



BILLING CODE 6727-01-P

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2427

[FLRA Docket No. 0-PS-39]

Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Official Time for Certain Lobbying Activities

AGENCY: Federal Labor Relations Authority.

ACTION: Proposed issuance of a general statement of policy or guidance.

SUMMARY: The Federal Labor Relations Authority (Authority) solicits written comments on a request from the National Right to Work Legal Defense Foundation (the Foundation) for a general statement of policy or guidance. The Foundation asks the Authority to issue a general statement of policy or guidance concerning whether Section 7131 of the Federal Service Labor-Management Relations Statute (the Statute) permits parties to bargain over, or union representatives to use, official time for lobbying activities that are subject to Federal law. Comments are solicited on whether the Authority should issue a general statement of policy or guidance, and, if so, what the Authority's policy or guidance should be.

DATES: To be considered, comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: You may send comments, which must include the caption "National Right to Work Legal Defense Foundation (Petitioner), Case No. 0-PS-39," by one of the following methods:

- E-mail: FedRegComments@flra.gov. Include “National Right to Work Legal Defense Foundation (Petitioner), Case No. 0-PS-39” in the subject line of the message.
- Mail or express mail: Emily Sloop, Chief, Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW, Washington, DC 20424-0001.

Instructions: Do not mail or express mail written comments if they have been submitted via email. Interested persons who mail or express mail written comments must submit an original and 4 copies of each written comment, with any enclosures, on 8½ x 11 inch paper. Do not deliver your comments by hand, Federal Express, or courier.

FOR FURTHER INFORMATION CONTACT: Emily Sloop, Chief, Case Intake and Publication, Federal Labor Relations Authority, (202) 218-7740.

SUPPLEMENTARY INFORMATION: In Case No. 0-PS-39, the Foundation requests that the Authority issue a general statement of policy or guidance concerning the use of official time under Section 7131 of the Statute for lobbying activities subject to 18 U.S.C. 1913. Interested persons are invited to express their views in writing as to whether the Authority should issue a general statement and, if it does, what the Authority’s policy or guidance should be.

Proposed Guidance

To Heads of Agencies, Presidents of Labor Organizations, and Other Interested Persons:

The Foundation has requested, under Section 2427.2(a) of the Authority’s rules and regulations (5 CFR 2427.2(a)), that the Authority issue a general statement of policy or guidance on whether Section 7131 of the Statute permits parties to bargain over, or

union representatives to use, official time for lobbying activities that are subject to 18 U.S.C. 1913. Under Section 7131(d) of the Statute, parties may negotiate any amount of official time that they agree “to be reasonable, necessary, and in the public interest.”

Section 1913 states, as relevant here, that

[n]o 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.

18 U.S.C. 1913.

In *U.S. Department of the Army, Corps of Engineers, Memphis District, Memphis, Tennessee*, 52 FLRA 920 (1997), the Authority considered whether 18 U.S.C. 1913 limits Section 7131(d) of the Statute. The Authority found that even if certain union lobbying activities “are within the definition of the items that Congress prohibited in 18 U.S.C. 1913,” Section 7102(1) of the Statute grants “employees, acting in their representational capacity, . . . the right to present the views of their labor organization to Congress.” 52 FLRA at 931-32. And because Section 7131(d) provides that employees shall be granted official time in connection with any matter covered by the Statute – such as the matters in Section 7102(1) – the Authority concluded that Congress “expressly authorized the use of appropriated funds for lobbying activities.” 52 FLRA at 933.

In its request, the Foundation asks the Authority to issue a general statement of policy or guidance holding that Congress did not expressly authorize the use of appropriated funds for union lobbying activities through the Statute, and, therefore, the

Statute does not permit parties to bargain over, or union representatives to use, official time for lobbying activities that are subject to 18 U.S.C. 1913.

Regarding the matters raised by the Foundation, the Authority invites written comments on whether issuance of a general statement of policy or guidance is warranted, under the standards set forth in Section 2427.5 of the Authority's rules and regulations (5 CFR 2427.5), and, if so, what the Authority's policy or guidance should be.

Dated: March 17, 2020.

Rebecca J. Osborne

Federal Register Liaison and Deputy Solicitor

Member Abbott, dissenting

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The Federal Service Labor-Management Relations Statute (Statute) calls upon the Authority to “provide leadership in establishing policies and guidance [in] matters under [our] Statute.”¹ Throughout its history, the Authority has issued general statements of policy or guidance when requested and when appropriate under this Statutory mandate.

Some circumstances warrant taking the time to reach out to the labor-management relations community for comment before issuing such a policy or guidance. But that is not always the case. Here, for example, seeking comment from the labor-management relations community will not change the fact that Authority precedent on the use of official time for lobbying activities rests upon interpretations of the Statute which can

¹ Section 7105(a)(1).

only be described as strained and contorted and which run counter to the plain language of an Executive Order² and the Statute.³

Under these circumstances, seeking and waiting for comment serves no useful purpose.

The Authority and the U.S. Court of Appeals for the District of Columbia, have held that “official time may only be granted to the extent that it is consistent with all ‘applicable laws and regulations.’”⁴ The Authority has also held that regulations issued pursuant to statutory authority are to be accorded the force and effect of law.⁵ Because E.O. 13,837 was issued pursuant to the President’s statutory authority to regulate the executive branch,⁶ it is accorded the force and effect of law and affects the negotiability of proposals covered by the Statute.

As relevant here, E.O. 13,837 states that “[e]mployees may not engage in lobbying activities during paid time, except in their official capacities as an employee,”⁷ and it directs agencies to deny official time for “lobbying activities in violation of section 1913 of title 18, United States Code.”⁸ This language closely parallels the plain language of 18 U.S.C. 1913 which prohibits the use of appropriated funds to pay any federal employee for lobbying activities. Specifically, section 1913 states that

² Exec. Order No. 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 FR 25,335, 25,337 (May 28, 2018) (E.O. 13,837).

³ Section 7131.

⁴ *Assoc. of Civilian Technicians, Tony Kempenich Mem’l Chapter 21 v. FLRA*, 269 F.3d 1119, 1122 (D.C. Cir.) (2001) (quoting *NFFE Local 2015*, 41 FLRA 1158, 1185 (1991)).

⁵ *NFFE, Local 15*, 30 FLRA 1046, 1070 (1988).

⁶ E.O. 13,837, 83 FR at 25,335 (citing to 5 U.S.C. 7301). 5 U.S.C. 7301 provides that “[t]he President may prescribe regulations for the conduct of employees in the executive branch.”

⁷ E.O. 13,837, 83 FR at 25,337.

⁸ *Id.* at 25,338.

appropriated funds may not be used “directly or indirectly to pay for any [activities] . . . intended or designed to influence in any manner a Member of Congress . . . 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.” Therefore, in reading E.O. 13,837 and section 1913 together, it is clear that official time may not be granted for any activities “intended or designed to influence in any manner a Member of Congress . . . to favor, adopt, or oppose, by vote or otherwise, any legislation, law ratification, policy, or appropriation.”

At first glance, it would appear that Executive Order 13,837 rests on an interpretation of 18 U.S.C. 1913 and that section 1913 provides an exception for appropriated money to be used for lobbying if there is an “express authorization by Congress.”⁹ On this point, the U.S. Department of Justice, Office of Legal Counsel (OLC), has issued two opinions.¹⁰ Those opinions provide valuable perspective on the interplay between 18 U.S.C. 1913 and section 7102 but are flawed insofar as they interpret our Statute. According to OLC, Congress provided express authorization in section 7102 for direct (but not “grass roots”¹¹) lobbying -- “present[ing] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.”¹² However, those

⁹ 18 U.S.C. 1913; *see also* 2005 Memo, 29 Op. O.L.C. at 181 (stating that 18 U.S.C. 1913 only applies “in the absence of express authorization by Congress”).

¹⁰ *See Application of 18 U.S.C. 1913 to “Grass Roots” Lobbying*, 29 Op. O.L.C. 179 (2005) (2005 Memo); *Constraints Imposed by 18 U.S.C. 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300 (1989).

¹¹ 2005 Memo, 29 Op. O.L.C. at 181.

¹² 2005 Memo at 184-85 (quoting section 7102).

conclusions were premised on interpretations of sections 7102 and 7131 (not 18 U.S.C. 1913) and Authority precedent that I would jettison¹³ and are thus entitled to little deference in light of E.O. 13,837.

Under these circumstances, I disagree that any valuable purpose is served or insights are to be gained by seeking written comments on this question.

I would issue a general statement of policy that the plain language of E.O. 13,837 and 18 U.S.C. 1913 limits the scope of section 7131(d) of the Statute, such that, a proposal that would grant the use of official time for lobbying activities is nonnegotiable because it is contrary to law. To the extent the cases cited above support the notion that proposals permitting the use of official time for lobbying activities are negotiable, I would conclude that they are not consistent with the EO and are therefore no longer good law.

¹³ See fn. 8.

[FR Doc. 2020-05992 Filed: 3/24/2020 8:45 am; Publication Date: 3/25/2020]