In the Matter of Arbitration:

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT	
and	Utilization of Official Time
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL UNION 476	

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Union:

Rushab Sanghvi, Esq.
(Legal Rights Attorney, AFGE 14th District)
Ashaki Robinson-Johns, President, AFGE Local 476
Edward E. Eitches, Esq., First Vice-President, AFGE Local 476
Fared S. Abdullah, Steward, AFGE Local 476

For the Department:

Darin B. Tuggle, Esq.
(Attorney-Advisor, Personnel Law Division, OGC)
Tresa Rice, Esq.
(Attorney-Advisor, Personnel Law Division, OGC)
Michael H. Stein, Esq., Acting Director, ELR/OCHCO
Anjanette Twiggs, Human Resources Specialist, ELR/OCHCO

BACKGROUND

An arbitration hearing was held in this matter on August 11, 2015. The Parties were unable to stipulate to a precise framing of the issue, though there was no dispute as to the substance of the issue, and it was agreed, pursuant to Article 23.08 of the Parties' 1998 collective bargaining agreement ("1998 Agreement") and Article 52.08 of the Parties' 2015 collective bargaining agreement ("2015 Agreement"), that the issue would be framed as part of the

decisional process. A transcript was prepared and was agreed to constitute the official record of the hearings. Post-hearing briefs were received on October 16, 2015.

The Agency and the Union enjoy a longstanding collective bargaining relationship. This case arises from the Agency's denial of a request for use of official time by Fareed Abdullah, a Senior Steward. He has worked as an IT Security Specialist with the Agency since 2008 and held other positions with the Agency before that time.

Relevant Contractual Provisions

Supplement 124 between AFGE Council 222 and the Agency, Union Representation and Official Time, states in relevant part that:

> Section 1. Representational Functions.
>
> (1) Official time allocated under this Agreement is authorized for:
>
> a. Attending investigatory interviews;
>
> b. Meetings with the Department representatives. except as noted below;
>
> c. Meeting with employees to resolve complaints and grievances;
>
> d. Attending grievance meetings with managers and employees;
>
> e. Attending formal discussions;
>
> f. Participating as a representative of the Union at an arbitration;
>
> g. Attending a meeting with the Federal Labor Relations Authority (FLRA) Field Agent or Attorney, pursuant to an Unfair Labor Practice charge or complaint;
>
> h. Completing business required by the Department of Labor;
>
> i. Participating as the representative of the Union at an arbitration or unfair labor practice hearing related to the AFGE/HUD unit;
>
> j. Communicating with Congress in their capacity as Union representatives regarding matters concerning bargaining unit working conditions, except when prohibited by federal statute; and
>
> k. Other representational functions permitted by law.
>
> Section 6. Procedure.
>
> (1) When it is necessary to use official time, the representative shall first obtain approval from

> his/her immediate supervisor or designee who has supervisory authority in advance.
>
> (2) The representative must, in addition, when entering a work area to meet with an employee, obtain advance approval from the supervisor of the employee if meeting with the employee for more than ten (10) minutes on duty time. Upon conclusion of the representational activity, the representative should inform the representative's supervisor or designee that the activity has been completed.
>
> (3) Supervisors may deny the use of official time based only on Departmental mission-critical necessities; e.g., emergency conditions. If denied, the supervisor shall give the reason in writing at the time of denial and the supervisor will discuss an alternative time when official time can be utilized. Such denial may be appealed to the representative's second line supervisor who shall promptly meet with the Union representative to make a determination on the appeal. Denials of official time are subject to the grievance procedure. The Union may immediately reallocate any official time that a representative is unable to use due to mission-critical emergency situations to another representative or to designate a new representative to fulfill the affected representative's Union responsibilities.
>
> (4) All designated Union representatives who are entitled to official time under this Agreement shall record the use of all representational time in Web TA or its successor system(s). . . .

Article 47 of the Parties' 2015 Agreement contains identical language regarding the use of official time.

Article 17, Hours of Duty – Alternative Work Schedules, of the Parties' 1998 Agreement provides in relevant part that:

> (5) Upon demonstrated need, Management may override, either temporarily or permanently, the work schedule choices, including work to earn credit hours, of individual employees in order to maintain adequate office coverage, to meet other operational needs of the Department or because of lack of work. The determination of who shall be required to work particular tours of duty in order to meet coverage or other operational requirements shall be within the discretion of Management. To the extent possible, however, personal scheduling preferences shall be considered in making such decisions.

Article 16, Hours of Duty, Credit Hours, Alternative Work Schedules, of the Parties' 2015 Agreement provides in relevant part that:

> Section 16.04 - Individual Alternate Work Schedules Denials, Suspensions, or Terminations.
>
> . . . .
>
> The supervisor may deny an employee's request for an alternative work schedule, or suspend or terminate an employee's participation in a particular alternative work schedule if it is determined that the employee's participation would negatively impact operational needs.
>
> . . . .
>
> If an employee's flexible work arrangement is suspended, it will be restored as soon as possible after the operational needs have been met. If the work schedule suspension lasts longer than two

(2) pay periods or the employee's work schedule is terminated the Union will be notified.

Evidence Regarding the Parties' Agreements and Practice with Regard to Official Time

Edward Eitches, Esq., a nonsupervisory Senior Trial Attorney with the Agency and the Union's First Vice-President, explained that, in a prior role as President of AFGE Council 222, he had served as chief negotiator for the Parties' 2015 Agreement. Mr. Eitches testified that, in the course of those negotiations, which spanned from June 2012 until September 2014, he and his management counterpart, Karen Newton-Cole, had prioritized the negotiation of a new official time article in order to avoid the possibility that the Parties would later reach impasse on that article. He explained that both he and Ms. Newton-Cole had agreed that the new official time article should become effective immediately upon its completion, that the article had been memorialized as Supplement 124 to the 1998 Agreement, that the Parties had signed off on Supplement 124, and that it had become effective on January 23, 2013. Supplement 124 is virtually identical to Article 47 of the Parties' current Agreement. Under Supplement 124, official time allocations are made by the Union on a quarterly basis.

Mr. Eitches testified that, among the Union's goals in negotiating Supplement 124 was the preservation of the right of Union officials to receive large blocks of official time to work fixed official time schedules. He noted that Supplement 124 contains, for the first time, language specifying that supervisors may deny the use of official time based only on departmental mission-critical necessities, such as emergency conditions. He explained that, previously, supervisory preauthorization of official time within the pay period in which the official time would be used had been at least nominally required except for those Union officers assigned to a fixed official time schedule, whose official time would be approved in advance on a quarterly basis. Mr. Eitches stated that, under Supplement 124, Union officers would enter their official time usage for the pay period at issue into the Agency's WebTA time and attendance system, and

their supervisors would review their official time usage at the conclusion of the pay period in the course of certifying time and attendance records. He noted that this process is different than that used for approval of annual leave, where employees must receive supervisory approval prior to taking leave.

Mr. Eitches noted that, in contrast to the language of Supplement 124, which provides for the denial of a request for official time only in the case of departmental mission-critical necessities, the 1998 Agreement had provided the Agency with the ability to change an employee's day off under an alternative work schedule merely by demonstrating that such movement had a business purpose.

Mr. Eitches testified that he knew of a number of Union officers on fixed day official time schedules, and that, to his knowledge, every Union officer receiving an official time allotment of 25 percent or greater had been provided a fixed official time schedule.

The record reflects that the Grievant's official time allocation and schedule has varied over the course of his service as a Union officer, ranging from a high of 50 percent official time to a low of ten percent official time and that, as of the request at issue in this matter, he had been allocated 35 percent official time. Mr. Eitches noted that an employee with a ten percent official time allotment would generally not have a fixed official time schedule.

Ms. Newton-Cole, who served as acting Chief Human Capital Officer for the Agency during the negotiation of Supplement 124, testified that she understood that document to require that a manager have a mission-critical necessity in order to deny an employee's request for the use of official time, and acknowledged that this requirement provided Agency managers with less discretion to deny requests for use of official time than they had had under prior negotiated agreements.

As of the date of the arbitration hearing in this matter, the Grievant was the only Union Steward in the Agency's Office of the Chief Information Security Officer.

The Union noted during the arbitration hearing that the grievance in this case does not claim or rely upon any claimed failure of the Grievant's supervisors to provide in writing at the time of denial the reason for the denial of his request for official time as required by Section 6, Subsection 3 of Supplement 124; rather, the grievance relates to the substance of the denial of the Grievant's request.

Evidence Regarding the Grievant's Use of Official Time

The Union's office is located in Room 3142, on the third floor of the Agency's headquarters building. The Grievant's office is located in Room 4282 of the same building, and he estimated it would take approximately five minutes to walk from one location to the other. The Grievant testified that his supervisors are able to reach him via telephone when he is working in the Union office. He stated that, on at least one occasion several weeks prior to his testimony in this matter, he had been approved for official time and had been performing work on behalf of the Union in the Union office, but nevertheless returned to his regular workstation at the request of a supervisor.

The Grievant testified that several years prior, while employed as a Program Analyst by the Agency, he had served as a Union officer and had been allocated 50 percent official time, which he had utilized every Tuesday and Thursday without objection from the Agency.

The record reflects that, for the fourth quarter of Fiscal Year 2014, the Grievant was allotted 52 hours of official time by the Union. The Grievant testified that for the first quarter of Fiscal Year 2015, he had been granted an official time allocation of 35 percent. He explained that, upon being given that allocation (which was more substantial than his prior allocation of

official time), he had been instructed by the Union to use his official time to, among other things, be present in the Union office every Friday during his working hours. The Grievant testified that he did not know whether the Union intended that he be present merely to staff the Union office or for some other purpose.

Upon learning of the Union's request that he use official time on Fridays, the Grievant notified his then-supervisor, Harold E. Williams, that his official time allocation had been increased and that the Union had requested that he utilize eight hours of official time on Fridays (i.e., for the entirety of his workday on Friday). In an email dated September 12, 2014, the Grievant wrote:

> Official Allotment of Union Times takes effect Oct 1, 2014. I was asked; as a Union Representative with Official Union Time by my Union President, to fill an Office void on Fridays. I "notified My Supervisor" of the changes to my work schedule. All other inquiries should be made to Labor Relations.

The Grievant received an email from Mr. Williams on October 2, 2014 which stated in relevant part that:

> Fareed, unfortunately working in the union office for 8 hours on Friday in [sic] not doable. I will offer you the following options (l) Work in the Union office for 2 hours in the morning Monday-Thursday, (2) Work on Call, and (3) As needed my [sic] Union. If you have other option that you would like to share please let me know.

The Grievant testified that his duties as an IT Specialist consist generally of ensuring that the Agency's computer systems are in compliance with certain mandated controls, as well as assisting Agency staff with IT security issues, such as the resetting of passwords. He averred that he and his colleagues have no role in the repair or maintenance of Agency infrastructure or in the Agency's day to day IT security operations, which are handled by outside contractors, and testified that he would have no direct role in responding to hacking attacks against the Agency. He explained that his current work schedule is 9:00 a.m. to 5:00 p.m.

Mr. Williams, who served as the Grievant's supervisor from 2008 until 2014, explained that his staff had been responsible for dealing with any security issues (including with regard to emails and telephone calls) for the Agency, though he acknowledged that the primary function of the unit was compliance. He noted that, while another employee had primary responsibility for incident response work, the Grievant was both capable of assisting and expected to assist with such duties. Both the Grievant and Mr. Williams testified that the Office of the Chief of Information Security Officer had operated without difficulty when without its full complement of employees, as in the case of absences resulting from leave usage or periods in which there were unfilled vacancies/understaffing. The Grievant stated that, to his knowledge, none of his duties are mission critical.

The Grievant testified that he had never sought advance approval from a supervisor before utilizing official time, though he had always notified his supervisors of his location before leaving his workstation to attend to Union business. He noted, however, that his use of official time is captured in the WebTA system. Mr. Williams testified that, in his experience, the Grievant's time and attendance records had always accurately reflected the time spent by the Grievant performing work on behalf of the Union. He stated that, at times, the Grievant would seek approval for the use of official time before taking official time while, on other occasions, he would seek retroactive approval from Mr. Williams.

Mr. Williams stated that, prior to the Grievant's October 2014 request to use official time on every Friday, the Grievant had never before requested of him a set schedule for the use of official time. He averred that the decision to deny the Grievant's request had originated with Carlos M. Segarra, Sr., the Agency's Chief Information Security Officer and Mr. Williams's first line supervisor.

Mr. Segarra explained that, upon becoming Chief Information Security Officer in April 2014, he had worked to ensure that his office was adequately staffed at all times. He noted that, in part because employees had chosen to work 5/4-9 alternative work schedules in order to extend one weekend per pay period, his office tended to be understaffed on Mondays and Fridays. In order to minimize the impact of alternative work schedules and teleworking on staffing, he restricted telework to Tuesdays, Wednesdays, and Thursdays, and eliminated 4-10 alternative work schedules.

Mr. Segarra testified that, although his office is not staffed on a 24 hour a day, seven days a week basis, some employees in his office are assigned to be on call for after-hours incidents, though he noted that the Grievant has never been assigned to be on call for such incidents.

Mr. Segarra testified that he understood Supplement 124 to require Union officers to request official time on a case-by-case basis for representational purposes and subject to supervisory approval. He stated that, following receipt of the Grievant's request for official time on Fridays, he had discussed the matter with Mr. Eitches, who had explained that the Union wanted to have the Grievant available to staff the Union's office on Fridays. Mr. Segarra testified that, given that he had a responsibility to staff his office as well and that his need related to the Agency's mission, he did not believe it appropriate to grant the request for official time. He also noted that, given that his office has been understaffed by two or three employees since he began as Chief Information Security Officer, he did not feel that he could spare the Grievant every single Friday.

Mr. Segarra explained that he had opposed the Grievant's request for official time because he did not feel comfortable predicting his office's Friday workload for twelve weeks given that a number of employees generally take Friday off as a scheduled day off on an

alternative work schedule or on annual leave. He stated that, were the Grievant to approach him each Friday to determine if the office's workload would permit his use of official time, he (Segarra) would likely be able to approve the Grievant's use of official time each week. He acknowledged that, had the Grievant requested to use official time on Wednesdays, he (Segarra) would likely not have objected to such use because no employees in his office are regularly scheduled to be off on Wednesdays.

Mr. Segarra testified that he had not considered the possibility of accommodating the Grievant's request by increasing staffing through changes to the schedules of other employees on alternative work schedules so as to reduce the number of planned absences on Friday, as he believed that it would negatively impact the quality of life of those employees and would generate grievances filed by the affected employees.

Michael Stein, Esq., Acting Director of the Employee and Labor Relations Division of the Agency's Office of the Chief Human Capital Officer, testified that his duties include the review of official time reports at the Agency. He testified that he had reviewed the Grievant's request for official time at issue in this matter and had noted that the basis for the request appeared to be only that the Union wished the Grievant to man its office in the Agency's headquarters building, and testified that he was not aware of the Union having cited a basis involving the performance of representational duties to support the Grievant's request to use official time on every Friday. He acknowledged, however, that he had not instructed the Agency's managers and supervisors to inquire into the content of the representational functions performed by the Union's stewards, and noted that, generally, the Agency did not question the nature of the activities performed by Union officials on full- and half-time official time

allotments. He noted that the Agency was not challenging in this matter the propriety of the Grievant's request for official time.

Mr. Segarra testified that he had not made a determination as to whether the Grievant would be performing representational duties on Fridays were he to be granted the official time that he sought.

On February 23, 2015, the Grievant sent an email to Ms. Bigesby, who succeeded Mr. Williams as the Agency's Deputy Chief Information Security Officer and as the Grievant's direct supervisor, which stated:

> I am requesting to be allowed to work my **"Official Union Time"** and fulfill my 8 hours on Fridays in the Union Office Room 3143.

On February 26, 2015, Ms. Bigesby replied:

> I received your initial request to me for the use of official time. Your request is approved for official time to work in the union office for 8 hours on Friday, February 27th, 2015. Let's meet on next week to discuss options for your future request to use official time on Fridays.

The Grievant and Ms. Bigesby subsequently met to discuss his request. On March 4, 2015, Ms. Bigesby sent an email to the Grievant which stated in relevant part that:

> Thank you for meeting with me to discuss your request to be allowed to work your "Official Union Time" using 8 hours on Fridays in the Union Office, Room 3143. Per our discussion, I am amenable to you working in the union office every other Friday starting March 13, 2015. As your supervisor, I am flexible if the need arises to switch/change the Friday when arranged in advance. Additionally, you should continue to request the use of official time throughout the work week as needed for recording purposes.
>
> Please let me know if you have any questions regarding this matter.

Ms. Bigesby testified that she had not viewed the Grievant's February 2015 request as related to the instant grievance. She explained that she had agreed to permit the Grievant to take every other Friday as official time as a compromise, and stated that she was concerned that the office would have been short staffed had she permitted him to utilize official time every Friday.

Mr. Segarra testified that he had not been involved in Ms. Bigesby's decision to permit the Grievant to work on official time every other Friday.

CONTENTIONS OF THE UNION

The Agency improperly denied the Grievant's September 2014 request for a fixed day of official time on Fridays. Supplement 124 places strict limits on the Agency's discretion to deny requests for official time, and no basis was shown for the exercise of such discretion in this case. Moreover, the Agency has not demonstrated any other basis, such as a past practice, that would have permitted it to deny the Grievant's request for official time.

Because Supplement 124 and Article 47 of the Parties' new collective bargaining agreement are virtually identical and because the Agency's denial of official time constitutes a continuing violation taking place both before and after the effective date of the new collective bargaining agreement, any findings made by the Arbitrator in this matter should be treated as an interpretation of Supplement 124 as well as Article 47 of the new collective bargaining agreement.

The plain language of Supplement 124 permits managers to "deny the use of official time based only on Departmental mission-critical necessities; e.g., emergency conditions." As both Mr. Eitches and Ms. Newton-Cole noted, this limitation represented a significant change from the Parties' prior negotiated language regarding requests for official time and restricted the circumstances under which Agency managers could deny such requests. The record reflects that a number of Union officers have been assigned fixed days for the use of official time, and that the Agency has expressed no objection, as a general matter, to such arrangements.

To the extent that the Agency argues that the Grievant attempted to unilaterally change a practice existing between his supervisor and himself regarding his requests for official time, such argument is clearly without merit. The fact that the Grievant's request was made in a manner consistent with the procedures established by the Parties and reiterated as recently as the

adoption of Supplement 124 in early 2013 as well as in Article 47 of the Parties' 2015 collective bargaining agreement, is sufficient to rebut the contention that the Grievant attempted to modify some sort of alleged practice relating to his requests for official time. Moreover, the testimony of Mr. Williams does not reflect the existence of any such practice.

The Agency failed to rebut the Union's contention that management's denial of the Grievant's request for a fixed date official time on Fridays was not based on mission-critical necessity, the standard for such denials that is set forth in Supplement 124 and Article 47. The Grievant credibly testified that his duties consist primarily of paperwork and occasional phone calls involving IT security compliance, an assertion supported by the testimony of Mr. Williams.

The record reflects that while certain of the Grievant's colleagues have been assigned duties that involved being on call as part of an incident response team, the Grievant has not been assigned such duties and that his role in the event of the need to respond to a significant incident is generally limited to a secondary or support role. There is no record evidence to support the notion that the work performed by the Grievant is such that he could not perform it on a Monday through Thursday schedule subject to being called back from the Union office on Fridays in the event of an emergency, such as a data or other security breach requiring assistance from all members of the Office of the Chief Information Security Officer.

Mr. Segarra testified that staffing issues, particularly with regard to the number of employees expected to be in the office on Fridays, played a significant role in his decision to deny the Grievant's request for a fixed day of official time on Fridays; Ms. Bigesby similarly testified that, as a first-line supervisor in the Office of the Chief Information Security Officer, she had similar concerns regarding the Grievant's use of official time. The record reflects that management has permitted other employees in the office who are on an alternative work

schedule that permits them to take an additional day off within each pay period to select Friday as their designated day off. While Mr. Segarra testified that he had chosen to deny the Grievant's request for a fixed day of official time on Fridays rather than modify the alternative work schedules of others in his office, the 1998 Agreement, after the effective date of Supplement 124, is clear that management has greater discretion to make such modifications than it does to reject a request for the use of official time.

Finally, the fact that the Grievant and Ms. Bigesby entered into a compromise whereby the Grievant would be permitted to utilize official time on alternating Fridays should not be understood to constitute a resolution of the instant grievance. The Agency has not taken such a position, and neither the Grievant nor Ms. Bigesby testified that they understood their agreement to constitute a resolution of this grievance.

For all of these reasons, the grievance should be sustained in its entirety. The Agency should be directed to: 1) cease and desist from its violation of Supplement 124 and Article 47; 2) provide the Grievant with an additional number of hours of official time equal to those he was unable to use due to the Agency's failure to grant his request; 3) post a notice in the Office of the Chief Information Security Officer informing employees of the Agency's violation; 4) grant the Grievant each Friday for use of his official time and; 5) grant any other remedies deemed appropriate.

CONTENTIONS OF THE AGENCY

The Union has failed to demonstrate that the Agency violated Supplement 124 or Article 47 of the 2015 Agreement when it refused to grant the Grievant's request to work eight hours of official time every Friday.

The Grievant's September 2014 request for official time was not proper under either Supplement 124 or Article 47 because the request was made in order to "fill an Office void on Fridays." As Mr. Stein noted in his testimony, staffing a Union office is not per se a representational function. While it is likely that a steward may perform some representational functions while staffing a Union office, it is unlikely that the Grievant would be performing representational functions at all times while staffing the Union office for eight hours every Friday for 12 weeks. Because the stated rationale for the Grievant's request was one upon which official time may not be granted, the request itself was improper and in violation of Supplement 124 and, later, Article 47.

Even if the Grievant's request was not facially improper, it was contrary to an established practice within the Office of the Chief Information Security Officer. The Grievant himself acknowledged that, since joining the Office of the Chief Information Security Officer in 2008, he had never had a fixed schedule of official time and had only requested official time on an as-needed basis until September 2014. This practice, having been consistent over a significant period of time and followed by both parties, must be understood to be binding, and the Grievant's request for a set schedule of official time was in violation of that binding past practice. No showing was made that this past practice was altered by the provisions of Supplement 124 or Article 47.

Moreover, the Agency's response to the Grievant's September 2014 request did not violate Supplement 124 or Article 47. The Agency appropriately considered whether it could accommodate the Grievant's improper request and, finding that it could not, it offered the Grievant a number of alternatives for using his official time. Moreover, the Grievant remained free to submit requests for official time on a week-by-week basis (i.e., for each Friday

individually). As Mr. Segarra noted, he likely would have been able to approve most, if not all, of the Grievant's requests if they had been submitted weekly rather than all at once for an entire quarter.

To the extent that the Union claims that the Agency may deny a request for the use of official time only in the event of emergency conditions, such assertion is clearly without merit. Both Supplement 124 and Article 47 list "emergency conditions" as an example of a mission-critical situation that would justify the Agency's denial of official time. The use of "e.g." indicates that the words that follow are examples rather than the only descriptors of the concept that precedes. For these reasons, the Agency did not abuse its discretion in denying the Grievant's request for official time.

If, arguendo, the Arbitrator determines that the Agency violated Supplement 124 or Article 47 by denying the Grievant's request for a fixed official time schedule on Fridays, any remedy involving notice should be restricted to the Office of the Chief Information Security Officer. In addition, to the extent sought by the Union, a remedy directing the Agency to permit all stewards to schedule official time consistent with Supplement 124 would be outside the scope of this matter. Finally, to the extent that the Union seeks that the Grievant be provided with additional official time to offset those hours of official time that he was not able to use due to the alleged violations by the Agency, the Union should have to demonstrate that those hours were not reallocated to other Union officials as permitted by Supplement 124 and Article 47.

For all of these reasons, the grievance should be denied in its entirety.

DISCUSSION AND OPINION

Although the proposed issues submitted by the Parties in this matter were substantively identical, for purposes of clarity, I find that the issue presented for decision is whether the

Agency violated Supplement 124 or another provision of the Agreement with respect to the scheduling of official time for the Grievant and if so, to determine the appropriate remedy.

After careful consideration of the entire record, I am persuaded that the Agency violated Supplement 124 and Article 47 of the 2015 Agreement when it denied the Grievant's September 2014 request to work eight hours of official time every Friday. Accordingly, the grievance is sustained. A summary of the principal reasons for this holding as well as a discussion concerning the appropriate remedy follows.

The material facts in this matter are largely undisputed. In or about September 2014, the Grievant, a Senior Union Steward, was informed that the Union intended to allocate him 35 percent of his working hours as official time for the first quarter of FY 2015, with the intention that he use that time, in part, for eight hours every Friday for that quarter. The Grievant thereafter requested that he be permitted to use his official time on every Friday, and his request was denied.

The basis for the denial, as set forth by Mr. Segarra, related to what Mr. Segarra viewed as low staffing levels on Friday due to the election by some employees to work an alternative work schedule that involved at least one Friday off per pay period, as well as the increased propensity of employees to use leave on Fridays. Several of the Agency's witnesses, including Mr. Segarra and Mr. Stein, expressed doubts as to whether the eight hours of official time requested by the Grievant each Friday would actually be used for representational functions. However, both Mr. Segarra and Mr. Stein noted that such doubts had not been a basis for the Agency's denial of the Grievant's request, and Mr. Stein also testified that the Agency had not questioned the propriety of the purpose underlying the Grievant's official time request in this case.

There are several reasons why the Agency's denial of the Grievant's request for official time cannot be found to have comported with the provisions of Supplement 124 and Article 47. Both Supplement 124 and Article 47 permit the Agency to deny the use for official time only on the basis of Departmental mission-critical necessities, and describe emergency conditions as an example of such necessity. As Ms. Newton-Cole noted in her testimony, mission-critical necessity is a different standard than that of mere business necessity.

The fact that the Office of the Chief Information Security Officer may be insufficiently staffed on Fridays due to scheduled alternative work schedule days off does not provide sufficient grounds to justify the denial of a request by the Grievant for the use of official time. Absences due to days off as part of alternative work schedules can be anticipated and managed so that the absence of the Grievant is not so crippling to the office's operations that his return to work is a mission-critical necessity. No showing was made that management could not have changed the schedules of employees in the office such that they would be able to take other days off instead of Friday to the extent necessary to accommodate the Grievant.

If staffing was sufficiently low due to unforeseen or unavoidable absences or greater than usual work needs such that the Office of the Chief Information Security Officer could not properly function in the Grievant's absence, or if the Grievant was needed at his workstation to deal with an matter for which his assistance was required, neither Supplement 124 nor Article 47 would preclude management from directing that the Grievant to return to work to deal with those situations, which would properly constitute mission-critical necessities.

Given the expressed reluctance of the Agency's witnesses to probe the content of the representational functions assumed to be performed by the Grievant on regularly scheduled official time and given the lack of record evidence regarding the functions that were performed

by the Grievant while on official time at the Union office (including the lack of any evidence that he spent significant amounts of time engaged in activities other than those that would legitimately qualify as representational functions), there is insufficient basis to find the Grievant's request deficient on the basis of the activities in which he might engage while on scheduled official time.

The Grievant's request for a fixed official time schedule did not provide grounds for the denial of his request. The use of fixed official time schedules is not per se inconsistent with the terms of Supplement 124 and Article 47, which require only that a Union representative obtain advance approval before utilizing official time. The Agency's assertion that past practice precluded the Grievant from requesting a fixed official time schedule is unpersuasive. Assuming arguendo that such a practice did exist, the record reflects a change in circumstances – the increased allotment of official time by the Union to the Grievant – sufficient to vitiate any such past practice, which would have developed over a period of time during which the Grievant was allotted significantly less official time. For example, the Grievant received a grant of 52 hours of official time in the fourth quarter of Fiscal Year 2014, an amount equivalent to approximately ten percent of his working hours for that quarter. Given the allotment of 35 percent official time provided to the Grievant beginning in the first quarter of Fiscal Year 2015, it is clear that any practice that might have existed previously would no longer be applicable.

In light of the finding that no reasons were shown for the Agency's denial of the Grievant's request for the use of official time that meet the standards contained in Supplement 124 of the 1998 Agreement and Article 47 of the 2015 Agreement, the grievance must be sustained. I find that the traditional remedy of a cease and desist determination is appropriate in this case. No basis was shown for a notice posting of the type requested by the Union as a

remedy for the contract breach in this case. Nor did the record contain a valid basis for awarding the Union or the Grievant additional hours of official time as requested. The record did not establish that the Grievant was unable to perform representational duties due to the denial of his request that remain in need of being performed at this time. Nor did the record reveal that the Union was unable to have reallocated the Grievant's time, if it chose to do so, so as to have had other representatives perform the representational duties that the Grievant would have performed had the request been granted. Finally, with regard to the remedy, the Union is found to be the prevailing party in this arbitration and, therefore, the Agency will be deemed the losing party for purposes of Section 23.04 of the 1998 Agreement. Consistent with that Section, the Agency is responsible in full for the Arbitrator's fees and expenses.

AWARD

The Agency violated Supplement 124 to the 1998 Agreement and Article 47 of the 2015 Agreement when it denied the Grievant's request for a fixed official time schedule of eight hours every Friday for the first quarter of Fiscal Year 2015.

The Agency is directed to cease and desist from similar violations of the 2015 Agreement.

The arbitration fees associated with this matter are allocated entirely to the Agency, consistent with Section 23.04 of the 1998 Agreement.

April 8, 2016

Ira F. Jaffe, Esq.
Impartial Arbitrator