Before the Congress of the United States
House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Government Operations
Hearing: "Union Time on the People's Dime: A Closer Look at Official Time"
May 24, 2018

Testimony of Robert J. Gilson, Virginia Beach, VA
Federal Labor Relations Consultant, Trainer, Negotiator

Introductory Statement

- Thank you for the opportunity to address the Subcommittee. I am a retired Federal employee with over 40 years experience working in the federal labor relations program as an Agency representative, advisor, advocate or negotiator. I regularly write for Fedsmith, a website devoted to Federal issues, and have done so for over 10 years. I currently train, advise and bargain on behalf of Federal Agencies as a contractor.
- A Civil Service Reform Act was passed in 1978. Its labor relations provisions were touted by its sponsors as an encoding of Presidents Nixon's and Ford's Executive Orders. It was to establish basic employee and union rights under law continuing as before. The law has turned into a Pandora's box of unintended consequences. One result, and why we're here today, is the evolution of a concept of "Official Time" no one 40 years ago either intended or would believe.
- The law's creation of a Federal Labor Relations Authority (FLRA) and General Counsel to administer government labor relations has had far reaching consequences on Federal government. The case law expanding the statute's official time and the creation of other broad and costly union subsidies is only one such consequence.
- Recently, the Office of Personnel Management issued a report on official time use for fiscal year 2016. OPM admits the report relies on Agency submissions and that some Agencies did not submit reports. This report, frankly, should not be relied on. No one knows what this costs.
- As an example, it reports the Justice Department unions using the same official time as the Department of Defense. Justice has about 120,000 employees while DOD has 750,000. It also reports the Department of Veterans Affairs official time is almost three times as much as DOD or DOJ. VA has less than half the number of employees of DOD. VA's official time numbers are probably closer to the truth but are also unreliable. Based on 44 years representing Agencies and interacting with program managers, I'd bet OPM's gross total is low by a factor between 5 and 10 and that's not a percent. The cost may top a billion dollars a year. No one knows.
- By the way, labor relations official time is not the only time union representatives get.
- In 2009, President Obama issued Executive Order 13522 requiring Agencies to engage in pre-decisional union involvement on Agency decisions and other activities. There unions complained that Agencies would hold them to the official time in labor agreements. Agencies were advised that since they were complying with a Presidential Order, duty time not official time would be appropriate for union involvement in Order activities. Many thousands of hours were used under this Order. No one knows what this cost.
- The Equal Employment Opportunity Commission regulations create what it also calls "official time". A Federal employee representing an EEO complainant at any stage of the process is on EEOC's official time. EEOC also specifies the activities warranting its "official time". There are literally hundreds of thousands of EEO allegations made in the government every year. Many union representatives

advertise themselves as “personal representatives” of employees. This avoid limitations under the labor agreement or having to report the EEOC “official time”. No one knows what this costs.

- The Merit Systems Protection Board and Labor’s Workers Compensation program also permit Federal employees to use “duty time” to represent who have issues before them. Union representatives are not required to report this as labor law “official time”. Like the EEOC hours, these go unreported. No one knows what this costs.
- I did not include Executive Order time, EEOC time, MSPB time or OWCP time in my estimate of labor law official time.
- So, why Agencies don’t hold employees accountable for reporting these other times? The answers are many and complex. To do so in a discrimination case would likely produce a “reprisal” complaint from the represented employee. A union representative double-hatted as a “personal” representative before MSPB and in a worker’s compensation case would certainly make claims of Agency interference tainting the involved employee’s rights.
- Also, few first line supervisors who have a union representative in the work group want to be beset by grievances and unfair labor practices for holding a representative accountable. It’s common for career and political executives to encourage subordinates to keep the union “noise level” down.
- Official time, however defined, and other free services to the union have never been accurately reported government-wide. These include dedicated union office space, furniture, computers, local and long-distance phone service, copying services, internet access, conference rooms, travel reimbursement, training of the union’s representatives, and other paid goods and services. No one knows what this costs.
- Federal unions pay almost nothing toward the cost of their day to day operations within an Agency. This creates large surpluses that may support lobbying, organizing and other internal business since the taxpayer is paying their operational costs.
- Based on the most recent DOL reports, the American Federation of Government Employees and the National Treasury Employees national offices claim to have $54 million and $44 million in assets respectively. Locals and Councils of these unions have their own assets and if added together would be larger than these amounts. Some Federal unions have proven poor guardians of these funds.
- Included with my testimony are:
    - Supplemental material supporting my remarks.
    - A white paper titled *Addressing the Tax-funded Subsidies and Other Benefits to Federal Sector Unions and Suggestions for Action to Address Them*.

In closing, no one in 1978, not even the unions themselves, would have believed that the cost of Federal employee union representation would be entirely borne by the taxpayer and that virtually all union dues would be available to them as discretionary funds. The taxpayer has paid many billions of dollars over the last 40 years for Federal labor union activity and growth. I, for one, don’t have a clue what they got for their money. No one knows what this costs.

Supplemental Testimony of Robert J. Gilson, May 24, 2015

This material is to be included with the testimony of Robert J. Gilson on May 24, 2018 before the Congress of the United States, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Government Operations hearing: "Union Time on the People's Dime: A Closer Look at Official Time"

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2. White Paper: Addressing the Tax-funded Subsidies and Other Benefits to Federal Sector Unions and Suggestions for Action to Address Them.

This paper addresses what any law maker, policy maker or adjudicator should understand about the evolution of a Federal sector union's entitlement to official time and other taxpayer provided facilities, services, and other benefits since 1979 to address the issues created by almost 40 years of expansion of the scope of the Federal sector labor law by administrative action.

This Paper proposes:

- The development of executive guidance from the President, the Office of Personnel Management or the Office of Management and Budget to regulate within their respective authority and to advise Agency executives and negotiators on those matters subsidizing Federal employee unions that are outside the intent of the original statute or which reflect poor stewardship of government resources.
- These areas should include, as a minimum:
    - Examining regulatory change requiring holding Federal employees accountable to their employing Agency, not their union, for the work they were hired to perform in their positions of record and for which they are compensated. For example, employees who spend 100 percent of their time as labor representatives, and those who spend a significant amount of time as determined by the agency, cannot be given performance appraisal ratings of record. *Explanatory statement of the Office of Personnel Management accompanying publication of* 5 CFR Part 430, 60 Fed. Reg. 43, 937.
    - Examining the determination by the Federal Labor Relations Authority (FLRA) that Federal employees representing a union are not covered by lobbying ban contained in 18 USC 1913 which FLRA claims is overridden by the specific language of 5 USC 7102 and 7131. Agencies must bargain over union proposals to grant official time for representatives to lobby Congress concerning either desired or pending legislation addressing conditions of employment.
    - Reexamining the statutory standard for the negotiation of official time to arrive at agreements agreed by the Agency and the union, not a third party, to be "*reasonable, necessary, and in the public interest."* Virtually no attention has been paid to the public interest in any discussions of these matters.

- Requiring an examination of the case law and regulations of the Federal Labor Relations Authority mandating the use of official time for its and the proceedings of the Federal Service Impasse Panel with absolutely no limits on the amount of time or number of people to be provided official time when union representatives are named in a case whether for "preparation", representation or appearance".
- Examining, for the first time, the actual hours used by union representatives under the labor law and the policies of the Equal Employment Opportunity Commission, Merit System Protection Board, Federal Labor Relations Authority, Agencies, executive orders and other grants made for the use of time away from the job whether classifies as "official time", duty time, administrative leave, travel time, representational time or another category. OPM only collects data on "official Time" and such provision is largely voluntary by an Agency.
- Examining, for the first time, the scope and cost of facilities and services provided Federal sector unions at no cost to them including but not limited to:
    - Office Space (There are, generally, for example, dedicated union offices at every Department of Veterans Affairs hospital (168 medical centers), Regional Office (over 50), and many cemeteries, some clinics (There are 1053 outpatient sites) and other sites. Based on FLRA's and impasse findings, such is common throughout government.
    - Some military bases have provided unions with exclusive use of an individual building.
    - Janitorial, maintenance and other related services in support of the above.
    - Office furniture at every site
    - Conference rooms
    - Meeting space (including space for union membership meetings)
    - Training rooms and associated equipment
    - Exclusive provision and or use of Agency telephone systems, fax, computers, software licenses, email and other communications systems, Agency intranet related services, printers, scanners, copy services, government vehicles, school intercom systems.
- With regard to these provided facilities and services, an examination should be undertaken (likely by the General Services Administration) to determine how such usage of tax funded benefits compare to those provided other government contractors and under what conditions.
- Under the IRS Code a labor organization is considered a 501c (5) organization, in other words, a non-public entity. A tasking should be considered to the Office of Government Ethics which has never conducted a review of the application of ethics regulations applicable to all Federal employees to those who act as union elected officials, unelected appointees or who are granted extended periods of leave without pay to work for the union while holding an official government position.

The following are exemplary, not dispositive, of the many decisions of the Federal Labor Relations Authority and Federal Service Impasses Panel on these subjects.

Official Time

The statutory language is found at ***5 U.S. Code § 7131. 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.

Decisions of the FLRA Concerning Official Time Related Specifically to the Statutory Provision Section (a)

- was initially thought to cover the idea that during the negotiation of an agreement, the number of bargaining unit employees at the bargaining table or engaged in impasse proceedings by could not exceed the number representing the Agency and that the time was limited to the time the employee is in a duty status. Since 1979, the Federal Labor Relations Authority or the courts has interpreted this provision to make such time mandatory for other than contract negotiations:
- Expanded the provision to cover impact and implementation bargaining. *Bureau of Alcohol, Tobacco and Firearms*, 10 FLRA 147(FLRA 1982).
- Expanded to cover local supplemental agreement negotiations. AFGE v. FLRA 750 F.2d 143 (D.C. Cir.)
- Created the concept that requesting official time to perform representational activities constitutes protected activity. Thus, an arbitrator's determination that a grievant wasn't engaged in protected activity when he met with his supervisor to review his official-time form was contrary to law. *Customs and Border Protection, Border Patrol, Yuma Sector*, 68 FLRA 293 (FLRA 2015)
- employment. *AFGE Local 12*, 61 FLRA 209 (FLRA 2005).
- If union representatives are already scheduled for overtime under the agency's direction and are diverted to perform a function that would otherwise qualify for official time, they are entitled to the appropriate overtime compensation. *Warner Robbins Air Logistics Center,* 23 FLRA 270 (FLRA 1986).

Section (b)

- The use of official time to prepare externally required documents is not a matter solely related to the institutional structure of a labor organization and is negotiable. *Internal Revenue Service*, 38 FLRA 1366 (FLRA 1991).

- Union meetings and conferences must be reviewed on a case-by-case basis to determine whether a grant of official time for all or portions of such activities is lawful. *Federal Aviation Administration*, 55 FLRA 322(FLRA 1999).
- Disseminating information about the union, if it does not constitute a plea for union membership, aids in implementing the labor-management relationship and is not solely related to the institutional structure of the union. *Internal Revenue Service*, 6 FLRA 508 (FLRA 1981).
- Proposals to use official time or other paid time (such as administrative leave) for union-sponsored training are negotiable if the training addresses collective bargaining issues and not matters solely of internal union interest. *Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 339 (FLRA 1992).

Section (c)

- FLRA's Regulation includes: *"§ 2429.13 Official time for witnesses."*

Section (d)

- Official time for representation in MSPB and EEOC procedures may be negotiated pursuant to 5 USC 7131(d), because they involve labor-management activities. *AFGE, National INS Council*, 45 FLRA 391(FLRA 1992).
- The agency is required to bargain over proposals to allow union representatives to use up to 100 percent of their scheduled work time on union representational activities*. AFGE, Council of Locals 214 v. FLRA*, 798 F.2d 1525 (D.C. Cir. 1986).
- A union proposal that sets aside specific blocks of time on a daily or weekly basis as official time for union activities is within the scope of bargaining. *VA Medical Center, Grand Junction*, 23 FLRA 547 (FLRA 1986).
- Union representational duties are not "officially assigned duties." Therefore, Section 359 of P.L. 106-346, the statute allowing federal employees to work at home or other alternative sites, does not allow for employees to perform union representational duties at alternative sites. *Department of Housing and Urban Development*, 60 FLRA 311 (FLRA 2004).
- Matters concerning official time usage are substantively negotiable including where official time will be exercised. Agreements or practices allowing employees to perform union representational duties on official time at their homes are lawful. *Environmental Protection Agency*, 63 FLRA 30 (FLRA 2008); *USDA Food Safety and Inspection Service*, 62 FLRA 364 (FLRA 2008).
- Section 7131(d) carves out an exception to management rights. *Military Entrance Processing Station*, (FLRA 1987).
- A proposal to provide reasonable accommodation in the appraisal process of union representatives -- to recognize their use of official time -- was negotiable as an appropriate arrangement. *Customs Service*, 40 FLRA 570 (FLRA 1991).

Additional Negotiability Decisions that Increased Union Official Time Entitlements

FLRA found a number of issues negotiable which then subjected them to Federal Service Impasse Panel jurisdiction if the Agency disagreed. As a result, all of the below have regularly become part of negotiated official time by fiat.

- FLRA found that negotiating ground rules is an integral part of the bargaining process. 14 FLRA 191 (FLRA 1984)

- FLRA found negotiable a ground rules proposal stating that official time for members of the union bargaining team who were on administratively uncontrollable overtime would be classified as administrative leave 68 FLRA 910 (FLRA 2015).
- An agency's declaration of the number of representatives it will have in negotiations does not preclude the union from bargaining under Subsection (d) for additional representatives. *Environmental Protection Agency*, 15 FLRA 461 (FLRA 1984).
- Regardless of the number of negotiators designated by the agency, the union may also bargain for note takers, observers, and resource persons to be present at negotiations on official time. 16 FLRA 625 (FLRA 1984)
- The statute does not provide an entitlement for official time to prepare for negotiations. However, such time may be bargained under Subsection (d). *Mather AFB*, (FLRA 1980).
- A proposal requiring official time to prepare proposals and counter-proposals prior to the start of across-the-table negotiations is negotiable. *Council 214, AFGE*, 21 FLRA 575 (FLRA 1986).
- A proposal requiring a grant of official time to prepare for bargaining over agency-initiated changes in conditions of employment is within the duty to bargain. *Harry S. Truman Memorial Veterans Hospital*, 17 FLRA 408 (FLRA 1985).
- The potential for official time abuse is not a legitimate reason to find a proposal nonnegotiable. *NAGE, SEIU*, 23 FLRA 542 (FLRA 1986).
- The statute permits the negotiation of official time for labor-management activities but does not preclude the use of official time in circumstances unrelated to labor-management relations. *Mine Safety and Health Administration*, (FLRA 1991).
- The question of whether a union representative or other individual performing activities on official time is entitled to travel and per diem reimbursement is subject to collective bargaining. *Department of the Treasury, Customs Service v. FLRA,* 836 F.2d 1381 (D.C. Cir. 1988).
- Proposals calling for the granting of administrative leave for union officials to attend training on collective bargaining matters are generally negotiable. *Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 339 (FLRA 1992).
- A proposal that would have required the agency to approve annual leave or LWOP to attend union-sponsored conventions or other events concerning the internal business of the union was nonnegotiable. *Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 339 (FLRA 1992).

Other FLRA Decisions that Expanded Union Benefits Outside the Scope of the Statute

Performance Management

- A provision allowing union officials spending almost all their time on representational functions to receive a "re-validated" performance appraisal by spending 120 hours on regularly assigned work was not contrary to governmentwide regulations. *Internal Revenue Service*, 55 FLRA 1005 (FLRA 1999).
- An arbitration award requiring the agency to carry over prior performance appraisals of union officials who were granted 100 percent official time was not deficient. *Social Security Administration, Office of Hearings & Appeals*, 48 FLRA 357 (FLRA 1993).

Benefits to Union Representatives

- Proposals that certain union officers be given preference in work assignments are negotiable to the extent they preserve management's discretion to assign such work when necessary. *NTEU v. FLRA*, F.2d 1224 (D.C. Cir. 1987).

- Proposals that would require an agency to adjust the work hours of union representatives for official time purposes are negotiable. *National Guard Bureau*, 26 FLRA 515 (FLRA 1987).
- An agency may be able to reassign a union representative to relieve a critical workload problem occasioned by her use of official time, but must be able to provide evidence of the necessity of doing so to avoid a ULP finding. *Norfolk Naval Shipyard*, 15 FLRA 867 (FLRA 1984).
- A proposal to assign union officers to the day shift regardless of seniority was negotiable to the extent it did not bring about a change in work assignments. *Bureau of Engraving and Printing*, 25 FLRA 113 (FLRA 1987).

Union Misconduct

- The agency lacked just cause to suspend a union president for physically intimidating and touching a coworker who decided to withdraw from the union. Although the president "lost it" during the altercation, he was provoked and did not make physical contact with the other employee. Moreover, the incident involved an internal union matter which only minimally affected the agency. *Department of Veterans Affairs, VA Maryland Healthcare System*, 65 FLRA 619 (FLRA 2011).
- A union official's shouting at a witness during an investigative hearing didn't exceed the bounds of protection. *Department of Veterans Affairs Medical Center, Richmond, Va.*, 64 FLRA 661 (FLRA 2010).
- An agency could not deny a union president's access to the computer system, despite her status as a former employee. The bargaining agreement stated that the agency would provide access to email and computer functions to each "union office," and the arbitrator found that denying computer access to the president was tantamount to denying computer services to the union. *Department of Veterans Affairs Medical Center, Richmond, Va.*, 65 FLRA 615 (FLRA 2011).
- A retired employee retained a contractual right, as union president, to use the agency's email system. The bargaining agreement provided that the agency would allow the union limited access to the email system, and it required the local president to use the email system. *Social Security Administration*, 65 FLRA 523 (FLRA 2011).

Dues deductions

- The FLRA upheld an arbitration award ordering the agency to reimburse the union for monies lost due to the agency's failure to properly manage monthly employee allotments that combined a union dues allotment with a dental benefits allotment. *Federal Bureau of Prisons, FCC Tucson, Ariz.*, 66 FLRA 517 (FLRA 2012).
- The FLRA upheld an arbitration award ordering the agency to pay the union $35, without deducting it from the employee's pay, for lost dues that the agency failed to collect from a new hire. *Charles George VA Medical Center, Asheville, N.C.*, 65 FLRA 797 (FLRA 2011).
- The FLRA determined that a bargaining agreement provision, which stated that a union official had to approve any dues revocation request, was not inherently coercive because if a union official chose to coerce an employee not to revoke dues, this would indicate an agreement violation, not that the provision itself was unlawful. *Internal Revenue Service*, 64 FLRA 833 (FLRA 2010).
- Parties may define the intervals for dues revocation through negotiations so long as those intervals are consistent with 5 USC 7115. *VA Medical Center*, 40 FLRA 657 (FLRA 1991).

Office space

- Management interfered with protected rights by limiting the time for grievance meetings, throwing employees out of the office used for meetings, making off-the-record comments to employees and union representatives that management was not going to allow the union in the office, and

interrogating employees as to why they had filed ULP charges. *SSA, Baltimore*, 14 FLRA 499 (FLRA 1984).

- In a relocation dispute, an FSIP mediator-arbitrator ordered that the union office have at least as much space as it had in the previous facility, with comparable furnishings. *Department of Homeland Security, U.S. Coast Guard*, 12 FSIP 157 (FSIP 2013).
- Proposals that agency management make certain facilities and services available to the union as an organization are substantively negotiable. *Military Entrance Processing Station*, 25 FLRA 685 (FLRA 1987).
- A proposal to provide office space for use by an exclusive representative is generally negotiable. *Bureau of Reclamation, Yuma*, *Ariz.,* 41 FLRA 3 (FLRA 1991).
- The fact that a union may use office space to conduct union business does not render the proposal non-negotiable. *Internal Revenue Service*, 38 FLRA 615 (FLRA 1990).
- An agreement to provide office space is enforceable, despite relocation at a later time. *Housing and Urban Development*, 35 FLRA 1224 (FLRA 1990).
- A proposal to provide a locking file cabinet that would be placed adjacent to the union president's office, as well as the use of a conference room to conduct representational business was negotiable in the absence of available office space. *Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 339 (FLRA 1992).

Press contacts

- An agency gag rule that prohibited employees from releasing information to the press and required that all press inquiries be referred to the prison warden interfered with the right of an employee as union representative to state the view of the union as to matters concerning unit employees' terms and conditions of employment, when it resulted in a caution and an admonishment to a union official. *Bureau of Prisons, FCI Danbury, Conn.*, 17 FLRA 696 (FLRA 1985).

Security and search issues

- A proposal to provide a non-employee union representative the combination to the lock on the facility's employee entrance was negotiable as an appropriate arrangement. *Social Security Administration, Huntington Park*, *Calif.,* 45 FLRA 1213 (FLRA 1992).

Communication devices

- The FLRA found negotiable a proposal that designated union officials have national use of the agency telephone systems from the union office to conduct labor-management relations activities. The use of the phone system concerned employment conditions because it assisted in the implementation of the conditions of employment established by the negotiated agreement. Contract administration directly related to working conditions. *Air Force Logistics Command, Wright-Patterson AFB*, 2 FLRA 604 (FLRA 1980).
- The FLRA upheld an arbitration award ruling that although the agency violated the bargaining agreement by not letting the union use the public-address system to announce a union event at which food was served, the union wasn't entitled to reimbursement of the food costs. *Department of Veterans Affairs Medical Center, Richmond, Va.*, 66 FLRA 911 (FLRA 2012).
- Proposals that would grant an exclusive representative access to the agency telephone system for the conduct of representational business are generally negotiable. *Department of Agriculture, Science and Education Administration*, 11 FLRA 122 (FLRA 1983).
- Access to a school intercom and to faculty meetings for the purpose of announcing union meetings was non-negotiable. *Fort Knox Dependents Schools*, 19 FLRA 878 (FLRA 1985).
- A proposal to allow the use of "penalty" mail for certain representational business was negotiable. *Forest Service*, 35 FLRA 1008 (FLRA 1990).

- A union proposal to provide voice mail for its representatives was approved by the FSIP. *Social Security Administration*, 94 FSIP 138 (FSIP 1994).

Computers, photocopiers

- A union proposal to retain access to personal computers for its representatives was approved by a Panel-appointed arbitrator. *Social Security Administration*, 91 FSIP 147 (FSIP 1991).
- A proposal to provide the union with a specific model of copier was negotiable. *Social Security Administration*, 25 FLRA 479 (FLRA 1987).

Transportation issues

- The FLRA majority found that the agency violated the statute when it unilaterally discontinued base taxi service to and from the union office. The FLRA ordered the agency to restore the taxi service and bargain over the taxi service at the union's request. *U.S. Air Force Academy*, 65 FLRA 756 (FLRA 2011).

3. Equal Employment Opportunity Commission regulations and guidance on representatives.

- **29 CFR § 1614.605**

  Representation and official time. (a) At any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

  (b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

- **EEOC Management Directive 110 section VII. WITNESSES AND REPRESENTATIVES IN THE FEDERAL EEO PROCESS**

  The procedures outlined here relate specifically to the processing of individual complaints of discrimination under 29 C.F.R. § 1614.108. The principles reflected in these procedures, however, should also guide the processing of class complaints of discrimination under 29 C.F.R. § 1614.204.

  A. Disclosure of Investigative Material to Witnesses

  To the Complainant

  The complainant must receive a copy of the complaint file and a transcript of the hearing, if a hearing is held. The complainant should be given the opportunity to receive a copy of the complaint file and hearing transcript in an electronic format as an alternative to the paper files/documents. The complainant should receive the same copy of the complaint file as the agency counsel does and where a hearing was requested as the Administrative Judge does.

  To Other Witnesses

During the investigation, the investigator may disclose information and documents to a witness who is a federal employee where the investigator determines that the disclosure of the information or documents is necessary to obtain information from the witness, for example, to explain the claims in a complaint or to explain a manager's articulated reason for an action in order to develop evidence bearing on that reason. Explanations of a witness' credibility are helpful, and the investigator should include observations on credibility without making a final conclusion as to credibility.

B. Travel Expenses

Witness Employed by the Federal Government

Section 1614.605(f) of 29 C.F.R. requires that a witness be in an official duty status when his/her presence is required or authorized by agency or Commission officials in connection with a complaint. A witness is entitled to travel expenses. If a witness is employed at an agency other than the one against which the complaint is brought and must travel to provide the attestation or testimony, the witness is entitled to reimbursement for travel expenses. The current employing agency of a federal employee must initially authorize and pay the employee's travel expenses and is entitled to reimbursement from the responding agency, which is ultimately responsible for the cost of the employee's travel. John Booth - Travel Expenses of Witness - Agency Responsible, File: B-235845, 69 Comp. Gen. 310 (1990). An agency would not be responsible for paying the travel expenses of non-federal witnesses.

Complainant or Applicant Not Employed by Federal Government

The agency is not responsible, however, for paying the travel expenses of a complainant or applicant who is not employed by the federal government. Although the complainant who, for purposes of his/her complaint is a witness, may once have been employed by the agency against whom s/he complains, the termination of the employment status with the federal government also terminates any federal obligation to pay travel expenses associated with prosecution of the complaint. Expenses of Outside Applicant Complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp. Gen. 654 (1982).

C. Official Time

Section 1614.605 of 29 C.F.R. provides that individuals/complainants are entitled to a representative of their choice during the administrative EEO pre-complaint counseling and at all stages of the administrative EEO complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to agency requests for information, if otherwise on duty. 29 C.F.R. § 1614.605(b). Former employees of an agency who initiate the EEO process concerning an adverse action relating to their prior employment with the agency are employees within the meaning of 29 C.F.R. § 1614.605, and their representatives, if they are current employees of the agency, are entitled to official time. Witnesses who are federal employees, regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with the complaint.

Reasonable Amount of Official Time

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. The complainant and the agency should arrive at a mutual understanding as to the amount of

official time to be used prior to the complainant's use of such time. Time spent commuting to and from home should not be included in official time computations because all employees are required to commute to and from their federal employment on their own time.

Meeting and Hearing Time

Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with the Commission Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable. Both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off day, that complainant or representative is entitled to official time, which may require that the agency pay overtime. The complainant should notify the agency of the meeting and hearing schedule as soon as possible.

Preparation Time

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings, conferences, and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the Commission, even though no meetings or hearings are involved. However, because investigations are conducted by agency or Commission personnel, the regulation does not envision large amounts of official time for preparation purposes. Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint. See Murry v. General Services Administration, EEOC Appeal No. 0120093069 (July 26, 2012).

Aggregate Time Spent on EEO Matters by Representative

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative's absence from his/her normal duties. The amount of official time to be afforded to an employee for representational activities will vary with the circumstances.

Moreover, 29 C.F.R. § 1614.605(c) provides that in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether s/he has a designated representative.

The Commission does not require agencies to provide official time to employee representatives who are representing complainants in cases against other federal agencies. However, the Commission encourages agencies to provide such official time.

Requesting Official Time

The agency must establish a process for deciding how much official time it will provide a complainant. Agencies further must inform complainants, their representatives, and others who

may need official time, such as witnesses, of the process and how to claim or request official time.

Denial of Official Time

If the agency denies a request for official time, either in whole or in part, the agency must include a written statement in the complaint file noting the reasons for the denial. If the agency's denial of official time is made before the complaint is filed, the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant subsequently files a complaint. Where a request for official time is denied in whole or part while an Administrative Judge is presiding over the matter, a copy of the agency's denial of official time with the requisite explanation should be provided to the Administrative Judge when provided to the requestor.

D. Duty Status/Tour of Duty

For purposes of these regulations, "duty status" means the complainant's or representative's normal hours of work.

It is expected that the agency will, to the extent practical, schedule meetings during the complainant's normal working hours and that agency officials shall provide official time for complainants and representatives to attend such meetings and hearings.

If meetings, conferences, and hearings are scheduled outside of the complainant's or the representative's normal work hours, agencies should adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance shall be within the discretion of the agency.

Any reasons for an agency's denial of official time should be fully documented and made a part of the complaint file, and if an Administrative Judge is presiding over the matter at the time of the request, then it should be provided to the Administrative Judge at the same time as it is provided to the requestor.

Witnesses, who are federal employees, regardless of their tour of duty and whether they are employed by the respondent agency or another federal agency, must be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

E. Use of Government Property

The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors, computers, internet, printers, and email) must be authorized prior to their use by the agency and must not cause undue disruption of agency operations.

4. Representatives before the Merit Systems Protection Board

- 5 U.S. Code §7503. Cause and procedure
  - (a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).
  - (b) An employee against whom a suspension for 14 days or less is proposed is entitled to—
    - (1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
(3) be represented by an attorney or other representative; and
(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting [1] the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request. (Added Pub. L. 95–454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1135.)

- 5 CFR §1201.31 Representatives.

(a) *Procedure.* A party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission, submitted as a pleading.
(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation or 15 days after a party becomes aware of the conflict. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.
(c) The judge, on his or her own motion, may disqualify a party's representative on the grounds described in paragraph (b) of this section.
(d) As set forth in paragraphs (d) and (e) of §1201.43 of this part, a judge may exclude a representative from all or any portion of the proceeding before him or her for contumacious conduct or conduct prejudicial to the administration of justice.

- 5 CFR § 1201.32 Witnesses; right to representation.

Witnesses have the right to be represented when testifying. The representative of a nonparty witness has no right to examine the witness at the hearing or otherwise participate in the development of testimony.

5. Representatives before the Office of Workers Compensation Program

- **20 CFR §10.701 Who may serve as a representative?**

A claimant may authorize any individual to represent him or her in regard to a claim under the FECA, unless that individual's service as a representative would violate any applicable provision of law (such as 18 U.S.C. 205 and 208). A Federal employee may act as a representative only:
(a) On behalf of immediate family members, defined as a spouse, children, parents, and siblings of the representative, provided no fee or gratuity is charged; or
(b) While acting as a union representative, defined as any officially sanctioned union official, and no fee or gratuity is charged.