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108 LRP 644

**American Federation of Government
Employees, Local 3917 and U.S.
Department of Housing and Urban
Development**

Federal Arbitration

0-AR-4333

06-05000

November 24, 2007

Related Index Numbers

1.036 Contract Interpretation

5.060 Specificity of Grievance

28.001 Absences

28.035 Determination of Meaning

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66.016 Employee Obligations

66.063 Administrative Leave

Judge / Administrative Officer

Nelson, Luella E.

Ruling

Arbitrator Luella E. Nelson ruled that the agreement allowed the grievant to use administrative leave to volunteer to help at his son's school.

Meaning

The arbitrator rejected the agency's assertion that the grievance was patently without merit and frivolous, finding that it was reasonable for the grievant to believe his request would be approved and then to pursue a grievance when it was denied.

Case Summary

A memorandum of understanding provided that employees may be granted up to eight hours administrative leave per month to engage in volunteer activities. It required that the activity engaged in by

the employee must meet one of four criteria. The agency rejected the grievant's request for administrative leave to help out in his son's classroom and lunchroom. Consequently, he used annual leave. The grievant did not initially address which of the four criteria applied, as the agreement required. However, as the dispute progressed through the grievance procedure, the grievant addressed the criteria and the agency rejected his claim by also stating its position on each criteria.

The arbitrator rejected the agency's claim that helping at a public school could not be encompassed within the volunteer activities intended by the agreement, because it is something every parent who works in the private sector would want to do, but would not be allowed on company time. The arbitrator noted that the government is a large employer that has for several years encouraged volunteerism. The agency pointed to agreement language indicating approval of the leave by management is permissive. The arbitrator agreed, but explained requests may not be disapproved arbitrarily, and decisions must be made in consideration of the terms of the agreement.

The arbitrator noted that the criterion most disputed by the parties was whether the volunteer activity was directly related to the agency's mission. Although the agreement required a "direct" relationship between the volunteer activity and the mission of the agency, the arbitrator noted the examples used went well beyond the agency's mission. She found the evident focus of those examples community development. Citing the language surrounding the examples, the arbitrator concluded that the agreement took an expansive view of eligible activities for employees to support community development. Finding the grievant's request was within the criteria contained in the agreement, the arbitrator ordered the agency to restore his lost annual leave and grant administrative leave.

Full Text

APPEARANCES:

On behalf of the Union: Mr. Perry Casper, AFGE Local 3917, 400 SW Sixth Avenue, Suite 700, Portland, OR 97204-1632

On behalf of the Agency: Timothy J. Hartzer, Esq., Chief Counsel, U.S. Department of Housing and Urban Development, 625 Silver Avenue SW, Suite 100, Albuquerque, NM 97102

Opinion and Award

This Arbitration arises pursuant to Agreement between AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 3917 ("Union"), and U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ("Agency"), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

Hearing was held on March 1 and July 25, 2007, in Portland, Oregon. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. Both parties filed post-hearing briefs on or about August 18, 2007.

Stipulated Issues

1. Is the grievance that is the subject of this arbitration patently without merit and/or frivolous?

2. Were the initial denial of administrative leave and the Step 1, 2, and 3 decisions on the subject grievance consistent with the Volunteer MOU, the Agreement, and other applicable documents addressing approval of administrative leave for Agency employees to engage in volunteer activity? If not, what shall be the remedy?

Relevant Provisions of the Agreement

ARTICLE 23

ARBITRATION

...

Section 23.04 -- Arbitration Fees and Expenses. The losing party shall pay the arbitrator's fees and expenses. The arbitrator should indicate which party is the losing party. If, in the arbitrator's judgment,

neither party is the clear losing party, costs shall be shared equally.

...

Section 23.13 -- Merit. Where a grievance is taken to arbitration and is found to be patently without merit and/or frivolous, and without any reasonable basis, the arbitrator, notwithstanding any other provision of this Agreement, shall charge all arbitrator's fees and representation fees to the losing party. In all other cases, fees shall be assessed in accordance with Section 23.04.

...

ARTICLE 4

EMPLOYEE RIGHTS/STANDARDS OF CONDUCT

Section 4.01 -- General. Employees have the right to direct and to pursue their private lives consistent with the standards of conduct, as clarified by this Article, without interference, coercion or discrimination by Management. Employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment, and may grieve any matter relating to employment.

...

Section 4.03 -- Performance of Duties. Employees shall perform all lawful duties assigned by appropriate Management officials and the successful performance of these duties shall not be the reason for delay or denial of a within-grade increase, or career ladder promotion, or for an act of reprisal against an employee.

...

Section 4.06 -- Morale. Recognizing the that productivity is enhanced when their morale is high, managers, supervisors, and employees shall endeavor to treat one another with the utmost respect and dignity, notwithstanding the type of work or grade of jobs held.

Section 4.07 - Voluntary Participation. Management may provide the opportunity, but may

not require employees to participate in recognized Savings Bonds programs, charitable campaigns for contributions, or other community activities not related to the employee's job.

...

ARTICLE 50

USE OF ADMINISTRATIVE LEAVE FOR ADOPT-A-SCHOOL VOLUNTEERS

Section 50.01 -- Scope. This article applies to volunteers participating in the Adopt-a-School Program.

Section 50.02 -- Administrative Leave.

(1) Up to eight (8) hours of administrative leave per month is allowed to participate in the Adopt-a-School Program. No leave may be granted where there would be an adverse impact on work operations or productivity. Supervisory approval is required for use of this leave. Any management decision which results in an Adopt-a-School volunteer receiving less than eight (8) hours of requested administrative leave per month for participation in the program is a grievable matter.

Relevant Provisions of the Memorandum of Understanding on Administrative Leave for Non-profit Volunteers ("Volunteer MOU")

...

1. Allowance of Time: Supervisors may approve administrative leave for non-profit volunteer purposes not to exceed an average of eight (8) hours per month per twelve (12) month period.

2. Required Criteria: The volunteer activity must meet one of the following four (4) criteria: (1) the absence will clearly enhance the professional development or skills of the employee in his/her current position; (2) the absence is brief and is determined to be in the interest of the Department; (3) the absence is officially sponsored or sanctioned by the Department; or (4) the absence is directly related to the Department's mission. Examples of the Agency's mission include, but are not limited to, any

program or activity which a city or town may support under the CDBG¹ program or other HUD program or which is related to housing or community development, such as Girls' and Boys' Clubs, Big Sisters/Big Brothers, volunteer firefighters, Red Cross emergency relief, and many more.

3. Request/Approval Procedures: Requests for administrative leave pursuant to this MOU must be made in advance and in writing. The request must include the name of the organization sponsoring the volunteer activity, the location, the date(s), detailed information describing the volunteer activity, and which of the required criteria contained in Article 2 apply to the activity in question. ...

...

5. Amount Of Leave: The amount of leave approved should be reasonable under the circumstances.

...

Facts

The Agency administers various housing-related programs. Its mission, as described in plaques posted at each office, is "To increase homeownership, support community development and increase access to affordable housing free from discrimination." Grievant works in the Agency's Portland, Oregon, office. This case involves his request for administrative leave under the Volunteer MOU.

The Administrative Leave Request

On January 20, 2006, Grievant requested three hours of administrative leave for January 24, 2006, to "teach and mentor 2 grade elementary school students during normal school hours and assist and chaperone lunch period and cleanup" at the Lake Oswego School District, where his son attends school. Grievant's leave request did not discuss how the activity fit within the criteria in the Volunteer MOU, and his supervisor did not ask for this information. Human Resource Specialist Pat Converse testified Grievant's supervisor (who has since retired) sent the request to her and asked if it met the Volunteer MOU criteria.

Converse reviewed the request and submitted it to the Agency's legal counsel; both concluded it did not address the criteria. She instructed Grievant's supervisor to deny the request on that basis. His supervisor disapproved the request on January 24 on the stated basis that the requested leave "does not meet criteria of Article 2 of MOU." The parties stipulated that the requested leave was brief.

The grievance over the denial of the first leave request was denied at the first step based on the lack of any explanation of how the request met the Volunteer MOU criteria. The Agency's second level response emphasized the permissive language of the Volunteer MOU, analyzed the criteria, and concluded that the request did not meet any of the criteria, specifically:

Criteria One -- the absence will clearly enhance the professional development or skills on the employee in his/her current position -- the volunteer work you described does not *clearly* enhance the professional development or skills of your *current position*. (Emphasis added). While in some areas, this may be speculative -- in this case -- it really isn't. The description you provided does not reflect activities directly related to your current position.

Criteria Two -- the absence is brief and is determined to be in the interest of the Department -- while the absence is brief, it is not in the best interest of the Department.

Criteria Three -- the absence is officially sponsored or sanctioned by the Department -- The absence was not officially sponsored or sanctioned by the Department.

Criteria Four -- the absence the absence [sic] is directly related to the Departments mission -- the absence was not directly related to the Agency's mission and it would not be supported under any HUD program or program area. Regardless of any similarity or potential affinity in missions, mentoring school-age children is not directly related to the Agency's mission.

The Agency also concluded that Grievant was

not a participant in an Adopt-a-School program under Article 50 of the Agreement. The written third level appeal articulated the following rationales for the request:

Criteria one -- the absence will clearly enhance the professional development or skills of the employee in his/her current position.

The second level response highlights clearly and current position. Communication skills are part of each HUD employee's performance evaluation. The skill to communicate and pass information on to clients is of such importance to HUD that every single HUD employee is evaluated each and every year on this skill. This specific employee has been given, offered, provided with, and mentored with NO communications skills classes or any type of training. The act of communicating with children, I would argue, is much more difficult a task than many of the meetings with clients that we in HUD conduct. At least are [sic] clients know the subject matter to start with. Any training or practice of communication skills and teaching through a school classroom setting is far more than HUD has provided this employee. Clearly any practice and honing of this skill is valuable and relates as noted in the employees performance standards as part of the current position. While the employee was not trying to make the supervisor or second level officer consider this, it does apply.

Criteria two -- the absence is brief and is determined to be in the interest of the department.

The absence is brief and the response agrees that it is. At issue is only if the activity is in the interest to the department. Both Article 4 section 4.07, Article 50, and the MOU itself should provide more than enough indication that the department does take interest in educational activities in the community While not all activities are listed the framers of the MOU gave some examples in order to help guide supervisors. Part two (2) of the MOU specifically refers to community development programs "such as Girls' and Boys' Clubs, Big Sisters/Big Brothers ..." Activities with kids were specifically targeted. The same line went on to say "and many more". Indicating

that the examples were not exclusive. Just so the school building isn't the issue, make sure you ask, can you volunteer as a Big Brother for one child at school time? The MOU doesn't limit the time or location. If so, then why could you not support all the kids in the classroom at once, which you may be doing anyway in one of the Big Brothers/Big Sisters setting. There is only so much that one hair can be split. Helping out in school is not limited or prohibited. Why in the world are we trying now to limit whom in the school the volunteer time is used for? The point is that "interest" was created when the MOU allowed for children to be included in the criteria. Nothing in the MOU prohibits looking at other sections of the contract or other program money uses to determine if the agency has an "interest" in the activity. Once again, I would suggest that schools have been one way or another benefitted someplace, at sometime, in someway from HUD dollars. More importantly, I again, suspect HUD money has been used to help kids in school, in some fashion, someplace and at sometime. If either of these premises are true then a HUD "interest" is established even beyond what already has been established in the contract and MOU.

Criteria 3 -- the absence is officially sponsored or sanctioned by the department.

This wording is poorly written and has therefore not been properly considered. If the supervisor approved the time then the absence is officially sponsored or at least sanctioned. The second level decision tried to determine if the activity was officially sponsored or sanctioned. While that may have been the intent, which I don't know that it was, the wording on face value completes this requirement with approval of administrative time. Considering you can't have official sponsorship or sanction until approval by the supervisor, as written, this criterion is vague and unclear.

Is the activity officially sponsored or sanctioned? If it pertains to what is in the MOU and contract it is. Article 50 solves that concern as does Article 4.07 and the MOU.

Criteria four -- the absence is directly related to

the Department's mission.

This may include "any program or activity which a city or town may support under the CDBG program or other HUD program or"

So ... are any of the "activities" of education, teaching kids, helping kids, supporting kids, mentoring kids, cleaning up after kids, activities that any CDBG or HUD program money can support? Considering it can be the program OR the activity, the employee absolutely meets this criteria. The second level decision focused on the program only that the CDBG or other HUD money could support and not on the activity. Criteria four has been met for this employees request.

The Agency's third step response rephrased much of the earlier analysis. As to the second criterion, it concluded the requested absence was not brief because it exceeded the one hour of "brief" absence supervisors were contractually permitted to excuse, and therefore did not address the remainder of that criterion.

Grievant took annual leave in lieu of the requested administrative leave. He testified he assisted in the classroom with educational exercises, and also assisted at lunch and on the playground. He had done similar volunteer work at his son's school on administrative leave in 2003 or earlier, while he worked for the Small Business Administration. He testified the teacher and the other volunteers were happy to have a male volunteer; most volunteers were women. He did not know whether other volunteers were on paid time.

Grievant submitted requests in March, for 3 hours; in April, for 3 hours; in May, for 4 hours (to be worked in June); in October, for 2 1/2 hours; and in November, for 5 3/4 hours. Those requests were also denied.

The Genesis and Application of the Volunteer MOU

Article 50 of the Agreement has been in the Agreement since 1997. Debt Servicing Representative Tim Oravec testified the Volunteer MOU was his

brainchild. He was already a volunteer firefighter; he was also interested in volunteering at local schools, but found it difficult to find information on how to secure permission under Article 50. He was also aware that many others in his office were volunteering for various community activities. In April 2005, he recommended that the Union seek expansion of Article 50 to include other volunteer activities. He testified a factor in this suggestion was then-recent statements by the President announcing Volunteer Week and encouraging volunteerism.

The Union adopted Oravec's suggestion, and proposed expansion of Article 50 in an April 14, 2005 memo to the Agency. The Agency was unwilling to amend Article 50, but agreed to expand opportunities for volunteering. Deputy Secretary Roy Bernadi issued a memo on August 29, 2005, restating current Office of Personnel Management (OPM) policy encouraging agencies to facilitate volunteer activities by federal employees.² Union President Carolyn Federoff suggested adding illustrative examples of volunteer activities; the examples she provided were drawn from instances where Agency managers had disapproved administrative leave in the past -- in her view, erroneously. Those examples were incorporated in the final language. Although the proposal to expand the use of paid administrative time for volunteer activity had already been agreed upon in concept, the devastating blow struck by Hurricane Katrina on the Gulf Coast provided further impetus for finalizing the Volunteer MOU and signing it on September 14, 2005.

The Union's website includes a Frequently Asked Questions section compiled by Oravec. It suggests writing the leave request to link the activity to "the best interests of HUD" or a "program or activity which a city or town MAY support under CDBG." [emphasis in original] It suggests filing a grievance over denials of requests "If you have done your research and made all of the necessary points in your request or others have been approved and are going the same volunteer work."

As part of Oravec's volunteer firefighting

activity, he speaks about fire safety at local public schools. He testified each such appearance uses all or most of a workday. He now submits leave requests under the Volunteer MOU for these appearances. He testified those requests describe the activity in detail and make connections to the Volunteer MOU. Federoff testified an employee in Boston volunteers two hours per week at a local school as a classroom aide.

The Agency's website includes a page encouraging employees to volunteer and providing links to various non-profit organizations. Its "Daily Message" newsletter reports on volunteer activities by Agency employees. Some of those activities are school-related events sponsored by local Agency offices. Examples include a "Community Outreach" program that provided supplies for a school in a low-income area in Richmond, Virginia, and a "Reach and Teach" day on housing conducted as part of a Leadership Development Program sponsored by Chicago's headquarters. Agency personnel have received approval for volunteer work with such entities as Habitat for Humanity, a homeless shelter, Catholic Charities, and a program providing home repair for seniors and persons with disabilities. Requests have been denied for such activities as leading vacation Bible school, attending Cub Scouts meetings, building activities at a church in Mexico, a church trip to Africa, advocacy for Voices for Children, and work with Freedom Service Dogs.

The Mission of the CDBG

According to a Guide issued by the Agency, CDBG provides grant funds to public and private nonprofit entities for the acquisition, construction, reconstruction, rehabilitation, and installation of public improvements and facilities. That program defines "public facilities" and "public improvements" broadly, to include "all improvements and facilities that are either publicly owned or that are traditionally provided by the government, or owned by a nonprofit, and operated so as to be open to the general public." This definition includes such facilities as schools and firehouses. The CDBG allows grant recipients to use

grant funds for distribution lines and related facilities for privately-owned utilities. It also permits funding of facilities for public services, including education programs. At least 51% of the funds must be spent to provide services to low- and moderate-income people.

CDBG funds have been used in low-income school districts nation-wide -- for example, to improve bathroom facilities at an elementary school in Lakeview, Washington; to reconstruct a playground in a low- and moderate-income neighborhood in Portland, Maine; and to develop a school park in New Albany, Indiana. The Agency's Neighborhood Networks program supports community computer learning centers in Medford and Aloha, Oregon; similar projects have been undertaken in other states as well, partnered with local school districts. The Agency's Strategic Plan includes use of a variety of Agency programs to address "quality-of-life issues in low-income communities and households." CDBG is among the programs used for this purpose, with the primary intended beneficiaries to be "low- and moderate-income residents."

The Portland office has no agreements with any schools under the Adopt-a-School program; such agreements in other states typically involve schools with a large low-income population or other populations with a direct tie to CDBG's mission. No CDBG funds have been allocated to the Lake Oswego School District. Lake Oswego is a relatively affluent community in Clackamas County, which is in the metropolitan area surrounding Portland, Oregon. A print-out of the Agency's projects in Clackamas County does not list any projects specifically targeted at Lake Oswego.

Position of the Union

The Agency has determined that paid administrative leave is acceptable for volunteer activities. OPM guidelines permit the use of paid administrative leave for this purpose. The Agreement has permitted paid administrative leave for volunteering at schools since 1997.

The location of the school and attendance by Grievant's son had no bearing on the decision to deny his request. The MOU does not require an employee to say how many children will be in a classroom or if any of the employee's children will be present. Grievant provided the necessary details about the volunteer activity. It is improper to scrutinize what children may be in a classroom where an employee volunteers.

The definition of non-profit organizations includes public facilities such as schools and fire stations. The Agency accepted every specific example of volunteer activities presented by the Union as examples where management had tripped over the concept of "related to the Agency's mission." The Agency agreed volunteer fire departments were legitimate non-profit volunteer organizations. This activity occurs in a public facility. The Agency's handbook describes the range of activities which may be supported by CDBG funds; it includes public schools. CDBG funds may go to public schools or educational public facilities. The Agency was aware this MOU would apply to non-profit organizations based on the Agency's working definition. This guideline provided a contextual definition of the term. Using a contextual definition is reasonable since the Agency uses them in management/union agreements. Other Agency programs include Neighborhood Network programs for education and children that partner with local school districts.

The MOU clearly indicates "non-profit organizations" means something other than IRS Section 501(c)(3). There is no indication 50 state laws would be addressed to define non-profits. No testimony indicated this. As long as the organization is not profit motivated, the MOU applies. The Agency places nonprofit and public facilities in the CDBG program under one umbrella. A public school would not be considered a for-profit rather than non-profit organization. This MOU applies equally to employees in all 50 states. The MOU made things easier for supervisors by providing criteria. An example of a non-profit organization that fits the criteria is the fire

safety teaching Oravec does at a school. An employee in Boston volunteers at a public school with approved administrative leave. The question of whether the school is a non-profit organization was not an issue in making the decision to approve or deny the request.

Grievant's request included the organization name, hours, purpose and location, but did not state which criteria applied. The Agency thought this process so simple that it did not create a special form for these requests. Grievant's supervisor reviewed the MOU and responded he did not meet the criteria. She did not ask for more detailed information, nor did any grievance officer. There was no indication in the denial or later grievance responses that the problem was the omission of criteria. The Agency concluded the criteria did not apply. Not listing the criteria did not disrupt the process. It was not necessary to detail the number of children, classroom size, or similar details; Oravec does not include such details for his fire safety classes. The Agency did not demonstrate that applications could not be processed if some small item was missing. At each level, Grievant and his representative argued how the criteria applied. A missing notation made no difference between approval and denial.

The language stating that the Agency "may" grant administrative leave does not support this denial. The Agreement requires the Agency to administer and interpret its provisions "consistent with the requirement for effective and efficient government." No workload issues or problems were involved in this request. Grievant received paid annual leave in place of administrative leave. The Agency was required to consider workload requirements in approving that leave. The same consideration was intended by the MOU. Other employees have been approved for administrative leave using the MOU authority and criteria. None of the denials have been based on the "because I can" theory. Every application is reviewed for criteria.

Grievant reasonably expected his request would be reviewed fairly, including by considering each applicable provision governing the process. He should

be free from arbitrary decisions. Article 4.01 requires fair and equitable treatment. No testimony suggested a supervisor or grievance officer used a standard of "because I can" in making this type of decision. The Agency made a point of trying to say how fair it was in the process used. If this is so, a denial based on a "because I can" standard would not be consistent, or fairly and equitably administered. This is an Agency-wide MOU; all employees must be treated fairly and equitably. Other employees were approved for volunteer administrative time at schools. Grievant was treated differently. There was no Agency testimony of others treated like Grievant.

Under MSPB case law, reasons for leave are reviewed, and the reason is part of the decision-making process. Employees must have a valid basis for each leave request. In reviewing leave, management must consider the request in its entirety, including reasons. If a valid reason for leave is presented, it must be reviewed. Management cannot deny leave based solely on a refusal to look at the reasons; reviewing the reasons is part of the supervisor's responsibility. The Agency's discretion is to determine the need to have the employee at work for the efficiency of the Agency. The efficiency of the Agency was not affected. This arbitration must determine if the Agency provided the correct type of time off based on the request and reasons.

Only one of the four criteria in Section 2 of the MOU must apply. During the grievance process, the criteria were discussed, and a written statement was provided at the third level. The decisions at each level were based on not meeting the criteria, not on a claim that the criteria were not addressed. The grievance officials did not consider everything, improperly considered information, did not review information for the purpose presented, incorrectly interpreted information, and drew conclusions that were not supported by the information.

In his original application, Grievant did not apply the first criterion. It was felt there was clarity enough to demonstrate communication skills. The Agency recognized this criterion was met by "reach

and teach" activity in Illinois in a "leadership development program" in elementary school. It was important to reach out to children at the location best suited to find this youthful audience. The Agency believes there is a valuable experience to be found in such activity. If nothing more, Grievant was able to gain valuable leadership skills in his volunteer work.

The Agency stipulated the absence was brief. The MOU allows eight hours per month; the three hours requested were brief. The absence was in the interest of the Department. The Agency has continually misapplied and misunderstood Grievant's response. Grievant needed to demonstrate that the Agency had an interest in the activity. From the outset, Grievant said Article 50 of the Agreement demonstrated an interest. This was not intended to say Grievant was applying for administrative leave under Article 50. The Adopt-a-School program was created with public purpose and efficiency of the Government in mind. It protects employees from adverse consequences for volunteering at a school. To argue that the Agency has no interest in this activity, but will allow administrative time to be used, is contrary to Agency actions and this Article.

The Agency has the burden to establish this denial was for just and proper cause. No justification was provided in the Agency's pre-hearing memorandum, and no new testimony was provided, as to why this leave was not in the Agency's interest. The central focus of the MOU criteria is the activity, not the location. At the third level, the grievance officer did not consider whether the request was in the Agency's interest because he erroneously concluded the absence requested was not brief. At the very least, the matter could be remanded to the Agency to consider all of criterion 2. However, since that grievance officer has retired, the Arbitrator must now do the Agency's job.

The Agency provided no testimony that volunteer work at a school was of no interest to the Agency. Federoff and Oravec testified about volunteer work at schools. Employees have participated in the Adopt-a-School program. The

Agency once adopted a school in Spokane, Washington, where Agency employees volunteered. In all cases, the Agency granted administrative leave. Public schools are a location identified by the Agency as a place where volunteer activity can take place.

The MOU broadly defines the programs or activities where employees can volunteer. The Agency chose not to address the meaning of "and many more" in Section 2 of the MOU. Its Multifamily Program supports Neighborhood Network centers. The activities at those centers include basic education, after-school enrichment programs, reading programs for children, basic literacy assistance, and reading programs. The Agency's own web page on volunteering directs employees to opportunities at non-profits, Literacy Volunteers, Habitat for Humanity, Big Brothers/Big Sisters, and many more. Information on Big Brothers/Big Sisters includes information on site based volunteering at schools, libraries, and community centers; it addresses activities targeted at children and aimed at improving the lives of young people. It supports programs to help kids stay in school. A White House Executive Order encouraging employees to volunteer.

The Agency has repeatedly made web based volunteer programs and activities known to employees on its internal web pages. This demonstrates an interest in such activities. It has joined with other federal agencies to support Helping America's Youth; created a mechanism to support schools; designed activities to support school involvement, improvement and graduation; and directed support to youth. Its web page advertises examples of employee participation in these activities. An Agency Regional Director helped open a school playground paid for by CDBG funds. The Agency has shown an interest in these activities via the location or activity of education.

Although Grievant did not originally indicate that Criterion 3 applied to his request, it should be considered sponsored based on the Adopt-a-School program criteria. There is no set process for approving or picking an adopt-a-school. Nothing in

Article 50 disallows Grievant to choose this school to adopt. Continued approval of his ongoing volunteer work should qualify this activity as sponsored. Mentoring of multiple students, chaperoning multiple students, and assisting students with reading and math are sponsored activities by the Neighborhood Networks Program.

The request meets Criterion 4. Schools can receive CDBG funds. Although this particular school has not received CDBG funds, the MOU reads "any program or activity which a city or town may support under the CDBG program." There is no requirement that a specific school receive funds in order to be covered. There was no testimony of intent or language that CDBG funds first had to go to the school. The language was intended to make the MOU as broad as possible. If CDBG funds can support a school, it is a mission of the Agency. This criterion helps in defining non-profit, by indicating that locations receiving funds would be mission related. The "but not limited to" language clearly indicates other activities would be allowable as mission related. This indicated the broadest possible interpretation was to be used. The Agency presented the language of its mission plaque, which includes "community development," but did not define "community development." The Agency has a broad community development mission.

The Union's witnesses were not directly refuted, particularly as to the intent and scope of the MOU, that employees have received volunteer administrative time for working at schools, that schools may receive CDBG funds, or that the Agency uses its web pages and other active efforts to list, congratulate, and promote volunteers in schools.

Greenman was unable to recall any specific discussion of the criteria in her second level grievance meeting with Grievant and his Union representatives. Those criteria were discussed in writing at the third level, and were a topic of the arbitration. Her credibility must also be called into question over the decision process. She had considered only one other application. She had no training on the MOU but

claimed she considered the criteria. She told the Regional Multifamily staff that building homes for Habitat for Humanity would not fall under the MOU, blamed her confusion on this point on the Office of General Counsel, and quickly corrected this opinion. Her lack of experience with this MOU made her unable to independently determine that building homes was an Agency mission. She testified she considered the August 29, 2005 memo on volunteering, which was replaced by the MOU, that did not contain the language changes. This reliance may have contributed to her misinterpretation of the criteria.

The third-level official claimed to have done his own research, but reversed the second level decision about the "brief nature of the absence even though the MOU stated eight hours per month was acceptable. He felt "brief meant only one hour. He failed to get this simple decision correct. Because of this mistake, he did not finish applying Criterion 2. The official who prepared the chart indicating the school in question received no CDBG funds could not put the lack of funds in context with this MOU because he knew little about the MOU.

No Agency witness testified to having any training on the MOU, yet they were expected to know how to apply the process and meaning. The Union's witnesses researched, created, and negotiated the MOU. They testified this was intended to be as broad a volunteer program as possible; that the language was specifically discussed with management and changed to make it as broad as possible.

The grievance is reasonable and has merit. The Union brought the Volunteer MOU concept to the Agency's attention. The Agency agreed to the concept and used OPM guidance to release a memo containing the basic concept for a new policy. The Union pointed out the need for a negotiated policy. Specific changes to the original memo were negotiated. The MOU has been in effect for over two years. It was not the result of a specific event. It is still in force and outlives Hurricane Katrina. Hurricane Katrina played a role of helping bring the MOU to completion swiftly, but did

not contribute to its language.

No typical family day to day activities were part of Grievant's volunteer request. He sought to help a classroom of children during duty hours, with activities of sufficient interest to the Agency to have a contractual policy for over 10 years allowing volunteerism in these same activities. Grievant had performed these same activities while at another federal agency. Under this MOU, he thought the Agency would care as much, if not more, about employees volunteering to help at schools. The Agency has agreed administrative time may be used at schools. It is refusing to allow administrative time to volunteer at schools if the employee only asks under the Volunteer MOU. The logic is senseless. A reasonable basis for the Union's position has been established. The Agency has not refuted the Union's documentation and position, has not established that the activity is outside the scope of the MOU, and has not established limits in the MOU criteria that exclude the requested activity. There was no indication of a "patently" and without merit or frivolous arbitration. There were a number of reasonable reasons for this arbitration, including the Agency's lack of understanding how to apply the MOU criteria.

The MOU is clear. It was broadly stated. To make sure this was understood, a list of non-profits including an activity at a public facility is listed for clarification. The Union was so worried this would not be clear to some managers and supervisors that it added special language. It negotiated a Volunteer MOU even after the Agency sent out a memo on this subject, directly because of concern that supervisors and managers would not interpret this broadly enough. Administrative leave is available to volunteer at schools and is already part of the Agreement. A valuable volunteer activity took place. The volunteer activity and Grievant should not be penalized because his son was included in the experience.

As a remedy, Grievant should be awarded the administrative leave in place of the annual leave he was forced to take. The finding should include that the request fell under the MOU criteria. The Agency

should be declared the loser of this arbitration and pay the entire cost of the arbitration.

Position of the Agency

The Lake Oswego School District and Grievant's son's second-grade classroom are not eligible organizations under the Volunteer MOU because public schools are not non-profit organizations. In Oregon, non-profit organizations register with the Secretary of State and are regulated under Chapter 65 of the Oregon State Statutes. Examples are organizations such as the Girls' and Boys' Clubs and Big Sisters/Big Brothers. Public schools are governed primarily by ORS Chapters 326 through 348. The plain language of the Volunteer MOU refers to "Administrative Leave for Non-Profit Volunteers" and "volunteer services to nonprofit organizations."

The leave request failed to provide a detailed explanation of how any of the four criteria in the Volunteer MOU were met. The request provided no connection to Agency programs. Grievant acknowledged that he failed to provide the required explanation. He attempted to justify his failure to comply with that requirement by complaining that his supervisor failed to ask them for more information. There is no evidence that the responsibility rests with the supervisor to elicit the information required by the MOU. Since the Union developed the volunteer leave concept and provided the form to request volunteer leave, it is logical that the Union would explain the requirement for a detailed explanation. Both Grievant and the Union failed to meet the plain and unambiguous requirements of the MOU.

The MOU gives supervisors discretion to approve or deny a request for administrative leave. Management is not required to provide administrative time. A manager is to first review the request in light of the MOU criteria. The mission has to come first.

None of the four required criteria of the MOU apply to the volunteer activity in question. Grievant's request did not identify how volunteering at his son's classroom and lunchtime applied to one of the four criteria. As to Criterion one, the Union's explanation

of how volunteering at his son's classroom would enhance grievance professional development or skills required the suspension of disbelief.

As to Criterion two, an absence of three hours a month would be brief. However, the absence would not be in the interest of the Department. The fact that HUD funds may be used to benefit local school facilities somewhere in the United States does not require a broad interpretation of the MOU requiring approval of a request for administrative leave to spend time during the workday at an employee's child's school. There is no evidence that HUD has an interest in this particular school, and specifically in this employee's son's second-grade classroom. The evidence is quite the contrary. Grievant is not asking to volunteer and provide a service to the community. He is asking the Agency to pay him while he visits his son's classroom and cleans up after his son's lunch. Such activity is not in the interest of the Department as envisioned by the MOU, nor is it likely to be viewed favorably by taxpayers who work in the private sector, many of whom would relish the opportunity to chaperone at their child's school on company time.

As to Criterion three, the Agency supports employees who engage in volunteer activities, but has made it clear that allowing an employee to take off time off to participate in the volunteer activity does not mean that the Agency endorses the activity. The Union's own web site states that the MOU has no effect on the Adopt-A-School program. Article 50 describes the sort of program that is "sanctioned" by the Agency, in marked contrast to Grievant's request to spend time at his son's school. Volunteering at this classroom is not officially sponsored or sanctioned by the Agency.

As to Criterion four, the Agency's mission is stated on a plaque provided to every field office, including Portland. The MOU states the examples of the Agency's mission include "any program or activity which the city or town may support under the CDBG program or other HUD program or which is related to housing or community development." It

identifies non-profit organizations. The MOU is clear. Any activity will not do. It requires a direct connection or relationship between the volunteer activity and the Agency's mission. There is no indication that HUD funds are being used in Grievant's son's second-grade classroom. Volunteering there does not increase homeownership, support community development, or increase access to affordable housing free from discrimination. Moreover, it does not fit within the purpose of the CDBG program. CDBG funds benefit low and moderate income persons. Lake Oswego is one of the most affluent communities in the area.

Denial of the request for administrative leave did not violate the Agreement. Grievant has the right to grieve a matter relating to employment. He was treated fairly and equitably. He does not have a right to approval of administrative leave for volunteer activity. The plain language of the MOU gives him the opportunity to request such leave, and the Agency the discretion to deny such a request. His request was denied, but he was allowed to use his annual leave. The Agency did not interfere with his right to direct and pursue his private life. He was treated fairly and equitably when his supervisor reviewed his request. The request was reviewed on its merits rather than being rejected out of hand, even though it was incomplete and provided no explanation of how the activity met any of the MOU criteria.

There is no evidence of retaliation. No witnesses provided any evidence that retaliation was a motivating factor in denying the request. There is no evidence that supervisors treated Grievant without respect or dignity. He submitted his request; his supervisor reviewed it even though it was not complete, and provided him an answer. It is unreasonable to expect the Agency to grant every employee's request, no matter how deficient and inappropriate. Section 4.07 does not give employees a right to volunteer. It limits management from requiring employee participation in activities not related to the employee's job. It is silent on paid volunteer time. Grievant made his request pursuant to

the MOU, not Article 4 of the Agreement, because the MOU provides the process for requesting administrative leave for nonprofit volunteers.

Article 50 is not applicable to this grievance. It involves a formal program by which a local HUD office "adopts" a school and HUD employees volunteer time there. There is no Adopt-a-School Program in effect in the Portland office. The MOU does not replace or in any way affect Article 50.

The grievance is patently without merit, frivolous, and without reasonable basis. It seeks to apply the MOU entered into the month after the Katrina hurricane to a facially deficient request by a single employee to spend time during working hours at his son's second-grade classroom. Employees throughout the Agency regularly and without apparent complaint use annual leave to engage in personal and family matters such as taking their children to medical appointments, attending school plays, attending their child's athletic events, meeting with teachers, and innumerable other routine day-to-day aspects of parenting.

The MOU and other documents as far back as 1998 encourage Agency employees to volunteer for community service and permit administrative leave for activities that are consistent with one or more of the criteria restated in the MOU. The chart of approvals and denials compiled by the Agency demonstrates that requests for administrative leave have been both approved and denied for a variety of reasons. The most common reason for denial has been the failure to meet any of the criteria in the MOU. Requests that were approved were for activities that are clearly consistent with the language and intent of the MOU such as the Boys' and Girls' Clubs, Catholic Charities, and home repair for seniors and persons with disabilities.

This request was primarily intended to use the grievance and arbitration process to determine how far the plain language of the MOU could be stretched to accommodate a clearly inappropriate attempt to utilize paid administrative leave for a personal activity. The Union attempted to clothe the request in

inapplicable contract provisions, excerpts from web pages, examples of school construction projects using HUD funds, and other examples that fail to connect in any clear way to the stated purposes of the MOU.

Grievant's request does not fall within the plain language of the MOU and other applicable guidance for federal agencies. A requirement to approve paid administrative leave instead of annual leave for routine family activities, as opposed to volunteering at non-profit organizations whose activities are consistent with the Agency's mission, would be an unintended consequence of an otherwise laudable MOU.

The grievance should be denied; the grievance should be found to be patently without merit, frivolous, and without any reasonable basis; all arbitrator's fees and representation fees should be charged to the Union.

Opinion

Preliminary Matters

The Union bears the burden of persuasion as the moving party in this contract interpretation case. The applicable standards for contract interpretation are well established. Where the language is clear and unambiguous, the Arbitrator must give effect to the parties' intent. That is so even where one party finds the result unexpected or harsh. Language may be deemed clear even though the parties disagree concerning its meaning. The Arbitrator cannot interpret disputed provisions in a vacuum, but must read them in conjunction with other negotiated provisions.

Where the contract language is unclear or ambiguous, the Arbitrator may look to extrinsic evidence of the parties' intent. Such evidence includes bargaining history, contemporaneous statements regarding the agreement reached, practice in implementing the agreement, and post-contract clarifications and modifications. Bargaining history is significant where either the evolution of language or the parties' statements at the bargaining table demonstrate the intent behind particular provisions.

The Arbitrator must avoid interpreting ambiguous language to nullify or render meaningless any part of the parties' negotiated agreement if another reasonable interpretation gives effect to all provisions. However, if no reasonable meaning can be given to a provision, either from its context or by examining the contract as a whole, it may be treated as surplusage and declared to be inoperative. If two plausible interpretations exist, the Arbitrator must prefer that interpretation which avoids harsh, absurd, or nonsensical results. Any ambiguity not removed by other rules of interpretation may be removed by construing the ambiguous language against its drafter. This aid in construction does not apply where the final language differs substantially from the unilaterally-drafted language, and both parties approved the final language.

"Patently Without Merit or Frivolous"

It was understandable that Grievant believed the MOU permitted paid administrative leave for volunteering at a school classroom where his son was a student. A prior federal employer gave him such leave for this purpose. The record does not reflect whether that agency also had a contractual commitment expanding volunteer opportunities beyond documents such as the OPM memo in evidence. Given this prior experience and the MOU, it was reasonable to seek similar volunteer opportunities at the Agency.

Even assuming, as is likely, that Grievant was motivated to volunteer for this particular activity by a desire to benefit his son's class specifically (as opposed to children generically), the fact that an employee gets personal gratification from doing volunteer work does not disqualify him from eligibility for leave under the Volunteer MOU. Experience tells us that people volunteer for activities they consider valuable. In many cases, they volunteer within their own communities, where they and their families will benefit directly or indirectly. If Grievant's son, for example, were active in the Boys' and Girls' Clubs, that personal connection would not disqualify him from paid leave to volunteer with that

organization, even though Grievant might also get personal gratification or time with his son. It therefore was not patently without merit or frivolous to seek paid administrative leave under the MOU or to pursue a grievance when it was denied.

At the same time, there was some basis for the Agency to question the applicability of the MOU to this activity. Lake Oswego is not a community that comes to mind first to an Oregon resident as a likely recipient of aid for low- and moderate-income families -- the primary target of CDBG funds. Managers at this office have not received specific training on this MOU. It therefore was not patently without merit or frivolous to seek interpretation of the MOU language, including through arbitration.

The Merits

A few matters raised in argument do not significantly aid in interpreting the Volunteer MOU. First, it is likely that, as asserted by the Agency, many private sector employees do not have the opportunity to be paid for their volunteer work. However, there is little relevance to a comparison between the perquisites enjoyed by employees of large employers, particularly the federal government, and those commonly available in private industry, where small employers predominate. In addition to the greater resources available to large employers, public employers in particular have incentives to give their employees opportunities for community service beyond the confines of their job descriptions. The OPM policy that pre-dated this MOU is but one indicia of the federal government's recognition of this interest. In this case, the parties negotiated an MOU that drew on OPM policy in allowing paid leave for volunteer activities. The question before the Arbitrator is not whether the parameters of that MOU are ones the Arbitrator or Agency counsel would find advisable; it is whether the negotiated parameters of that MOU encompass the volunteer activity at issue.

As the Agency's brief points out, the permissive language of the MOU gives supervisors discretion to grant or deny leave requests. That discretion,

however, is not determinative of the merits of this matter. It is well settled that discretion must be exercised reasonably and with due regard for the intent behind the negotiated language. If there were any doubt on this score, the first sentence of Article 5 of the MOU, which calls for the amount of approved leave to be "reasonable under the circumstances," emphasizes the expectation that supervisors will respond reasonably to requests for paid leave under the MOU. The permissive term "may" simply recognizes that leave may be inadvisable in some circumstances, or the request may not meet the purposes of the MOU. It does not suggest that supervisors may deny leave requests arbitrarily. Instead, they must consider them in light of the standards established in the MOU.

Grievant's leave request, as originally submitted, did not articulate which MOU criterion he believed applied to this activity. The MOU requires employees to include that information in the request. However, unlike some managerial decisions, a decision to charge leave to one account can be changed after the fact if further discussion provides information warranting a charge to a different leave account. Grievant and the Union provided additional information as this matter proceeded through the grievance steps. It is therefore appropriate to consider the information the Agency had available at the last point where it could have reconsidered its decision -- i.e., at the conclusion of the grievance process.

Applicability of the Criteria

The MOU requires a leave application to meet any one of the four listed criteria. The criterion to which the parties devoted the most attention in negotiating and drafting the MOU language was the fourth criterion:

(4) the absence is directly related to the Department's mission. Examples of the Agency's mission include, but are not limited to, any program or activity which a city or town may support under the CDBG program or other HUD program or which is related to housing or community development, such

as Girls' and Boys' Clubs, Big Sisters/Big Brothers, volunteer firefighters, Red Cross emergency relief, and many more.

Although the initial phrase of this criterion speaks of a "direct" relationship between the activity and the Department's mission, the illustrative examples of the "Agency's mission" that follow go beyond the stated mission on the Agency's office plaques or the projects for which CDBG funds may be used. The evident focus of those examples is "community development." Although the MOU does not define that term, other Agency offices have given this language a broad reading, consistent with the wide range of examples and the contractual stipulations that those examples are "not limited to" the examples but include "many more."

Assisting with the aspects of classroom management that do not require the training or license of a teacher has a long and honorable history as a community volunteer activity. Such classroom assistance differs vastly from purely personal involvement in the school activities of one's child, such as attending a parent-teacher conference, a school play, or an athletic event. By providing another adult to oversee a class, lunchroom, or playground, it augments the scarce resources available to public schools in even the most affluent communities. It is true that much of this work historically has been -- and likely will remain -- performed by parents who are not employed, or at least not employed full-time, outside the home, often on unpaid time. The same is true of almost any community volunteer activity one might care to name, including the examples listed in the fourth criterion of the Volunteer MOU.

The inclusion of volunteer firefighting as an example of an activity that fits within the fourth criterion demonstrates that the parties intended the definition of a "non-profit" to extend well beyond IRC § 501(c)(3) charitable organizations. Like fire districts, public school districts are public agencies that commonly rely on volunteers from the community to assist in their activities. Those activities may not directly benefit "housing;"

however, they are related to the other prong of the negotiated scope of the fourth criterion, "community development." Similarly, volunteering in a public school classroom shares with Boys' and Girls' Club and Big Brothers/Big Sisters the feature of working with children in activities that may not have any direct connection to housing, but that are related to "community development." The listed examples, coupled with the broad and inclusive language of the language surrounding the examples, argues strongly for an expansive view of the eligible activities for Agency volunteers to support "community development."

For all the above reasons, it is concluded that the activity at issue met the fourth criterion of the Volunteer MOU. One criterion is sufficient under that MOU. It is therefore unnecessary to consider whether it also met any of the other three criteria. The amount of leave Grievant sought fell comfortably within the upper limit of eight hours per month under the Volunteer MOU. No evidence exists that operational necessities or other similar considerations made it inadvisable to grant him administrative leave at that time.

For all the above reasons, it is concluded that, although the sketchy nature of Grievant's leave request provided a reasonable basis for the initial decision to deny administrative leave, the adherence to that denial in the subsequent steps of the grievance procedure was inconsistent with the Volunteer MOU. It is unnecessary to consider whether the Agency also violated other applicable documents. Neither the conclusion nor the remedy would be affected by such consideration.

As a remedy, the Agency shall restore to Grievant the annual leave that was charged for his volunteer work with the Lake Oswego School District, and will charge the time involved against administrative leave under the MOU. The Arbitrator retains jurisdiction over the remedy and any disputes arising therefrom.

Pursuant to Article 23.04 of the Agreement, it is concluded that the Agency is the losing party in this

matter. Accordingly, the Arbitrator's fees and expenses will be charged solely to the Agency.

Award

1. The grievance that is the subject of this arbitration is not patently without merit and/or frivolous.

2. There was a reasonable basis for the initial denial of administrative leave. However, the Step 1, 2, and 3 decisions on the subject grievance were not consistent with the Volunteer MOU.

3. As a remedy, the Agency shall restore to Grievant the annual leave that was charged for his volunteer work with the Lake Oswego School District, and will charge the time involved against administrative leave under the Volunteer MOU.

4. The Arbitrator retains jurisdiction over the remedy and any disputes arising therefrom.

5. The Agency is the losing party in this matter.

¹CDBG is the acronym for the Agency's Community Development Block Grant program.

²That memo quotes language from OPM memos describing Agency discretion to grant administrative leave if the volunteer activity is "not specifically prohibited by law and satisfies one or more of the following criteria: (1) the absence is directly related to the department or agency's mission; (2) the absence is officially sponsored or sanctioned by the head of the department or agency; (3) the absence will clearly enhance the professional development or skills of the employee in his or her current position; or (4) the absence is brief and is determined to be in the interest of the agency."

Regulations Cited

IRC 501(c)(3)