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## **Summary of AFGE Lawsuit Challenging Executive Order on Official Time**

June 5, 2018

The lawsuit filed by the American Federation of Government Employees, AFL-CIO seeks declaratory and injunctive relief with respect to the Executive Order issued by President Donald J. Trump on May 25, 2018, entitled “Executive Order Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use” which will be referred to here as the “Official Time Order.” The Official Time Order seeks to impermissibly rewrite portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq., (“Chapter 71”) that govern labor relations in the federal civilian workplace. In particular, this order, without any congressional imprimatur, seeks to restrict 5 U.S.C. § 7131, Official Time.

The Official Time Order seeks to prohibit employees from receiving official time to prepare, file, and pursue negotiated grievances on behalf of their labor organization, i.e., union, and prohibits employees who are union representatives from receiving official time for the purpose of representing another individual employee or group of employees in negotiated grievances brought on behalf of such individual employee or group of employees. It does not, however, prohibit individual employees from receiving official time to prepare, file, and pursue negotiated grievances on behalf of themselves.

The Official Time Order also purports to unilaterally set a limit on the number of hours of official time that may be granted to employee representatives of federal sector labor organizations under 5 U.S.C. § 7131. But, the Official Time Order contains no rationale for distinguishing between union grievances, union representatives, and individual employee grievances. The Official Time Order also contains no rationale for imposing the specific cap on official time.

Therefore, we take the position that the Official Time Order violates the First Amendment of the United States Constitution. Without any valid justification, it singles out labor organizations and their representatives for disparate, negative treatment as compared to individuals. In so doing, the Official Time Order restrains and retaliates against AFGE and its union-member employee representatives in and for the exercise of their respective rights to expressive association.

Further, the Official Time Order is contrary to Chapter 71, and the Separation of Powers mandated by the United States Constitution, because it seeks to vest agencies with unilateral authority to determine whether a particular amount of official time is reasonable, necessary, and in the public interest.





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AFGE and its councils and locals have been certified as the exclusive representative of nearly 700,000 federal workers. The union is actively engaged in negotiating collective bargaining agreements, arbitrating grievances brought pursuant to applicable negotiated grievance procedures, representing employees in formal discussions or investigative examinations pursuant to 5 U.S.C. § 7114(a)(2), litigating employees' collective and individual rights before administrative agencies and in court, representing federal employees in grievances brought pursuant to negotiated grievance procedures, and generally acting as federal civilian employees' exclusive representative for the purpose of collective bargaining with the federal government.

AFGE, and its members and officers, both publicly and privately engage in multiple forms of expression, such as promoting unity of action in matters affecting the mutual interest of federal employees, promoting organized labor, and advocating for workers' rights and for the improvement of government service.

The federal sector is an open shop. Members and officers of AFGE voluntarily choose to associate with AFGE in pursuit of the common goals referenced above, and vice versa. AFGE has a statutory duty of fair representation to its bargaining unit employees in the negotiated grievance and collective bargaining processes, regardless of whether a given employee is a dues-paying member of the union. AFGE uses official time to meet this duty of fair representation.

### **COUNT 1 - Violation of the First Amendment**

AFGE alleges that the Official Time Order violates the First Amendment of the Constitution of the United States. Section 4(a)(v) of the order purports to categorically prohibit the use of official time to: (a) prepare or pursue grievances brought on behalf of a labor organization itself or brought to vindicate a labor organization's institutional interests; or (b) to provide a union representative to another employee.

There is no valid basis to distinguish grievances brought by the union qua union or grievances in which a union representative seeks to represent another employee from grievances brought on an employee's own behalf or instances in which an employee is to appear as a witness in a grievance proceeding. By singling out labor organizations for disparate treatment, Section 4(a)(v) of the Official Time Order unlawfully restrains and retaliates against plaintiff and its union-member representatives, separately and collectively, in and for the exercise of their rights to expressive association. Section 4(a)(v) therefore violates the First Amendment to the United States Constitution and should be enjoined.





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## **COUNT 2 - Violation of the Separation of Power/Ultra Vires**

AFGE alleges that the Official Time Order violates the principle of separation of powers under the Constitution of the United States in that the order attempts to legislate rules for official time when legislation is strictly the province of the Congress. AFGE has a non-statutory right of action to enjoin and declare unlawful Executive action that is ultra vires. The United States Constitution does not vest the President with the power to legislate. The Official Time Order is an attempt to exercise legislative power specifically withheld by Congress.

Sections 2(j) and 3(a) of the Official Time Order seek to vest agencies with unilateral authority to determine whether a particular amount of official time is “reasonable, necessary, and in the public interest” by purporting to establish a “union time rate” with no statutory basis to artificially and arbitrarily limit the amount of § 7131(d) official time an agency will authorize. By purporting to give the agencies the sole right to determine whether an amount of official time satisfies the requirements of 7131(d) Section 3(a) of the Official Time Order is contrary to 5 U.S.C. § 7131. It is therefore ultra vires and void.

By establishing a so-called “union time rate” that is not set forth in any statute and then using that rate to purportedly determine when a collective bargaining agreement that allows official time pursuant to 5 U.S.C. § 7131(d) may be considered “reasonable, necessary, and in the public interest”, Sections 2(j) and 3(a) of the Official Time Order are contrary to 5 U.S.C. § 7131. They are therefore ultra vires and void.

## **COUNT 3 - Violation of the Separation of Powers/Ultra Vires**

AFGE has a non-statutory right of action to enjoin and declare unlawful Executive action that is ultra vires. The United States Constitution does not vest the President with the power to legislate. The Official Time Order is an attempt to exercise legislative power specifically withheld by Congress.

Section 4(a)(ii) purports to restrict employees to using official time no more than twenty-five percent of their duty time in each fiscal year and penalizes employees who use more than that amount in a given fiscal year by adding any yearly excess to the following fiscal year. Under 5 U.S.C. § 7131(d) “any employee representing an exclusive representative,” or “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.”

With respect to the requirement of mutual agreement set forth in Section 7131(d), 5 U.S.C. § 7114 (b)(1) provides that agencies have a duty to bargain in good faith that includes the





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obligation to approach negotiations with a sincere resolve to reach agreement. By purporting to fix a preexisting and specific cap on the amount of official time that an employee may use in a fiscal year, and by purporting to add allegedly excess amounts in one fiscal year to the cap calculation for the following fiscal year, Section 4(a)(ii) of the Official Time Order is contrary to Chapter 71. It is therefore ultra vires and void.

### **Requested Relief**

The Official Time Order is intended to and will harm AFGE in carrying out its duty of fair representation owed to the bargaining unit employees that AFGE represents. The Official Time Order is unlawful on its face. Implementation and enforcement of the Official Time Order should be enjoined. AFGE seeks a court order:

- (1) Declaring that Section 4(a)(v) of the Official Time Order is void and contrary to the First Amendment to the United States Constitution;
- (2) Declaring that Sections 2(j) and 3(a) of the Official Time Order are ultra vires and contrary to 5 U.S.C. § 7131;
- (3) Declaring that Section 4(a)(ii) of the Official Time Order is ultra vires and contrary to 5 U.S.C. § 7131 and Chapter 71;
- (4) An Injunction enjoining the defendants from implementing Sections 2(j), 3(a), 4(a)(ii), and 4(a)(v) of the Official Time Executive Order;
- (5) Granting plaintiffs attorneys' fees and costs; and,
- (6) Granting such other relief as this Court finds necessary and proper.

