

THE WHITE HOUSE
Office of the Press Secretary

FOR IMMEDIATE RELEASE
May 25, 2018

EXECUTIVE ORDER

ENSURING TRANSPARENCY, ACCOUNTABILITY, AND EFFICIENCY
IN TAXPAYER-FUNDED UNION TIME USE

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and section 7301 of title 5, United States Code, and to ensure the effective functioning of the executive branch, it is hereby ordered as follows:

- **NFFE Note:** 5 USC § 7301 provides that the President may prescribe regulations for the conduct of employees in the executive branch. Much of what follows in this Executive Order, and the two others issued along with it, is guidance for agencies to follow when negotiating new CBAs. **Executive Orders do not override statutes or existing collective bargaining agreements.**

Section 1. Purpose. An effective and efficient government keeps careful track of how it spends the taxpayers' money and eliminates unnecessary, inefficient, or unreasonable expenditures. To advance this policy, executive branch employees should spend their duty hours performing the work of the Federal Government and serving the public.

- **Purpose of the Statute:** Congress specifically wrote into 5 USC §7101 that collective bargaining safeguards public interests and contributes to the effective conduct of public business (among other benefits).
- **Official Time while Bargaining:** Under Section 7131(a), union representatives are entitled to official time whenever they are negotiating collective bargaining agreements.
- **Official Time for Representational Activities:** Official time spent on representational activities is time spent conducting agency business. Congress found that the amount of official time that is "reasonable, necessary, and in the public interest" should be determined in an agreement between the agency and the union (not Executive-level Departments, the White House, OPM or OMB). 5 USC § 7131(d).

Federal law allows Federal employees to represent labor organizations and perform other non-agency business while being paid by American taxpayers (taxpayer-funded union time). The Congress, however, has also instructed the executive branch to interpret the law in a manner consistent with the requirements of an effective and efficient government.

- **Statute Controls:** Agencies' collective bargaining responsibilities, including those with respect to official time, come from the statute passed by Congress, not Executive Orders issued by the President.
 - the White House's interpretation of the statute is not controlling and does not have the force/effect of law.

To that end, agencies should ensure that taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest. Federal employees should spend the clear majority of their duty hours working for the public. No agency should pay for Federal labor organizations' expenses, except where required by law. Agencies should eliminate unrestricted grants of taxpayer-funded union time and instead require employees to obtain specific authorization before using such time. Agencies should also monitor use of taxpayer-funded union time, ensure it is used only for authorized purposes, and make information regarding its use readily available to the public.

- **CBA Controls:** If an agency is required under a CBA to reimburse official time, and official time expenditures are not prohibited by law (an Act of Congress), the CBA controls and this portion of the Executive Order has no legal effect.
 - Agencies are also required by law to bargain in good faith with a sincere resolve to reach an agreement, and that includes addressing how much official time is 'reasonable, necessary and in the public interest'.

Sec. 2. Definitions. For purposes of this order, the following definitions shall apply:

(a) Except for purposes of section 4 of this order, "agency" has the meaning given the term in section 7103(a)(3) of title 5, United States Code, but includes only executive agencies. For purposes of section 4 of this order, "agency" has the meaning given to "Executive agency" in section 105 of title 5, United States Code, but excludes the Government Accountability Office.

(b) "Agency business" shall mean work performed by Federal employees, including detailees or assignees, on behalf of an agency, but does not include work performed on taxpayer-funded union time.

- **Spin:** The terms "agency business" and "taxpayer funded union time" are not found in the Statute. This is an obvious attempt by the White House to mislead the public as to the purpose and benefits of official time.

(c) "Bargaining unit" shall mean a group of employees represented by an exclusive representative in an appropriate unit for collective bargaining under subchapter II of chapter 71 of title 5, United States Code.

(d) "Discounted use of government property" means charging less to use government property than the value of the use of such property, as determined by the General Services Administration, where applicable, or otherwise by the generally prevailing commercial cost of using such property.

(e) "Employee" has the meaning given the term in section 7103(a)(2) of title 5, United States Code, except for purposes of section 4 of this order, in which case it means an individual employed in an "Executive agency," according to the meaning given that term in section 105 of title 5, United States Code, but excluding the Government Accountability Office.

(f) "Grievance" has the meaning given the term in section 7103(a)(9) of title 5, United States Code.

(g) "Labor organization" has the meaning given the term in section 7103(a)(4) of title 5, United States Code.

(h) "Paid time" shall mean time for which an employee is paid by the Federal Government, including both duty time, in which the employee performs agency business, and taxpayer-funded union time. It does not include time spent on paid or unpaid leave, or an employee's off-duty hours.

(i) "Taxpayer-funded union time" shall mean official time granted to an employee pursuant to section 7131 of title 5, United States Code.

(j) "Union time rate" shall mean the total number of duty hours in the fiscal year that employees in a bargaining unit used for taxpayer-funded union time, divided by the number of employees in such bargaining unit.

Sec. 3. Standards for Reasonable and Efficient Taxpayer-Funded Union Time Usage. (a) No agency shall agree to authorize any amount of taxpayer-funded union time under section 7131(d) of title 5, United States Code, unless such time is reasonable, necessary, and in the public interest. Agreements authorizing taxpayer-funded union time under section 7131(d) of title 5, United States Code, that would cause the union time rate in a bargaining unit to exceed 1 hour should, taking into account the size of the bargaining unit, and the amount of taxpayer-funded union time anticipated to be granted under sections 7131(a) and 7131(c) of title 5, United States Code, ordinarily not be considered reasonable, necessary, and in the public interest, or to satisfy the "effective and efficient" goal set forth in section 1 of this order and section 7101(b) of title 5, United States Code. Agencies shall commit the time and resources necessary to strive for a negotiated union time rate of 1 hour or less, and to fulfill their obligation to bargain in good faith.

- **CBA Control:** To the extent our CBAs authorize official time usage at a rate exceeding one hour per employee, those agreements control -- until the agreements are renegotiated.
 - o Further, 5 USC § 7131(d) mandates that employees be granted official time for representational purposes in amounts agreed to by the agency and exclusive representative as reasonable, necessary, and in the public interest. The White House has no authority to direct agencies to do otherwise. Therefore, to the extent this section directs agencies not to agree to official time authorizations exceeding 1 hour per bargaining unit employee, the EO is inconsistent with the law.

(b) (i) If an agency agrees to authorize amounts of taxpayer-funded union time under section 7131(d) of title 5, United States Code, that would cause the union time rate in a bargaining unit to exceed 1 hour (or proposes to the Federal Service Impasses Panel or an arbitrator engaging in interest arbitration an amount that would cause the union time rate in a bargaining unit to exceed 1 hour), the agency head shall report this agreement or proposal to the President through the Director of the Office of Personnel Management (OPM Director) within 15 days of such an agreement or proposal. Such report shall explain why such expenditures are reasonable, necessary, and in the public interest, describe the benefit (if any) the public will receive from the activities conducted by employees on such taxpayer-funded union time, and identify the total cost of such time to the agency. This reporting duty cannot be delegated.

Each agency head shall require relevant subordinate agency officials to inform the agency head 5 business days in advance of presenting or accepting a proposal that would result in a union time rate of

greater than 1 hour for any bargaining unit, if the subordinate agency officials anticipate they will present or agree to such a provision.

(ii) The requirements of this subsection shall not apply to a union time rate established pursuant to an order of the Federal Service Impasses Panel or an arbitrator engaging in interest arbitration, provided that the agency had proposed that the Impasses Panel or arbitrator establish a union time rate of 1 hour or less.

- **Reporting Requirement for Agencies:** Subsection (b) creates a bureaucratic reporting requirement for agencies who choose to negotiate official time.

(c) Nothing in this section shall be construed to prohibit any agency from authorizing taxpayer-funded union time as required under sections 7131(a) and 7131(c) of title 5, United States Code, or to direct an agency to negotiate to include in a collective bargaining agreement a term that precludes an agency from granting taxpayer-funded union time pursuant to those provisions.

- **Negotiable Official Time:** Sections 7131(a) and (c) require that official time be given to representatives involved in the negotiation of collective bargaining agreements and for participation in FLRA proceedings. However, Section 7131(d) requires agencies and unions to negotiate the amount of official time that shall be granted to employees for other representational purposes - such as filing grievances.

Sec. 4. Employee Conduct with Regard to Agency Time and Resources. (a) To ensure that Federal resources are used effectively and efficiently and in a manner consistent with both the public interest and section 8 of this order, all employees shall adhere to the following requirements:

(i) Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee.

- **Lobbying and Official Time:** If a CBA authorizes union stewards to lobby their elected members of Congress on official time, consistent with Section 7102, which gives employees the right to express the views of their labor organization to Congress, the CBA controls.

(ii)(1) Except as provided in subsection (2) of this subsection, employees shall spend at least three-quarters

of their paid time, measured each fiscal year, performing agency business or attending necessary training (as required by their agency), in order to ensure that they develop and maintain the skills necessary to perform their agency duties efficiently and effectively.

(2) Employees who have spent one-quarter of their paid time in any fiscal year on non-agency business may continue to use taxpayer-funded union time in that fiscal year for purposes covered by sections 7131(a) or 7131(c) of title 5, United States Code.

- Agencies may not refuse to approve negotiated or statutorily authorized official time solely to comply with this EO's instruction to limit official time to one-quarter of an employee's paid time.

(3) Any time in excess of one-quarter of an employee's paid time used to perform non-agency business in a fiscal year shall count toward the limitation set forth in subsection (1) of this subsection in subsequent fiscal years.

(iii) No employee, when acting on behalf of a Federal labor organization, may be permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. Such property and resources include office or meeting space, reserved parking spaces, phones, computers, and computer systems.

- Union Space and Equipment Isn't Free: To the extent that access to agency space and use of agency equipment and supplies is negotiated in our contracts, it is not "free or discounted" it is bargained.
 - o If agencies are obligated to provide certain space, equipment and/or supplies under the CBA, they must comply until these terms are renegotiated.
 - o Further, many agencies grant free or discounted use of property to non-agency businesses and organizations. It is important that each local find out if this is a practice at the sites that they represent.
 - o It is an Unfair Labor Practice for agencies to seek payment from unions for use of space and resources if other outside groups receive the same for free/discount. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

(iv) Employees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation.

- **CBA Controls:** If agencies are obligated to reimburse official time related expenses under the CBA, agencies must fulfill these contract obligations.

(v) 1) Employees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of title 5, United States Code, except where such use is otherwise authorized by law or regulation.

- **CBA Controls:** This EO purports to prohibit the use of official time to prepare, pursue, and arbitrate grievances pursuant to a CBA. Agencies should not read this as invalidating existing CBAs. However, agencies may attempt to bargain/implement this into new CBAs or newly reopened CBAs.

(2) The prohibition in subsection (1) of this subsection does not apply to:

(A) an employee using taxpayer-funded union time to prepare for, confer with an exclusive representative regarding, or present a grievance brought on the employee's own behalf; or to appear as a witness in any grievance proceeding;

- **Grievants May Get Official Time:** This portion of the EO purports to allow individuals to get official time for their OWN grievance, but not for any union officials/stewards to help them.

or

(B) an employee using taxpayer-funded union time to challenge an adverse personnel action taken against the employee in retaliation for engaging in federally protected whistleblower activity, including for engaging in activity protected under section 2302(b)(8) of title 5, United States Code, under section 78u-6(h)(1) of title 15, United States Code, under section 3730(h) of title 31, United States Code, or under any other similar whistleblower law.

- **OPM May Change Its Regs:** Under current regs, an employee is entitled to be represented by another employee of the agency,

who is also entitled to official time, unless the costs to the agency would be "unreasonable" or workload precludes the employee representative's release. 5 CFR Section 752.404(e).

- o OPM's regulations also authorize official time for employees to prepare for replies and to secure medical information that they wish for an agency to consider, regardless of whether the employee is raising a retaliation defense. 5 CFR Section 752.404(c) (1), (3).

(b) Employees may not use taxpayer-funded union time without advance written authorization from their agency, except where obtaining prior approval is deemed impracticable under regulations or guidance adopted pursuant to subsection (c) of this section.

- In cases of full-time or virtually full-time representatives, agencies have generally agreed that approval for each official time activity is not required because it would be inefficient, and a waste of government resources to require as much.

(c) (i) The requirements of this section shall become effective 45 days from the date of this order. The Office of Personnel Management (OPM) shall be responsible for administering the requirements of this section. Within 45 days of the date of this order, the OPM Director shall examine whether existing regulations are consistent with the rules set forth in this section. If the regulations are not, the OPM Director shall propose for notice and public comment, as soon as practicable, appropriate regulations to clarify and assist agencies in implementing these rules, consistent with applicable law.

(ii) The head of each agency is responsible for ensuring compliance by employees within such agency with the requirements of this section, to the extent consistent with applicable law and existing collective bargaining agreements. Each agency head shall examine whether existing regulations, policies, and practices are consistent with the rules set forth in this section. If they are not, the agency head shall take all appropriate steps consistent with applicable law to bring them into compliance with this section as soon as practicable.

- Agencies must honor CBA provisions related to official time until those provisions are lawfully renegotiated.
- OPM will need to examine and likely update its regulations.

(e) Nothing in this order shall be construed to prohibit agencies from permitting employees to take unpaid leave to perform representational activities under chapter 71 of title 5, United States Code, including for purposes covered by section 7121(b) (1) (C) of title 5, United States Code.

Sec. 5. Preventing Unlawful or Unauthorized Expenditures. (a) Any employee who uses taxpayer-funded union time without advance written agency authorization required by section 4(b) of this order, or for purposes not specifically authorized by the agency, shall be considered absent without leave and subject to appropriate disciplinary action. Repeated misuse of taxpayer-funded union time may constitute serious misconduct that impairs the efficiency of the Federal service. In such instances, agencies shall take appropriate disciplinary action to address such misconduct.

- NFFE's position is that agencies must honor their contractual obligations for authorizing and approving official time.
 - Charging employees as AWOL and disciplining them, in violation of these obligations, would not promote the efficiency of the service and therefore should result in such actions being overturned in a grievance proceeding.

(b) As soon as practicable, but not later than 180 days from the date of this order, to the extent permitted by law, each agency shall develop and implement a procedure governing the authorization of taxpayer-funded union time under section 4(b) of this order. Such procedure shall, at a minimum, require a requesting employee to specify the number of taxpayer-funded union time hours to be used and the specific purposes for which such time will be used, providing sufficient detail to identify the tasks the employee will undertake. That procedure shall also allow the authorizing official to assess whether it is reasonable and necessary to grant such amount of time to accomplish such tasks. For continuing or ongoing requests, each agency shall require requests for authorization renewals to be submitted not less than once per pay period. Each agency shall further require separate advance authorization for any use of taxpayer-funded union time in excess of previously authorized hours or for purposes for which such time was not previously authorized.

(c) As soon as practicable, but not later than 180 days from the date of this order, each agency shall develop and implement a system to monitor the use of taxpayer-funded union time to ensure that it is used only for authorized purposes, and that it is not used contrary to law or regulation. In developing these systems, each agency shall give special attention to ensuring taxpayer-funded union time is not used for:

- (i) internal union business in violation of section 7131(b) of title 5, United States Code;

(ii) lobbying activities in violation of section 1913 of title 18, United States Code, or in violation of section 4(a)(i) of this order; or

(iii) political activities in violation of subchapter III of chapter 73 of title 5, United States Code.

Sec. 6. Agency Reporting Requirements. (a) To the extent permitted by law, each agency shall submit an annual report to OPM on the following:

(i) The purposes for which the agency has authorized the use of taxpayer-funded union time, and the amounts of time used for each such purpose;

(ii) The job title and total compensation of each employee who has used taxpayer-funded union time in the fiscal year, as well as the total number of hours each employee spent on these activities and the proportion of each employee's total paid hours that number represents;

(iii) If the agency has allowed labor organizations or individuals on taxpayer-funded union time the free or discounted use of government property, the total value of such free or discounted use;

(iv) Any expenses the agency paid for activities conducted on taxpayer-funded union time; and

(v) The amount of any reimbursement paid by the labor organizations for the use of government property.

(b) Agencies shall notify the OPM Labor Relations Group established pursuant to the Executive Order entitled "Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining" of May 25, 2018, if a bargaining unit's union time rate exceeds 1 hour.

(c) If an agency's aggregate union time rate (i.e., the average of the union time rates in each agency bargaining unit, weighted by the number of employees in each unit) has increased overall from the last fiscal year, the agency shall explain this increase in the report required under subsection (a) of this section.

(d) The OPM Director shall set a date by which agency submissions under this section are due.

Sec. 7. Public Disclosure and Transparency. (a) Within 180 days of the date of this order, the OPM Director shall publish a standardized form that each agency shall use in preparing the reports required by section 6 of this order.

(b) OPM shall analyze the agency submissions under section 6 of this order and produce an annual report detailing:

(i) for each agency and for agencies in the aggregate, the number of employees using taxpayer-funded union time, the number of employees using taxpayer-funded union time separately listed by intervals of the proportion of paid time spent on such activities, the number of hours spent on taxpayer-funded union time, the cost of taxpayer-funded union time (measured by the compensation of the employees involved), the aggregate union time rate, the number of bargaining unit employees, and the percentage change in each of these values from the previous fiscal year;

(ii) for each agency and in the aggregate, the value of the free or discounted use of any government property the agency has provided to labor organizations, and any expenses, such as travel or per diems, the agency paid for activities conducted on taxpayer-funded union time, as well as the amount of any reimbursement paid for such use of government property, and the percentage change in each of these values from the previous fiscal year;

(iii) the purposes for which taxpayer-funded union time was granted; and

(iv) the information required by section 6(a)(ii) of this order for employees using taxpayer-funded union time, sufficiently aggregated that such disclosure would not unduly risk disclosing information protected by law, including personally identifiable information.

(c) The OPM Director shall publish the annual report required by this section by June 30 of each year. The first report shall cover fiscal year 2019 and shall be published by June 30, 2020.

(d) The OPM Director shall, after consulting with the Chief Human Capital Officers designated under chapter 14 of title 5, United States Code, promulgate any additional guidance that may be necessary or appropriate to assist the heads of agencies in complying with the requirements of this order.

Sec. 8. Implementation and Renegotiation of Collective Bargaining Agreements. (a) Each agency shall implement the requirements of this order within 45 days of the date of this order, except for subsection 4(b) of this order, which shall be effective for employees at an agency when such agency implements the procedure required by section 5(b) of this order, to the extent permitted by law and consistent with their obligations under collective bargaining agreements in force on the date of this order. The head of each agency shall designate an official within the agency tasked with ensuring implementation of this order, and shall report the identity of such official to OPM within 30 days of the date of this order.

(b) Each agency shall consult with employee labor representatives about the implementation of this order. On the earliest date permitted by law, and to effectuate the terms of this order, any agency that is party to a collective bargaining agreement that has at least one provision that is inconsistent with any part of this order shall give any contractually required notice of its intent to alter the terms of such agreement and either reopen negotiations and negotiate to obtain provisions consistent with this order, or subsequently terminate such provision and implement the requirements of this order, as applicable under law.

Sec. 9. General Provisions. (a) Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order.

(b) Nothing in this order shall be construed to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under chapter 71 of title 5, United States Code, or encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

- **CBAs Control (for now):** Sections 8 and 9 recognize that to the extent agencies' collective bargaining agreements provide differently than what is prescribed in this EO, agencies must comply with the contracts until those agreements are lawfully amended through bargaining.
- **White House Overreaching Its Authority:** The FLRA and federal courts, not the White House, are the final arbiters whether the provisions of this order interfere with employee's and exclusive representatives' rights under Chapter 71.

(c) Nothing in this order shall be construed to impair or otherwise affect the authority granted by law to an executive department or agency, or the head thereof.

(d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(f) If any provision of this order, including any of its applications, is held to be invalid, the remainder of this order and all of its other applications shall not be affected thereby.

