



## **The Use of Official Time for Union Activities at the Department of Veterans Affairs**

**Testimony before Subcommittee on Economic Opportunity and Subcommittee on Government Operations**

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Chairman Meadows, Chairman Arrington, Ranking Member Connolly, Ranking Member O'Rourke, and members of the committees. Thank you for holding this hearing and providing me the opportunity to discuss the issue of official time in the federal workforce. My name is William Kovacs III, and I am a labor policy analyst at the Competitive Enterprise Institute (CEI). CEI is a nonprofit, nonpartisan public policy organization that focuses on regulatory issues from a free market and limited government perspective.

### **Summary**

When Congress enacted the Civil Service Reform Act of 1978 (CSRA), it determined (in the findings and statement of purpose) that labor unions and collective bargaining in the federal government "safeguard[] the public interest,"<sup>i</sup> advance "the effective conduct of public business,"<sup>ii</sup> and "improve employee performance and the efficient accomplishment of the operations of the Government."<sup>iii</sup>

It is debatable whether permitting collective bargaining in the federal government achieves these objectives.<sup>iv</sup> Yet, one component of the collective bargaining system blatantly undoubtedly contradicts the CSRA's findings.

That provision is known as union official time, which grants federal employees paid time off from their government duties to perform union work.<sup>v</sup> Official time subsidizes federal labor unions to file grievances, negotiate contracts, and even lobby Congress. Unfortunately, a general lack of transparency surrounding the practice makes it impossible to know what specific activities are performed on official time or what its costs are.



Despite official time taking federal employees away from the jobs they were hired to do, the federal government imprudently views official time as a crucial cog in its carefully crafted collective bargaining regime. The fact is that official time is simply a subsidy, costing taxpayers at least \$157 million in FY 2012.<sup>vi</sup>

Hundreds of federal employees spend *100 percent* of their time performing union activity instead of any public service.<sup>vii</sup> It is impossible for a federal employee who never conducts any public service to promote the public interest, contribute to effective performance of public services, or achieve efficient government operations. Activity performed on official time benefits only labor unions and their members, not the public.

Union activity conducted using official time should be financed with union dues instead of tax dollars. Federal employee unions contend that official time is necessary because the CSRA requires a duty of fair representation, which requires unions to represent both dues-paying members and non-members, and prohibits unions from forcing non-members to pay dues. A better solution than subsidizing federal unions is to release them from the duty to represent non-members and free those employees from working under a union contract.

Union official time is an unwise use of limited tax dollars and serves the private interests of unions. The public does not directly benefit from the use of official time. Congress should eliminate the use of official time. In absence of abolishing official time, greater safeguards against its misuse should be implemented, such as a detailed, annual accounting of the cost and activities performed on official time.

## **Background**

The Civil Service Reform Act of 1978 statutorily requires the use of official time for collective bargaining, impasse proceedings, and cases before the Federal Labor Relations Authority (FLRA), the agency that resolves labor dispute in federal workforce.<sup>viii</sup> Outside of this, official time may only be granted “in any amount the agency employer and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.”<sup>ix</sup> A sole statutory restriction on official time is that it cannot be granted for internal union business, such as conducting union elections or collecting union dues.<sup>x</sup> A non-statutory limit on official time found in collective bargaining agreements is a requirement that a supervisor must authorize official time prior to use. As will be discussed below, this is not necessarily an effective safeguard.

The Office of Personnel Management (OPM) sporadically collects official time data from federal agencies and publishes its findings in a report.<sup>xi</sup> Agencies report official time in four broad categories:



1. General Labor Management—Meetings between labor and management officials to discuss general conditions of employment, labor-management committee meetings, labor relations training for union representatives, and union participation in formal meetings and investigative interviews.
2. Dispute Resolution—Time used to process grievances up to and including arbitrations and to process appeals of bargaining unit employees to the various administrative agencies.
3. Term Bargaining—Time used by union representatives to prepare for and negotiate a basic collective bargaining agreement or its successor.
4. Mid Term Bargaining—Time used by the union representatives to bargain over issues raised during the life of a term agreement.

According to the most recent OPM report on official time, the cost to taxpayers from salaries and benefits paid for official time was \$157 million in FY 2012.<sup>xii</sup> Federal employees spent 3.4 million hours on union activities in FY 2012, the equivalent of more than 1,500 full-time positions.<sup>xiii</sup> The majority of FY 2012 official time hours—2.64 million hours, representing 76 percent—was spent on “General Labor Management,” activities that are specific to the union’s concerns.<sup>xiv</sup>

### **Cost of Official Time Is Greater than Reported**

The Office of Personnel Management’s official time report is the best resource available to understand the cost of official time and how it is used, but it has several weaknesses. OPM only reports the payroll costs of official time. There are additional non-payroll costs associated with official time that OPM does not track or report. Collective bargaining agreements between federal employers and unions frequently require taxpayer funds to cover the cost of office space, telephones, and travel for government employees using official time.<sup>xv</sup>

Another report does account for these costs at one agency. The Social Security Administration (SSA) is required to produce an annual report on its union official time activities. It gives a more complete picture of the costs deriving from official time at the agency. In FY 2015, the value of official time in salary and benefits was \$13.2 million. However, unlike the OPM study, the SSA report also calculates the cost of travel and per diem, office space, telephones, supplies, interest, and arbitration expenses associated with official time. These extra official time costs add up to \$2.2 million, which is 15 percent of the total official time cost at the SSA.<sup>xvi</sup> If non-payroll official time costs at all other agencies equaled 15 percent, it would increase the total costs of official time in the federal government by \$23 million.

Additionally, in 2014, the United States Government Accountability Office (GAO) issued a report that criticized OPM’s accounting methods related to official time.<sup>xvii</sup> The report found that the methodology used by OPM to estimate the cost of official time is inaccurate. According to the GAO report, OPM estimates the cost of official time by “multiplying each agency’s average



salary as reported in EHRI [Enterprise Human Resources Integration] for BU [bargaining unit] employees covered by official time activities by the agency’s total reported official time hours.” Using a more sound methodology that uses the actual salary of employees using official time, GAO found at four of the six agencies it examined, official time costs are about 15 percent higher than the OPM cost estimates.<sup>xviii</sup>

The same GAO report notes that OPM cannot affirm that agencies report official time hours accurately.<sup>xix</sup> Two other GAO reports that investigate the Department of Veterans Affairs and the National Labor Relations Board (NLRB) make similar claims. Both of these reports state that official time hours and activity performed are not accurately kept, and in some cases not reported at all.<sup>xxxxi</sup> It is more than probable that if agencies accurately reported official time hours the total cost would rise.

### **Official Time at the Department of Veterans Affairs**

Cost and use of official time at the Department of Veterans Affairs (VA) has steadily increased in recent years. In 2008, according to OPM, federal employees spent 774,679 hours on official time at a cost of \$29.97 million. In 2012, the numbers jumped to 1.086 million hours, costing nearly \$46.87 million, which amounts to percentage increases of 40 percent and 36 percent, respectively, over the four year period. In addition to the inflated use and cost over the years, the VA also has one of the highest official time rates in the federal government.<sup>xxii</sup>

In addition to increasing use and costs of official time, Freedom of Information Act requests reveal that over 200 VA employees—including over 80 who held nursing positions—spent *100 percent* of their time conducting union activities.

In June 2013, upon learning of the practice of official time at the VA, Senator Rob Portman (R-OH) and Tom Coburn (R-Okla.) wrote to Secretary of Veterans Affairs Eric Shinseki, commenting:

Federal employees not serving veterans during official time could lead to the failure of VA’s top goals and the well-being of those who have sacrificed in the service our nation, could be compromised.

Moreover, the recent decision to overtime “surge” to help eliminate the backlog is troubling considering VA employees who should be completely dedicated to serving veterans are authorized for large amounts of official time. Accepting policies that foster poor personnel management practices in a critical period of VA’s history will undoubtedly negatively impact veterans who could have otherwise been served by taxpayer dollars now reserved for federal employee overtime pay. ...



[T]his time of sequestration and tight budgets, it is important to know how so many employees can be spared to serve the interest of outside groups, instead of carrying out jobs that are essential to the health, safety and transition of our nation's veterans.

Documents show that your department recently employed at least 85 VA nurses, some with six-figure salaries, who were in 100 percent official time status. At the same time, the department is recruiting more people to fill open nursing positions. USA Jobs currently has openings for hundreds of nursing positions to be filled.<sup>xxiii</sup>

Echoing the statement of the Senators is the recent GAO report on official time at the VA, which notes that the use of official time can cause staffing and scheduling challenges.<sup>xxiv</sup>

Worse, in the department's master collective bargaining, VA employees are permitted to use official time for lobbying instead of fulfilling the agency's mission of serving veterans.<sup>xxv</sup>

### **Official Time Enables Filing of Frivolous Grievances**

Subsidizing union activity via official time gives union representatives the opportunity to file frivolous grievances and other appeals. This is a predictable outcome, when union representatives are given a nearly unlimited amount of official time to prepare, file, and defend federal employees in any kind of appeals procedure.

Of 4,300 grievances filed before the Federal Labor Relations Authority in FY 2012, unions initiated over *90 percent*. Only 20 percent proceeded to trial before an FLRA administrative law judge, and of those, the FLRA found an actual violation of the CSRA in only 13 instances—or .003 percent of the 4,300 charges filed.<sup>xxvi</sup>

It is also important to note, that when cases come before the FLRA, taxpayers pay for all costs associated with grievances, unfair labor practice filings, and other representation matters.<sup>xxvii</sup> Official time pays union representatives to work on behalf of the employee, not taxpayers. Tax dollars also pay any and all expenses incurred by the agency, arbitrators, and employees. This is a costly perk when only .003 percent of all grievances result in actual violations.<sup>xxviii</sup>

Federal Labor Relations Authority member Patrick Pizzella notes several examples of conspicuously frivolous grievances that, if not for official time, would likely never be filed. In a case where union officials of an American Federation of Government Employees Border Patrol local were granted official time, "the taxpayers paid for the parties to bicker over whether the agency or the union should pay the cost of leftover food from a union-sponsored event that had lower-than-expected attendance purportedly because the agency would not permit the union to use its public address system."<sup>xxix</sup>

In another grievance, officials of the Federal Union of Scientists and Engineers asked the FLRA “to resolve whether an agency was required to bargain over the union’s request to place an American flag near the entrance of a cafeteria.”<sup>xxx</sup>

A recent grievance before the FLRA involved employees at a Social Security Administration teleservice center in Indiana. One day they reported to work and the “heating system was not operating to capacity and that the ambient air temperature in the office was sixty-five degrees. The Agency swiftly reported the problem to the building owners and the temperature was raised to sixty-seven degrees by 10:15 a.m. and sixty-eight degrees by 1:00p.m.”<sup>xxxi</sup> AFGE, the SSA employees’ union, immediately filed a grievance, arguing that the SSA “failed to make ‘every reasonable effort’ and should have considered additional ‘appropriate arrangements’ such as ‘bringing in supplemental heat/cooling equipment or closing the office and granting employees administrative leave.”<sup>xxxii</sup>

### **Lobbying on Official Time**

Like all other individuals or organizations, federal employee unions have the right to lobby government, but they should not do so at the taxpayer’s expense. Unfortunately, the FLRA, on multiple occasions, has ruled that federal employees are allowed to lobby government while using official time.

There are laws, such as the Anti-Lobbying Act, that prohibit federal employees from engaging in political activity with the use of appropriated funds. Despite these restrictions, the FLRA has permitted lobbying on official time and such provisions appear in a number of collective bargaining agreements.

In 2000, the FLRA approved a proposal by the Association of Civilian Technicians, which represents employees at the Department of Defense, to be granted official time for lobbying purposes.<sup>xxxiii</sup> The decision appears to directly contradict section 8012 of the DOD appropriations law of 2000, which prohibits federal employees from lobbying Congress:

None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.<sup>xxxiv</sup>

Somehow, the FLRA determined that the use of official time to lobby Congress does not conflict with the unambiguous text of the DOD appropriations law.

In the same decision, the FLRA decided that lobbying government on official time does not run afoul of another law, the purpose of which is to prohibit lobbying with appropriated money. The law states:

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.<sup>xxxv</sup>

Notwithstanding efforts made by Congress to root out lobbying by federal employees while using tax dollars, as a general rule, lobbying on official time is permitted:

As a general proposition ... unions may negotiate for official time to lobby Congress on employment-related matters, as AFGE Local 12 and Dept. of Labor, [61 FLRA 209](#), 216 (2005), explained concerning Proposal 6, “lobbying Congress. Union representatives shall be granted official time to lobby Congress concerning pending or desired legislation affecting conditions of employment of bargaining unit employees.”<sup>xxxvi</sup>

In a number of cases, the FLRA has ruled to permit unions to negotiate for official time for purposes of lobbying activity related to employee work conditions, including at the Department of Veterans Affairs.<sup>xxxvii</sup>

Due to a lack of tracking the activity on, and reporting of, official time, it is unknown how much time federal employees spend lobbying Congress on official time. Failing to eliminate official time, greater restrictions should be placed on using official time to lobby Congress.

### **Federal Employees use Official Time without Authorization**

There are very few safeguards against unnecessary use of official time. One limitation placed on official time is that collective bargaining agreements can require supervisors to sign off on official time requests.<sup>xxxviii</sup>

However, according to an Inspector General audit of official time at the National Labor Relations Board, employees regularly took official time without receiving authorization from a supervisor.<sup>xxxix</sup>

The audit revealed a lack of control over official time usage. Upon inspection, the audit found that the NLRB did not track the amount of time given and allowed employees to take official time without prior approval. The Inspector General found that documentation for requesting and approving the use of official time was “generally not maintained.”

The Inspector General reported:

We also found that the Agency could, but does not, record the use of official time by bargaining unit employees in its payroll system. Instead, four different forms are used to record official time information on a monthly basis. The forms do not match the categories reported to OPM and compiling the figures for the report appears to require a certain degree of estimation.<sup>xi</sup>

The Inspector General concludes:

Given the cost of the official time, the lack of oversight, and the disparity with the Government-wide average, we question whether the amount of time used by these officials meets the statutory test of reasonableness, necessity, and public interest.<sup>xii</sup>

## Conclusion

Official time is an unnecessary subsidy to federal employee unions that serves the interests of unions and their members, not the public. The taxpayer does not receive a direct benefit or any discernable consideration in return for the cost of official time.

Congress should eliminate the federal union subsidy known as official time. Short of that, detailed annual reporting of official time should be required and agencies should improve their tracking of union activity. Taxpayers have a right to know how much of their tax dollars are used to finance official time and what union activities federal employees undertake instead of the job they were hired to do.

## Notes

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<sup>i</sup> 5 U.S.C. § 7101(a)(1)(A)), <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partIII-subpartF-chap71.htm>.

<sup>ii</sup> 5 U.S.C. § 7101 (a)(1)(B)), <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partIII-subpartF-chap71.htm>.

<sup>iii</sup> 5 U.S.C. § 7101 (a)(2)), <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partIII-subpartF-chap71.htm>.

<sup>iv</sup> For a general critique of collective bargaining in government, see David Denholm, "Beyond Public Sector Unionism: A Better Way," Public Service Research Foundation, October 1994, <http://www.psr.org/issues/beyond.jsp#art1>.

<sup>v</sup> 5 U.S.C. § 7131, <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partIII-subpartF-chap71.htm>.



<sup>vi</sup> Office of Personnel Management, “Labor-Management Relations in the Executive Branch,” October 2014, <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf>.

<sup>vii</sup> Americans for Limited Government, “Full-Time Official Time: A Special Report Exposing Taxpayer-Funded Union Employees,” summer 2016, <https://getliberty.org/wp-content/uploads/2016/06/ALGF-Full-Time-Official-Time-Report-Final-Binder-06.28.16.pdf>.

<sup>viii</sup> 5 U.S.C. § 7131 (a) (c), <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partIII-subpartF-chap71.htm>.

<sup>ix</sup> 5 U.S.C. § 7131 (d) (2)), <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partIII-subpartF-chap71.htm>.

<sup>x</sup> 5 U.S.C. § 7131 (b), <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partIII-subpartF-chap71.htm>.

<sup>xi</sup> See note 6.

<sup>xii</sup> Ibid.

<sup>xiii</sup> Ibid.

<sup>xiv</sup> Ibid.

<sup>xv</sup> Mark Flatten, “Too Big To Manage: Public pays for government unions to lobby for more federal spending,” *Washington Examiner*, February 4, 2014, <http://washingtonexaminer.com/public-pays-for-government-unions-to-lobby-for-more-federal-spending/article/2543213>.

<sup>xvi</sup> Social Security Administration, “Social Security Administration Report Concerning Expenditures for Union Activities,” January 21, 2016, <https://www.ssa.gov/legislation/Official%20Time%20for%20Union%20Activities--FY2015.pdf>.

<sup>xvii</sup> Government Accountability Office, “Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time,” GAO-15-9, October 2014, <http://oversight.house.gov/wp-content/uploads/2014/11/GAO-report.pdf>.

<sup>xviii</sup> Ibid.

<sup>xix</sup> Ibid.

<sup>xx</sup> National Labor Relations Board Office of Inspector General, “Official Time for Union Activities,” Report No. OIG-AMR-62-10-01, December 2009, [http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1700/oig-amr-62-10-01\\_0.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1700/oig-amr-62-10-01_0.pdf).

<sup>xxi</sup> GAO, “VA Could Better Track the Amount of Official Time Used by Employees,” Report to the Chairman, Committee on Veterans' Affairs, House of Representatives, January 2017, <http://www.gao.gov/assets/690/682250.pdf>.

<sup>xxii</sup> “Labor-Management Relations: REPORTS ON OFFICIAL TIME,” OPM website, accessed February 13, 2017, <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/>.

<sup>xxiii</sup> “Portman/Coburn Letter: Should 188 VA Employees Be Paid To Do Union Work Full-time While Veterans Face Backlog?,” June 5, 2013, Office of Senator Rob Portman, <http://www.portman.senate.gov/public/index.cfm/press-releases?ID=6bbbed8f6-35c2-49e3-a0fb-fd10a0089f04>.

<sup>xxiv</sup> See note 21.

<sup>xxv</sup> Contract between Department of Veterans Affairs and the American Federation of Government Employees and National Veterans Affairs Council of Locals, [https://www.va.gov/LMR/AFGE\\_Master\\_Agreement\\_Final.pdf](https://www.va.gov/LMR/AFGE_Master_Agreement_Final.pdf).

<sup>xxvi</sup> AFGE, Local 2913, 67 FLRA 107 (2013), <https://www.flra.gov/decisions/v67/67-26.html>.

<sup>xxvii</sup> Ibid.

<sup>xxviii</sup> Ibid.

<sup>xxix</sup> Ibid.

<sup>xxx</sup> Ibid. The Federal Union of Scientists and Engineers (FUSE) is a local of the National Association of Government Employees, which itself is a local of the Service Employees International Union. Federal Union of Scientists and Engineers, “About FUSE,” FUSE website, accessed February 10, 2017, <http://fuseunion.org/about-fuse>.

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<sup>xxx</sup><sup>i</sup> *AFGE*, Local 3571, 67 FLRA 178 (2014), <https://www.flra.gov/decisions/v67/67-46.html>.

<sup>xxx</sup><sup>ii</sup> *Ibid.*

<sup>xxx</sup><sup>iii</sup> *ACT*, Razorback Chapter 117, 56 FLRA 62 (2000), <https://www.flra.gov/decisions/v56/56-062.html>.

<sup>xxx</sup><sup>iv</sup> Department of Defense Appropriations Act, 2000, <https://www.govtrack.us/congress/bills/106/hr2561/text>.

<sup>xxx</sup><sup>v</sup> 18 U.S.C. § 1913, <https://www.law.cornell.edu/uscode/text/18/1913>.

<sup>xxx</sup><sup>vi</sup> Peter Broida, "A Guide to Federal Labor Relations Authority Law and Practice," 2014, American Civil Service Law Series, <http://deweypub.com/store/15FLRA.html>.

<sup>xxx</sup><sup>vii</sup> Here is a selection of cases permitted lobbying on official time decided by the FLRA: *NFFE*, Local 122, 47 FLRA 105, (1993), <https://www.flra.gov/decisions/v47/47-105.html>. *NFFE*, Local 259, 52 FLRA 93, (1997), <https://www.flra.gov/decisions/v52/52-093.html>. *ACT*, Granite State Chapter, 54 FLRA 38, (1998), <https://www.flra.gov/decisions/v54/54-038.html>.

<sup>xxx</sup><sup>viii</sup> See note 20.

<sup>xxx</sup><sup>ix</sup> *Ibid.*

<sup>xl</sup> *Ibid.*

<sup>xli</sup> *Ibid.*