


 UNITED STATES OF AMERICA
 FEDERAL LABOR RELATIONS AUTHORITY

CHARGE AGAINST AN AGENCY

FOR FLRA USE ONLY

Case No.

Date Filed

Complete instructions are on the back of this form.

1. Charged Activity or Agency

Name: U.S. Department of HUD
 Address: 451 7th Street, S.W., Suite 2160
 Washington, D.C. 20410-3000
 Tel.#: (202) 708-2000 Ext.
 Fax#: (202) 619-8129

2. Charging Party (Labor Organization or Individual)

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 Address: 451 7th St. SW, Suite 3143
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3. Charged Activity or Agency Contact Information

Name: Karen Newton Cole
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4. Charging Party Contact Information

Name: Eddie Eitches
 Title: President, AFGE Local 476
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5. Which subsection(s) of 5 U.S.C. 7116(a) do you believe have been violated? [See reverse] (1) and (1), (2), (7), and (8)6. Tell exactly WHAT the activity (or agency) did. Start with the DATE and LOCATION, state WHO was involved, including titles.
See attached7. Have you or anyone else raised this matter in any other procedure? No Yes If yes, where? [see reverse] _____8. I DECLARE THAT I HAVE READ THIS CHARGE AND THAT THE STATEMENTS IN IT ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT MAKING WILLFULLY FALSE STATEMENTS CAN BE PUNISHED BY FINE AND IMPRISONMENT, 18 U.S.C. 1001. THIS CHARGE WAS SERVED ON THE PERSON IDENTIFIED IN BOX #3 BY [check "x" box] Fax 1st Class Mail In Person Commercial Delivery Certified Mail

Eddie Eitches

Type or Print Your Name

Your Signature

11/01/2011

Date

Item 6, continued

On September 30, 2011, the Department of Housing and Urban Development (HUD) issued a memorandum from James Reynolds, Deputy Director, Employee and Labor Relations Division, to HUD managers of union officials, subject: Appropriate Use and Accounting for Official Time. That memo, circulated among union officials by an email of October 4, 2011, states that

The following are misconceptions about official time...that 85% is considered as 100%... AFGE representatives are only authorized the amount of official time allocated as per Article 7 and all remaining time during their work schedules should be in the performance of the assigned duties of their position of record unless on approved leave. All designated AFGE representatives who are entitled to Official Time as per the Agreement shall record and specifically annotate the use of all representational time on HUD Form 25006-A. ... In determining the amount of Official Time the representative is entitled to for the quarter; subtract the amount of Official Time the representative is allocated by their AFGE Local President from the total hours the representative is scheduled to work during the quarter as an employee.

Imposition of the requirements stated in September 30 memo is an unfair labor practice in that it:

- (1) improperly defines the basis for calculating official time;
- (2) specifically rejects the idea that a union representative allocated 85% official time is the equivalent of a full-time union representative;
- (3) requires the use of a paper time-keeping form that has not been in use since the Department implemented a Web-based time and attendance system (WebTA); and
- (4) rejects the weight past practices have on current procedures

HUD's enforcement of the policies stated in the September 30 memo violates subsections (1), (2), (7) and (8) by:

- (1) Interfering with employees' rights to serve as union representatives and to be represented by improperly reducing the number of hours available for representation of the bargaining unit and the interests and rights of members of the bargaining unit;
- (2) Discouraging active membership in the labor organization by discrimination in connection with accounting for time spent on official time, a significant condition of employment;
- (3) Applying and enforcing a new definition of official time that conflicts with the HUD-AFGE Agreement, Article 7, which was in effect before the date the memo was issued; and
- (4) Otherwise failing or refusing to comply with any provision of Title 5, Chapter 71 by rejecting the past practices that have been accepted for many years, and even decades.

Discussion

1. HUD is incorrect in defining the basis for calculating official time as a percentage of the total hours the union representative is *scheduled to work* during the quarter. In an arbitration decision (85-05) involving HUD and Council 222, Arbitrator Ellen Bussey clarified that official time is calculated on the basis of *days paid*. “Article 7 of the Agreement entitles the Union to official time calculated on the basis of days paid per quarter and does not authorize deductions for paid holidays.” As noted by Arbitrator Bussey,

The Contract is silent on the annual hours to be used as a base for computing official time. There is no reference to a specific number of hours, or to any part or parts of the year, or quarter, for which official time will not be granted.

That remains true in the current HUD-AFGE Agreement. Official time is defined in the HUD-AFGE contract in § 7.01 as “all representational functions,” which are described in § 7.02 of the contract. Section 7.04 explains how official time is to be allotted:

Time shall be allotted on a quarterly basis. The amount of official time available to be allocated will be reviewed quarterly to match changes in Department strength.

Consistent with Arbitrator Bussey’s determination over 25 years ago, the only reference to the basis for determining official time in the current Agreement is Department strength. There is no reference to calculating official time based on scheduled work hours. Thus, official time must be calculated as a percentage of total hours that would be paid, with no deductions for holidays, leave, or any other time that is not scheduled work. Any such subtraction from the basis of the calculations is an improper reduction in the number of hours available for representation of the bargaining unit. Mr. Reynolds’ instruction to “subtract the amount of Official Time the representative is allocated by their AFGE Local President from the total hours the representative is scheduled to work” is therefore improper.

2. Mr. Reynolds’ direction that “all remaining time during their work schedules should be in the performance of the assigned duties of their position of record unless on approved leave” is improper, as is HUD’s corresponding rejection of the concept that 85% official time is equivalent to full-time work.

There are many activities other than performing assigned duties of a representative’s position of record that are not representational functions that may not be allocated to official time. In addition to taking accrued leave, using federal holiday leave, attending training, attending staff meetings, reading and reviewing correspondence unrelated to Union functions, performing administrative tasks such as entering time and attendance data, reviewing performance ratings, responding to employee surveys, participating in telephone calls, checking voice mail, and interacting with one’s own supervisors or managers outside of union business are all examples of activities that do not count against official time.

The HUD-AFGE contract addresses the assignment of work in §7.05, Adjustments of Workload.

In order to facilitate release of Union representatives on official time, individual workloads shall be adjusted up-front, where practical, to reflect time needed away from official duties.

Mr. Reynolds' reference to "all remaining time" is farcical. Over the course of a 2080-hour year, an employee who is allotted 85% official time would be entitled to spend 1768 hours on official time. The remaining time to which Mr. Reynolds refers is only 312 hours—equal to only six hours per week. Paid federal holidays account for 80 of those remaining non-official time hours. The remaining 232 hours—less than 9 hours per pay period—has to include all annual and sick leave, training time, and administrative tasks.

A 2006 OPM showed that, on average, employees used between 73 and 105 hours of sick leave per year, depending on the employee's proximity to retirement. Congressional Research Service, *Sick Leave: Usage Rates and Leave Balances for Employees in Major Federal Retirement Systems* (2008).¹ Any employee in the maximum annual leave category (e.g., an employee in a use-or-lose situation who earns the maximum 208 hours of annual leave per year) could be expected to use 281 hours of leave (73+208=281) each year. Most employees participate in training, staff meetings, and town hall meetings, and it would be reasonable to estimate that 80 hours per year might be allocated to those activities. Adding in a minimal estimate of one hour per work day for all administrative tasks (not counting leave days), accounts for another 215 hours of non-official time. The sick leave, annual leave, holiday leave, training, meetings, and administrative tasks—none of which are official time—together total 576 hours per year, or 28% of paid hours. This is far more than the 312 hours of "remaining time" during which Mr. Reynolds wants work assigned.

Thus, HUD's rejection of the idea that a union representative allocated 85% official time is the equivalent of a full-time union steward is wrong. In contrast to Mr. Reynolds' assertion that 85% official time is not equivalent to full-time representational work, these figures show that any allotment over 72% is equivalent to full-time representational work. For some employees, such as those who use more sick or annual leave, participate in more training or meetings, or spend more time on administrative tasks, an allocation of even 55% official time might be the equivalent of full-time representational work. As with the Department's attempt to reduce basis for calculating official time, this is an improper attempt to further reduce the amount of time available to represent the bargaining unit. HUD cannot charge leave, training, holidays, and other non-representational time to official time.

3. The HUD memo states that union representatives who are on official time must use a paper time-keeping form (HUD 25006-A) to account for their time, including beginning and ending time for each day that they engage in official time. This form has not been in use in some offices for over a decade. It has not been used for union representatives who are considered the equivalent of full time, as it creates a burden on both the employee and managers. Its general use has been dropped once the Department implemented a Web-based time and attendance system

¹ Available online at www.nrlca.org/userfiles/File/legislative/Sick_Leave_Usage_Rates.pdf.

(WebTA). WebTA provides the same information, including the different categories of union time. Forcing union representatives to provide the same data twice and to account for their time by minutes each day, with each start and end time annotated (e.g., start official time, stop for break or to conduct non-official business, start again, stop again, etc.) is a form of harassment that serves to discourage membership from engaging in representational functions. This can be contrasted with the situation where employees take leave, another non-agency work status, yet no longer have to fill in paper SF-71 to account for leave time because it is entered in the online WebTA system.

4. HUD's rejection of the weight carried by past practices is improper, as shown by numerous FLRA decisions and case law over the years. For example:

Where a past practice establishes a condition of employment, that condition of employment becomes incorporated into the collective bargaining agreement. *Defense Contract Management Agency*, 103 LRP 19393 , 58 FLRA 519 (FLRA 2003).

An agency is required to fulfill its obligation to bargain in good faith when it changes a condition of employment that was established through past practice. *Food Safety and Inspection Service*, 108 LRP 19510 , 62 FLRA 364 (FLRA 2008).

Even when an agency's decision to terminate a past practice involves the exercise of a management right, the agency must give notice to the union and provide them with an opportunity to engage in impact bargaining. *DOD, Domestic Dependent Elementary and Secondary Schools*, 105 LRP 48955 , 61 FLRA 327 (FLRA 2005); *U.S. Geological Survey*, 82 FLRR 1-1571 , 9 FLRA 543 (FLRA 1982).

Thus, if HUD management wants to change past practices, such as the recognition that a significant percentage of time allocated to official time is equivalent to full-time union work or the substitution of electronic time-keeping for paper forms, management must formally notify the Union and engage in bargaining in good faith. Until such notice and bargaining is effected, management may not unilaterally change conditions of employment.

Mr. Reynolds, in a subsequent email of October 6, suggests that the past practices are invalid because they violate the HUD-AFGE Agreement. The contract states in § 1.01 (4) that "Management and the Union agree that, in regard to the bargaining unit, they will not do anything by custom or practice that will contravene or violate this Agreement." The past practices referenced include calculating official time based on total paid hours, treating employees allotted significant percentages of official time as full-time union representatives, and eliminating the use of paper time-keeping forms for full-time representatives and for all representatives with the introduction of automated systems. All of these practices are consistent with the contract terms.

Mr. Reynolds' refusal to provide notice of a planned change and to bargain in good faith not only violates the Agreement but also interferes with employees' rights be represented by improperly attempting to intimidate the union through the unilateral issuance of policy statements.

Conclusion

Local 476 requests that HUD be ordered to calculate official time as instructed by the 1985 FLRA Arbitration decision, based on total paid hours; that union representatives allocated a significant percentage of official time—at least 68%, although the amount might be less depending on the employee’s situation— be treated as full-time representatives; to eliminate the requirement to use an obsolete paper time-keeping form; and to recognize the weight of past practices that are not in conflict with the negotiated contract.

Request for Injunctive Relief

AFGE Local 476 requests immediate issuance of injunctive relief that requires HUD to use days paid as the basis for calculating official time in accordance with the 1985 FLRA Arbitration decision; to recognize that a union representative allocated a significant percentage of official time be treated as a full-time union representative; and to eliminate the requirement to use the paper time-keeping form HUD 25006-A to account for union time.

We believe the actions of the Agency meet the criteria for temporary relief. Granting such relief is “just and proper” and the evidence clearly establishes that an unfair labor practice is being committed. Further, such relief would not interfere with the ability of HUD to carry out its essential functions.

1. The matter is serious. HUD’s attempt to reduce Union representation of bargaining unit employees is a serious interference with employee’s rights to representation and discourages Union membership and participation. This has a direct effect on employee working conditions and the ability of the Union to respond to issues.
2. The law is clear regarding Management’s duty to bargain. If HUD wishes to change long-established policy, Management has the obligation to bargain with the Union. HUD has rejected all Union attempts to bargain or even discuss the matter.
3. The granting of temporary relief would not interfere with the ability of the Agency to fulfill any essential function, nor interfere with the Agency’s mission in any way.
4. The Union has pursued remedies for this matter as quickly as possible. Management has refused to respond. Any delay is due strictly to Management.
5. Failure to maintain the status quo will frustrate the HUD employees adversely affected by the Union’s inability to represent them in a timely and effective manner. The working conditions of numerous employees may be harmed while awaiting a final decision of the FLRA. A final order of the FLRA would be rendered ineffectual by the passage of time that is normally required for processing of a case through the administrative procedure.
6. Management’s refusal to bargain undermines the fundamental right to engage in collective bargaining.