

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

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FILE: B-156287

DATE: FEB 23 1976 098567

MATTER OF: Department of the Army and Overseas Federation of Teachers - Extended Official Time and Leave Without Pay for Union Representative

- DIGEST:
1. Department of Army questions legality of negotiated agreement permitting employee to serve as full-time union representative by use of official time for one-half of each day and leave without pay for other half day for 3 years. Civil Service Commission regulations authorize agencies to grant leave without pay unrestricted as to time period, but suggest period not exceed 1 year with careful review of requests for extension. Agreement provision is valid as to extended leave without pay.
  2. Agency and union agreed employee would be granted use of official time for half of each day and leave without pay for other half day for 3 years to serve as union representative. No statute authorizes extended official time for this purpose. While departments and agencies have authority under 5 U. S. C. § 301 and specific enabling laws to allocate employee duties, authority is not sufficiently broad to permit diversion of employee from his official position for extended period. Thus, official time provision of agreement is invalid and may not be implemented.
  3. In the absence of specific statutory authority, agencies and departments may not permit an individual employee to devote more than 160 hours of official time per year to the performance of union representational duties.

This action involves a request from the Department of the Army by letter of January 10, 1975, from Jack E. Hobbs, Acting Assistant Secretary of the Army (Financial Management), for an advance decision on the legality or propriety of a provision in a labor-management agreement negotiated between the United States Dependents Schools, European Area (USDESEA) and the Overseas Federation of Teachers (OFT), hereinafter sometimes referred to as the "agency" and the "union," respectively, pursuant to Executive Order No. 11491, as

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amended, 3 C. F. R. 254 (1974). The provision of the labor-management agreement in question reads as follows:

"In recognition of the special circumstances currently in existence and the responsibilities involved in carrying out an effective labor-management program, it is agreed that the State Union Representative (SUR) will be administratively excused for half of each day of the school year and granted Leave Without Pay for the other half of each day to allow the necessary time to accomplish labor-management related activities."

According to the Department of the Army's letter, this provision would allow the Government employee--a mathematics teacher--to serve full time as a union official for the 3-year term of the agreement and receive one-half of his Government salary during this period. The Department of the Army further states that the provision would establish a negotiation precedent for hundreds of Government employees who are union representatives. For this reason, the Department of the Army, as the approving agency for the agreement pursuant to section 15 of Executive Order No. 11491, is concerned about the legality and reasonableness of the negotiated provision. Under section 15, the approving agency must determine whether the agreement "conforms to applicable laws, the Order, existing published agency policies and regulations \* \* \* and regulations of other appropriate authorities."

The Department of the Army's concern stems in part from the restrictions placed on Federal employees who are labor organization representatives in their use of official time for union activities by section 20 of Executive Order No. 11491, which provides as follows:

"Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to one-half the time spent in negotiations

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during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives. "

Although section 20 permits an agency to agree that a certain amount of time devoted to negotiating an agreement may be official time for pay purposes, the Army notes that in a previous ruling (B-156287, July 12, 1966, addressed to the Chairman, Subcommittee on Manpower, House Committee on Post Office and Civil Service), we construed the preamble and section 9 of Executive Order No. 10988, the predecessor to Executive Order No. 11491, supra, as permitting agencies to grant excused absences to attend union-sponsored training sessions only for short periods of time, ordinarily not to exceed 8 hours.

In view of 31 U. S. C. § 628 (1970), restricting the expenditure of appropriated funds solely to objects for which made and for no others, the Department of the Army questions the legality of the provision and says it is unaware of any appropriation available to pay the salary of a union representative who renders no direct service to the Government.

Since the Federal Labor Relations Council has the responsibility to administer and interpret Executive Order No. 11491, supra, we requested the Council's views and comments. The Council, in accordance with its rules of procedure (5 C. F. R. 2410.6), solicited the views of the Department of Defense (DOD) and the OFT. After receiving such views, the Council replied to us on May 23, 1975 (FLRC No. 75P-1).

The Council's reply advises that when the Army had reached a tentative conclusion that the provision in question could not be approved under section 15 of the Executive order, the matter had been referred by Army to the DOD for an agency head's negotiability determination pursuant to section 11(c)(2) of the Order and applicable DOD regulations. On November 20, 1974, DOD determined that the negotiated provision did not conflict with existing laws, regulations, published policy or the Order and, thus, that there was no basis for disapproving the agreement under section 15 of the Order. The Department of Defense advised the Council that it had not considered the issue of the reasonableness of the agreement, as distinguished from its legality, in its negotiability determination because reasonableness is not reviewable under section 15 and is a matter to be

finally concluded by the negotiating parties at the bargaining table. The DOD also stated the use of official time by the union representative under the agreement is intended to encompass only those activities having to do with the labor-management relationship in which the Government and union share an interest and not such activities as constitute "internal business" of a union which are prohibited under section 20 of the Order. Hence the latter activities could not be performed during the period covered by official time under the agreement.

According to the Council, the reply of the Overseas Federation of Teachers generally supports the DOD position. Moreover, the union stated that a separate memorandum of understanding between the parties restricts the use of official time by the union representative to handling employees' grievances, appeals, and complaints, attending meetings with management officials, and preparing union responses to agency directives. The union further stated that important underlying considerations were involved in the negotiation of the agreement provision, namely that: (1) the three military departments are involved; (2) members of the bargaining unit are dispersed over an area that is two and one-half times the land area of the United States; (3) almost 1000 teachers ranging from kindergarten to the twelfth-grade level are in the unit; and (4) members of the unit are subject to from three to six levels of administrative control. Finally, according to the union, the parties agreed that internal union business would not be conducted during official time.

The Federal Labor Relations Council's letter of May 23, 1975, then advised us that the Council had considered the matter and had concluded that nothing in Executive Order No. 11491 prohibits an agency and a union from the negotiation of provisions, such as in this case, which provide for official time for union representatives to engage in contract administration and other activities of mutual interest to the agency and the union relating to their relationship and not to internal union business.

The Council's reasoning may be summarized as follows. Section 20 is the only provision of the Order that specifically addresses the issue of the use of official time for labor-management relations activities, and in construing this section the statutory construction aid of expressio unius est exclusio alterius, i. e., the mention of one thing implies the exclusion of another, is applicable. Thus, inasmuch as the section

prohibits only the solicitation of membership or dues and other internal business of a labor organization during duty hours, there is no prohibition against the parties negotiating the use of official time for other activities.

The Council states that the scope of permissible activities under the agreement provision in this case, such as investigation and informal resolutions of employee grievances, participation in formal grievance discussions or third-party proceedings and discussions of problems arising in the administration of the agreement with management officials, are not internal union business but are of mutual concern and go to the heart of the labor-management relationship.

Moreover, the Council is of the opinion that agreements granting union members official time to perform the aforementioned activities benefit both agencies and labor organizations because such activities serve to maintain a constructive and cooperative relationship between the parties and to promote the purposes of the Executive order. The Council therefore concludes that these types of activities are not barred by section 20, and that the agreement provision here in question is consistent with the purposes of Executive Order No. 11491.

Finally, the Council notes that such agreements are not uncommon in the Federal sector and that a variety of official time clauses have been negotiated between agencies and labor organizations in over 450 agreements. Such clauses provide official time to perform a variety of functions ranging from less than one hour per week to three-fourths of a week. Therefore, according to the Council, the provision here in question would not be a precedent but would be consistent with many similar provisions in existing agreements.

We shall divide our discussion into two parts covering first the use of leave without pay, and second the use of official time. Our consideration of these issues is confined to the legality of the agreement under applicable laws, regulations, and Comptroller General decisions.

#### Leave Without Pay

With regard to the extended leave without pay granted by the agreement to a union representative, FPM Supplement 990-2, Book 630, subsection S12-2, states that "authorizing leave without

pay is a matter of administrative discretion" and that subsection S12-3(a) states that "[t]here is no maximum prescribed by law or general regulation on the amount of leave without pay which can be granted." The Civil Service Commission, however, suggests in subsection S12-3(b) that agencies should not initially authorize leave without pay for any period in excess of 52 calendar weeks and that requests for renewal of the authorization be carefully scrutinized for adherence to the suggested criteria for granting leave without pay as outlined in subsection S12-1.

Congress has also acknowledged that agencies have discretion to authorize employees to enter on approved leave without pay for extended periods to serve as full-time officers or employees of organizations composed primarily of employees by enacting statutory authority in 5 U. S. C. § 3706(e) and 5 U. S. C. § 8906(e)(2) to continue the eligibility of such employees for Federal life and health insurance coverage for up to 1 year of nonpay status.

In addition, granting extended leave without pay for a part of each workday is in some respects equivalent to placing an employee on part-time status for the period involved. Federal agencies are authorized to use part-time employees under 5 U. S. C. § 6101, et seq. (1970), and implementing regulations promulgated by the Civil Service Commission.

Accordingly, we are of the opinion that it is within the discretion of agency heads to approve extended leave-without-pay absences for union representatives and to include provisions covering such matters in agreements they negotiate with labor organizations. Hence, we conclude that provision in question granting extended leave without pay to a union representative is legally valid.

#### Official Time

The Department of the Army in its submission concedes that, under section 20 of the Order, the use of official time for certain union activities of employees is a negotiable item. Therefore, the question raised concerns the amount of official time that an employee may be permitted to devote to such activities. There is no statute covering the use of official time for labor-management activities. Although we have previously considered questions relating to official time (see 46 Comp. Gen. 21 (1966)), we have not had occasion to

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consider the legal issues involved in the amount of official time an employee may devote to union activities.

The Army points to our letter to the House Subcommittee on Manpower, B-156287, July 12, 1966, which held that an employee may be granted an excused absence for brief periods to attend union-sponsored training courses, and questions whether that letter would preclude the agreement provision stating " \* \* \* that the State Union Representative (SUR) will be administratively excused for half of each day of the school year \* \* \* ."

We do not read our letter of July 12, 1966, as being controlling in the present case, inasmuch as that letter concerned excused absences without regard to a negotiated agreement and specifically related only to employees attending union-sponsored training courses.

The Department of the Army also challenges the legality of the agreement provision on the basis of 31 U. S. C. § 628 (1970), which requires that appropriations be expended solely for the objects for which they are made. While we agree that the employee in question would not be performing the duties of a mathematics teacher, his official position, it does not follow that the time devoted to representational duties would not be a direct service to the Government. In our opinion, the provisions of 31 U. S. C. § 628, *supra*, would not serve to bar salary payments to the employee for such representational duties inasmuch as we find a direct connection between such duties and the purposes for which the appropriation was made. 27 Comp. Gen. 679 (1948), and B-184306, October 2, 1975, 55 Comp. Gen. \_\_.

However, we believe there is a legitimate concern over the legality of an agreement provision that would preclude an employee from performing any of the duties of his official position for a 3-year period. Obviously such arrangements serve to divert employees from performing the duties of their official positions. Consequently, agencies must shift these duties to other employees or augment their employee staffs. Extended absence of employees for representational duties may also conflict with the principles of position classification as set forth in 5 U. S. C. § 5101, *et seq.* (1970), and 5 U. S. C. § 5346 (Supp. III, 1973). See, for example, subparagraph 8-3b, chapter 300, Federal Personnel Manual.

On the other other hand, we recognize that Congress has granted broad discretionary authority to executive departments in 5 U. S. C. § 301 (1970), and to the various independent agencies in specific

legislation, to regulate and manage the distribution and performance of business in the accomplishment of their missions. In this connection, we note that Civil Service Commission regulations authorize agencies to grant their employees official time to represent fellow employees in presenting grievances under agency grievance systems or in processing equal opportunity complaints. See, for example, 5 C.F.R. 771.105(b)(2), 531.407(d), and 713.214(b). We regard the administrative authority contained in 5 U.S.C. § 301, *supra*, and in specific enabling legislation as being sufficiently broad to permit departments and agencies to allocate these and other employee representational functions among their employees in the manner which will promote efficiency. However, we do not regard the aforementioned authority as being sufficiently broad to permit departments and agencies to divert an employee from the performance of the duties of his official position for an extended period.

Therefore, in the absence of specific statutory authority, we are of the opinion that departments and agencies may only permit their employees to devote such time to the performance of representational duties as will not substantially interfere with the performance of the duties of their official positions. While it is impracticable to establish rigid guidelines governing the maximum amount of time that any individual employee may devote to representational duties, we believe that no employee should be allowed to spend more than 160 hours per year engaged in such activities.

In view of the foregoing, we conclude that USDESEA had no authority to negotiate an official time provision that would divert an employee from the performance of the duties of his official position for the extended period specified therein. Thus the provision is contrary to law and regulations and may not be implemented.

So as not to unduly disrupt labor-management relations in agencies that have collective-bargaining agreements in force which contain provisions inconsistent with the above-described limitation, a transition period of 90 days from the date of this decision is allowed so that other arrangements may be made with regard to representational duties. After the 90-day transition period, agencies and departments may not comply with agreement provisions that exceed the aforementioned limitations.

(SIGNED) ELMER B. CLEGG

Comptroller General  
of the United States