

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Federation of Government
Employees, AFL-CIO,
80 F St N.W.
Washington, D.C. 20001
(202) 737-8700,

Plaintiff,

v.

Civil Action No.

Robert Wilkie
In his official capacity as Secretary of Veterans Affairs
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 273-5400,

and

U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 273-5400,

Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

The American Federation of Government Employees, AFL-CIO, (“AFGE”) brings this action to hold unlawful and set aside a determination by the U.S. Department of Veterans Affairs (“VA”) purportedly issued pursuant to 38 U.S.C. § 7422(b) (the “Official Time Determination”). In the Official Time Determination, the VA declared that, effective November 15, 2018, VA employees who are represented by AFGE and who occupy positions listed in 38 U.S.C. § 7421(b) (“Title 38 employees”) may not, under any circumstances, use “official time” to engage

in or perform union representational activities. The VA made this declaration notwithstanding that, *inter alia*, 5 U.S.C. § 7131 specifically guarantees employees official time to engage in such union representational activities. On November 8, 2018, the VA issued the Official Time Determination, which it styled as “Notice of Repudiation” and dated November 7, 2018. A true and accurate copy of the Official Time Determination is attached to this complaint as Exhibit 1.

The Official Time Determination is inconsistent with 38 U.S.C. § 7422 (“Section 7422”) and is contrary to the Administrative Procedure Act, and the Federal Service Labor Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (hereinafter “Chapter 71”). Chapter 71 establishes a comprehensive labor relations framework for federal sector employees and their unions. *See, e.g., AFGE, et al. v. Trump, et al.*, 318 F. Supp.3d 370 (D.D.C. 2018). As part of this framework, 5 U.S.C. § 7131 (“Section 7131”) specifically authorizes federal employees, including Title 38 employees, to receive official time, i.e., officially sanctioned time, to perform union collective bargaining and representational work in support of bargaining unit employees.

Section 7422 applies to particular VA positions listed in Section 7421, i.e., Title 38 employees. Section 7422 allows, *inter alia*, the Secretary of the VA (“the Secretary”) to remove certain matters relating to Title 38 employees from collective bargaining. The Secretary’s power to remove matters from collective bargaining is limited, however, to matters concerning only three discrete issues: (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation. 38 U.S.C. § 7422(b). Outside of these three discrete types of issues, the Secretary’s power over Title 38 employees is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with Chapter 71. 38 U.S.C. § 7422(a); *see also AFGE, et al. v. Trump, et al.*, 318 F. Supp at 434 (“Congress

enacted [Chapter 71] to protect and preserve collective bargaining rights, not to destroy them. . . . Quite frankly, it is hard to even *imagine* a rational statutory exception that is *intentionally* designed to swallow the rule.”).

The Official Time Determination is thus unsupported and unsupportable. The use of official time by Title 38 employees does not relate to the three discrete areas described by 38 U.S.C. § 7422(b), and is not in accordance with 38 U.S.C. § 7422(a) or Chapter 71. Plaintiff therefore seeks a judgment declaring that the Official Time Determination is invalid and setting it aside pursuant to 5 U.S.C. §§ 706(2)(A) and (C) because it is arbitrary and capricious, an abuse of discretion, and contrary to law, and exceeds the VA Secretary’s authority under 38 U.S.C. § 7422.

I. JURISDICTION

1. This court has jurisdiction under 28 U.S.C. §§ 1331, 2201 and 2202; 38 U.S.C. §§ 7422(b) and (d); and 5 U.S.C. § 701 *et seq.*. See *AFGE Local 446 v. Nicholson*, 475 F.3d 341, 347-350 (D.C. Cir. 2007).

II. VENUE

2. Venue lies in this court under 28 U.S.C. § 1391(e)(1) and (2).

III. PARTIES

3. Plaintiff AFGE is a national labor organization and unincorporated association having its headquarters at: 80 F Street N.W., Washington, D.C. 20001. AFGE represents approximately 650,000 federal civilian employees in agencies and departments across the federal government, including approximately 260,000 federal civilian employees in the VA.

4. AFGE and its affiliated councils and locals are the certified exclusive representative, under 5 U.S.C. § 7111, of bargaining unit employees at the VA.
5. AFGE is an exclusive representative of a consolidated unit in the VA which includes Title 38 employees. The Title 38 employees whom AFGE represents include AFGE representatives who have used official time and who would use it but for the Official Time Determination.
6. Defendant Robert Wilkie is the Secretary of the U.S. Department of Veterans Affairs. He is sued solely in his official capacity.
7. The U.S. Department of Veterans Affairs is a federal agency whose headquarters are located at 810 Vermont Avenue N.W. Washington, D.C 20420.

IV. FACTS

The Federal Service Labor-Management Relations Statute (Chapter 71)

8. 5 U.S.C. Chapter 71 governs labor relations in the federal civilian workplace.
9. When enacting Chapter 71, Congress explicitly found that labor organizations and collective bargaining are in the public interest. 5 U.S.C. § 7101(a).
10. 5 U.S.C. § 7102, as part of Chapter 71, protects the right of employees to form, join, or assist any labor organization freely and without fear of penalty or reprisal.
11. 5 U.S.C. § 7131(a) provides that employees representing an exclusive representative shall be authorized official time to negotiate a collective bargaining agreement.
12. 5 U.S.C. § 7131(c) provides that the Federal Labor Relations Authority shall determine, except as provided in § 7131(a), whether employees are entitled to official time in any phase of proceedings before the Authority.

13. 5 U.S.C. § 7131(d) provides that “any employee representing an exclusive representative,” or “in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.”

38 U.S.C. Sections 7421 and 7422

14. 38 U.S.C. § 7421 provides that the Secretary of the VA “shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees listed in 38 U.S.C. Section 7421(b).”
15. 38 U.S.C. § 7421(b) refers to the following Title 38 positions: Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-Duty Dental Auxiliaries, and Chiropractors.
16. 38 U.S.C. § 7422(a) provides “Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations).”
17. 38 U.S.C. § 7422(b) provides: “Such collective bargaining . . . in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.”

18. 38 U.S.C. § 7422(c) provides: “For purposes of this section, the term ‘professional conduct or competence’ means any of the following: (1) Direct patient care. (2) Clinical competence.”
19. 38 U.S.C. § 7422(d), provides that “an issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, . . . shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.”

The VA/AFGE Master Agreement

20. The VA and AFGE executed a national collective bargaining agreement on March 15, 2011 (hereinafter “VA/AFGE Master Agreement”).
21. The Duration of Agreement provision stated that the VA/AFGE Master Agreement would be implemented and become effective after it had been approved, ratified, signed by the Parties, and subjected to Agency head review pursuant to 5 U.S.C. § 7114(c).
22. Eric K. Shinseki, then Secretary of the U.S. Department of Veterans Affairs, approved the VA/AFGE Master Agreement, including those articles governing the use of official time under 5 U.S.C. § 7131.
23. The VA/AFGE Master Agreement became effective and remains in effect.
24. Article 48, Section 1(B) of the VA/AFGE Master Agreement states, “As provided in 5 U.S.C. § 7131, official time shall be granted as specified in law and in any additional amount the Department and the Union agree to be reasonable, necessary, and in the public interest. Official time shall be granted for activities as specified in law and in amounts specified by this Agreement or otherwise negotiated.”

25. Article 48, Section 2 of the VA/AFGE Master Agreement sets forth agreed-upon amounts of official time for Union officials designated at the national and district levels.
26. Article 48, Section 10 of the VA/AFGE Master Agreement sets forth agreed-upon amounts of official time for Union officials designated at the local level.
27. Pursuant to the VA/AFGE Master Agreement, other collectively bargained agreements between AFGE and/or its affiliated councils and locals and the VA, and past practice, Title 38 employees in the AFGE/VA bargaining unit have received official time.

The Official Time Determination

28. On November 8, 2018, Jacquelyn Hayes-Byrd, Acting Assistant Secretary for Human Resources and Administration of the VA, issued the Official Time Determination in this case.
29. The Official Time Determination stated that, “pursuant to 38 U.S.C. § 7422, employees described in 38 U.S.C. § 7421(b) (“Title 38 employees”) may no longer utilize official time because the use of official time by Title 38 employees negatively impacts direct patient care.”
30. Regarding the VA/AFGE Master Agreement, the Official Time Determination stated that “[t]he official time exclusion applies to all Title 38 employee official time provisions found in the VA/AFGE Master Agreement, as well as any Memorandum of Understanding (“MOU”), past practices, supplemental agreements, and collectively bargained agreements with AFGE that are currently in effect.”
31. The Official Time Determination listed the following articles of the VA/AFGE Master Agreement as containing provisions that reference official time and were therefore impacted by the Official Time Determination:

Articles 3: Labor Management Cooperation

Section 7—Use of Time

Article 4; Labor Management Training

Section 3—Joint Management Training;

Article 5: Labor Management Committee

Article 7: Quality Programs

Section 2 - General

Section 3—Quality Programs Council Charter

Section 4—Official Time Usage

Section 5—Labor Management Forums and Official Time

Section 6—Performance Evaluation

Section 7—Return to Duty of 100% Union Representative

Article 8: Child Care

Section 33—Local Child Care Committees

Article 18: Equal Employment Opportunity

Section 7—VA Diversity Council/EEO Committees

Article 27: Performance Appraisal

Section 3—Policy

Article 29: Safety, Health and Environment

Section 2—National Safety and Health Committee

Section 3—Union Participation

Article 45: Dues Withholding

Section 6—Revocation for Bargaining Unit Employees

Article 46: Local Supplement

Section 3—Ground Rules for Negotiating Local Supplemental Agreements

Article 47: Mid-Term Bargaining

Section 2-National

Section 4—Local

Article 48: Official Time

Section 1—Purpose

Section 2—Designated Union Officials/Representatives

Section 3—Accumulated Official Time

Section 4—Additional Time Allotted

Section 5—Travel to Other Locations

Section 6—Other Activities

Section 7—Performance Evaluation

Section 10—Local

Article 49: Rights and Responsibilities

Section 9—New Employee Orientation

32. The Official Time Determination stated, “Beginning on November 15, 2018, the Department will no longer comply with the official time provisions for Title 38 employees contained in the VA/AFGE Master Agreement, any MOUs, past practices, supplemental agreements, and any other collectively bargained agreements currently in effect.”

COUNT I

**Violation of the Administrative Procedure Act
5 U.S.C. § 706(2)(C)**

33. Paragraphs 1 through 32 are hereby incorporated by reference.
34. The use of official time by Title 38 employees does not concern professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) or § 7422(d).
35. The use of official time by Title 38 employees does not concern direct patient care within the meaning of 38 U.S.C. §§ 7422(b), 7422(c), or 7422(d).
36. By issuing the Official Time Determination that applied 38 U.S.C § 7422(b) to situations that do not pertain to professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), the VA Secretary violated, misinterpreted, and misapplied 38 U.S.C. §§ 7422(b) and (d).
37. By the conduct set forth in paragraphs 1 through 32, the VA Secretary acted outside the scope of his 38 U.S.C. § 7422(d) authority in violation of 38 U.S.C. § 7422(b), 38 U.S.C. § 7422(d), and 5 U.S.C. § 706(2)(C).

COUNT II

**Violation of the Administrative Procedure Act
5 U.S.C. § 706(2)(A)**

38. Paragraphs 1 through 32 are hereby incorporated by reference.
39. The use of official time by Title 38 employees does not concern professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) or § 7422(d).
40. The use of official time by Title 38 employees does not concern direct patient care within the meaning of 38 U.S.C. §§ 7422(b), 7422(c), or 7422(d).

41. By issuing the Official Time Determination that applied 38 U.S.C § 7422(b) to situations that do not pertain to professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), the VA Secretary violated, misinterpreted, and misapplied 38 U.S.C. §§ 7422(b) and (d).
42. By the conduct set forth in paragraphs 1 through 32, the Official Time Determination is arbitrary and capricious in violation of 38 U.S.C. § 7422(b), 38 U.S.C. § 7422(d), and 5 U.S.C. § 706(2)(A).

COUNT III

**Violation of the Administrative Procedure Act
5 U.S.C. § 706(2)(A)**

43. Paragraphs 1 through 32 are hereby incorporated by reference.
44. The use of official time by Title 38 employees does not concern professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) or § 7422(d).
45. The use of official time by Title 38 employees does not concern direct patient care within the meaning of 38 U.S.C. §§ 7422(b), 7422(c), or 7422(d).
46. By issuing the Official Time Determination that applied 38 U.S.C § 7422(b) to situations that do not pertain to professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), the VA Secretary violated, misinterpreted, and misapplied 38 U.S.C. §§ 7422(b) and (d).
47. By the conduct set forth in paragraphs 1 through 32, the Official Time Determination is an abuse of discretion in violation of 38 U.S.C. § 7422(b), 38 U.S.C. § 7422(d), and 5 U.S.C. § 706(2)(A).

COUNT IV

**Violation of the Administrative Procedure Act
5 U.S.C. § 706(2)(A)**

48. Paragraphs 1 through 32 are hereby incorporated by reference.
49. The use of official time by Title 38 employees does not concern professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) or § 7422(d).
50. The use of official time by Title 38 employees does not concern direct patient care within the meaning of 38 U.S.C. §§ 7422(b), 7422(c), or 7422(d).
51. By issuing the Official Time Determination that applied 38 U.S.C § 7422(b) to situations that do not pertain to professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), the VA Secretary violated, misinterpreted, and misapplied 38 U.S.C. §§ 7422(b) and (d).
52. By the conduct set forth in paragraphs 1 through 32, the Official Time Determination is not in accordance with law in violation of 38 U.S.C. § 7422(b), 38 U.S.C. § 7422(d), and 5 U.S.C. § 706(2)(A).

COUNT V

**Violation of the Federal Service Labor-Management Relations Statute
5 U.S.C. Sections 7101-7135**

53. Paragraphs 1 through 32 are hereby incorporated by reference.
54. The use of official time by Title 38 employees does not concern professional conduct or competence within the meaning of 38 U.S.C. §§ 7422(b) or 7422(d).
55. The use of official time by Title 38 employees does not concern direct patient care within the meaning of 38 U.S.C. §§ 7422(b), 7422(c), or 7422(d).

56. By issuing the Official Time Determination that applied 38 U.S.C § 7422(b) to situations that do not pertain to professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), the VA Secretary violated, misinterpreted, and misapplied 5 U.S.C. § 7131 which provides that federal employees shall receive Official Time when representing an exclusive representative in the negotiation of a collective bargaining agreement (5 U.S.C. § 7131(a)); when participating for, or on behalf of, a labor organization in any phase of proceedings before the Federal Labor Relations Authority (5 U.S.C. § 7131(c)); and when representing an exclusive representative or in connection with any other matter covered by this chapter in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest (5 U.S.C. § 7131(d)).

57. By the conduct set forth in paragraphs 1 through 32, the Official Time Determination is not in accordance with the Federal Service Labor-Management Relations Statute.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

1. Hold unlawful and set aside the Official Time Determination because its declaration that the use of official time by Title 38 employees, as provided in the VA/AFGE Master Agreement and Chapter 71, concerned professional conduct or competence exceeded the VA Secretary's statutory authority;
2. Hold unlawful and set aside the Official Time Determination because its holding that the use of official time by Title 38 employees, as provided in the VA/AFGE Master Agreement and Chapter 71, concerned professional conduct or competence is arbitrary and capricious and an abuse of discretion;

3. Hold unlawful and set aside the Official Time Determination because its holding that the use of official time by Title 38 employees, as provided in the VA/AFGE Master Agreement and Chapter 71, concerned professional conduct or competence is not in accordance with law;
4. Order the Defendants to comply with the VA/AFGE Master Agreement regarding official time for Title 38 employees;
5. Order the Defendants to return to the status quo ante; and
6. Grant any other relief which the Court deems proper.

Respectfully submitted,

/s/ Judith Galat
JUDITH GALAT *
Assistant General Counsel, AFGE
galatj@afge.org
D.C. Bar #399962

*Lead Counsel

/s/ Andres M. Grajales
ANDRES M. GRAJALES
Deputy General Counsel
grajaa@afge.org
American Federation of Government
Employees, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6424
D.C. Bar #476894

Attorneys for AFGE