

Frequently Asked Questions and Answers for NFFE Leaders about the Trump Executive Orders

On Friday May 25, 2018, the Trump administration released three executive orders attacking collective bargaining, official time and employees' due process rights. Here are the titles of the individual EOs:

- Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining (EO 13836)
- Executive Order Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use (EO 13837)
- Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles (EO 13839)

These orders represent a serious attack on federal unions and federal employees. They urge agencies to reopen federal contracts to lessen employee and union rights, limit official time, and to take steps to make it easier to fire employees. Here are answers to some basic questions about the orders:

Do these orders have the force of federal law? Do they overturn the Federal Service Labor-Management Relations Statute, 5 USC 7101 et seq.?

They do not. Executive Orders direct Agency management to take certain actions, but they cannot overturn a federal law. NFFE contends the orders essentially order Agency management to open labor contracts in their agencies and to seek to obtain through collective bargaining various anti-employee goals such as preventing employees from challenging removals or even grieving performance appraisals, limiting union officials right to obtain official time, charging unions for using government phones and office space, limiting the time employees are given to improve their performance before being subjected to adverse action, and eliminating well established fairness concepts such as progressive discipline.

EO 13836: Collective Bargaining

1. Do the Executive Orders (EOs) overturn our collective bargaining agreements (CBAs)?

They do not. Each order specifically states that it does not overturn any provision of any current CBA. Sec. 9(c))

2. What if we are currently renegotiating our CBA?

This may depend on where you are in the bargaining process. NFFE's position is that an Agency would commit an unfair labor practice if it changed its proposals for the worse in the middle of bargaining. This is called regressive bargaining. Consult your Business Representative if you are in this situation. If your bargaining is near completion, it is probably a good idea to finish it up ASAP.

3. What if our contract is several years old? (Sec. 4(a))

You need to ascertain the status of your CBA. Some CBAs "rollover" with automatic yearly reopeners. If your CBA has one, figure out the reopener date and get ready for bargaining because the EOs direct the Agencies to reopen contracts and seek to gut them. Consult your Business Representative if you are in this situation.

4. Our contract is expired with no rollover. What can happen?

Management can reopen at any point, so prepare to bargain. Consult your Business Representative if you are in this situation.

5. Do the EOs affect how bargaining is done? (Sec. 5(a))

The bargaining EO directs agencies to seek to bargain ground rules within 6 weeks, to limit the CBA negotiating period to 4 to 6 months, and to expeditiously move impasses to FMCS and FSIP. These time frames are not necessarily unworkable. Normally, it is Agencies that engage in foot-dragging that results in multi-year negotiations. NFFE negotiators do need to be mindful to make sure FMCS mediation and FSIP petitions are filed as soon as impasse is reached. Under labor law, Agencies can implement their "last best offer" if FMCS or FSIP assistance is not timely invoked. The EO encourages Agencies to use this tactic. There is a current horror story where Dept. of Education implemented an entire contract on AFGE through this tactic.

6. *What about midterm bargaining?* (Sec. 5(b))

The EO suggests midterm bargaining should be done in 9 months.

EO 13837: Official Time

7. *What is the difference between official time and “taxpayer funded union time”?*
(Sec. 2(i))

The term “taxpayer funded union time” is not found in the Statute. The Statute authorizes “official time” for representational activities, and there is no distinction between official time activities and duties assigned by the employer. This is political verbiage at odds with the concept in the law that collective bargaining and unions are in the public interest. 5 USC 7101.

Under Section 7131(a), union representatives are entitled to official time to negotiate collective bargaining agreements, when they would otherwise be in duty status. For other representational activities, Congress decided that the amount of such time that is “reasonable, necessary, and in the public interest” should be determined in an agreement between agencies (not Executive level Departments, the WH, OPM or OMB) and the representatives elected by the agencies’ employees. Section 7131(d). In short, under the Statute, official time is time spent conducting agency business.

8. *The EO says agencies should limit official time to a total of 1 hour per year per bargaining employee. We have much more than that now. Can the agency change our official time set up now?* (Sec. 3(b)(i))

NFFE contends the EO only directs agencies to seek this rate the next time the contract is renegotiated. If no agreement is reached and management maintains that proposal to the FSIP, the FSIP will weigh the proposals of both parties and decide how much official time is granted. The EO requires agencies to report to OPM when they fail to achieve the rate.

9. *Does the EO prevent Agencies from agreeing to a greater rate than 1 hour per BUE?*
(Sec. 6(b))

The EO specifically permits Agencies to negotiate a greater rate, but they have to report it to OPM if they do.

10. *The EO purports to prohibit employees from lobbying on official time. We attend Lobby Week on official time currently. Can we do so next year? (Sec. 4(a)(i))*

5 USC 7102 (1) says union officials can lobby, and 5 USC 7131 (d) says the parties can agree to official time for union activities authorized under the Statute. Therefore, where our CBA states we can get official time for lobbying explicitly or through past practice, the Agency must honor that contract provision. NFFE's position is that, at most, the Agency can seek to eliminate the right to official time in future negotiations.

11. *The EO says employees can spend no more than 25% of their total time on official time. We have representatives who use much more than that now. Can the agency change our official time set up now? (Sec. 4(a)(ii))*

This is similar to the 1 hour per year rule/goal. The EO only directs agencies to seek this limitation the next time the contract is renegotiated. If no agreement is reached and management maintains that proposal to the FSIP, the FSIP will weigh the proposals of both parties and decide how much official time is granted.

12. *The EO purports to give the Agency the right to charge unions for union use of facilities not available to non-federal organizations. Can the Agency take away our union office next week? (Sec. 4(a)(iii))*

The EO only directs agencies to seek this requirement when the contract is renegotiated. If no agreement is reached and management maintains that proposal to the FSIP, the FSIP will weigh the proposals of both parties and decide whether unions should be charged for use of facilities. Locals should be researching as to whether groups such as vendors, or service organizations like the Red Cross, get use of facilities for free or at a discount. NFFE advises sending FOIA requests to your agencies for this information

13. *The EO appears to prohibit payment of travel expenses for union matters. We currently receive travel reimbursement for union representational travel for grievance meetings, etc. Can the Agency stop paying this now? (Sec. 4(a)(iv))*

The CBA remains in full effect unless and until it is renegotiated. If no agreement is reached and management maintains that proposal to the FSIP, the FSIP will weigh the proposals of both parties and decide whether unions should be reimbursed for travel. If there is nothing in the contract regarding such payments, but the Agency has made such payments in the past, then the Agency may have established a past practice that cannot be unilaterally changed without bargaining.

If there is no contract provision, or past practice of providing reimbursement, management can propose to change the current practice subject to impact and implementation bargaining.

14. *The EO appears to say that employee whistleblowers and grievants can get official time to talk to a union rep for grievance prep, but the union rep can't unless otherwise authorized by law. Does that apply to us now? (Sec. 4(a)(v))*

NFFE agreements typically provide for the authorization of official time for union representatives to prepare for grievance meetings or replies to proposed disciplinary actions. The agreements also authorize time for employees to confer with union representatives for such purposes and to participate in such meetings. That includes time to prepare for all oral replies, including those in which the employee does not intend to raise whistleblower claims. Again, the Agency would have to seek to negotiate these rights out of our agreements.

Additionally, OPM's regulations independently 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). 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. See Section 752.404(e).

15. *A provision of the EO states that advanced written approval is required for all official time. Another provision states that using official time without prior written approval is AWOL and Agencies are encouraged to fire repeat offenders. A third says that official time must be requested on a pay period by pay period basis. Are these provisions controlling for us now? (Sec. 4(b); Sec. 5(a); Sec. 5(b))*

As discussed above, 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 could result in such actions being overturned. Our contracts generally require union representatives seeking approval for official time activities to describe the general nature of the activity, but have differing requirements for representatives to describe the activity in detail. These CBA requirements control until renegotiated.

EO 13839: Reducing Due Process

While the order claims to enhance employee accountability while recognizing due process, it seeks to limit employees' statutory procedural rights and protections under the law, including Chapters 43 and 75 of Title V of the U.S. Code, OPM's current regulations, and NFFE's collective bargaining agreements.

The EO discusses the FEV survey results that reflect employees' views that poor performers are not dealt with effectively, survey results do not reflect widespread views that employees' procedural rights and protections from unfair and unwarranted personnel actions should be cut back. It is NFFE's position that sufficient legal tools exist for Agency managers to deal with poor performers. Agency managers are not held accountable for effectively dealing with unacceptable performance and misconduct using the tools they have now. This EO does nothing to change that. Rather than improving morale, the EO will undermine it by increasing the chances that employees are treated unfairly, for non-merit reasons.

16. *The EO states that managers should not be required to use progressive discipline. Will managers now be able to fire employees for a first offense? (Sec. 2(b))*

Progressive discipline is a basic tenet of labor law, the idea that discipline should be limited to a penalty that will correct behavior and that penalties increase with repeated offenses is a cornerstone principle of labor law.

Agencies have always been able to fire employees for serious first offenses warranting removal. However, the law and our contracts require that discipline and adverse actions promote the efficiency of the service. To promote the efficiency of the service, the penalty for proven misconduct may not exceed the bounds of reasonableness. An illustrative list of aggravating and mitigating factors for assessing the reasonableness of a penalty under a particular set of circumstances were first articulated in *Douglas v. Veterans Administration*, and are often included in NFFE's contracts. These factors are also often included in agencies' rules of conduct and tables of penalties.

Failure to use progressive discipline could implicate several *Douglas* factors, such as whether the offense was frequently repeated; the employee's past disciplinary record; the consistency of the penalty with those imposed on others and with the agency's table of penalties; the employee's potential for rehabilitation; the clarity with which the employee was on notice of the rules violated or had been warned about it; and, the adequacy and effectiveness of alternative sanctions. A failure to follow a course of progressive discipline could result in the penalty being found unreasonable and, therefore, contrary to the statutory requirement that actions promote the efficiency of the service.

17. *Language in the EO seems to undermine the concept of disparate treatment, that an employee should not be penalized more severely than others for the same offense. We make these arguments all the time. Are these arguments no longer valid? (Sec. 2(c))*

Disparate treatment arguments remain valid and should be made. As noted, the consistency of a penalty imposed on others in an agency for the same or similar offenses is a *Douglas* factor bearing on the reasonableness of a penalty. Under case law, if an employee facing an adverse action raises a claim of disparate treatment by pointing to others treated less severely for engaging in the same or similar misconduct, the agency must establish why it was reasonable to treat the situations differently.

18. *The EO directs agencies to remove employees rather than suspend them. Are suspensions a thing of the past? (Sec. 2(d))*

If an Agency pursues removal when a suspension is appropriate, such action could violate the *Douglas* factor requiring the consideration of the adequacy and effectiveness of alternative sanctions. The *Douglas* factors are currently the law, and an executive order does not overturn that law.

19. *The EO states that when disciplining employees Agencies can take into account all past misconduct, not just misconduct that is similar to current misconduct. Are these arguments no longer available to us? (Sec. 2(e))*

Agencies generally have this discretion under the law, including the ability to consider all past misconduct. But the similarity of past misconduct bears on the appropriateness of the penalty, implicating several *Douglas* factors such the employee's potential for rehabilitation, the clarity with which the employee was on notice that the conduct was wrong, and the effectiveness of alternative sanctions to deter the conduct by the employee and others. *Douglas* remains the law.

20. *Language in the EO directs Agencies to issue decisions within 15 business days of the end of the employee reply period, and to try and limit the 30 day notice period for proposed actions to no more than 30 days. Does this language change the procedural time limits? (Sec. 2(f); Sec.2(g))*

No. By law, 5 USC 7513 requires that employees receive "at least" 30 days advanced notice of an adverse action, including removals, and a "reasonable time", "not less than 7 days", to answer a proposed action "orally and in writing". OPMs regulations, at 5 CFR Part 752, and our contracts incorporate these standards. NFFE contracts may also contain additional procedures, and those remain in place until renegotiated. Often time frames are extended when requested information relevant to the proposed action has yet to be provided. The EO suggests that Agencies should hurry up. To the extent agencies do so and act without providing requested information there is an increased likelihood of a final decision that is unfair. Agencies hell-bent

to issue decisions within 30 days may risk committing harmful procedural error, a basis for overturning adverse actions. See 5 USC Section 7701(c)(2).

21. *The EO talks about Agencies using Chapter 75 for performance actions. Chapter 43 is for performance actions. What does this language mean? (Sec. 2(h))*

Chapter 75 procedures are generally used to take adverse actions against employees for misconduct whereas Chapter 43 procedures are used to remove employees or reduce them in grade for unacceptable performance. But agencies have the discretion to use Chapter 75 procedures to take actions based on unacceptable performance. *Lovshin v. Navy*, 767 F2d 826 (Fed. Cir. 1985).

There are advantages and disadvantages to agencies and employees under each Chapter. Under Chapter 75, there is no requirement that an employee receive an opportunity to improve their performance and, for that reason, an action may be taken more quickly, from a procedural standpoint. But the burden of proof is higher, preponderance of the evidence vs. substantial evidence. Also, since the action must promote service efficiency, mitigation of the penalty is a possibility where Chapter 75 is used. The failure of an Agency to help an employee improve their performance before removal could be a significant mitigating factor.

22. *Language in the EO suggest that the probationary period is “the last step in the hiring process”. Does it change anything? (Sec. 2(i))*

No, NFFE views this as aspirational language encouraging managers to fire probationary employees. Considering probationary periods are now often 2 years and the EOs make so much of government cost, it is unfortunate the EO makes no mention of government investment lost when managers give up on probationary employees.

23. *The EO talks about changing the RIF rules to emphasize performance over seniority. What has changed? (Sec. 2(j))*

RIF rules changed in NDAA 2017 for Department of Defense employees. OPM will have to revise its RIF regulations to make changes for other federal employees. Those regulatory changes will have to be published in the Federal Register and go through the notice and comment process.

24. *The EO directs agencies to seek to exclude removals from the grievance process? Does this mean we can no longer take removals to arbitration? (Sec. 3)*

No, the EO only directs Agencies to seek to exclude removals the next time the contract is renegotiated. If no agreement is reached and management maintains that proposal to the FSIP, the FSIP will weigh the proposals of both parties and decide whether removals are excluded.

If removals are excluded from the grievance, appeals to the Merit Systems Protection Board or complaints under the statutory EEO procedure would be the only option for challenging unfair removals. Most, if not all, NFFE agreements currently provide the option of taking adverse and performance actions through the negotiated grievance procedure, and have always done so. Some of these agreements have existed for close to forty years. In bargaining, the burden would be upon the agency to justify eliminating a procedure that has served the parties for years.

Chapter 71 establishes the collective bargaining relationship between the agency and the exclusive representative, not the White House and the exclusive representative. Executive direction to Agencies to exclude removals from the grievance procedure at the direction may be inconsistent with agency's statutory good faith bargaining obligations under Section 7114(b).

25. *The EO directs agencies to exclude performance appraisals, awards and retention bonuses from grievance procedures. Can we no longer file grievance over these topics? (Sec. 3)*

No, the EO only directs agencies to seek to exclude these subjects the next time the contract is renegotiated. If no agreement is reached and management maintains those proposal to the FSIP, the FSIP will weigh the proposals of both parties and decide whether any of these items were excluded. Excluding appraisals, awards and incentive payments from the grievance procedure will have a negative impact on federal employee morale, reduce accountability, and encourage favoritism. These provisions have been in our CBAs for years and the burden will be on the Agency to justify eliminate.

26. *Agencies are directed to limit performance improvement periods or opportunity periods for employees with performance issues to no more than the statutory minimum of 30 days. Our CBA has a longer period. Is the PIP time now 30 days? (Sec. 4)*

Again, the EO only directs agencies to seek to negotiate minimum PIP period the next time the contract is renegotiated. If no agreement is reached and management maintains a proposal to the FSIP, the FSIP will decide. Historically, the length of an appropriate PIP has depended on the nature of the work.

27. *Some language in the EO references “clean 50” settlements. What is that about? (Sec. 5)*

The 2017 National Defense Authorization Act (NDAA) added a new section 3322 to Title 5, requiring a permanent official personnel file notation if the employee subject to a personnel investigation (which includes an action under Chapter 43 or 75) resigns and there is an adverse determination against the employee based on the investigation. Certain due process protections must be afforded before the notation is made permanent and the employee may appeal the adverse determination to the MSPB. If the employee prevails, the notation must be removed. The EO goes one further and precludes settlement agreements from providing for expungement of adverse notations from a personnel file. As a practical matter, this would make it more difficult to settle removal actions for resignations, as the incentive of a clean record would be eliminated. This would likely increase costs to the government.