

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES, AFL-)
CIO,)
))
Plaintiff,)
))
v.)
))
DONALD J. TRUMP, *et al.*,)
))
Defendants.)

No. 1:18-cv-1261 (KBJ)

NATIONAL FEDERATION OF)
FEDERAL EMPLOYEES, FD-1,)
IAMAW, AFL-CIO, *et al.*,)
))
Plaintiffs,)
))
v.)
))
DONALD J. TRUMP, *et al.*,)
))
Defendants.)

Hon. Ketanji Brown Jackson
United States District Judge

September 17, 2018

AMERICAN FEDERATION OF)
STATE, COUNTY AND MUNICIPAL)
EMPLOYEES, AFL-CIO, *et al.*,)
))
Plaintiffs,)
))
v.)
))
DONALD J. TRUMP, *et al.*,)
))
Defendants.)

NATIONAL TREASURY EMPLOYEES)
UNION,)
)

Plaintiff,)
)
v.)
)
DONALD J. TRUMP, <i>et al.</i> ,)
)
Defendants.)
)

THIRD PARTY MOTION FOR CONTEMPT AND SPECIFIC ENFORCEMENT

Comes now the third-party American Federation of Government Employees Local 3399 (“AFGE 3399” or the “Local”), by and through counsel, and respectfully moves this Honorable Court to find the United States Department of Veterans Affairs in contempt of the Court’s Order issued August 24, 2018. In support of this motion, AFGE 3399 states the following:

I. STANDING AND JURISDICTION

1. A finding of contempt is appropriate to enforce this Court’s Order and this Court retains jurisdiction to enforce its own orders while an appeal is pending. *See, e.g., Smith v Smith*, 56 A.2d 833 (DC 1969); *see also* Fed. R. Civ. P. 70(e) (“The court may also hold the disobedient party in contempt.”).

2. “When an order grants relief for a nonparty . . . , the procedure for enforcing the order is the same as for a party.” Fed. R. Civ. P. 71.¹

¹ The landscape of Rule 71 is explained by the United States District Court for the District of Columbia in *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 34 F. Supp. 2d 28, 43 (D.D.C. 1998):

According to the Court of Appeals for the Second Circuit, “It seems clear that Rule 71 was intended to assure that process be made available to enforce court orders in favor of and against persons who are properly affected by them, even if they are not parties to the action.” *Lasky v. Quinlan*, 558 F.2d 1133, 1137 (2d Cir.1977) (citing 7 J. Moore, Federal Practice at 71.10 (1975)). This view was adopted by the Ninth Circuit in *Westlake North Property Owners Association v. City of Thousand Oaks*, 915 F.2d 1301, 1304 (9th Cir.1990), in which the court stated: “Rule 71 was designed to memorialize the common-sense rule that courts can enforce their orders against both parties and non-parties.” *Id.* In particular, the courts are willing to enforce orders against nonparties when their nonparty status is used as a shield to frustrate the courts’ orders. *See, e.g., Wilson Motor Co. v.*

3. AFGE 3399 may seek to enforce this Court's Order because the interest AFGE 3399 seeks to vindicate is clearly within the zone of interests this Court determined were protected under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101 *et al.* See, e.g., *Moore v. Tangipahoa Parish School Bd.*, 625 F.2d 33, 34 (5th Cir. 1980); see also *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) ("It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").

4. The Court's Order was for the benefit of AFGE 3399's because it enjoined Defendants from infringing upon the statutory rights afforded to duly entitled federal employees, and by extension the labor unions that represent them, not simply the labor unions named as plaintiffs. Cf. *Iyengar v. Barnhart* (Ivengar II), 281 F. Supp. 2d 38, 40 (D.D.C. 2003) (explaining that the court's order was for the benefit of all aliens who were denied a drivers' license based on their lack of social security number, not exclusively the named plaintiffs); see also *Iyengar v. Barnhart* (Ivengar I), 233 F. Supp. 2d 5, 16 (D.D.C. 2002).

5. This Court has jurisdiction to hear the issues AFGE 3399 seeks to enforce. See Mem. Op. at 33–65.

6. On December 20, 2002, AFGE 3399, along with American Federation of Government Employees Local 903, entered into a Memorandum of Understanding with the Department of Veterans Affairs. (Ex. 1.) Among other things, this local Memorandum of Understanding set forth guarantees about official time and scheduling for the Local's officials and

Dunn, 129 Okla. 211, 264 P. 194, 197 (Okla.1928) ("Such an absurd contention could only prevail where might was right and where utter contempt was in vogue of all law, courts, and orderly procedure.").

stewards. *Id.* Specifically, the Department of Veterans Affairs agreed to afford the Union an allotment of hours over a schedule to be agreed upon, and further agreed that Local officials would be scheduled Monday through Friday on day shifts so that they would be appropriately situated to address union matters as they arise. *Id.*

7. On August 24, 2018, this Court “. . . **ORDERED** that sections 5(a), 5(e), and 6 of Executive Order 13,836 (also known as ‘The Collective Bargaining Procedures Order’); sections 3(a), 4(a), and 4(b) of Executive Order 13,837 (also known as ‘The Official Time Order’); and sections 3, 4(a), and 4(c) of Executive Order 13,839 (also known as ‘The Removal Procedures Order’) are hereby declared **INVALID.**” (Ord. at 2–3 (emphasis in original).) This Court “**FURTHER ORDERED** that the President’s subordinates within the Executive Branch are **ENJOINED** from implementing or giving effect to any of the invalid executive order provisions listed above.” *Id.* at 3 (emphasis in original).

8. Between August 27, 2018, and August 30, 2018, Mr. Michael Glavin, President of AFGE 3399 submitted multiple requests to the Mr. David B. Isaacks, Director of the Harry S. Truman Memorial Veterans’ Hospital, and Mr. David P. Doler, Supervisory Human Resources Specialist, requesting a return to status quo following this Court’s Order. (Ex. 2.)

9. One of these communications was an email Mr. Glavin sent to Director on Isaacks on August 29, 2018, in which he states, “[t]his facility continues to be in violation of [the Court’s Order] and updated [Office of Personnel Management] guidelines.” *Id.* Mr. Doler responded, “[w]hat is Local 3399’s question?” *Id.*

10. On August 30, 2018, American Federation of Government Employees Local 3399, through counsel, issued a letter to Mr. Micahel Anfant, Deputy Chief Counsel for the Department of Veterans Affairs, regarding the continued implementation of the Executive Orders that were

invalidated by this Court's Order. (Ex. 3.) The letter "put the [Department of Veterans Affairs] on notice that Director Issack's failure to comply with Judge Ketanji Brown Jackson's Order is denying the members of AFGE 3399 of their rights, and adversely impacting the ability of the Local to do their jobs effectively as permitted under the Master Agreement and locally negotiated [Memorandum of Understanding(s)]. *Id.*

11. Also on August 30, 2018, Mr. Donny Boyte, National Representative for the American Federation of Government Employees Ninth District, sent an email to Mr. Doler with the American Federation of Government Employees guide to implementing this Court's Order and informing the Department of Veterans Affairs that they remained in contempt of court. (Ex. 4.)

12. On August 31, 2018, the United States Department of Veterans Affairs issued a letter rescinding their Notice of Implementation of Executive Order 13837. (Ex. 5.)

13. On August 31, 2018, Alma L. Lee, the President of the American Federation of Government Employees, AFL-CIO, and the National Veterans Affairs Counsel, #53, sent a letter to Ms. Kimberly McLeod, Executive Director, Labor Management Relations, explaining that the Court's "order specifically invalidated the provision of the [Executive Order 13,837 section 4(b)] requiring prior advance approval for the use of official time." (Ex. 6.) It was further explained that, "[t]he HRML and implementation of VATAS specifically requires advance approval for the use of official time" and that, "[d]emonstratively, Section 5(a)(1) states 'Union Representatives are required to use VATAS to request and receive approval for Official Time prior to its use, based on the four categories required by OPM, as noted in paragraph 2, above[']'" and that "Section 5(a)(6) states 'Union Representatives must submit their request for the use of Official Time via VATAS on the first scheduled workday of each pay period.'" *Id.*

14. On September 4, 2018, Mr. Doler sent an email to AFGE 3399 officials stating that, “[a]ll Union officials/stewards must continue to request the use of official time on the first scheduled work day of each pay period per the instructions provided via email on July 13, 2018, at approximately 2:45 p.m.” (Ex. 7.)

15. Director Isaaks, Mr. Doler, and the leadership at Harry S. Truman Memorial Veterans’ Hospital, have abused the VATAS tracking system to unlawfully deny requests for official time in contempt of this Court’s Order.

16. Through September 12, 2018, the Agency refused to release certain Union officials including the Chief Steward, Mr. Aaron G. McMahon, to a standard Monday through Friday daytime work schedule as required by December 20, 2002, Memorandum of Understanding. (Ex. 1; Ex. 8.)

17. When the Local was entitled to an in-person meeting to present a grievance to the Department of Veterans Affairs, Mr. Doler sent an email stating the Local could present their grievance on September 10, 2018 at 12:00 PM CT. (Ex. 8.)

18. Mr. McMahon requested five hours of official time to present the grievance for the scheduled time. *Id.* This request was denied on September 7, 2018. *Id.* On September 7, 2018, at 3:29 PM CT, Mr. McMahon informed Mr. Doler that his request for official time had been denied and explained that he would not be able to present the grievance at the scheduled time based on the denial of official time. *Id.* Mr. McMahon also reissued his request for official time.

19. On September 10, 2018, at 10:37 AM CT, Mr. McMahon once again emailed Mr. Doler to say, “[a]s of this time I have still not been given notice of release for official time[.]” and asked that Mr. Doler, “[p]lease advise [him] as to what options are available for; release, rescheduling the meeting, etc[.]” *Id.*

20. Ten minutes later, Mr. Doler replied stating that, “HR cannot provide the requested [sic] guidance as the Agency cannot interfere with management practices of the union[,]” and that, “[t]he HRO is still available to hear Local 3399’s on Monday, September 10, 2018, at Noon in room 202 of the HR Building.” *Id.*

21. On September 10, 2018, at 11:50 AM CT, Mr. McMahon replied, once again explaining that he would not be able to attend the grievance meeting as he had been denied official time, and he requested that the meeting be rescheduled. *Id.*

22. On September 10, 2018, at 2:22 PM CT, Mr. McMahon attempted to follow up with Mr. Doler and asked if the Department of Veterans Affairs intended to provide the Local with an updated date and time to meet on the grievance. *Id.*

23. On September 10, 2018, at 4:12 PM CT, Mr. McMahon received an email stating that his request for official time to meet at noon earlier that day had been denied. *Id.* Immediately thereafter, Mr. McMahon received a second email stating that the status of his request had been reverted to pending. *Id.*

24. On September 10, 2018, at 4:38 PM CT, Mr. Doler emailed Mr. McMahon to say that the official assigned by Director Isaaks was no longer available for an in-person meeting and the Local must now submit any support for their grievance in writing. *Id.*

25. Per the article 43, section 7 of the Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees, “[g]rievance meetings . . . will be face-to-face”. VA Pamphlet 05-68 (Mar. 2011).²

26. Director Isaaks has willfully ignored the Court’s Order in an effort to frustrate AFGE 3399’s ability to represent their members and advance grievances. In his email sent

² The Master Agreement is available at , available at https://www.va.gov/lmr/docs/agreements/afge/master_agreement_between_dva_and_afge-fin_march_2011.pdf.

September 4, 2018, Mr. Doler makes an illusory and unexplained reference to patient care as the reason the Court's Order cannot be promptly implemented. (Ex. 7.) Director Isaaks failed to provide an explanation as to how implementing the Court's Order would adversely affect patient care or how his opinion on patient care supersedes this Court's authority. It is clear that Director Isaaks and his designees do not have a good faith reason for delaying the implementation of the Court's Order based on their refusal to reschedule a required in-person meeting to hear the Local's grievance after they denied the Local's Chief Steward official time to attend the meeting.

27. AFGE 3399 requests that this Court schedule a hearing and to afford the Department of Veterans Affairs an opportunity to show cause as to their failure to comply with the Court's Order.

WHEREFORE, the premises considered, respectfully requests that:

a) The Court grant his motion for Contempt and For Specific Performance, and enter appropriate sanctions;

b) The Court issue a Notice of Hearing and Order Directing Appearance at the hearing of this Motion;

c) The Court enter such relief as it deems necessary and appropriate in aid of enforcement and to collect from Department of Veterans Affairs all back pay and overtime that AFGE 3399 officers have necessarily incurred as a result of the Defendant's refusal to implement the Court's Order.

d) The Court order Defendants to pay AFGE 3399's reasonable attorney's fees associated with this Motion.

Dated this nineteenth day of September, 2018.

Respectfully submitted,

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