the Agency committed an unfair labor practice in violation of 5 U.S.C. s7116(a)(1) and (5) by refusing to bargain in good faith with the Union and by refusing to provide the Union with data reasonably necessary for collective bargaining.

5 U.S.C. s7116 (Unfair Labor Practices) (a)(1) and (5) provides that:

> (a) For the purpose of this chapter, *it shall be an unfair labor practice for an agency*…
>
> (1) *to interfere with, restrain, coerce any employee in the exercise by the employee of any right* under this chapter;…
>
> (5) *to refuse to consult or negotiate with a labor organization* as required by this chapter.
>
> (Emphasis added).

According to the Union, the Agency's entire plan from the outset of ground rules negotiations was to get the matter to the FSIP. To reach this goal, the Agency presented unreasonable and inflexible proposals regarding Article 47 (Official Time) during the term negotiations. At no point during the bargaining process did the Agency approach negotiations with a sincere desire to reach a collective bargaining agreement with the Union. To the contrary, the Agency's goal was to limit negotiations between the parties and ultimately to progress the matter to the FSIP.

The Union dismisses the Agency's argument that it was bargaining in good faith regarding Article 47. Agency management refused to bargain the amounts of available Official Time with the Union and refused to permit Official Time to be used without restriction (up to 100% Official Time). This refusal to bargain over Official Time for grievance representation was completely arbitrary and proof that Agency management was only engaged in surface bargaining.

According to the Union, the Agency's proposals were so extreme that they demonstrated an intent to frustrate the entire bargaining process. Management's proposals were designed to prevent Union Representatives from filing grievance son behalf of bargaining unit members, the Union argues. By unilaterally and arbitrability placing limits on Official Time – including by denying Official Time for Union Representatives who wished to meet with bargaining unit members to investigate, prepare, and participate in relevant meetings and hearings - the Agency failed to bargain in good faith as required by the statute. Forcing Union Representatives to use personal leave in order to file and process grievances was intended to limit the use of grievances against the Agency.

The Union believes that the Agency's insistence on excluding representation duties from Official Time was solely designed to diminish Union representation of bargaining unit members. Management's proposals that insisted on removing grievance representation from Official Time allowances meant that the Union would be unable to perform its representational duties for its members. By denying all Official Time for grievance representation work, and by refusing to amend its proposals in any meaningful way, the Agency demonstrated that it was not bargaining in good faith during the term negotiations, the Union asserts. Where the Agency makes proposals that are intended to significantly disadvantage the Union and its bargaining unit members, that is compelling evidence that management did not make any meaningful effort to negotiate with the Union. The Agency's obstinate "take-it-or leave-it" approach to bargaining Official Time was not a case of "hard-bargaining" as management claims, but rather is evidence that management refused to bargain with Union negotiators.

The Union notes that the 2015 CBA allowed a maximum of 58,525 hours for Official Time annually and it was permitted for some nineteen (19) different types of Union representational duties. An employee who received an Official Time allocation of 2080 hours annually (taken from the ban of Official Time hours of 58,528) would be on 100% Official Time.

According to the Union, the Agency's proposals radically changed how much Official Time would be available and the types of duties that would be covered by Article 47. In its proposals, the Agency stubbornly refused to bargain Official Time up to 100% of a Union representatives annual hours. Moreover, the Agency's proposals became more and more regressive with each set of proposals it made to Union negotiators. Management's first proposal on February 28, 2019, proposed that total Annual Official Time hours be only 18% of the 2015 CBA hours and that each individual Union representative have a 10% limit (10,400 Union hours based on an average of 50 representatives or 208 hours/p.a. per representative). Its second proposal dated December 3, 2019, proposed that total annual Official Time hours be only 11% of the 2015 CBA hours and that each Union representative have a 15% individual limit (9512 Union hours cap for a maximum of 30 Union representative for an average of 312 hours/p.a. per representative). Finally, in its third proposal, the Agency proposed that total annual Official Time hours be only 3.4% of the 2015 CBA hours and that each individual Union representative have a 15% limit (2000 Union hours cap for a maximum of 7 Union representatives for an average of 276 hours/p.a. per representative).

According to the Union, the Agency's proposals actually became more regressive during the term negotiations. Not only did the Agency wish to limit the number of Official Time hours available, but it also wished to limit the hours available to each individual and to limit the types of activities that Official Time

could be used for. The increasing harshness of the Agency's proposals clearly establish that management had no desire to meaningfully negotiate or to reach an agreement with the Union, evidence of management's failure to negotiate in good faith during the term negotiations. The Union believes the totality of the evidence shows that management's proposals sought to frustrate the possibility of arriving at any sort of agreement; it had no intention of trying to reach an agreement.

The Union insists that the Agency committed unfair labor practices under the statute by failing to bargaining in good faith. Therefore, the Union requests that the Arbitrator sustain the instant grievance, find that the Agency failed to meet its statutory obligations to bargain in good faith, and conclude that the Agency committed unfair labor practices pursuant to Section 7116(1), and (5) of the Statute. The Union requests that a status quo ante remedy for Article 47 be issued to rescind the changes that were implemented, so that meaningful bargaining between the parties occurs. It further requests that the Agency be ordered to post a notice acknowledged its violations to all bargaining unit employees.

**The Agency's Position**

According to the Agency**,** the Union has failed to meet its burden that the Agency committed an unfair labor practice. The Agency believes the circumstances of the instant case demonstrates that management acted in good faith throughout the ground rules negotiations. Management approached the negotiations with a sincere resolve to reach an agreement regarding Article 47 (Official Time).

The Agency notes that the Union may have disagreed with management's objectives during the negotiations over Article 47. However, there is absolutely no evidence that the Agency engaged in bad faith negotiating during these negotiations.

The Agency notes that the duty to negotiate in good faith includes the following obligations;

Section 7114(b):

> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
>
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining…"

According to the Agency, the overwhelming evidence presented at the hearing showed that management bargaining in good faith with the Union over Article 47. It notes that the Union has not alleged that the Agency sought to avoid negotiating over Article 47; did not refuse to offer dates for negotiations; did not violate the parties' ground rules for negotiations; and did not faith to provide information during the negotiations. Testimony presented at the hearing showed that Agency management was very clearly interested in meeting and discussing Article 47 as frequently as was necessary in order to make progress in

renegotiating the Official Time provision of the parties' 2015 CBA. HUD managers and supervisors had identified Article 47 as one of the most important issues to be addressed during the term negotiations over a new CBA, the Agency asserts.

The Agency dismisses the Union's assertion that management failed to approach negotiations with a sincere resolve to reach an agreement. There was no evidence that the Agency merely engaged in superficial surface bargaining in order to proceed to impasse over Article 47, as the Union claims. Nor was there any evidence that the Agency simply going through the motions of bargaining. According to the Agency, it made numerous meaningful and substantive proposals to the Union and it showed a willingness to move during the negotiations in response to the Union's proposals. At all times, the Agency made in-depth proposals at the bargaining table and presented a clear rationale for its proposals. Management's proposals during negotiations was to correct the real problems and issues at HUD with Official Time, the Agency insists. In contrast, the Union made only superficial concessions during negotiations and sought to maintain the status quo with respect to Official Time.

The Agency denies that its negotiating team did not engage during the December 2019 bargaining sessions over Article 47. Throughout the negotiating sessions, the parties discussed their relative positions and detailed their experiences of Article 47 at HUD. There was, the Agency argues, a reasoned

back-and-forth discussion between the parties at the negotiating table. Both bargaining teams were attempting to convince the other side of their respective positions, the Agency contends. The totality of the circumstances and the evidence in this case establish that there was sincere – yet forceful – bargaining ongoing between the parties. While both parties held very strong positions on Article 47, which ultimately resulted in impasse, this does not equate to bad faith bargaining. Hard bargaining by the parties is not evidence of bad faith bargaining, regardless of how frustrated the bargaining teams had become with one another, the Agency asserts.

The Agency rejects any suggestion that its Official Time proposals were based-upon or constricted by Executive Order 13837. Agency negotiators credibly testified at the hearing that management did not base any of its proposals or other negotiation considerations in EO 13837. By the time that Agency management delivered its initial proposals to the Union on February 28, 2019, EO 13837 had been enjoined by federal court for more than five (5) months (August 2018). Agency Negotiator Hannah testified that in September 2018 she and her team "removed anything that could have been based on the executive order" as they "wanted to make sure that everything that we were seeing was based on our own experience at HUD." Even after the injunction on EO 13837 was lifted in October 2019, Agency negotiators did not base any of their proposals on the executive order because it was unclear whether the EO would remain in effect. According to Ms. Hannah, Agency negotiators "didn't feel

comfortable relying on the executive order."

The Agency notes that Official Time presented historical issues at HUD, which had become increasingly problematic due to the uncontrolled use of Official Time. Management negotiators were intent on revising Article 47 given that Official Time issued were in the top two priority concerns raised by HUD managers and supervisors nationwide.

According to the Agency, management pursued proposals that were intended to address Official Time problems (limiting the total amount available and amount per representative, and adding notice requirements to ensure more accountability). Agency Negotiator Hannah testified that the issue of Official Time and the outsized use of Official Time at HUD had been an ongoing issue for a number of years. Management's concern with this matter was something that pre-dated the issuance of EO 13837. To address these concerns, the Agency presented legitimate and credible proposals to the Union during the term negotiations. The Union has not met its burden of showing that the Agency failed to approach negotiations over Article 47 with a sincere resolve to reach an agreement, the Agency asserts. Numerous witnesses established that ongoing problems with Official Time at the Agency over a number of years caused management to want to renegotiate Article 47. Moreover, these witnesses credibly explained how they sincerely and fully participated in bargaining over Article 47 and that at no point was the bargaining process viewed as merely a

"box check" on the path to impasse.

The Agency dismisses the Union's assertion that management blindly followed any Executive Order in making its various proposals. Management's proposals were aimed to accomplish legitimate goals, including appropriately (1) reducing the amount of time HUD employees spent performing activities outside their job duties; (2) increasing employee accountability and advance notice regarding the use of Official Time; and (3) allowing supervisors more flexibility to deny Official Time requests that conflicted with its operational needs. All of the evidence presented at the hearing shows that the Agency had a legitimate rationale for bargaining Article 47 and a sincere resolve to reach an agreement.

The Agency denies the claim that it failed to appropriately respond to the Union's post grievance RFIs. According to the Agency, the grievance in the instant case did not allege a ULP for failing to provide information or answer RFIs. It is improper for the Union to attempt to expand the scope of its grievance mid-arbitration by claiming there has been a ULP based on failure to respond to RFIs. Given that the Union failed to grieve or invoke arbitration on any issue other than bad faith bargaining for Article 47, the Arbitrator does not have jurisdiction to hear a ULP based on a RFI. Even if the matter were properly within the Arbitrator's jurisdiction, the evidence in this case shows that the Agency consistently responded to the Union's voluminous RFI's between March and August 2020 with appropriate responses and documents. The Agency

insists that it has fully and repeatedly responded to every request from the Union.

The Agency argues that the Union's requested relief in this case are beyond the Arbitrator's authority. It notes that the FSIP asserted jurisdiction and issued a final decision following the parties' impasse, a decision that included Article 47. The August 12, 2020 FSIP Decision makes it clear that the FSIP was aware of the instant arbitration, but it nonetheless still asserted jurisdiction over the parties' negotiations, including Article 47. In its Decision and Order, the FSIP issued a final determination regarding 11 articles that had reached impasse during the 2019 term negotiations between the parties including Article 47.

According to the Agency, the instant arbitration does not have the power to overturn the FSIP decision. The Union may not challenge the FSIP decision before an Arbitrator – as it is seeking to do hear – as only the FLRA has jurisdiction to review and FSIP decision. In effect, the Union is seeking to have another bite at the apple by asking the undersigned Arbitrator to reverse the FSIP's decision by ordering the parties back to the bargaining table. The Agency requests that the Arbitrator decline the Union's invitation to nullify or alter the FSIP decision in any way, including by ordering the parties to return to the bargaining table to renegotiate Article 47.

**DECISION AND AWARD:**

The issue to be addressed in the present grievance relates to whether or not the Agency bargained in good faith during the parties' mid-term negotiations over Article 47 in violation of 5 U.S.C. s7116(A)(1) and (5).

5 U.S.C. Section 7116 (Unfair Labor Practices) (A)(1) and (5) provides that:

> (a) For the purpose of this chapter, *it shall be an unfair labor practice for an agency*…
>
> (1) *to interfere with, restrain, coerce any employee in the exercise by the employee of any right* under this chapter;…
>
> (5) *to refuse to consult or negotiate with a labor organization* as required by this chapter.
>
> (Emphasis added).

Section 7114(b) details the obligations of the Union and the Agency when engaged in collective bargaining under the Statute:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining…"

The Union alleges in its grievance that management committed an unfair labor practice in violation of the Federal Service Labor Management Relations Act's duty to bargain in good faith.

According to the Union, management's substantive positions regarding Article 47 showed that it bargained over those issues in bad faith, thereby committing an unfair labor practice. The Union believes that Agency management took intractable "take it or leave it" types of positions rather than allowing for "give and take" on issues in order to make progress. Agency management was unwilling to compromise or in any way change it's hard line positions during these ground rule negotiations, the Union asserts.

Perhaps the most troubling aspect of negotiations for the Union was management's refusal to include grievance handling within permitted Official Time activities. Refusing to include grievance handling within Official Time would adversely impact the Union from performing its representational duties to its members.

The Union believed that this would not only prevent it from meeting its statutory duty of fair representation, but it would also take away the Union's very ability to function since it would be unable to represent employees properly. According to the Union, the Agency was simply following the provisions of EO 13837 regarding Official Time and was not pursuing legitimate management objectives.

Management disputes the Union's version of events and defends its bargaining by insisting its proposals were considered positions that were open to modification depending on the Union's counter proposals. Rather that the Agency being inflexible in its approach, the management negotiating team made substantial movement in its proposals. In its initial proposal, the Agency proposed that there be no bank of Official Time hours but this was changed in subsequent management's proposals.

During the negotiations, the management negotiating team also agreed to raise the individual cap of hours that was permissible for each Union steward or representative. The management team also agreed to exclude formal disciplinary meetings and ELM meetings from the Official Time cap. Each of these concessions were meaningful and significant, and were made in an earnest attempt to reach agreement with the Union. According to the Agency, it was the Union was not prepared to move on many subjects of negotiations.

Management further denies that its proposals were based on the EO, as the Union alleges. It notes that the EO was enjoined at the time that the management negotiating team was agreeing its negotiating strategy and presenting its initial proposals to the Union. Rather than basing its proposals on the EO, the management negotiating team presented proposals that were intended to resolve the problems that were experienced by HUD management when dealing with Official Time in the past.

Based on the evidence and testimony presented at the hearing, it is clear that Agency management wanted to negotiate significant restrictions in the hours of Official Time. Management had long believed that there was an overuse of Official Time in the Agency and it wished to limit the number of hours and activities that would be considered permissible under the Official Time contractual provision. HUD management and supervisors had identified Article 47 as one of the priorities to be addressed during term negotiations over a new CBA.

It is worth noting that the Official Time provision had been largely unchanged since the 1990s and, because of this, the Agency had concerns that the OT provision should be updated. The testimony and evidence presented at the hearing suggests that the management negotiating team submitted proposals that would have massively reduced the amount of Official Time that had been permitted under the 2015 CBA (both in terms of total hours and in terms of how much each individual Union representative or steward could use).

Other significant changes included requiring each Union representative to obtain authorization from management before being considered for Official Time and reducing the number of activities that would be a permitted activity.

Given the different motivations of the parties, it was clear from the outset that negotiations over Article 47 were inevitably going to be heated and contentious. Clearly management wanted huge restrictions in the Official Time provisions whereas the Union wished to maintain the status quo as far as was reasonably possible. It seems the parties were coming to the Official Time negotiations from completely different vantage points.

While the Union may have been unhappy about the Agency's efforts to restrict the hours and activities covered by Official Time, the Arbitrator is satisfied that the Agency had a valid motivation for its proposals to limit Official Time. There appears to have been historic problems concerning the use of Official Time at HUD and as growing discontent between management and the Union regarding the use of Official Time.

Management's motive in restricting the use and availability of Official Time appears to have been valid and based on legitimate operational concerns, the Arbitrator notes. Quite understandably, the Agency wished to significantly reduce the total number of Official Time hours used by Union representatives and stewards. Approaching the mid-term negotiations with this goal in mind and presenting proposals that were designed to obtain this goal was entirely reasonable.

That said, though, these were not incremental changes being proposed by the Agency, the Arbitrator notes. The proposals made by the management negotiating team were, by any objective measure, quite radical – even extreme in nature. While the Arbitrator is satisfied that the Agency's aims may have in fact have had a legitimate underpinning, he nonetheless believes that the Agency's approach to the negotiations was extremely restrictive. The magnitude and extent of the Agency's proposals were objectively severe and harsh in many respects.

One area of particular concern for the Arbitrator is the manner in which the Agency's negotiating team refused to bargain over the use of Official Time for grievance handling and representation. Throughout the negotiations, the Agency refused to countenance or even consider authorizing Official Time for grievance handling matters, a fundamental responsibility of the Union in representing its members. The Agency seemed intent on ensuring that Union representatives did not benefit from Official Time to meet with employees to investigate complaints, or to prepare/participate ion grievance meetings/hearings, the Arbitrator notes.

Given that the parties have a contractual provisions that permits employees to grieve disputes with Agency management, it is essential that Union representatives and stewards be able to participate in all relevant grievance procedures. For the Agency negotiating team to obstinately refuse to bargain over Official Time for grievance representation matters would inevitably have an

impact on the Union's ability to represent its members, the Arbitrator notes. In fact, the Agency's bargaining demand with respect to grievance handling goes to the very heart of the Union's institutional obligations.

The Arbitrator believes that the Agency's refusal to consider, let alone bargain over, Official Time for grievance handling matters would discourage Union members from filing of grievances and perhaps even depress representation. Not only would this stem the filing of future grievances, but it would also have a harmful and detrimental effect on Union members and Agency employees.

The Arbitrator notes that the alternative to having Official Time cover the handling of grievances was to force Union representatives to use their own unpaid time to pursue grievances on behalf of bargaining unit members. While Union representatives would still be able to handle grievances, it would mean that grievances would essentially be performed on their own time and outside official work hours.

Management's assertion that its proposals would allow the Union to pursue its statutory duties outside of the Official Time caps is unavailing, the Arbitrator finds. Evidence and testimony was presented at the hearing showing that Union representatives would be unable meet with their management counterparts when they were present during work hours if Official Time did not

cover the handling of grievances. Similarly, Union representatives might be unable to review Agency held documents during work hours if "grievance handling" was not incorporated within Official Time, something that would hamper the Union's ability to pursue grievance steps in a timely manner.

Moreover, for those employees who have already filed grievances and who are currently relying on Union representation throughout the grievance process, their grievances might be impacted if Union representatives were unable to obtain Official Time for grievance handling. The Arbitrator believes the Agency's complete refusal to consider Official Time for grievance handling matters would have significantly harmed bargaining unit members and adversely impacted the Union's ability to perform its legal obligations with respect to its members.

The Arbitrator is further concerned that the Agency seemed to have no fallback position over this issue - even though it was surely cognizant of the alarming effect it would have on the Union. Management showed no sign of compromise and refused to consider the Union's counterproposals when it came to the issue of permitting Official Time for grievance handling. Such an unbending and unyielding approach over what was a central representation issue and institutional interest to the union suggests that the Agency was not intent on sincere and good faith bargaining, the Arbitrator finds.

To the contrary, the Arbitrator believes that the Agency was so intransigent and inflexible in what it was proposing that it was essentially refusing to make a good faith effort to reach an agreement with the Union. There was no evidence that the Agency modified or adopted its positions and proposals in this regard in an effort to progress negotiations, the Arbitrator finds.

All of the evidence indicates that the Agency was not engaged in hard bargaining as it claims, but rather was engaged in surface bargaining, the Arbitrator finds. The Agency's' proposals appear designed to stymie the filing of future grievances and to undermine the Union from performing its representational duties in the future. Its proposals were entirely outside the zone of expectations of the parties, the Arbitrator finds. The absolute nature of the Agency's approach inevitably guaranteed that the dispute would proceed to the FSIP for consideration.

By adopting such a controversial approach to negotiations (denying Official Time for grievance handling), the Agency was essentially frustrating the possibility of any agreement at the outset.

It appears to the Arbitrator that the Agency's negotiating approach over this particular issue was unreasonable and unwarranted; the Agency did not show a good faith or sincere effort to negotiate at the bargaining table with the Union. Given the length of time that Official Time had remained unchanged, and

taking into account the parties prior practices, the Arbitrator believes that the Agency's bargaining over the issue of Official Time for grievance handling was bad faith bargaining. The Agency failed "to approach the negotiations with a sincere resolve to reach a collective bargaining agreement" with the Union as required by the statute, the Arbitrator concludes.

Thus, the Arbitrator concludes that the Agency acted in bad faith during the mid-term negotiations with respect to Official Time and that it committed an unfair labor practice in violation of the relevant statute. The Arbitrator finds that a *status quo ante* remedy is the appropriate remedy for Article 47 until meaningful bargaining between the parties occurs. The Arbitrator further directs the parties to renegotiate the issue of Official Time and, in particular, the issue of permitting Official Time for grievance handling.

The other issue for consideration is whether the Agency acted in bad faith by failing to provide the Union with requested documentation or by failing to adequately respond to the Union's RFI requests. According to the Union, the Agency improperly refused to provide it with information that was requested in a number of RFIs. The Union argues that management violated the relevant statute by failing to respond to the Union's RFIs. Management's refusal to disclose the requested data in the RFIs was an intrinsic part of the Unions' claim of bad faith bargaining, the Union asserts.

The Arbitrator, however, rejects the Union's assertion that Agency management refused to disclose the requested data in the RFIs submitted by the Union. While the Arbitrator accepts that the RFIs were not an explicit part of the original grievance filed by the Union, he nonetheless notes that one of the administrative responsibilities of an Arbitrator is to assure due process by overseeing the provisions of information necessary to each side.

After reviewing the record, the Arbitrator does not however believe that the Agency acted in bad faith by refusing to provide information and data to the Union. The Arbitrator notes that Agency management provided extensive documents and information to the Union as part of the mid-term negotiations and indeed the grievance process itself. There was a huge number of documents and information disclosed by Agency management to the Union during the negotiations, the Arbitrator notes.

Any suggestion that the Agency negotiating team refused to respond to the Union's RFIs is not supported by the evidence. For that reason, the Arbitrator finds that the Union has failed to prove that the Agency acted in bad faith by failing to provide adequate information to the Union's requests as alleged.

In reaching this decision and award, the Arbitrator rejects the Agency's assertion that the Arbitrator does not have jurisdiction over the instant matter. According to the Agency, the Arbitrator lacks jurisdiction as the FSIP considered the parties' last best offers on Article 47 (Official Time) and ultimately chose the Agency's proposal over the Union's proposal.

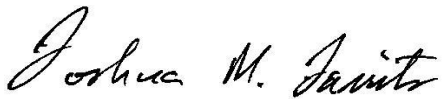
The Arbitrator notes that his role in the instant grievance is to consider whether or not the Agency's failed to bargain in good faith during the mid-term negotiations into Article 47 and Official Time. Although the FSIP may have ruled in favor of the Agency when it came to choosing management's Official Time proposal over the Union's, the Arbitrator notes that the FSIP's role was only to deal with the parties last best offers on the Article 47 issue.

The FSIP did not consider and did not address the ULP charge of whether there had been any bad faith bargaining during the mid-term negotiations. As such, the allegation of bad faith bargaining is a subject that was preserved solely for the undersigned Arbitrator via the instant grievance. For that reason, the Arbitrator is fully satisfied that he has jurisdiction to consider the ULP allegations made by the Union.

Therefore, for the reasons outlined above, the instant grievance is sustained in part and denied in part. No award is made with respect to the legal costs/expenses associated with the instant arbitration, as neither the Union nor

the Agency were the “prevailing party” in accordance with Article 52.04 of the parties’ CBA. Each party shall be responsible for its own legal fees and expenses, the Arbitrator finds.

The Arbitrator will retain jurisdiction for purposes of any remedial issues.



3/28/21

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Joshua M. Javits, ARBITRATOR Date