REFERENCE GUIDE

LOBBYING AND OFFICIAL TIME

DISCUSSION

Current law continues to prohibit using official time to influence legislation or appropriation matters pending before Congress. Section 8014 of the Department of Defense (DoD) Appropriations Act 2009 prohibits the use of official time for lobbying. Specifically, this section states:

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

Section 8014 contains similar language to that of earlier public laws for Fiscal Years 1996 through 2008. As a result, there has been much litigation concerning the negotiability and enforceability of contract language that permits union representatives to use official time for lobbying Congress. This guide provides a synopsis of relevant negotiability and unfair labor practice decisions of the Federal Labor Relations Authority (FLRA), and a number of Appeal Courts' decisions, on the subject.

Negotiability Decisions

Since 1999, three Circuit Courts of Appeals have affirmed a number of FLRA decisions that concern official time for lobbying Congress on pending legislation. The last Appeal Court affirmation is found in Association of Civilian Technicians (ACT), Tony Kempenich Memorial Chapter 21 v. FLRA, 269 F.3d 1119 (D.C. Circuit), November 9, 2001.

This Appeal Court case arose from a FLRA decision that the Appropriations Act precludes, as a matter of law, the granting of official time for lobbying Congress on "pending" legislation. See ACT, Tony Kempenich Memorial Chapter 21, and Department of Defense, National Guard Bureau, Minnesota National Guard, 56 FLRA 526 (2000). In reaching its decision, the FLRA relied on decisions of the First and Ninth Circuit Courts of Appeals, which addressed virtually identical contract provisions and identical DoD

appropriation act language from previous years. The FLRA reaffirmed the Minnesota decision in 56 FLRA 947 (2000), when the union requested reconsideration. Consequently, the union petitioned judicial review by the D.C. Circuit Court of Appeal. In its decision, the Court affirmed the FLRA decision and noted that the contract provision "is not consistent with the Appropriations Act. Hardly more needs to be said." The contract provision in question reads as follows:

> *"Official time will be granted to union officials in the following manner: Union officials when representing Federal Employees by visiting, phoning and writing to elected representatives in support [of] or opposition to pending or desired legislation which would impact the working conditions of employees represented by the labor organization."*

DoD disapproved the above contract language in agency head review. In appeal, the FLRA determined the portion of this contract provision that permitted the use of official time to lobby Congress on "pending" legislation to be inconsistent with the DoD Appropriations Act for Fiscal Year 1999. The remaining portion of the provision that permitted the use of official time to lobby Congress on "desired" legislation was not contrary to law.

The FLRA found that "desired legislation…is separate and distinct from the plain meaning of 'pending' as used in the DoD Appropriations Act and the proposals/provisions previously examined by the Authority. Therefore, provisions regarding desired legislation fall outside the scope of the Appropriations Act's prohibition against lobbying regarding pending legislation and are not inconsistent with the Appropriations Act." The FLRA made a similar ruling in Association of Civilian Technicians, Razorback Chapter 117 and Department of Defense, National Guard Bureau, Arkansas National Guard, Camp Robinson, North Little Rock, Arkansas, 56 FLRA 427 (2000).

In another case, the FLRA determined a contract provision that permitted the use of official time to lobby Congress to be inconsistent with the DoD Appropriations Act for Fiscal Year 1998. See Association of Civilian Technicians, Old Hickory Chapter, and North Carolina National Guard, Raleigh, North Carolina, 55 FLRA 811 (1999). In this particular case, the agency head disapproved the following contract language:

> *"Association Officers will be granted reasonable official time to represent the bargaining unit by visiting, phon[ing], and writing to elected representatives in*

> *support of or opposition to pending or desired legislation which would impact the working conditions of the employee's [sic] represented by the Association."*

In this case, the FLRA rejected the union's argument that the provision is not contrary to the Defense Appropriation Lobbying Statute (Section 8012 of the DoD Appropriations Act for Fiscal Year 1998 as referred to by the FLRA) because official time, like annual leave, does not constitute duty time. The FLRA noted that official time and duty time – unlike non-duty time such as annual leave – shall be considered hours of work under 5 CFR § 551.424(b). The FLRA stated that "the distinction the Union draws between duty time and non-duty time does not persuade us that the Authority erred (in previous decisions) in determining that the use of official time to lobby Congress is inconsistent with the Defense Appropriation Lobbying Statute."

Unfair Labor Practices

In one decision, the FLRA determined that contract language in the parties' collective bargaining agreement language, which permitted the use of official time in order to lobby Congress in support or opposition to pending or desired legislation, was contrary to Section 8015 of the 1996 DoD Appropriations Act. See Association of Civilian Technicians, Georgia State Chapter, and Office of the Adjutant General, Georgia National Guard, Atlanta, Georgia, 54 FLRA 654 (1998), *review denied sub nom* Association of Civilian Technicians, Georgia State Chapter vs. Federal Labor Relations Authority, 184 F.3d 889 (D.C. Circuit), August 3, 1999. As such, the contract language was unenforceable and the agency did not violate the Statute1 when it denied the requests for official time to be used for such purposes.

The union sought judicial review of the FLRA's decision by the D.C. Circuit Court of Appeals. The union raised several objections to the FLRA's decision. The Court noted that no one made these objections, or any arguments in support of them, during the administrative proceedings and the FLRA's opinion did not address them. The Court ruled "no objection that has not been urged before the Authority … shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The particular failure or neglect encountered here cannot be excused. There are no extraordinary circumstances. And so the petition for judicial review must be denied."

In another decision, an unfair labor practice complaint was issued alleging that the Nevada National Guard refused to implement Federal Service Impasses Panel directed

language concerning official time for lobbying. See Headquarters, National Guard Bureau, Nevada Air and Army National Guard and The Association of Civilian Technicians, 54 FLRA 316 (1998), *reconsideration denied*, Headquarters, National Guard Bureau, Nevada Air and Army National Guard and The Association of Civilian Technicians, 54 FLRA 595 (1998), *affirmed* Association of Civilian Technicians, Silver Barons Chapter and Silver Sage Chapter vs. Federal Labor Relations Authority, 200 F.3d 590 (9th Circuit), January 10, 2000.

Another unfair labor practice complaint was issued against the New Hampshire National Guard for refusing to bargain over a proposal, which was substantially identical to a proposal previously found negotiable by the Authority (47 FLRA 1118 (1993)). See Office of Adjutant General, New Hampshire National Guard, Concord, New Hampshire and Granite State Chapter, Association of Civilian Technicians, 54 FLRA 301 (1998), *affirmed* Granite State Chapter, Association of Civilian Technicians vs. Federal Labor Relations Authority, 173 F.3d 25 (1st Circuit), April 1, 1999.

The finding in both 54 FLRA 301 and 54 FLRA 316 was that the agency did not commit an unfair labor practice since the use of official time for influencing legislation pending before Congress was contrary to Section 8015 of the Department of Defense Appropriations Act for Fiscal Year 1996, Public Law No. 104-61. The Authority noted that DoD Appropriations Acts for Fiscal Years 1997 and 1998 contain the identical Chapter 71 of Title 5, United States Code, “The Federal Service Labor-Management Relations Statute” provisions. **(*FAS*** *note: Identical provisions are contained in the DoD Appropriations Acts for Fiscal Years 1996-2004.)*

The Authority determined that since the allotment of official time results in payment of wages, it is an expenditure of appropriated funds. Therefore, relevant provisions in the applicable DoD Appropriations Acts would apply. Section 8015 of the DoD Appropriations Act for Fiscal Year 1996 provided:

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

The Authority found that the wording of this section, "... expressly prohibits the use of appropriated funds to engage in any discussion referring to pending legislation or appropriations." As such, the Authority determined that the proposals, in both cases, were contrary to law, the 1996 DoD Appropriations Act, and therefore are outside the duty to bargain.

On the other hand, following the rationale used in earlier cases, the Authority determined that the union's proposals were not contrary to Section 8001 of the Act.

Section 8001 provides:

> *"No part of any appropriation contained in this Act shall be used for publicity and propaganda purposes not authorized by the Congress."*

The Authority ruled that proposals seeking official time for lobbying activities are not contrary to Section 8001 on the basis that Sections 7102 and 7131(d) of the Federal Service Labor-Management Statute were authorized by Congress. Section 7102 provides for union representatives to express their views to Congress and engage in collective bargaining with respect to conditions of employment, and 7131(d) provides for official time, "… in connection with any other matter covered… " by the Statute. On this basis, the Authority stated, "The fact that Congress expressly authorized official time for matters covered by the Statute demonstrates that Congress expressly authorized the use of appropriated funds for the proposed activities…". Therefore, they found that the proposal in 54 FLRA 301 was not inconsistent with Section 8001.

Army Corps of Engineers

A similar prohibition on lobbying is included in Section 501 of the Energy and Water Development Appropriations Act for Fiscal Year 2004, Public Law 108-137, December 1, 2003, which applies to the U.S. Army Corps of Engineers. Section 501 includes the same statutory language as the DoD Appropriations Act, but also includes additional language allowing the use of appropriated funds (as provided to the U.S. Army Corps of Engineers) for purposes of communicating to Members of Congress as described in Section 1913 of Title 18, United States Code. Specifically, Section 501 states:

> *"None of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913."*

It should be noted that the FLRA has previously ruled, "When Congress enacted 18 U.S.C. § 1913, it intended to protect its Members from indirect lobbying by agency officials." See U.S. Department of the Army, Corps of Engineers, Memphis District and National Federation of Federal Employees, Local 259, 52 FLRA 920 (1997).

CONCLUSIONS

Language that pertains to the use of official time for lobbying for the purpose of influencing legislation or appropriation matters pending before Congress will continue to be found nonnegotiable during agency head review where appropriated funds are used. However, union officials are not precluded from using official time to speak, meet, or correspond with Congressional personnel for those issues which are unrelated to any legislation or appropriation matters pending before the Congress, such as representing bargaining unit employees with individual complaints, should management and the union agree to such language.

The additional language in the Energy and Water Development Appropriations Act for Fiscal Year 2004, Public Law 108-137, as it applies to the U.S. Army Corps of Engineers will not affect agency head review of collective bargaining agreements in the U.S. Army Corps of Engineers. This Act still prohibits the use of official time for lobbying for the purposes of influencing legislation or appropriation matters pending before Congress.

The provisions in current collective bargaining agreements that provide for the use of official time for lobbying with respect to pending legislation are void and unenforceable. However, prior to making any contractual changes, labor organizations must be notified in accordance with the Federal Service Labor-Management Statute and collective bargaining agreements.

It is important to remember that Appropriations Acts are valid only for the Fiscal Year for which they are passed. Therefore, the application of current case law will be questionable if the language of the Act is changed.

If you have any questions concerning this reference guide, please contact the Field Advisory Services, Labor and Employee Relations Team, at (703) 696-6301, Team 3. Our DSN is 426-6301.