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Via Electronic Mail

April 24, 2020

Federal Labor Relations Authority
1400 K Street NW, Suite 200
Washington, DC 20424
Attention: Emily Sloop, Chief, Case Intake and Publication
FedRegcomments@flra.gov
Subject: National Right to Work Legal Defense Foundation (Petitioner), Case No. 01–PS–39

Re: Comments of the National Right to Work Legal Defense Foundation in Response to the Authority's Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Official Time for Certain Lobbying Activities, 85 Fed. Reg. 16915 (Mar. 25, 2020).

Dear Ms. Sloop:

On August 19, 2019, the National Right to Work Legal Defense Foundation submitted a request that the Federal Labor Relations Authority issue a statement of policy that using official time, paid for by the federal government, for union lobbying activities of any kind is unlawful. Specifically, the Foundation requested the Authority issue guidance holding that the Federal Service Labor-Management Relations Statute ("Statute") does not permit exclusive representatives to bargain for or receive official time for lobbying activities that are subject to 18 U.S.C. § 1913. Such guidance is necessary to conform Agency precedent with applicable federal law. In response to the Authority's request for comments regarding whether it should issue a general statement of policy or guidance on this topic, the Foundation submits these further comments in support of its position.

COMMENTS

A. Official Time for Lobbying is Inconsistent with Federal Law and Executive Order 13,837

1. Executive Order 13,837 prohibits use of official time for union lobbying.

Executive Order 13,837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use, 83 Fed. Reg. 25335 (May 25, 2018) (hereafter, "Executive Order 13,837"), directly addresses this issue and has the force and effect of law.[1] Executive Order 13,837 specifically states: "Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee." 83 Fed. Reg. at 25337. Additionally, the Executive Order 13,837 directs each agency to "give special attention to ensuring taxpayer-funded union time is not used for . . . lobbying activities in violation of section 1913 of title 18, United States Code." *Id.* at 25338. As succinctly summarized by Member

[1] Executive Order 13,837 has the force and effect of law because it was issued pursuant to the President's statutory authority to regulate the civil service. *Id.* at 25335 (preamble citing statutory authority under 3 U.S.C. § 301 and 5 U.S.C. § 7301); 85 Fed. Reg. at 16916 (Member Abbott, dissenting) (citing *Nat'l Fed'n of Fed. Emps., Local 15,* 30 FLRA 1046, 1070 (1988)).

Abbott in his dissent from the Authority's decision not to issue the requested statement of policy without further proceedings, "reading [Executive Order] 13,837 and section 1913 together, it is clear that official time may not be granted for any activities 'intended or designed to influence in any manner a Member of Congress . . . to favor, adopt, or oppose, by vote or otherwise, any legislation, law ratification, policy, or appropriation.'" 85 Fed. Reg. at 16916. On this basis alone, the Authority should issue guidance to explicitly conform its precedent and policy with Executive Order 13,837.

2. Federal law prohibits use of official time for union lobbying.

Even without considering Executive Order 13,837, permitting union officials to use taxpayer funded official time to lobby the government is impermissible under the Statute and 18 U.S.C. § 1913, which prohibits the payment of federal funds for employees' lobbying activities.

Whether a union representative can use official time for lobbying involves the interplay of four different statutes: 18 U.S.C. § 1913 ("Section 1913") and Sections 7131(d), 7102(1), and 7117(a) of the Statute.

Section 1913 states, in pertinent part:

> No part of the money appropriated by any enactment of Congress shall, *in the absence of express authorization by Congress*, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation . . . .

Id. (emphasis added). Section 1913's prohibition applies to government funded official time. *U.S. Dep't of the Army Corps of Eng'rs, Memphis Dist., Memphis Tenn.*, 52 FLRA 920, 930 (1997) (hereafter "*Memphis District*") ("[T]he allotment of official time results in use of Federal funds to 'pay for' wages or salary. Therefore, . . . in the circumstances of this case, it is clearly subject to 18 U.S.C. § 1913."). Thus, under Section 1913, payments of federal funds for official time for lobbying are unlawful "in the absence of express authorization by Congress." 18 U.S.C. § 1913.

The operative question, therefore, is: does the Statute expressly authorize these payments to union officials? Three provisions of the Statute are relevant to this analysis. First, Section 7102(1) allows federal employees to "act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." 5 U.S.C. § 7102(1). Second, Section 7117(a) provides, in pertinent part, that an agency and exclusive representative's duty to bargain in good faith does not extend to matters that are "inconsistent with Federal law." 5 U.S.C. § 7117(a). Third, Section 7131(d) states:

> Except as provided in the preceding subsections of this section—
>
> (1) any employee representing an exclusive representative, or
> (2) 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.

5 U.S.C. § 7131(d).

None of these three provisions expressly authorize the use of taxpayer dollars to fund union lobbying activities under Section 1913.

Section 7102(1) merely allows union representatives the right to lobby the government. It says nothing about the federal government *funding* these activities.

Section 7117(a) explicitly states that federal agencies have no duty to bargain over matters that are inconsistent with federal law. Here, official time payments for lobbying are inconsistent with Section 1913.

Section 7131(d) does not expressly authorize using taxpayer dollars to subsidize union lobbying. Section 7131(d) is a vague catch-all provision that does not mention lobbying at all. It does not amount to express authorization by Congress to fund any particular matter, much less lobbying.

If anything, Section 1913 *removes* official time from the matters for which agencies and unions can grant official time under Section 7131(d). That section permits official time only for matters that federal agencies agree are "reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d). In Section 1913, Congress made clear it does *not* consider using federal funds to subsidize lobbying to be "reasonable, necessary, [or] in the public interest." Section 1913 trumps Section 7131(d) and controls its scope. Section 7131(d) does not permit official time for matters prohibited by Section 1913.

This conclusion is reinforced by the fact that Section 7117(a) of the Statute permits bargaining only to an "extent not inconsistent with Federal law." 5 U.S.C. § 7117(a). Under Section 7117(a), agencies and exclusive representatives cannot agree to conduct that violates federal law, such as 18 U.S.C. § 1913. Consequently, the parties cannot "agree" to official time for lobbying under Section 7131(d) because that "agree[ment]" is, in the first, instance, not permitted under the Statute. Stated succinctly, given that it would violate Section 7117 for a union to bargain for official time for lobbying that violates 18 U.S.C. § 1913, it follows that unions and agencies cannot agree to such official time under Section 7131(d).

Executive Order 13,837 further precludes finding that Section 7131(d) authorizes official time for union lobbying. As stated above, official time is only allowed if the agency and union agree it is "reasonable, necessary, and *in the public interest*." 5 U.S.C. § 7131(d) (emphasis added). Executive Order 13,837 unequivocally states that the policy of the federal government (and therefore all federal agencies engaged in collective bargaining) is that official time for lobbying is *not* reasonable, necessary, or in the public interest. Therefore, even if official time for lobbying could be permitted under Section 7131(d), which it

cannot not, Executive Order 13,837 eliminates that ostensible basis for using taxpayer dollars to fund union lobbying activities.

3. Prior Authority precedent is inconsistent with federal law and Executive Order 13,837.

The Authority's prior precedent erroneously permits federal funding of union lobbying activities through use of official time. In *Memphis District*, the Authority concluded that "Congress expressly authorized the use of appropriated funds for lobbying activities" by combining Section 7131(d)'s catch-all provision and Section 7102(1), which allows union representatives to "present the views of the labor organization" to federal authorities. 52 FLRA at 933. Similarly, the Office of Legal Counsel found "sections 7102 and 7131(d) together give 'express authorization' under 18 U.S.C. § 1913 for union representatives 'to lobby members of Congress on representational issues.'" Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives, 29 Op. O.L.C. 179, 181 (2005) (citations omitted).

This reasoning is deeply flawed and the Authority should abandon it. An "express authorization" to use federal funds under Section 1913 cannot be found by cobbling together a vague catch-all provision and a union's general right to represent its members that does not mention funding. The sum of Sections 7131(d) and 7102 does not exceed its parts. "Implied" plus "implied" does not equal "express."

This especially is true given that, when read together, Section 1913 and Section 7131(d) support the proposition that using federal funds for union lobbying is *not* permissible. Section 7131(d) permits official time for matters that federal agencies agree are "reasonable, necessary, and in the public interest." 5 U.S.C. § 7113(d). A use of federal funds that Congress prohibited in Section 1913 is plainly not "reasonable, necessary, [or] in the public interest." Section 1913 removes use of official time for union lobbying from Section 7131(d)'s catch-all provision, not the other way around.

As discussed previously, Section 7131(d) also cannot support official time for union lobbying because: (1) under Section 7117(a), federal agencies and unions cannot "agree" in bargaining to terms inconsistent with federal laws, such as Section 1913; and (2) Executive Order 13,837 deems official time for union lobbying *not* to be necessary *nor* in the public interest.

Finally, the Authority's holding in *Memphis District* and the Office of Legal Counsel's rationale are inconsistent with the Authority's more recent decision in *Department of Veterans Affairs Medical Center, Richmond, Virginia*, 64 FLRA 701, 707 (2010), which recognized that "any entitlement to official time to engage in activities covered by § 7131(d) is a contractual, not statutory, entitlement." If such entitlement is contractual rather than statutory, surely Section 7131(d) cannot be an "express authorization *by Congress*" for use of taxpayer funds under Section 1913. 5 U.S.C. § 1913 (emphasis added).

The Authority's decision in *Department of Veterans Affairs Medical Center* is correct: Section 7131(d) is not an express authorization by Congress to fund any activity. Section 7131(d) merely allows unions and agencies to bargain for official time where federal law otherwise permits use of official time. In this instance, Section 1913 prohibits use of federal funds for lobbying. Therefore, union and agencies cannot bargain for, agree to, or utilize official time for lobbying under Section 7131(d) or under Section 7117(a).

Thus, careful analysis of the relevant statutory provisions compels the conclusion that the Statute does not expressly authorize the expenditure of federal funds for union lobbying.

B. The Authority Should Issue Guidance on this Matter.

As discussed above, applicable federal law and Executive Order 13,837 prohibit the use of taxpayer funds for union lobbying efforts. Prior Authority precedent, however, permits this unlawful diversion of taxpayer dollars. The Authority should issue guidance on this issue to make clear to agencies and unions that those precedents are erroneous and that official time for lobbying activities is strictly prohibited.[2]

This question is most appropriately resolved through a statement of guidance because it would be difficult to timely resolve this issue through other means. Bringing a challenge to the Authority's current precedent would be difficult. Unions have no reason to bring such a suit because the current official time policy directly benefits them. An agency would have no reason to challenge an agreement to allow official time that it voluntarily entered into. An employee would have significant procedural hurdles to overcome in any challenge to this policy because employees are not parties to an agency agreement and a respondent could argue the employee does not suffer direct harm from unions lobbying on official time. On the other hand, a statement of policy would allow the Authority to clarify its position on this issue without waiting for an appropriate case which may never come to it.

This issue should be addressed because it inherently confronts federal agencies in their labor-management relationships. The only way union officials can engage in lobbying on official time is through an agreement between an agency and a union. OPM's report Official Time Usage in the Federal Government Fiscal Year 2016 suggests the use of official time for lobbying is frequent because "lobbying Congress concerning pending or desired legislation" is one of five items the Report explicitly lists as uses for the General Labor-Management Relations category of official time. Office of Pers. Mgmt., Official Time Usage in the Federal Government Fiscal Year 2016, app. A at 1 (2018), https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/reports/2016-official-time-usage-in-the-federal-government.pdf.

A statement of guidance now on this subject would promote constructive and cooperative labor-management relationships by providing additional clarity as to the limits of bargaining for official time for union business. It benefits all parties to a negotiation to know what they can lawfully agree, and what they cannot. It would not benefit the labor-management relationship for an agency to bargain over official time

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[2] In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
(a) Whether the question presented can more appropriately be resolved by other means;
(b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question;
(c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor–Management Relations Statute;
(d) Whether the question currently confronts parties in the context of a labor-management relationship;
(e) Whether the question is presented jointly by the parties involved; and
(f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor–Management Relations Statute.
5 C.F.R. § 2427.5.

for lobbying activities, or include such a provision in a collective bargaining agreement, only to later find out that the provision is unlawful.

Most importantly, a statement of policy would promote the Statute's purposes. Put simply, the Authority's prior precedent is inconsistent with the Statute's text. This inconsistency has real-world implications. For example, in 2016, union officials throughout the government spent 2,738,363.88 hours of official time on actions they deemed "reasonable, necessary, and in the public interest," including lobbying Congress. *Id.* at app. B, at 8. This is an astronomical number of hours, resulting in a significant amount of taxpayer money funding lobbying in violation of federal law. To promote the Statute's plain text and purpose, and to ensure federal agencies are not violating federal law, the Authority must issue guidance to conform its position with that law.

C. The Authority Should Issue a Policy Statement Explicitly Stating Using Official Time is Prohibited

The Authority should immediately and explicitly affirm the prohibitions on using official time for lobbying in federal law and in Executive Order 13,837. Dissenting Member Abbott was right when he said:

> I would issue a general statement of policy that the plain language of E.O. 13,837 and 18 U.S.C. 1913 limits the scope of section 7131(d) of the Statute, such that, a proposal that would grant the use of official time for lobbying activities is nonnegotiable because it is contrary to law. To the extent [prior precedent and Office of Legal Counsel Memoranda] support the notion that proposals permitting the use of official time for lobbying activities are negotiable, I would conclude that they are not consistent with the E.O. and are therefore no longer good law.

83 Fed. Reg. at 16916. The Foundation would merely add that the Authority should explicitly declare all requests for official time for lobbying activities to be contrary to Section 1913 as well as Executive Order 13,837, including those requested pursuant to current collective bargaining agreements.

Respectfully submitted,

/s/ Raymond J. LaJeunesse, Jr.
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