Union Official Time: Why a Basic Change is Needed

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By Bob Gilson on January 31, 2018 in Human Resources

I have a number of questions about official time. They are in bold faced type throughout the article.

What do you know about official time for employee union representatives in the Federal sector? The law addressing this issue can be found at 5 U.S. Code §7131. It says:

> Official time
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) 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.

Problem #1: Section (a)

In essence, the law provides for official time for union representatives when negotiating with an Agency if they would otherwise be in a duty status and the number of union representatives shall not exceed the number of Agency representatives.

Despite the very clear language of the law, various Federal Labor Relations Authorities (FLRA) have found that:

- An Agency must negotiate with the union for more employee/union representatives at negotiation than the Agency sends.

- The limit in the law only applies to those union representatives who are employees, so if the union sends a union employee to negotiate, it still gets an equal number of employee representatives to the number of representatives the Agency sends.

- The Agency must bargain with the union over official time at a negotiation for union representatives who are not "negotiators" but may be notetakers, observers or resource persons.

- The negotiation of ground rules, impact and implementation issues and local supplemental agreements have all been found to constitute a "collective bargaining agreement" not just a "collective bargaining agreement" or term contract as is understood by every common use of that phrase within or outside government.

- An Agency must negotiate official time not only for union representatives engaged in negotiations, but for any involved in negotiation preparation whether engaged in the negotiation or not as well as the time to travel to and from a negotiation site, preparation site or wherever the FLRA decides to hold a meeting or hearing the union may send someone to.

So, in interpreting Section (a) alone, the FLRA has repeatedly decided to expand the amount of official time unions may receive despite simple language that limits union representatives in the negotiation of a collective bargaining agreement to the number the Agency sends.

That's not the most important concept here. It is that since the passage of the statute, the various FLRAs have eliminated for a union any cost associated with payment of union representatives for negotiations of any kind anywhere.

The key question here is a simple one:
Did the Congress of the United States intend to eliminate any labor dollar cost of negotiations to an employee union and place the entire cost of the time spent by union employee representatives on the American taxpayer?

If the Congress so intended, it's not at all discernable from the language of the law in section 7131(a). Of course, I may be missing something here. After all, I'm the same guy who thought the Obama labor forums were limited to working conditions, not to the determination of Agency missions. Silly me.

Problem #2: Section (b)

Section (b) appears clear in prohibiting any kind of paid time for an employee engaged in internal union business.

To address this, at least in part, we need to discuss another law. That is 18 U.S. Code § 1913 which reads:

> Lobbying with appropriated moneys
> 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; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

Over the years, various FLRAs have found that:

- The above language was in some way trumped by Section (d) of 7131 without any explanation except that it was. For me, the hardest part to get by is that lobbying can

only be described as the internal union business of a private sector organization, or at the very least a non-governmental entity, over a matter in the self-interest of its members.

So, the only Federal employees who can legally lobby Congress are those that operate as union officials; did you see that in the above law?

- The completion of required forms and provision of information to outside Agencies (e.g., Dept. of Labor) was not internal union business.

  Really, the administration of union affairs is appropriately funded by taxpayer money?

- The union can send out any information it wants about itself on the clock unless the information specifically solicits an employee to join the union.

  So, by this logic, the commercial on TV selling cars is not a commercial unless it specifically says, "Buy this Car"? What planet does the FLRA live on?

Problem #3: Section (c)

This is really an interesting provision. It provided that FLRA, including the General Counsel, which historically and virtually has only represented unions against Agencies, can spend the Agency's money (official time) for any purpose it believes supports prosecuting its case.

This has meant Agencies must pay not only for the union employees' time, but also travel and per diem if FLRA wants the employee. It certainly encourages the filing of such cases when it means the unlimited use of witnesses the GC thinks might be relevant, case preparation assistance for the GC and having union representatives sit at the table with FLRA lawyers during the proceeding despite having no ability to say anything. Really!

So, does anybody think that Congress intended union representatives, officers and employees to get every minute they spend on the government clock when filing a claim against an Agency, meritorious or not, to the tune of 5,000-8,000 cases per year over the last 37 years?

Problem #4: Section (d)

This provision states conditions on the grant of official time; namely, the parties must agree that the time is reasonable, necessary, and in the public interest.

I've done a bunch of research for this article and generally, but have yet to see any discussion by FLRA or the Federal Service Impasse Panel as to whether a union proposal on official time must meet any kind of reasonableness, necessity or public interest standard. In other words, this language has been systematically ignored by the administrative bodies responsible for interpreting Section 7131(d) of the Code.

So, does anyone think the Congress expected the substantial language in Section (d) would be ignored, perhaps because doing so might actually place limits on the cost to taxpayers of official time?

Problem #5: Broad Use of Official Time Outside the Scope of Federal Labor Relations

Lots of people, especially on the Hill, are unaware that the taxpayer bill for official time for union representatives is way beyond what is laughingly underreported by the Office of Personnel Management.

FLRA has found that union representatives are entitled, that's entitled not subject to negotiation, to represent employees before the Equal Employment Opportunity Commission (EEOC), Merit Systems Protection Board (MSPB) and Office of Workers' Compensation Programs (OWCP).

EEOC has actually issued a regulation (29 CFR §1614.615) titled "Representation and Official Time" despite the fact that the Commission has absolutely no authority under law to make such a grant or interpret the Federal labor statute.

OWCP, also without authority to interpret 5 USC 7131, does exactly that in its FECA Procedure Manual 2-0804-16. Union representatives get official time to represent employees in workers compensation appeals, a time consuming process, to say the least.

FLRA has found that Agencies must negotiate the use of official time for MSPB appeals. MSPB appeal regulations address the rights of representatives once selected by an employee. See 5 CFR 1201.31. Originally a topic of negotiation, this has become a right by fiat.

The Federal sector labor law includes provisions on grievance procedures and arbitration. No provision addresses appeals outside the statute, yet FLRA, MSPB and OWCP have either directed or encouraged the use of union representatives in their appeal processes.

In writing the Federal labor statute, did the Congress intend to allow union representatives to represent employees in virtually any appeal process at taxpayer cost and free to any appellant?

Because the "official" time involved in such representation is extrastatutory (My word, like it?), it is rarely, if ever, reported.

The questions above are mine. It's obvious I think the administrative bodies have misinterpreted the law to give an unintended broad scope benefit to unions at absolutely no cost to those institutions.

Any opinion you find here is mine. I don't believe any serious knowledgeable look has been undertaken by anyone on these issues. If anyone thinks the official time reported by OPM is anything other than wildly inaccurate and a tremendously understated estimate is simply dead wrong.

The Federal government is paying for its employees and their unions to challenge virtually any decision it makes for free. Because doing this is free and considered a totally "protected activity", claims of any sort, whether frivolous or of an even lesser standard are encouraged. The system is broken beyond the repair of an amendment of the statute. The third parties involved in seeking to "level the playing field" have created a money eating monster that no one in Congress or in any political administration of either party understands or even knows exists.

About the Author

Bob Gilson is a consultant with a specialty in working with and training Federal agencies to resolve employee problems at all levels. A retired agency labor and employee relations director, Bob has authored or co-authored a number of books dealing with Federal issues and also conducts training seminars.