Federal Mediation and Conciliation Service
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire

In the matter of:

Passport Services, U.S. Department Of State (Employer)	:	**FMCS No. 14-58161-A**
and	:	
National Federation of Federal Employees, Local 1998, AFL-CIO (Union)	:	

Decision and Award

Appearances:

On behalf of Passport Services, U.S. Department Of State:
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On behalf of National Federation of Federal Employees, Local 1998, AFL-CIO:
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Dated: September 25, 2015

Timothy J Brown, Esquire
Arbitrator

Introduction

This arbitration arises pursuant to a July 2009 National Bargaining Agreement (the Agreement) between Passport Services U.S. Department of State (the Agency) and the National Federation of Federal Employees, Local 1998 IAMAW, AFL-CIO (the Union). In its underlying grievance the Agency asserts that two of the Union's stewards violated the terms of the Agreement relating to use of Official Time. The parties were unsuccessful in resolving the dispute through their grievance procedure and the Agency thereafter filed a demand for arbitration. The parties selected the undersigned arbitrator through the processes of the Federal Mediation and Conciliation Service (FMCS) to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard by the undersigned on January 21, 2015 in Washington, D.C. All present were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. A transcript was taken of the proceedings. At the close of the hearing on January 21, 2015 the parties elected to submit written post-hearing briefs, upon the receipt of which by the undersigned the dispute was deemed submitted. This decision is made following careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses.

Issues

The parties stipulated that based upon the record as a whole, including all evidence submitted into the record and arguments by the parties, the Arbitrator has the authority to determine the issue or issues presented and to be determined in this matter. Based upon the record as a whole, I find that the issues on the merits of this arbitration may be described as follows:

Did the Union, through the conduct of its stewards identified by the Agency in its grievance, comply with Article 7 of the Agreement relating to official time, and if not, what shall be the remedy?

Evidence

Background

The Union represents a nationwide bargaining unit of Passport Services employees; a unit of approximately 1200 employees in various offices primarily composed of Passport Specialist. In 2011 paralegals in the Law Enforcement Liaison Division (LE) of the Office of Legal Affairs were added to the unit. The two Union stewards involved in this matter are paralegals in LE.

Article 7 of the Agreement is entitled "Union Rights and Representation" and Section 5 of that Article relates to "Official Time" and provides, in part:

> a. Pursuant to 5 U.S.C. 7131(d), the following Union officials/representatives shall be granted the indicated amounts of official time to perform representational and contract administration functions:
>
> ….
>
> v. Chief Steward: 16 hours/week
>
> vi. One Senior Steward at each Regional Agency, Center, mini-Agency, and one for headquarters (including Office of Technology Operations[PPT/TO]): 6 hours/week each.
>
> vii. One Steward at each agency/location where there are less than 40 bargaining unit employees; for each agency/location where there are 40 or more bargaining unit employees,…: 5 hours/week each.
>
> b. …
>
> Any additional time as needed will be approved on a case by case basis by the Regional or office Director. The decision to approve additional time will depend on the facts and circumstances of each case.
>
> c. Representational functions include, but are not limited to: meeting with bargaining unit employees about representational matters; handling and investigating complaints; interviewing witnesses; filing grievances; filing Unfair Labor Practice charges; formulating proposals; assisting representatives with representational issues; appropriate legislative functions, communicating

representational rights and information to bargaining unit employees; representational research (e.g. the Master Agreement, 5 U.S.C. Chapter 71, training materials, case law, etc.) and reading and responding to representational messages (including emails).

d. In addition to the above, Union officials will be granted reasonable amounts of official time to attend Employer-initiated meetings, Union officers will also be granted official time in accordance with 5 U.S.C. 7131(c).

Section 6 of that Article relates to "Procedures For Official Time" and provides, in part:

a. Scheduling Official Time:
…Union Stewards may arrange regularly scheduled, fixed blocks of time to perform representational functions. The specific date(s), time(s), and length of the scheduled blocks will be arranged by the Union Steward and his/her supervisor. The regional Director or designee must concur with the fixed time agreed to between the steward and supervisor. In the event that there are no representational duties for the Union Steward to perform during the schedule block, he/she shall report back to his supervisor for other assignment.

b. Coordinating Official Time: When not using pre-scheduled blocks of official time, a representative will consult his/her supervisor (normally via email) to obtain concurrence for official time usage. The representative will provide the approximate amount of official time that will be needed, offering a starting and ending time where needed, and providing a telephone number where he/she can be contacted if the representative needs to conduct their business off site. When seeking to use official time, the representative will provide a description of the reason for the time, without having to divulge the name of employees seeking representation or intricate details of any complaint/grievance but must provide adequate justification. For instance:

i. I need two hours to research the master Agreement and case law to prepare for a discussion with Management.
ii. I need a ½ hour to return a bargaining unit employee's phone call regarding a concern.
iii. I need one hour to review emails from NFFE Headquarters and respond.
iv. I need three hours to prepare a step 1 grievance.

…If the representative requires more time than originally approved by the supervisor, he/she will contact the supervisor to secure additional time.

…

Section 7 of the Article is entitled "Internal Union business and provides:

> Internal Union business (e.g. solicitation of Union membership, election of Union officials or collection of dues) will be conducted during the non-work time of the bargaining unit employees involved, Official time will not be authorized for the performance of internal Union business.

Conduct of the Union's Chief Steward, Gerald Moore

In his paralegal position Gerald Moore works in drafting response to requests for passport records from law enforcement entities. He is assigned work by a Team Leader who places files to be handled by Moore in a "in-basket" in the offices' file room. When finished with an assignment, Moore places his work and the related file into another basket identified for such in the file room. He testified without contradiction that he is never without work to do. Moore's immediate supervisor during the relevant period herein was Chief of Law Enforcement Liaison Regina Ballard. Jonathan Rolbin is the Chief Counsel and Director of the LA and LE divisions within the Agency's legal department. At all time material herein More held the position of the Union's chief steward.

At 8:47 am on January 29, 2014, the Moore sent an email to Office Director Jonathan Rolbin requesting an hour of official time to participate in a monthly union/management telephone conference at 12:00 noon that day. At 9:44 that morning Rolbin approved the request via email writing: "We will approve this. If participation in this call is to become routine, perhaps you should consider revising your scheduled allotted time on Wednesdays." The "official time" requested by Moore was not part of Moore's pre-scheduled blocks of weekly time identified by Rolbin as "scheduled allotted

time" and referred to in Article 7, Section 6(a), but rather was a request for non-pre-scheduled time under Article 7, Section 6(b) of the Agreement.

Paralegal Moore testified that notwithstanding requesting and receiving approval to participate in the conference call he was not feeling well and as it turned out he decided not participate in the conference call. Instead, he stayed at his work-station and performed his usual work. He explained that he received work by cases being dropped into his "in" bin by his team leader and that there were cases awaiting his attention in his in-box.

Moore admitted that he did not inform Rolbin that he was not going to participate in the call. Moore also testified that he was a grievant in an arbitration involving a grievance filed against Director Rolbin alleging the Director had reduced his (he was steward at the time) and Chief steward Michael McPherson's prescheduled or "block" official time in half, and that he and McPherson won the arbitration.[1]

Director Rolbin testified that he learned that Moore had not participate in the conference call after-the-fact and that upon learning such he emailed Moore at 2:00 pm that day; "It is my understanding that you did not participate in the conference call below today at noon. Was their some type of emergency situation that arose? Let me know." More responded two minutes later; "No, there was no emergency situation that prevented me from participating in the conference call. The one (1) hour of official time is being yielded back. Thank you."

Rolbin testified that there are times when paralegals are assigned time sensitive editing work or other emergency work and that by not notifying his superiors that he was

[1] In that arbitration FMCS 12-58370 (Arbitrator David Clark) the Arbitrator found, among other things, that Rolbin's reduction of the combined weekly official time hours provided the two stewards from 11 to 6 violated Article 7 violated the Agreement.

not going to be on the conference call, the Agency was not aware of the employee's being available should he have been needed. He had not previously heard of the "yielding back" of official time and in his view, Rolbin testified, Moore's yielding back the hour after the fact was like someone eating a sandwich and the say he yielded it back; it was meaningless.

Conduct of Senior Union Steward Michael McPherson

McPherson is also a paralegal in LE and performs the same type of work as Moore. At times material to this matter, Michael McPherson worked a Monday through Friday schedule of 7:30 am to 4:15 pm with two 15 minute breaks during the day, and had prescheduled blocks of official time were 2:00 pm to 4:00 pm Monday, Wednesday and Friday.

The grievance asserts that McPherson sent emails related to representational matters during his work time and not during his designated official time on eight occasions. The record establishes that: (1) at 3:19 pm on Tuesday, September 24, 2013 McPherson emailed Division Chief Vanessa Washington and Rolbin about the possibility of having bargaining unit members view a new office space Thursday, September 26, 2013 at 9:30 am; (2) a September 24, 2014 3:34 pm email to Washington and Rolbin identifying six employees who had not yet toured the new space; (3) a September 24, 2014 3:44 pm email Washington and Rolbin stating "Ok! We will see you on Thursday at

9:30 am. Thanks";[2] (4) at 10:33 am, Friday, December 6, 2013 McPherson emailed Rolbin the following:

> Good Morning Jonathan,
> The Union is willing to extend the negotiation of the work schedule agreement to January 7, 2013, The Union would like to receive a copy of Managements proposal no later that December 20, 2013. We would also like of Management to respond in good faith to the ground rules proposal that was submitted by the Union.
> I hope you accept our extension and able to agree to the terms stated above.;

(5) On December 19, 2013 McPherson wrote to Rolbin; "Retirement party for branch Chief Vanessa Washington is being held tomorrow beginning 2pm. I hope that's a good enough reason for you to grant me to switch my official time"; (6) on Thursday, December 19, 2013 4:00PM McPherson emailed Rolbin relating to ground rules for bargaining; (7) on January 28, 2014 McPherson emailed a number of individuals, including copy to Bolin, relating to a request for official time for a more experienced steward in a matter; and (8) a February 3, 2014 email from McPherson copied to Rolbin relating to a Union's request for official time. The record also includes a February 18, 2014 email to McPherson from Rolbin providing:

> Many times in recent week/months, you have emailed me regarding union business when not on official time. On multiple occasions, I have reminded you that you are not permitted to perform representational functions except during official time. Article 7, Section 5(c) of the collective bargaining agreement specifically states that "[r]representational functions include…reading and responding to representational messages (including emails)" With few exceptions specifically enumerated by the CBA, you are not permitted to email me in your capacity as NFFE Local 1998 Senior Steward (as opposed to your capacity as paralegal) except during official time properly

[2] Although the emails on their face reflect that there must have been a back and forth between the steward and two managers, the manager responses were not admitted into the record.

> scheduled pursuant to Article 7, Section 6. If I have emailed you regarding union business, there typically is no necessity for you to read it or respond to it prior to your next scheduled block of official time. When you have done so in the past, you may have violated Article 7 of the CBA. Please consider this email a renewed warning for any such violations, please be advised that, if you repeat such conduct in the future, you may again be in violation of Article 7. I intend to hold you and the Union accountable for any such violations you may commit, and it is my hope that this will be the last time I need to warn you about this topic. Please contact me – when you are on official time – if you have questions, or wish to discuss this further.

According to McPherson, most of the emails at issue were his responding to emails from his superiors, were about rescheduling or scheduling official time or were time sensitive.

Positions of the Parties

Both parties submitted detailed post-hearing briefs and case law making exhaustive arguments relating to relevant disputed facts and applicable law. I have carefully read and closely considered the submissions of the parties and what follows is intended only to be a summary of the respective briefs and arguments of the parties.

The Agency

On the question of arbitrability raised by the Union, the Agency asserted, the Union may not now claim that the grievance is untimely as the Union has waived the defense. In this regard, the Agency argued, the Union was required to raise the timeliness defense at its first opportunity and here the Union failed to do so its initial March 7, 2014 response to the grievance. Instead, the Agency continued, the Union waited until its

answer to the second step where it stated that in most instances the exchanges occurred more than 45 days prior to the grievance, and even the only specifically claimed that the grievance relating to the McPherson's December 19, 2013 exchange was untimely. Moreover, the Agency asserted, the matter raised in the grievance, the steward's engaging in representational activates outside of official time, having been repeated frequently, is a "continuing violation" and should therefore be subject to the grievance process.

On the merits relating to the January 29, 2014 conduct of Moore, the Agency continued, the provision of Article 7, Section 6(a) providing that "[i]n the event that there are no representational duties for the Union Steward to perform during the schedule block, he/she shall report back to his supervisor for other assignment" reflects an understanding by the parties that if official time was not needed the employee should report back for work. If stewards were to be held not required to report back to their supervisors in the event they do not require all of their official time, the Agency argued, such would amount to a harsh and absurd result and waist of Agency time. The parties did not intend that unused official time could become time for union officers to engage in personal business. Instead, the Agency maintained, by requiring union officials to report back to their supervisors when official time is not needed, such allows union officers to estimate the time they may need to perform a representational function – thereby meeting the intent of the contractual provisions involved - with no loss of work time to the Agency.

As for a remedy of the violation by Moore, given the employee's apology to Rolbin at the arbitration hearing and proper notification to his supervisor when he was

not required to use all of his scheduled official time on January 20, 2015, the Agency requests only that the arbitrator find that Moore's conduct of January 29, 2014 violated Article 7, Section 6 and assess all costs relating to this claim to the Union pursuant to Article 22, Section 4 of the Agreement.

As for the conduct of McPherson sending emails outside of his scheduled official time, the Agency argued, he violated Article 7, Section 5(a) of the Agreement. Statute, court decisions and decision of the FLRA establish that union representatives may not perform union-related duties on official time except in the context of a negotiated agreement to that effect, and, the Agency continued, the union must conduct itself within the parameters of such agreement. Here the union did not. If McPherson required additional time for emailing he should have requested the time, or, as suggested by Mr. Rolbin at the hearing, the union steward could have waited until his next block of official time; there was nothing pressing about the matters addressed in any of McPherson's emails. Nor is there any support for an argument that either because a manager sends a union-business-related email during non official time hours, or because a union representative begins an email conversation during official time, that the union officer is somehow excused from the provisions of the Agreement limiting the time when union officers may perform representational tasks.

Each of the eight emails presented by the Agency constitute a separate violation of Article 7, Sections 5(b) and 6 (b) of the Agreement, the Agency asserted.

As for the Union's claim that the grievance was filed in retaliation motivated by a prior arbitration award, the Agency argued that such is not a valid affirmative defense to a grievance; that the appropriate forum for such an allegation is to file an unfair labor

practice charge; even assuming arguendo such a defense was available, here the evidence establishes that the grievance was filed in good faith and justified by the evidence.

As remedy, the Agency requested that the arbitrator assess costs to the Union pursuant to Article 22, Section 4 of the Agreement, and that: (1) two hours of L/LE senior steward time in a future week to be determined by the Agency be dedicated to the steward performing paralegal work, (2) the Union post a conspicuous notice on its website for at least one year, in a signed letter from the Union's president to all BUEs and Union officials, stating that any correspondence to any person regarding representational or contract administration functions prepared or sent during duty hours, other than pre-authorized official time constitutes a violation of the agreement and federal law, and that all BUEs and Union officials are to cease all such conduct immediately, and (3):

> That the Union agree that, beginning with the week after the finality of the Arbitrators ruling in this case, that any Union official who is, or should become, employed in the L/LE, shall, on any occasion for which he or she requests official time additional to that which he or she already has been granted for the week in question, including any prescheduled blocks, provide his or her supervisor with a report documenting how he or she has used the official time already granted him or her during the week in question. Further that such documentation shall be in 15-minute increments, and shall both describe, in a manner consistent with Article 7, Section 6(b), of the Agreement, the actual use(s) to which the official has put the official time he or she has already taken during the week and the intended use of any official time that he or she has been authorized to take (including any prescheduled blocks) during the remainder of the week. Further, that, if the official has been granted any official time for the remainder of the week for which no specific use is intended, he or she shall be required to reallocate all such official time before being granted any additional official time.

The Union

Even assuming for purposes of argument only that the issue here relating to Moore is when Moore should have "yielded back" his official time on January 29, 2014, the Union argued, the grievance here should be denied as no remedy can be granted for what is, at most, a *de minimus* technical violation of Article 7, Section 6. Additionally, the Union asserted, the language of the Agreement did not require that Moore report to his supervisor that he was not going to use the official time granted on January 29. In this regard, although Article 7, Section 6(a) may require that a chief steward "report back to his supervisor for other assignment" in the event the steward has no representational duties to perform during scheduled official time blocks, there is no such language in Section 6(b) of the Article relating to ad hoc official time as was approved herein for Moore. Such is the case notwithstanding the "opinion" offered at the arbitration by the Agency's chief negotiator, a witness who notwithstanding the Agency's claim to be an "expert," had no knowledge of the Union's intention in agreeing to the language of the Agreement. There is no evidence in the language of the Agreement or in the record of the arbitration to support a conclusion that the "parties intended language in Article 7, Sec. 6(a) omitted in Article 7, Sec.6(b), to be included in Article 7, Sec.6(b)."

The Union also argued that based upon arguments raised by the Agency at the hearing, the Agency is claiming Moore acted dishonestly in requesting the January 29, 2014 official time, and that such may be just the "tip of the iceberg" of official time abuse in the office. There is absolutely not a scintilla of evidence to support such a claim, the Union asserted, and if such were the motivation for the Agency filing the grievance, it would have been pursued through discipline.

In the Union's view the grievance focusing upon Moore's conduct was motivated by Agency bad faith and was brought to harass and bring needles expense upon the Union in retaliation for the Union's exposing of Chief Counsel Rolbin in Arbitrator Clark's August 13, 2013 Decision and Award. But even assuming such were not the case and the Agency established Moore somehow violated the Agreement, such violation should be dismissed a *de minimus*, the Union argued.

McPherson's alleged violation involved eight emails, most of which were three sentences long or less, the Union observed. On February 18, 2014, Rolbin disciplined McPherson for sending the emails. Although it has disciplined the employee, the Agency now claims it may also seek "redress" under the Agreement for the violation of the Agreement by McPherson. However, the Union argues, the Agency has suffered no harm that requires contractual-based "redress."

The Union admits that all eight of the emails at issue were sent while McPherson was not on official time. The issues relating to the emails however are many, and in such regard the Union proffered, the Agency's grievance was not timely as Rolbin's email of December 6, 2013 establishes that the Agency was aware of McPherson's email activity and yet did not file a grievance until February 12, 2014 (some 49 days later and five days short of the filing period established in the Agreement); the conduct of sending the emails at issue did not constituted "representational activity" that can only be performed when a Union representative is in official time status under the terms of the Agreement; there is no, or at most *de minimus,* harm caused by the conduct to the Agency; the Agency's pursuing a grievance after it disciplined McPherson is probative of bad faith; and the

relief sought by the Agency is out of proportion to the contract violation alleged in its grievance.

The Union argued that in addition to the defenses described above, as to the first three of the eight emails (involving a tour of a new facility and not representational activity within the meaning of the Agreement) the allegations should be dismissed because the Agency did not offer the entirety of the email conversation as the Agency purposefully excluded the supervisory emails contained in the conversation. Similarly, in addition to the defenses described above, the Union argued, the December 6, 2013 10:33 a.m. email from McPherson is part of a longer email conversation concerning a representational activity – negotiations to negotiate work schedules – and McPherson credibly testified that he sent the email during his 15 minute morning break.

As for McPherson's email of December 18, 2013, the Union noted that the steward's first requesting to switch official time due to a retirement party for his supervisor was sent during the steward's official time and only his response to Rolbin's question "[p]lease explain why. Thanks" was the subject of the grievance. In regard to that response, the Union maintained, McPherson could not have, as the Agency now claims, simply waited until his next block of official time to respond to Rolbin as the steward's next such block was scheduled for a time after the party in question.

The email of December 19, 2013 was a relatively longer email and involved representational activity, the Union admitted. However, as established by the evidence, the email was drafted by steward Moore during that steward's official time and the sending of the email by McPherson took no more than a minute. The email of January 28, 2014 was a request for official time by McPherson on behalf of a bargaining unit

employee under circumstances where the bargaining unit employee needed immediate assistance and for McPherson to have waited until his block time in the afternoon of the next day would have been too much of a delay for his meeting with the employee. Finally, the email of February 23, 2014, was the third in an email conversation started by McPherson during his official time and requesting official time for all bargaining unit employees to attend a thirty-minute meeting. The second email in the chain was a response from Chief Ballard and the third email – the email challenged by the Agency – amounted to three sentences asking the Chief why she referred a different time for the meeting and offering an alternative date for the meeting.

Even the Agency's self-identified "expert" could only go so far as to testify that the emails were "technically" violations of the Agreement language and did not affirmatively testify that the emails constituted representational activities or that that a steward's requesting or rescheduling official time amounts to representational activity within the meaning of the Agreement.

The Union offered further argument relating to its timeliness defense and noted that the language of the grievance procedure of the Agreement specifically provides that "[f]ailure by the grieving party to meet time limits, or to request and receive an extension of time, **shall** automatically cancel the grievances, unless mitigating circumstances prevail." (Emphasis added). In addition to this clear language, here, the Union asserted, it raised the timeliness issue in it step two response. Contrary to the claim of the Agency, there is no surprise here raised for the first time only a week before the arbitration hearing; the agency was well aware of the Union's defense eight months prior to the hearing.

As for it argument that the emails here did not constitute representational activity, the Union maintained that all of the emails involve requests for additional official time or rescheduling of official time. Nowhere in Article 7, a detailed Article, the Union argued, is there any language that can be reasonably read to infer that requesting or rescheduling official time is itself representational activity. In fact, the definitional paragraph of "representational functions" found in Section 5(c) neither mentions the two pages of text contained in Article 7, Section 6 governing the scheduling of official time or otherwise suggests that such is a representational activity. "It is clear," the union asserted, "that the prescribed procedure to obtain official time, in which management has the authority to deny, complicate or delay it, cannot be a representational function." Rather, the Union continued, it is "a preliminary step an employee, then under the control of management, must take to achieve official time status to enable performance of representational activity to begin." Moreover, the Union continued, if representational activity may not be performed unless the employee is on official time and the employee must receive management approval of time to be in official time, it logically follows that the time an employee spends seeking approval cannot logically also be a representational activity. To follow the Agency's argument – that requests for official time may only be made during official time - to its logical conclusion, the Union asserts, would result in the Union never being able to request official time. Such an interpretation of the Agreement is absurd and should not be given credit.

Finally, the Union argued, the grievance was filed in bad faith in retaliation against the Union for wining an arbitration relating to official time. Bad faith, the Union

maintained, that may is plainly evident by the unreasonable and overreaching remedy sought by the Agency.

Discussion

The Procedural Issues

Having presented the position that arbitration of certain of the Agency's allegations are barred based upon considerations of procedural arbitrability, the Union has the burden of establishing that these matters are time barred. Public policy favors the arbitration of disputes between parties to collective-bargaining agreements. Consistent with such public policy where, as here, parties have provided for the arbitration of their disputes relating to their agreement there is a strong presumption in favor of arbitrability of grievances. Consequently, the Union's argument that portions of the Agency's grievance are time-barred from resolution through arbitration is subject to strict scrutiny.

Apply such a standard to the matters herein, I find that the Union has not met its burden of establishing that Agency's claim relating to emails sent by McPherson more than 45 days prior to the Agency's grievance is untimely and outside of the jurisdiction of the arbitrator. In this regard, I agree with the Agency that defenses based upon timeliness (as opposed to matters of substantive arbitrability) may be waived by the parties and that here, the Union waived its timeliness defense by not raising the issue of timeliness at step one of the grievance procedure.

The Merits

Because this matter involves the interpretation of the language of the parties' Agreement, the Agency as the party initiating the grievance has the burden of establishing that its proffered interpretation of the language at issue is consistent with the mutual intent of the parties. Here, the Agency maintains the Union violated the Agreement by its two stewards performing representational functions at times when the stewards were at work but not on "official time." I find that based upon the record as a whole, including all evidence admitted into the record and arguments of the parties, the Agency has met its burden of establishing violations relating to two emails sent by steward McPherson, but has failed to meet its burden of establishing the remaining violations of the Agreement alleged.

Allegations Relating to Moore

As initial matters, I find that the evidence admitted into the record is insufficient to support findings either that; (a) Moore misrepresented his intentions when he originally requested official time for the January 29, 2014 conference call or that (b) Moore did not perform Agency work during the time of the conference call. My further finding that that the Agency failed to meet its burden in regard to the portion of its grievance relating to steward Moore is primarily based upon two considerations. First, assuming for purposes of analysis only that a Union steward granted official time under Article 7, Section 6(b) is required to comply with the "report back to his supervisor for other assignment" language of the second paragraph of Article 7, Section 6(a), I find that under the circumstances presented, on January 29, 2014 Moore substantially complied

with such requirement. The language of Section 6(b) plainly reflects the mutual intention of the parties that in such circumstances the purpose of the employee/steward reporting back to his supervisor is "for assignment." In the instant matter the evidence establishes that the manner in which Moore and other paralegals present themselves "for assignment" is to collect their assignments (files) from the "in box" in the LE file room. Moore testified without contradiction that during the time of the union-management conference call on January 29, 2014, he continued to perform his work at his workstation. As a practical matter, and under the circumstances where, as here, Agency witnesses admitted that the paralegals in LE such as Moore collect their assignments and perform their tasks in a relatively independent manner, I find that Moore "presented himself for assignment" as contemplated in Article 7, Section 6(a).

Secondly as to Moore, I find contrary to the argument of the Agency, that the Agreement did not require steward Moore to "report back to his supervisor for other assignment." In this regard, as evidenced by their specific agreement in 6(a) that Union stewards who do not have representational duties to perform during a scheduled block should report back to their supervisor for assignment, the parties certainly knew how, if they so desired, to memorialize an understanding that such a requirement would also apply to Union Stewards who had been granted ad hoc, non-prescheduled (block) official time. The parties did not do so and, based upon widely recognized principles of contract interpretation, I find that such was intentional by the parties.

Contrary to the argument of the Agency, such a finding does not lead to an absurd result or a holding that employees who find themselves in the circumstance of Moore on January 29, 2014 may use the time as their own. Rather, my conclusion makes sense

under the circumstances. In this regard, as established by the evidence and confirmed by the language of Article 7, Section 6(a) itself, when establishing "blocks" of official time, management reduces the workload and corresponding performance standards of the paralegal employee/stewards involved. Here the performance targets of Moore (as well as McPherson) relating to closed cases were reduced proportionally to the number of hours prescheduled in their respective blocks or official time. Consequently, under circumstances where such an employee has unexpected time for Agency work because he or she has no representational work to perform during regularly scheduled blocks of time, management has not previously assigned the employee work to be performed during that period of time, and it stands to reason that management would have an interest in assigning the employee additional work to "backfill" the reduced workload of the employee.

However, with the ad hoc type of time involved in 6(b) as was the case with Moore on January 29, 2013, such "backfilling" considerations do not apply as the employee's regular workload has not previously been reduced in consideration of the grant of ad hoc official time. In the case of Moore, although his workload was reduced to compensate for his regularly scheduled official time, there is no evidence that his workload was further reduced to compensate for his ad hoc official time requested for one hour on January 29, 2014. In such a setting, if the employee eventually does not need the ad hoc time, there is no need for management to assign further work to the employee to fill a void; there is no void to fill. The employee already has his or her normally assigned work. In the case of Moore on January 29, 2014 there was no absence of assigned work for him to do caused by his grant of ad hoc official time, and when he

failed to use the time he performed his normal work as assigned and the Agency suffered no loss of employee work time.

I find that the evidence is insufficient to establish that Steward Moore violated the Agreement as alleged by the Agency.

Allegations Relating to McPherson

The Nature of Official Time

Based upon the language of 5 U.S.C. 7131 and the Agreement I find that "Official Time" consists of the following and conduct similar to the following:

A. Representing bargaining unit employees in negotiations and formal meeting with the Employer with regard to matters affecting the conditions of employment, as provided in Article 7, Section 1, Recognition, of the Agreement.

B. Time spent by Union representatives "to perform representational and contract administrative functions as provided in Article 7, Section 5 (a) (citing 5 U.S.C. 7131(d)) of the Agreement.

C. Meeting with bargaining unit employees about representational matters; handling and investigating complaints; interviewing witnesses; filing grievances; filing Unfair Labor Practice charges; formulating proposals; assisting representatives with representational issues; appropriate legislative functions, communicating representational rights and information to bargaining unit employees; representational research, reading and responding to representational messages (including emails),

and attending Employer-initiated meetings, as provided in Article 7, Section 5(c)&(d) of the Agreement.

D. Time spent on conduct such as and similar to; preparing for discussions with management including researching the master Agreement and case law; returning communications of bargaining unit employees regarding their concerns; reviewing and responding to communications from NFFE Headquarters and investigating and preparing for grievances as provided by examples in Article 7, Section 6 (b) of the Agreement.

With such a definition of official time in mind, I conclude that it is not enough for the Agency to merely present emails sent during non-official time from McPherson in his capacity as Union steward to establish a violation of the Agreement. To meet its burden of establishing a violation of Article 7, the Agency must show that an email was sent in the course of the steward engaging in conduct described in, or similar to the conduct described in, Article 7 of the Agreement. Based upon such and the additional consideration discussed below, I am persuaded by the argument of the Union that the large majority of the emails written by McPherson at issue herein did not violate the terms of Article 7 of the Agreement.

As for the three September 24, 2013, emails, I find the Agency has failed to meet its burden for a number of reasons. It is the Agency's burden to establish the violation alleged. McPherson credibly testified - and it is apparent from the language of the emails - that there were related emails in the email-chain sent to McPherson from members of management that were not offered into evidence by the Agency. Considering the limited

scope of the evidence offered by the Agency, I do not have the benefit of knowing the full conversation or the context of the emails offered into evidence. On their face, the emails offered by the Agency concern scheduling a tour for employees of a new work location and, as presented, do not substantially concern representational or contract administrative functions as defined in the Agreement. Under such circumstances, I find that the Agency failed to meet its burden relating to the three September 24, 2013 emails.

As for the emails of (a) December 19, 2013 relating to a retirement party, (b) January 28, 2014 and (c) February 3, 2014, they each involve scheduling official time. Considering the language of the Agreement as a whole, I find that the parties plainly intended that Official Time would be productive and dedicated to performance of the representational and contract administrative work for which it was established. The language of Article 7, Section 6(b), supports such a conclusion. The first sentence of that Section contemplates a difference between the time spent scheduling Official Time in the future and the time actually spent in Official Time. There, the parties agreed that "[w]hen not using pre-scheduled blocks of official time, a representative will consult his/her supervisor (normally via email) to obtain concurrence for official time usage." There is nothing in the language of the Agreement limiting when a representative may consult his/her supervisor or that such consultations must be conducted during official time. Applying the language of the Agreement, and additionally relying upon common sense, I find that steward McPherson substantially complied with the terms of the Agreement on these three occasions.

As to the remaining emails of December 6 and 19, 2013 offered by the Agency, I find they involved matters for which official time could have been used. As to the email

sent at 10:33 am, Friday, December 6, 2013, its subject was a request for an extension of time for negotiations; plainly a matter covered by the Official Time language of the Agreement. As to that email, McPherson testified that he recalled that he wrote and sent the email while on his break. To contradict the recollection of McPherson, the Agency offered a written policy establishing that the employee's scheduled break time was 10:00 to 10:15 a.m. and testimony of Rolbin (as well as policy language providing) that when an employee misses a break the employee is required to speak to his supervisor about rescheduling the break. Under the circumstances where the Union did not show that the employee had his break rescheduled that day, and the email at issue was sent 3 minutes after even the alternative 10:15 to 10:30 a.m. break established by the controlling policy would have ended, I find that the Agency has offered sufficient contradictory evidence to establish that it is more likely than not that the email was sent during the employee's regularly scheduled work time.

Similarly, the email of December 19, 2013 from McPherson to Rolbin related to ground rules for bargaining over LE work schedules was again plainly a matter covered by the Official Time language of the Agreement. Notwithstanding that the detailed email was drafted by steward Moore during that employee/steward's official time, and that McPherson was the chief negotiator for the Union on the matter, the evidence establishes that the email was sent by McPherson at a time during the workday when he was not on official time.

Based upon the above considerations, I find that the record establishes that McPherson violated the Agreement by sending the emails of December 6 and 19, 2013 during periods when he was not on Official Time.

Conclusion

Considering the totality of the evidence and arguments presented by the parties in this matter, I find that the grievance is sustained in part and denied in part. The evidence was sufficient to establish that the Union violated the Agreement by its steward performing representational and/or contract administrative functions by sending emails relating thereto to the Agency on December 6 and 19, 2013. I find that the Agency has failed to meet its burden relating to all other allegations of the grievance, and those allegations are therefore dismissed. Having found merit to some of the allegations by the Agency, contrary to the Union's argument, the record is insufficient to establish that the grievance herein should be dismissed as a mere effort by the Agency to retaliate against the Union for the Union's prior grievance filing activity.

Remedy

The violations of the Agreement I have found herein may concern important matters addressed by the parties in their Agreement and therefore require some form of remedy, however, as the time spent by the Union steward on union matters during his regular work hours is minuscule; amounting to only a matter of minutes; I will not order restitution as requested by the Agency. Nor will I order other of the remedies requested by the Agency as they are wholly disproportional to the very narrow and the isolated violations of the Agreement found herein relating to a single steward. Instead, as remedy I will order that the Union cease and desist from violating Article 7 of the Agreement and comply with the terms of the Agreement relating to use of Official Time in the future.

As this is a "split" decision under Article 22, Section 4 of the Agreement I will assess each party an equal, one half, portion of the undersigned's arbitration bill.

ORDER

The grievance is sustained in part and denied in part.

The Union violated the Agreement by its steward performing representational and/or contract administrative functions by sending two emails relating thereto to the Agency while on non-official-time work time.

All other allegations of the grievance are dismissed.

The Union is hereby ORDERED to cease and desist from having its stewards perform representational and/or contract administrative functions by sending emails relating thereto to the Agency during non-official-time work time.

Dated: September 25, 2015

Timothy J. Brown, Esquire
Arbitrator