

# Mackinac Center for Public Policy

Statement of:

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Before the United States House of Representatives  
Subcommittee on Economic Opportunity of the  
House Committee on Veterans' Affairs

Regarding  
H.R. 1461, the "Veterans, Employees, and Taxpayer Protection Act of 2017"

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## **Introduction**

Chairman Arrington, Ranking Member O'Rourke, and Members of the Committee, thank you for holding this hearing and giving me an opportunity to discuss the issue of the use of "Official Time" at the Department of Veterans Affairs.

My name is Derk Wilcox, and I am the Senior Attorney at the Mackinac Center for Public Policy. The Mackinac Center is a nonpartisan research and educational institute dedicated to improving the quality of life of people in its home state of Michigan and nationwide by promoting sound solutions to public policy questions.

I'd like to note that as a practicing attorney I have had the honor of representing many veterans as their court-appointed counsel in mental health, guardianship, and conservatorship hearings. I have spent many hours at the VA facility in Ann Arbor working with the staff and the veterans there.

VA Hospitals are beset with many problems as they try to meet the needs of our veterans. Official Time has added to those problems. Official Time is the practice of releasing employees to perform union functions while they are paid by the government agency – Veterans' Affairs, in this instance.

H.R. 1461 is a much needed first step requiring tracking and reporting the use of Official Time, and that is what I am here to testify about today.

## **History**

This bill is not the first effort to track Official Time. Back in 1979 the General Accounting Office (GAO) found that 18 of 26 bargaining units at four agencies had no record of Official Time usage, and recommended that the Office of Personnel Management (OPM) issue annual reports on its use.<sup>1</sup>

Through the Federal Personnel Manual, OPM directed agencies to develop a record keeping system.<sup>2</sup> However, the Federal Personnel Manual was discontinued in 1994, along with any requirements for tracking Official Time.

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<sup>1</sup> Office of Personnel Management Summary Report: Official time for Representational Activities Fiscal Year 2002. <https://www.chcoc.gov/content/official-time-union-related-activities>

<sup>2</sup> Federal Personnel Manual letter 711-161

Since then, agencies have been subject to different requirements by differing administrations. Hence, the need for legislation to create a standardized database which will assist effective personnel management at the VA.

### **Official Time has been misreported and underreported**

OPM currently reports sporadically on limited aspects of Official Time. In the Fiscal Year 2012, the last year for which estimates appear, OPM estimated that Official Time cost the VA \$46,868,149.40. This cost represented 253,691 employees performing 1,086,257 total hours. This was up over \$4 million from the previous year, when it was estimated to be \$42,565,000.79.<sup>3</sup> There does not appear to be published estimates from OPM for the last five years.

But even these costs are merely estimates. As pointed out in the February 16, 2017 testimony before this subcommittee by William “Trey” Lawrence Kovacs III of the Competitive Enterprise Institute, these estimated costs fall short of the true costs because these fail to account for the use of office space, phones, and travel by employees using Official Time.<sup>4</sup>

The GAO report from 2014 criticized the OPM’s method of accounting for Official Time. The GAO found that using a more sound method of accounting resulted in higher Official Time costs at four of the six agencies it examined. The estimates by the GAO were 15% higher than the OPM estimates because they changed the methodology of determining the amount of salaries devoted to Official Time.<sup>5</sup>

But what the GAO did not look at is whether or not the official timekeeping itself is flawed. From my investigations, it appears that the use of Official Time is underreported. I examined cases brought before both the Department of Labor’s Employees’

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<sup>3</sup> United States 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-relationsin-the-executive-branch-2014.pdf>

<sup>4</sup> William Lawrence Kovacs, III, “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,” February 16, 2017. <https://oversight.house.gov/wp-content/uploads/2017/02/kovacs.pdf>

<sup>5</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>

Compensation Appeals Board (ECAB) and the Federal Labor Relations Authority (FLRA). These cases involved the use of Official Time by VA employees, and Official Time was a central part of the case. In so doing I found several cases where more time was devoted to the union's activities than was being reported as Official Time.

In a case out of the Dayton, Ohio VA Medical Center, a patient services assistant petitioned for workers' compensation after she was injured while performing a union function.<sup>6</sup> She initially claimed that she had been on Official Time when the injury occurred. But an investigation into the facts found that she had been performing a union-related function during her regular work time – not on approved Official Time. She was a union steward, and chose to attend an appraisal meeting where her presence was not required. She had been granted Official Time usage during the morning, but not during the afternoon when her injury occurred.

In another ECAB claim, this one out of the Philadelphia VA Medical Center, a medical supply assistant was injured while travelling to attend a union meeting.<sup>7</sup> Again, the Board found "Appellant's supervisor and appellant both note that based on her union position she was entitled to use up to four hours a day of official time. However, both agree that her time sheet did not reflect that she was on official time at the time of injury and that appellant was in a regular duty status when her injury occurred." Again, the official time keeping did not reflect that she was performing the union's work.

Perhaps most egregious was a FLRA case out of the Medical Center at Leeds, Massachusetts.<sup>8</sup> A clinical neuro-psychologist was also the union president. She was allowed to spend 60 percent of her workweek on Official Time. However, an arbitrator found that, because of her Official Time, it was an unfair labor practice to require her, as part of her performance appraisal plan, to see any patients per week. Because "official union duties placed time constraints on the grievant's clinical schedule during the workweek" it was "unfair" to require her to see as few as one patient for testing per week. In short, what was recorded as 60 percent Official Time effectively became 100 percent Official Time. Furthermore, she was exempt from the procedures for scheduling patient "consults." i.e., she was not required to participate in "requests from physicians or others that a veteran be seen for psych[iatric] or neuro-psych[hiatric] evaluation." Although the time sheets would not show it, Official Time kept this neuro-psychologist from seeing any patients as a requirement of her employment.

In 2013 Senator Rob Portman (R-OH) and Tom Coburn (R-OK) wrote to the then-Secretary of Veterans Affairs, Eric Shinseki, noting that: "Documents show that your

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<sup>6</sup> Simpson, ECAB Docket No. 04-1809, 57 ECAB 197 (2005).

<sup>7</sup> K.L. and Dept. of Veterans Affairs, Docket No. 06-2154, 2007 WL 1227942

<sup>8</sup> NAGE Local R1-274, 68 FLRA No. 160 (2015)

department recently employed at least 85 VA nurses, some with six-figure salaries, who were in 100 percent official time status.”<sup>9</sup> <sup>10</sup> Yet as the cases I have cited show, there are others, perhaps many, whose Official Time usage exceeds their allotment and who are effectively on 100 percent Official Time despite being on record as only devoting 60 percent to Official Time.

So while the OPM found that in VA employees spent 1,086,257 hours on Official Time, based on the cases I have cited, there is ample reason to believe that hours reported to the OPM are undercounted.

One of the common responses to the use of Official Time for union-related business is that the unions are required to represent all bargaining unit members, both dues paying members and non-members. And that this universal representation requirement imposes an unfair burden on the unions in their representational activities. However, according to the VA, the union which represents most VA employees is the Government Employees AFGE AFL-CIO.<sup>11</sup>

In FY 2015 Government Employees AFGE AFL-CIO National Headquarters reported receipts of \$134,852,702 on its LM-2 disclosure forms. (This number does not include the locals.) It would not be unreasonable to expect the AFGE and other unions to bear the costs of their own activities rather than shifting these costs to taxpayers and shortchanging the veterans who are supposed to be served by the VA employees who are instead on Official Time. If the burden of representing non-union members in the bargaining unit is too great, than perhaps the unions should be relieved of that requirement in exchange for non-union-member employees being allowed to represent themselves, a.k.a., “Workers’ Choice.”<sup>12</sup>

The enactment of H.R. 1461 could provide the necessary tool to properly count the hours and total cost of Official Time at the VA. Likewise, it would restrict Official Time

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<sup>9</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/pressreleases?ID=6bbed8f6-35c2-49e3-a0fb-fd10a0089f04>

<sup>10</sup> In another FLRA case out of the Dayton, Ohio VA, a woman was hired as a prosthetics representative. But on becoming union president, she spent 14 years on 100 percent official time. She then filed a grievance and won when the Agency did not consider those 14 years of union business to be equivalent to advancement in the prosthetics field. AFGE Local 2209, 65 FLRA No. 206 (2011).

<sup>11</sup> <https://www.va.gov/LMR/laborunions.asp>

<sup>12</sup> <http://www.mackinac.org/22471>

activities so that physicians like the psychiatrist in the case above at the Leeds facility are using their skills and expertise on the treatment for which they were trained and hired, and not for union activities. Section 741(a)'s requirement that time be accounted for "accurately and to a specific degree" should eliminate the case of duty time being used for union activities, as the aforementioned cases found. Section 741(2)(E) and (F) should correct the flaws pointed out in the February 16, 2017 CEI testimony before this body, which pointed out that Official Time was not accounting for fringe benefits, office space, or other facilities used for Official Time. Section 742(a) correctly restricts Official Time from being used for "political activities or activities related to lobbying." As noted above, the unions representing VA employees have annual revenues of well over \$100 million – under no circumstances should taxpayers be required to fund political activities on their behalf. Lastly, and perhaps most importantly, Section 742(b) is a necessary correction prohibiting physicians and other highly-skilled medical professionals from using Official Time when their unique skills and training should be used to treat our veterans.

### **Summary**

In summary, when cases have been looked at in-depth, it has been frequently shown that employees have been using more time for union activities than has been allocated to them as Official Time. H.R. 1461 would appear to be a necessary first step to properly track how much time VA employees spend on Official Time, account for the true costs, and restrict the improper uses of Official Time. Following the enactment of H.R. 1461, we should get a more complete picture of the extent of the problem, and better enable managers to effectively use the resources available to help our veterans.

I would like to thank the subcommittee for this opportunity and will welcome any questions.

## **DERK A. WILCOX**

### **Biographical Data**

Derk A. Wilcox is Senior Attorney at the Mackinac Center for Public Policy. He is a litigation attorney and economist.

Wilcox has previously served as a litigator in private practice, and as an economic forecaster for a firm, Economics America, Inc., which provided forecasts for the United States Postal Service before the Postal Rate Commission.

He was the author/editor of *The Right Guide* and *The Left Guide* – reference books commonly used in academic libraries.

He has also written book reviews for the National Association of Business Economics' *Business Economics* journal.

He has been cited or quoted in numerous national and regional publications.

### **Economics Experience**

Economics America, Inc., Ann Arbor, Michigan  
Research Associate, 1989-2000

### **Legal Experience**

Pear Sperling Eggen and Muskovitz, Ann Arbor, Michigan  
Attorney/Law Clerk, 2001-2003

Sullivan and Leavitt, Novi, Michigan  
Associate Attorney, 2003-2005

Derk A. Wilcox, Attorney at Law, PLLC, Dexter Michigan  
Principal Attorney, 2005-2011

Tishkoff and Associates, Ann Arbor, Michigan  
Associate Attorney, 2011-2012

Mackinac Center Legal Foundation, Midland, Michigan  
Senior Attorney, 2012 – Present

## **Education**

**Ave Maria School of Law**, Ann Arbor, Michigan  
*Juris Doctor*, 2003  
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**University of Detroit, Mercy**, Detroit, Michigan  
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